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## Detainees in the Global War on Terrorism Aboard Guantanamo Bay

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## DETAINEES IN THE GLOBAL WAR ON TERRORISM ABOARD GUANTANAMO BAY

*Chad Lennon\**

### I. INTRODUCTION

In the aftermath of September 11, 2001, the United States (“U.S.”) government took actions to prepare for a military response against those responsible for the attacks. The Authorization for Use of Military Force (“AUMF”) by Congress authorized President Bush to take military action in Afghanistan against Al-Qaeda and the Taliban. In a military action, when the armed forces come across members of the opposing force, they will detain them. The U.S. government authorized the detention and trial, or non-trial, of individuals in the Global War on Terrorism. Initially, the U.S. forces detained individuals in Afghanistan; however, they eventually moved the detainees to Guantanamo Bay, Cuba (“Guantanamo”).

When an armed force detains an individual, that individual may, or may not, have certain rights. A detainee may be classified as a combatant or non-combatant, which will have implications in the way he is treated. Further, a detainee may fall under the treatment prescribed under the Geneva Conventions. The Geneva Conventions is an effort to establish a standard for treatment of persons captured during a conflict. Most of these individuals fall under the category or protection that the Geneva Convention provides. However, the U.S. government took a different approach with those detainees associated with Al-Qaeda and the Taliban because the Global War on Terrorism was not against a recognized government or military force of another country.

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The U.S. government eventually discovered that some of its own citizens had taken up arms against the U.S. The court system took different approaches to each detainee, based on whether he was a U.S. citizen captured in a foreign country or a citizen attempting a terrorist act within the borders of the U.S. Moreover, reports of abuse against Guantanamo detainees, as well as detainees in other locations, became prevalent in the mainstream media with detainees reporting widespread mental and physical abuse. The U.S. government first charged and convicted one of its own citizens for abusing a detainee in 2004. An increase in the reports of abuse and the media attention caused the U.S. government to take action starting with the Detainee Treatment Act of 2005, followed by the Military Commission Act of 2006, and the Military Commission Act of 2009. The Supreme Court has also stepped into the controversy with a number of rulings that changed the government's approach to the treatment of detainees.

One proposal to solve the issue of the treatment of detainees is to establish a National Security Court. Congress, however, has opposed this view; yet the District Court for the District of Columbia has become a court with similar characteristics of the proposed National Security Court. Alternatively, President Barack Obama has discussed shutting down Guantanamo. The President has recently released or traded some of the detainees at Guantanamo, which may reflect the possibility of shutting down the facility. Further, questions will arise with the President's recent comments about opening diplomatic relations with Cuba.

This Comment will discuss the U.S.'s response to the attacks on September 11, 2001. Section II will examine the controversial history of how the U.S. gained control of Guantanamo and previously used it to house individuals with an undetermined legal status. Section II will also discuss the Geneva Convention and its applicability to different categories of individuals and groups. Section III will consider how the U.S. government has categorized the legal status of Al-Qaeda and Taliban detainees. Section IV will analyze the differences between combatants and non-combatants, and the privileges that may or may not apply to them. Section V will provide examples of U.S. citizens charged with aiding in terrorism and discuss the legal rights afforded to them as U.S. citizens. Section VI will explore the changes in the public's view of detainees with the widespread reports of abuse against prisoners in the Global War on Terrorism. Section

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VII will examine the government's response to prevent further abuse of detainees. Finally, Section VIII will consider possible resolutions to bring closure to the issue of detainees, specifically those held at Guantanamo.

## II. HISTORY

### A. How the U.S. Government Gained Control of Guantanamo Bay, Cuba

The U.S. gained control over Guantanamo Bay following the Spanish-American War of 1898.<sup>1</sup> The Platt Amendment of 1901 required Cuba to lease or sell land for use as an American military base.<sup>2</sup> In 1903, a lease was agreed upon that gave the U.S. authority over Guantanamo Bay and ceded sovereignty to the remainder of the island to Cuba.<sup>3</sup> This lease stayed in place until 1934, when the U.S. and Cuba agreed that the lease would remain in effect as long as the U.S. did not withdraw from the base.<sup>4</sup>

The U.S. government had initially utilized Guantanamo to hold individuals without a determined legal status. The first case in which the government's use of Guantanamo gained national attention came in 1993, after the 1991 coup of the Haitian government, when numerous Haitians fled the country, many pursuing resettlement in the U.S.<sup>5</sup> The interdiction-at-sea policy forced the return of Haitians caught at sea by the U.S. Coast Guard.<sup>6</sup> Guantanamo, which the U.S. claimed was not subject to American laws, was used to house the refugees; however, it was ruled Guantanamo was subject to U.S. legal jurisdiction at that time.<sup>7</sup> In 1993, the case was brought to the Eastern District of New York, which ruled that the U.S. government erred in holding Haitian refugees in Guantanamo without the benefit of counsel and the Attorney General abused her discretion by denying

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<sup>1</sup> Scott Packard, *How Guantanamo Bay Became the Place the U.S. Keeps Detainees*, THE ATLANTIC (Sept. 4, 2013, 8:05 AM), <http://www.theatlantic.com/national/archive/2013/09/how-guantanamo-bay-became-the-place-the-us-keeps-detainees/279308/>.

<sup>2</sup> Guantanamo Naval Station—Proof of Title, 25 U.S. Op. Atty. Gen. 160 (U.S.A.G.), 1904 WL 530.

<sup>3</sup> Packard, *supra* note 1.

<sup>4</sup> *Id.*

<sup>5</sup> Haitian Ctrs. Council, Inc. v. Sale, 823 F. Supp. 1028, 1032 (E.D.N.Y. 1993).

<sup>6</sup> *Id.* at 1033.

<sup>7</sup> *Id.* at 1041.

detainees parole.<sup>8</sup> This marked the beginning of the controversy regarding the rights of detainees held on Guantanamo.

In November 2001, following the attacks of September 11, 2001, the U.S. military captured a number of enemy combatants, to the extent where the government had to find somewhere to detain them.<sup>9</sup> Some of the individuals were originally held at a base in Khandahar, Afghanistan.<sup>10</sup> Each detainee was evaluated to determine his value for intelligence gathering to combat future terrorist operations.<sup>11</sup> However, the staff at Khandahar was not capable of effectively gathering the intelligence from each individual held.<sup>12</sup> “Some of the critical conditions necessary for the establishment of a detention facility were security and safety of the detainees, control, a certain freedom from legal review, timeliness, security, established supporting infrastructure, and cost managements.”<sup>13</sup> Guantanamo was an ideal location because of the legal status, or lack thereof, that the prisoners had when being detained on non-U.S. soil.<sup>14</sup> The detainees would not be afforded the right to legal representation and the rights of the U.S. legal system.<sup>15</sup> Therefore, the Bush Administration considered this an ideal location for the long-term strategic view of detention.<sup>16</sup>

The Constitution of the United States and the Bill of Rights are applicable to U.S. citizens inside and outside of the borders of the country.<sup>17</sup> However, the Constitution and Bill of Rights become blurred when applied to non-U.S. citizens on land being leased in a foreign country.<sup>18</sup> In *Boumediene v. Bush*,<sup>19</sup> the Supreme Court held

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<sup>8</sup> *Id.* at 1049.

<sup>9</sup> Packard, *supra* note 1.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Packard, *supra* note 1.

<sup>15</sup> *Id.*; see also Brandt Goldstein, *Guantanamo: The Prequel*, WALL ST. J. (Dec. 4, 2007, 1:08 PM), <http://www.wsj.com/articles/SB119672508133812403>. Judge Sterling Johnson Jr. declared Haitian refugees would be afforded legal representation detained at Guantanamo. *Id.* However, the Clinton administration negotiated an agreement that vacated Judge Johnson's decision. *Id.*

<sup>16</sup> Packard, *supra* note 1.

<sup>17</sup> *Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (plurality opinion).

<sup>18</sup> *Boumediene v. Bush*, 553 U.S. 723, 746 (2008) (holding that a non-U.S. citizen has habeas rights on land the U.S. has sovereign jurisdiction over).

<sup>19</sup> 553 U.S. 723 (2008).

that the detainees in Guantanamo had certain rights under the United States Constitution, including the right to challenge their detention through habeas corpus.<sup>20</sup> The groundbreaking ruling marked the first time the Supreme Court had held that constitutional rights were applicable to foreigners in a foreign country.<sup>21</sup> Furthermore, this ruling also had the same effect that the Military Commission Act of 2006<sup>22</sup> with regard to halting habeas corpus.<sup>23</sup> After this ruling, the only situations in which the suspending of habeas corpus would be constitutional are in cases of rebellion or invasion.<sup>24</sup>

Since the U.S. took control of Guantanamo Bay after the Spanish-American War, it has been a highly controversial location to hold detainees. President Obama recently stated that the U.S. would be looking to open diplomatic relations with Cuba.<sup>25</sup> It is highly probable that Guantanamo will remain controversial, especially with Cuba likely seeking to regain control of the land.

## **B. The Geneva Conventions**

The Geneva Conventions are rules that are applicable during armed conflicts and protect individuals who are not fighting, as well as those no longer fighting. The individuals may be sick, wounded, ship wrecked, prisoners of war, or civilians.<sup>26</sup> Thus far, there have been four conventions to cover the above individuals. The first convention concerned the treatment of sick and wounded members of an armed force; the second was for the treatment of ship-wrecked personnel; the third was for the treatment of Prisoners of War (“POWs”); and the fourth was for the treatment of civilians.<sup>27</sup> Fur-

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<sup>20</sup> *Id.* at 728. A writ of habeas corpus is brought before the court to challenge the legality of a person’s imprisonment or detention. The writ may also be used to obtain a judicial review of the jurisdiction of a court which has handed down a criminal sentence. *See* BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “habeas corpus”).

<sup>21</sup> *Boumediene*, 553 U.S. at 751.

<sup>22</sup> *See infra* Section VII.B.

<sup>23</sup> U.S. CONST. art. I, § 9, cl. 2.

<sup>24</sup> *See generally id.*

<sup>25</sup> Larisa Epatko, *Obama’s Plan to Open Relations with Cuba in 13 Points*, PBS NEWSHOUR (Dec. 17, 2014, 12:00 PM), <http://www.pbs.org/newshour/rundown/obama-announcement-on-cuba/>.

<sup>26</sup> *See generally* Geneva Convention [I] for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31.

<sup>27</sup> *See generally* Geneva Convention [I] for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S.

thermore, there have been three protocols that have provided further amendments to the treatment of individuals during an armed conflict. In 1977, the first and second Protocols were extended to protect individuals in international and non-international conflicts respectively.<sup>28</sup> The third protocol added the adoption of the additional distinctive emblem, the Red Crystal, to the Red Cross, Red Crescent, and other emblems.<sup>29</sup>

The Geneva Convention established and continues to govern the treatment afforded to Prisoners of War. Article 4 defines a POW as an individual who is a member of an armed force, or an organization resembling a military force with similar command structure with a distinctive sign of military activity.<sup>30</sup> Article 118 states that an individual will be repatriated to his country at the end of hostile activities.<sup>31</sup> Therefore, the U.S. government, according to the Geneva Conventions, was obligated to return Taliban and Al-Qaeda detainees at the conclusion of hostile activities.

The Bush Administration faced a difficult decision regarding the applicability of the Conventions with this new enemy, Al-Qaeda. Although the Taliban was the governing force in Afghanistan, Al-Qaeda was an organization and not a ruling political party. The Bush Administration stated that members of the Taliban would not meet the criteria of POWs and they should be detained, as would be any other member of Al-Qaeda.<sup>32</sup> The Taliban and Al-Qaeda detainees

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31; Geneva Convention [II] for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention [III] Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention [IV] Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

<sup>28</sup> See generally Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-international Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609.

<sup>29</sup> See generally Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem, Dec. 8, 2005, 45 I.L.M. 558 (2005).

<sup>30</sup> John B. Bellinger III & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Laws*, 105 AM. J. INT'L L. 201, 214 (2011).

<sup>31</sup> *Id.* at 234

<sup>32</sup> Brief for Petitioner, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027), 2004 WL 871163, at \*1 (stating the President has the right to declare an individual is an associate of Al-Qaeda, may be declared an enemy combatant, detained, and thus, subject to detention). See *infra* Section III.B.

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were then labeled as enemy combatants at Guantanamo.<sup>33</sup> In *Hamdi v. Rumsfeld*,<sup>34</sup> the Court held that the U.S. could not only detain those individuals involved in the September 11, 2001 attacks, but also anyone who militarily opposes the U.S.<sup>35</sup> Furthermore, the Court stated that habeas corpus is unavailable if an enemy is captured and detained “beyond the territorial jurisdiction of any court of the United States.”<sup>36</sup> Guantanamo was considered beyond the jurisdiction of the U.S. court system which facilitated the denial of POW status to those detainees.<sup>37</sup>

The Geneva Convention governing non-international armed conflict is silent regarding review procedures as to who may be eligible for detention.<sup>38</sup> Article 5, however, does state that when a detainee’s status is in question, he should be afforded the status of a POW.<sup>39</sup> The detainee’s status should then be determined through a competent tribunal.<sup>40</sup> However, the tribunal is to determine merely the status of the detainee, not whether he is guilty of a belligerent act.<sup>41</sup>

The Fourth Geneva Convention provides certain protections to detained protected persons, such as the right to be provided with an initial review by the state, the right to an appeal, and the right to receive a bi-annual review.<sup>42</sup> However, the U.S. did not recognize members of the Taliban or Al-Qaeda as protected individuals and, thus, they were not provided these rights.<sup>43</sup> Moreover, the U.S. government never recognized the Taliban government in Afghanistan.<sup>44</sup> Therefore, the government’s view was that the detainees did not fall

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<sup>33</sup> Brief for Petitioner, *supra* note 31, at \*13 (stating the Bush Administration’s opinion that “[t]he capture and detention of enemy combatants is an inherent part of waging war, and the President’s decision whether to detain a person as an enemy combatant is a basic exercise of his discretion to determine the level of force needed to prosecute the conflict”).

<sup>34</sup> 542 U.S. 507 (2004).

<sup>35</sup> *Id.* at 518.

<sup>36</sup> *Johnson v. Eisentrager*, 339 U.S. 763, 778 (1950).

<sup>37</sup> Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57, 834 (proposed Nov. 13, 2001) (to be codified at 32 C.F.R. pt. 10).

<sup>38</sup> Bellinger, *supra* note 30, at 222.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 222-23.

<sup>41</sup> *Id.* at 223.

<sup>42</sup> Geneva Convention [IV] Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

<sup>43</sup> See *supra* note 32 and accompanying text. See also generally *Hamdi*, 542 U.S. 507.

<sup>44</sup> Zachary Laub, *The Taliban in Afghanistan*, COUNCIL ON FOREIGN RELATIONS (July 4, 2014), <http://www.cfr.org/afghanistan/taliban-afghanistan/p10551>.



under the protections of the Geneva Convention.

The U.S. government's view that Al-Qaeda and the Taliban do not fall under the protection of the Geneva Convention has validity. However, there are two points that the U.S. government should have considered when making this decision. First, the government should have considered the effect this view would have on U.S. troops when captured by an enemy force. When the enemy learns of the policy its fighters are subject to, our enemy may want to subject our U.S. servicemen to similar conditions.

The second point to consider is the example we set for the rest of the world. The U.S. is one of, if not the most, influential countries in the world. The U.S. compromises her standing in the international community when she does not afford potential POWs the protections of the Geneva Convention. When the U.S. government was making these policy decisions, perhaps a more rigid stance should have been taken.

### C. 9/11 Attacks and Detainees

On Tuesday, September 11, 2001, four hijacked commercial airliners were used to attack targets on U.S. soil.<sup>45</sup> Planes flew into the north tower of the World Trade Center, the south tower of the World Trade Center, and the Pentagon; another plane, believed to be headed for a target in Washington D.C., was forced down by passengers and crashed into the woods of Pennsylvania.<sup>46</sup> Nineteen men hijacked the four American commercial flights.<sup>47</sup> These attacks were attributed to Al-Qaeda and its leader, Osama Bin Laden. Bin Laden was then living in Afghanistan under the protection of the Taliban.<sup>48</sup>

The President of the United States is the Commander in Chief of the United States military, and Congress stipulates the actions he may take.<sup>49</sup> On September 18, 2001, Congress authorized the use of military force against those groups, individuals, and states involved in the September 11 attacks in an effort to prevent further acts of ter-

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<sup>45</sup> *In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d 765, 779 (S.D.N.Y. 2005).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Laub *supra* note 44.

<sup>49</sup> David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 745 (2008) (stating the President may use war powers to quickly defend the United States).

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rorism.<sup>50</sup> President George W. Bush issued the military order of Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism on November 13, 2001.<sup>51</sup> The military order authorized the Secretary of Defense to detain individuals who the administration believed to be members of Al-Qaeda, or any individuals involved in terrorism or terrorist activities against the U.S.<sup>52</sup> The U.S. led the military action into Afghanistan, initially seizing control of Bagram airfield, which would become the site for detaining enemy forces.<sup>53</sup> Eventually, the United States government decided to move hundreds of detainees from Bagram, to U.S. Naval vessels and later to the U.S. Naval Base at Guantanamo.<sup>54</sup> The first wave of detainees arrived in early January 2002.<sup>55</sup>

### III. THE U.S. GOVERNMENT'S VIEW OF AL-QAEDA AND THE TALIBAN

The U.S. government had to decide on how to properly handle prisoners captured in Afghanistan. The issue was whether Al-Qaeda and the Taliban would be classified as POWs, criminals, or in another category. Defining the legal status of Al-Qaeda and Taliban members would allow a decisive action on the treatment of the prisoners and would then determine if certain rights would be applicable to them.

#### A. The Legal Status of Al-Qaeda Detainees

In his January 2002 memo to the President, White House counsel Alberto Gonzales endorsed not applying the Geneva Conventions to Guantanamo detainees to avoid Geneva's limitations on questioning enemy prisoners.<sup>56</sup> A January 2002 legal opinion stated

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<sup>50</sup> *Hamdi*, 542 U.S. at 510.

<sup>51</sup> Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. at 57, 834.

<sup>52</sup> *Id.*

<sup>53</sup> Michael Gordon, *Securing Base, U.S. Makes Its Brawn Blend In*, N.Y. TIMES (Dec. 3, 2001), available at <http://www.nytimes.com/2001/12/03/international/asia/03BASE.html>.

<sup>54</sup> *Secretary Rumsfeld Media Availability after Visiting Camp X-Ray*, U.S. DEP'T OF DEFENSE (Jan. 27, 2002), <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2348>.

<sup>55</sup> *DoD News Briefing – Secretary Rumsfeld and Gen. Myers*, U.S. DEP'T OF DEFENSE (Jan. 11, 2002), <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2031>.

<sup>56</sup> *See generally* Memorandum for Alberto Gonzales and William J. Haynes II on the Ap-

Al-Qaeda militants were not covered under the Geneva Convention for three reasons.<sup>57</sup> First, Al-Qaeda was not a state and not entitled to receive the benefits of a party that is a signatory to the Geneva Convention.<sup>58</sup> Second, Al-Qaeda failed to meet the POW standards established in Article 4 of the Geneva Convention.<sup>59</sup> Third, Article 3 of the Geneva Convention did not apply to the fight between the U.S. and Al-Qaeda.<sup>60</sup> Thus, the Office of Legal Counsel for the Department of Justice (“OLC”) determined that, as a matter of law, Al-Qaeda detainees were not considered POWs.<sup>61</sup> Further, it was determined that Article 5 tribunals were not necessary because Al-Qaeda, as a group, did not qualify and, therefore, individual members of Al-Qaeda would not qualify either.<sup>62</sup> Al-Qaeda members would not be afforded the protections under the Geneva Conventions, nor classified as criminals; however, they would become detainees who lacked minimal, if any, legal rights.

### B. The Legal Status of Taliban Detainees

The issue of whether the Third Geneva Convention would apply to the Taliban was a difficult one for the Bush Administration. President Bush determined that members of the Taliban were not privileged as POWs under the Third Geneva Convention.<sup>63</sup> The Taliban did not satisfy Articles 4(A)(1)-(3), despite the fact that the Taliban was the controlling party in Afghanistan.<sup>64</sup> One reason was that the President would be able to suspend the Third Geneva Convention regarding the Taliban, and therefore, the convention would be inapplicable to the conflict.<sup>65</sup>

The theory that the President could determine that Taliban

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plication of Treaties and Laws to Al Qaeda and Taliban Detainees (Jan 22, 2002), available at <http://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memo-laws-taliban-detainees.pdf>.

<sup>57</sup> Major Dana M. Hollywood, *Redemption Deferred: Military Commissions in the War on Terror and the Charge of Providing Material Support for Terrorism*, 36 HASTINGS INT’L & COMP. L. REV. 1, 44 (2013).

<sup>58</sup> *Id.* at 44-45.

<sup>59</sup> *Id.* at 45.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Hollywood, *supra* note 57, at 48.

<sup>63</sup> *See supra* note 56, at 29.

<sup>64</sup> *Id.* at 30.

<sup>65</sup> *Id.* at 31.

members would not be classified as POWs under Article 4, even if the Third Geneva Convention was applicable, was also used to deny rights to Taliban members.<sup>66</sup> This theory arose from a second legal opinion prepared by the OLC describing the Taliban, which discussed whether the Third Geneva Convention would apply to the organization.<sup>67</sup> The OLC opinion stated that the President had enough facts to declare that members of the Taliban had no legal claim to be classified as POWs under Article 4.<sup>68</sup> The Taliban did not satisfy three of the four elements under Article 4(A)(2), as its members did not openly comply with the Law of War.<sup>69</sup> Further, the opinion reasoned that there was no need to set up Article 5 tribunals for individuals of the Taliban.<sup>70</sup> The President established that the Taliban as a whole did not qualify, thus denying any indecision concerning individual detainees and their status.<sup>71</sup> Moreover, President Bush reasoned that the Taliban would not meet the criteria of POWs as a matter of law.<sup>72</sup> Similar to Al-Qaeda members, the Taliban would also be denied the status of POWs. In fact, members of Al-Qaeda would become detainees just as the Taliban.

#### IV. CLASSIFICATION OF COMBATANTS AND NON-COMBATANTS

The President is given the authority to detain individuals with “necessary and appropriate force”<sup>73</sup> because it is a fundamental and accepted incident of war.<sup>74</sup> The Supreme Court in *Hamdi* stated that “[t]here can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing

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<sup>66</sup> *Id.* at 30.

<sup>67</sup> Hollywood, *supra* note 57, at 47.

<sup>68</sup> *Id.* at 48.

<sup>69</sup> They did not wear a fixed sign, did not carry arms openly, and did not conduct their activities in compliance with the Law of War.

<sup>70</sup> Hollywood, *supra* note 57, at 52.

<sup>71</sup> *Id.* at 50.

<sup>72</sup> *Id.* at 45.

<sup>73</sup> The necessary and appropriate use of force is the required force used to accomplish a mission. Generally, the U.S. military may target equipment, facilities, and forces that would incapacitate a force tasked by a commander. A particular mission, such as Operation Enduring Freedom, would have specific rules which limit the amount of force a commander may use.

<sup>74</sup> *Hamdi*, 542 U.S. at 518.

the AUMF.”<sup>75</sup> The Court concluded that detention of those in this category during a conflict in which they are captured is a “fundamental” aspect of war.<sup>76</sup> The Court held the detention of enemy forces is therefore a “necessary and appropriate force” authorized by Congress for the President.<sup>77</sup> The international agreement at the Hague Convention states that capturing and detaining lawful combatants, as well as the capture, detention, and trying of unlawful combatants, is a frequent occurrence during war.<sup>78</sup> The purpose of detention is to prevent enemy forces from returning to battle and continuing their fight against U.S. forces.<sup>79</sup> “The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on he must be removed as completely as practicable from the front, treated humanely and in time exchanged, repatriated or otherwise released.”<sup>80</sup>

An individual captured during wartime can be a privileged combatant (also known as a Prisoner of War), an unprivileged combatant (a POW who violates a Law of War), or a civilian (also known as a noncombatant).<sup>81</sup> The Law of War<sup>82</sup> differentiates between combatants and civilians by classifying them either as the armed forces or the nonviolent population, and each class is afforded specific rights. The main point to be noted is that an individual cannot belong to both classes at one time.<sup>83</sup>

The first group an individual may find himself a part of is the nonviolent population, or civilian populace. A civilian is defined as an individual who does not aid or participate in attacking individuals or objects from an opposing force.<sup>84</sup> Therefore, an individual who is

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Ex parte Quirin*, 317 U.S. 1, 14-16 (1942).

<sup>79</sup> Yasmin Naqvi, *Doubtful Prisoner-of-War Status*, 84 INT’L REV. RED CROSS 571, 572 (2002) (explaining that an individual captured is not held for punishment, but rather held to prevent him from continuing combat operations).

<sup>80</sup> *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946).

<sup>81</sup> 10 U.S.C. § 948(a) (2009).

<sup>82</sup> Law of War is the legal system the military abides by to ensure there is not an abuse of civilians or prisoners of war. The Law of War is utilized to prevent suffering and destruction, and to mitigate the negative effects of combat through a standard to be afforded to civilians and combatants, including loss of property. MAJOR KEITH PULS, LAW OF WAR HANDBOOK 2-4 (Dep’t of the Army, 2005).

<sup>83</sup> Karl S. Chang, *Enemy Status and Military Detention in the War against Al-Qaeda*, 47 TEX. INT’L L.J. 1, 21 (2011).

<sup>84</sup> *Id.* at 8.

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not a lawful combatant is instead a civilian.<sup>85</sup> “In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.”<sup>86</sup> A noncombatant can be temporarily detained in an administrative detention but should not be arrested, nor subjected to prolonged incarceration.<sup>87</sup>

Alternatively, an individual not considered part of the nonviolent populace will be part of the armed forces group and placed in the privileged or non-privileged category based on his actions. An individual who takes up arms in a war may find himself classified as an enemy combatant. An enemy combatant is an individual alleged to take part in aiding forces that are hostile towards the U.S., or their coalition partners, in Afghanistan and those who engage in armed conflict against the U.S. around the world.<sup>88</sup> The term “enemy combatant” was first used during the Bush administration in March 2002.<sup>89</sup> The term was used to describe those enemies of the U.S. following the attacks of September 11, 2001 who did not wear traditional military uniforms.<sup>90</sup> “Enemy combatants” also included individuals the administration believed to be criminals.<sup>91</sup> The strategic view of the term was used in an effort to justify the actions taken against individuals who were determined to be a direct threat to U.S. National Security.<sup>92</sup>

A privileged combatant can be detained, but must be released after hostilities cease and cannot be tried.<sup>93</sup> A member of an armed force is initially considered a privileged combatant, which is an individual who has engaged in combat, and may be classified as a POW.<sup>94</sup> However, if that combatant violates a Law of War, he may

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<sup>85</sup> *Id.* at 15.

<sup>86</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, 26 (defining a civilian and the civilian populace).

<sup>87</sup> Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 INT’L REV. RED CROSS 375, 382-83 (2005).

<sup>88</sup> *Hamdi*, 542 U.S. at 516.

<sup>89</sup> Chang, *supra* note 83, at 6.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 7.

<sup>93</sup> *Geneva Convention on Prisoners of War*, N.Y. TIMES (Dec. 30, 1983), available at <http://www.nytimes.com/1983/12/30/world/geneva-convention-on-prisoners-of-war.html>.

<sup>94</sup> A Prisoner of War is a person who belongs to an armed force who has become captured by his or her opposing force. DEP’T OF THE ARMY, THE LAW OF LAND WARFARE 25 (1956).

lose the privileged status and be tried for his actions.<sup>95</sup> Moreover, a combatant who hides among civilians can lose the privileged status; a civilian can also become a combatant, and a combatant can become a noncombatant.<sup>96</sup>

The Law of War is designed to guide the members of an armed force in differentiating the civilian populace and the enemy force. Enemy forces have legal protections similar to their opposing force. For example, an armed force is able to engage in warlike activities while still receiving legal protections from the enemy's domestic laws.<sup>97</sup> A member of the military, whether friendly or enemy, may kill opposing forces without being tried for murder, capture opposing forces without being charged with kidnapping, and destroy the opposing force's property without being liable for a tort.<sup>98</sup> Further, an enemy combatant is eligible for a number of other privileges while detained.<sup>99</sup>

An individual in the military may be captured and is entitled to certain privileges. However, those privileges are retained only if specific conditions are met. An individual must wear a uniform, or other item, to separate himself from the civilian populace. One must also identify himself as an armed forces member and must not attack specific civilian objects or peaceful citizens.<sup>100</sup>

An individual captured can separate himself by wearing a uniform and identifying himself as a member of an armed force. He will then, generally, be classified as a privileged combatant who cannot face trial for his actions taken during combat. However, the captured individual must conduct himself in a particular manner so as to not lose his privileged status. For example, if the individual purposely kills a guard while being detained, he will lose his privileged status and likely be charged with homicide.

As noted, an individual captured during a conflict can be classified as a combatant and will then be entitled to certain privileges, though he may lose those privileges for actions he may take. There is no doubt that those individuals captured fighting U.S. military forces

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<sup>95</sup> Robert Bejesky, *Closing Gitmo Due to the Epiphany Approach to Habeas Corpus during the Military Commission Circus*, 50 WILLIAMETTE L. REV. 43, 71 (2013).

<sup>96</sup> *Id.*

<sup>97</sup> Chang, *supra* note 83, at 7.

<sup>98</sup> *Id.* at 7-8.

<sup>99</sup> *Id.* at 8.

<sup>100</sup> *Id.* at 9.

are combatants. However, difficulty arises because the Taliban and Al-Qaeda do not wear military uniforms and cannot be differentiated from the civilian populace. The Law of War is a guide for members of an armed force to distinguish who belongs in each category and the rights afforded to those categories. When an enemy force does not distinguish itself from the civilian populace, the issue can be a hotly debated topic as to which category the enemy belongs. To prove to our enemies that the U.S. fights for justice, U.S. leadership should immediately express that we will afford our enemies the initial status as a POW. There are still members of Al-Qaeda and the Taliban held at Guantanamo who have yet to receive POW status. It is without controversy that Al-Qaeda and the Taliban have committed great atrocities against the U.S. and the people of this country. The U.S. can distinguish herself from her enemies because she is in a unique position to set an example with regard to the treatment of individuals—even when those individuals are actively and aggressively trying to cause harm to the U.S. Labeling the Guantanamo detainees as POWs will help the U.S. gain international credibility in her efforts to combat terrorism.

## V. STATUS OF U.S. CITIZENS AS ENEMY COMBATANTS

U.S. forces have also encountered a number of American citizens fighting American forces, such as John Walker Lindh, Jose Padilla, and Yaser Hamdi. These individuals, after their citizenship was discovered, were brought to the U.S. and put on trial through the federal court system. These three cases demonstrate the legal differences between a U.S. citizen's treatment and that of a non-U.S. citizen. The Bush Administration wanted those U.S. citizens found fighting U.S. forces in the Global War on Terrorism to be detained at Guantanamo with the other foreigners already being detained there. However, the federal courts had a different view on the status of U.S. citizens captured in the Global War on Terrorism.

In November 2001, U.S. forces in Afghanistan captured John Walker Lindh during combat operations.<sup>101</sup> He was the first U.S. citizen to be captured in Afghanistan supporting the Taliban.<sup>102</sup> In the spring of 2001, Mr. Lindh traveled to Pakistan to attend an Al-Qaeda

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<sup>101</sup> *United States v. Lindh*, 227 F. Supp. 2d 565, 569 (E.D. Va. 2002).

<sup>102</sup> *Pentagon Discover Second American Taliban*, CNN (Apr. 4, 2002, 1:29 PM), <http://transcripts.cnn.com/TRANSCRIPTS/0204/04/lt.12.html>.



military training camp.<sup>103</sup> Once he completed his training, at his request, he joined the Taliban to fight against the Northern Alliance.<sup>104</sup> He was then instructed to attend another training camp, which was hosted by the Taliban.<sup>105</sup> On July 15, 2002, Mr. Lindh pled guilty in the United States District Court of Virginia of assisting the Taliban, which is a felony.<sup>106</sup> Mr. Lindh was not sent to Guantanamo at this time because the detainees were still being held in Afghanistan. However, the case may have been a precedent for future cases regarding U.S. citizens and the Global War on Terrorism because, following his guilty plea, Mr. Lindh was not sent to Guantanamo but to a U.S. federal prison.

Jose Padilla is an American citizen who was arrested at Chicago O'Hare Airport in May 2002.<sup>107</sup> He was accused of planning to detonate a dirty bomb, leading him to be initially labeled an "enemy combatant."<sup>108</sup> The government originally held him as a military detainee.<sup>109</sup> Yet, the government eventually turned him over to the Department of Justice after the Bush Administration was required to offer proof about his enemy combatant status.<sup>110</sup> Mr. Padilla was convicted in the federal court system on criminal charges of attending a terrorist training camp run by Al-Qaeda in Afghanistan.<sup>111</sup> The Second Circuit held that Mr. Padilla was not an enemy combatant because the President lacked authority to detain Mr. Padilla militarily. A question which the Supreme Court did not reach.<sup>112</sup> This was the second case involving a U.S. citizen who faced the federal court system and was not held in Guantanamo as a detainee but instead was incarcerated in the U.S. prison system.

Yaser Hamdi was initially captured by the Northern Alliance in Afghanistan.<sup>113</sup> The Northern Alliance released Mr. Hamdi to U.S. forces, which then detained and interrogated him in Afghanistan.<sup>114</sup>

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<sup>103</sup> *Lindh*, 227 F. Supp. 2d at 567.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 566.

<sup>107</sup> *Rumsfeld v. Padilla*, 542 U.S. 426, 430-31 (2004).

<sup>108</sup> *Id.* at 431.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 433-34.

<sup>111</sup> *Padilla v. Yoo*, 678 F.3d 748, 751 (9th Cir. 2012).

<sup>112</sup> *Padilla*, 542 U.S. at 426.

<sup>113</sup> *Hamdi*, 542 U.S. at 507.

<sup>114</sup> *Id.* at 510.

Mr. Hamdi was later sent to Guantanamo in January 2002.<sup>115</sup> In April 2002, officials discovered that Mr. Hamdi was an American citizen, and transferred him to a naval brig in Norfolk, Virginia.<sup>116</sup> The U.S. government initially stated that he was an enemy combatant because he was captured in Afghanistan.<sup>117</sup> Mr. Hamdi's father filed a petition on behalf of his son to be released from unlawful custody.<sup>118</sup> The Court of Appeals for the Fourth Circuit held that Mr. Hamdi would not be afforded a hearing because he was captured in a combat zone.<sup>119</sup> The Supreme Court reversed, holding that Mr. Hamdi would be granted a hearing based on the Fifth Amendment.<sup>120</sup> This third case again demonstrates that a U.S. citizen will be tried in the U.S. court system when captured, as opposed to being sent to Guantanamo as a detainee.

The federal courts have held that American citizens accused of aiding terrorism must be afforded an opportunity in the U.S. court system to determine their innocence or guilt. The courts have demonstrated that a U.S. citizen is not to be held at Guantanamo with non-U.S. citizen detainees, nor face a military commission. Furthermore, the courts have held there is little difference for an American citizen, whether or not captured outside the country, regarding his constitutional rights when facing charges in the Global War on Terrorism. On the other hand, individuals who are not U.S. citizens, especially those captured outside the country, generally do not have the opportunity to have their cases heard through the court system.

## **VI. ALLEGED ABUSE CHANGES PUBLIC OPINION REGARDING DETAINEES**

Public opinion regarding the detention of detainees captured during combat in the Global War on Terrorism slowly began to change. Several years after the invasion of Afghanistan, reports of abuse of over 200 individuals came to light.<sup>121</sup> These reports includ-

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 510.

<sup>118</sup> *Hamdi*, 542 U.S. at 511.

<sup>119</sup> *Id.* at 516.

<sup>120</sup> *Id.* at 509.

<sup>121</sup> REED BRODY, *THE ROAD TO ABU GHRAIB* 30 (June 2004), available at <http://www.hrw.org/sites/default/files/reports/usa0604.pdf>.

ed detainees held at Guantanamo and other detention facilities.<sup>122</sup> A number of deaths attributed to interrogation techniques began to make the news.<sup>123</sup> Public pressure started to mount and the government had to take some stance against the abuse of prisoners related to the Global War on Terrorism.

Detainees released from U.S. custody began to speak to the public about the treatment they were receiving, including those held at Guantanamo. Reports began to surface of detainees who were, for example, physically beaten, stripped naked, and photographed.<sup>124</sup> Two prisoners were found dead at Guantanamo in December 2002, apparently from blunt force trauma.<sup>125</sup> Another detainee, Jamal Naseer, was found beaten to death in March 2003 at an Army fire-base in Gardez, Afghanistan.<sup>126</sup> The original report stated that Mr. Naseer's death was from an infection.<sup>127</sup>

David Passaro was a Central Intelligence Agency ("CIA") contractor and former U.S. Army Special Forces soldier.<sup>128</sup> Passaro conducted numerous interrogations, and he was ultimately convicted for the abuse and eventual death of detainee Abdul Wali in 2003.<sup>129</sup> This was the first time a U.S. civilian had been indicted and convicted in federal court for abusing a detainee.<sup>130</sup> Mr. Passaro's conviction led to a sentence of 100 months.<sup>131</sup>

Mr. Passaro arrived in Afghanistan in May 2003.<sup>132</sup> During that time period, U.S. commanders focused on the number of rocket attacks against Asadabad.<sup>133</sup> Reports determined that Abdul Wali was

<sup>122</sup> *Id.* at 1-2.

<sup>123</sup> *Id.* at 2.

<sup>124</sup> Jeannine Bell, "Behind This Mortal Bone": The (In)Effectiveness of Torture, 83 IND. L.J. 339, 347-48 (2008).

<sup>125</sup> Tim Golden, *Army Faltered in Investigating Detainee Abuse*, N.Y. TIMES (May 22, 2005), available at <http://www.nytimes.com/2005/05/22/international/asia/22abuse.html?pagewanted=all>. Detainees even endured interrogations that lasted hours, while being accused of being terrorists who worked with Al-Qaeda. *Id.*

<sup>126</sup> Craig Pyes & Kevin Sack, *Two Deaths Were a 'Clue That Something's Wrong,'* L.A. TIMES (Sept. 25, 2006), available at <http://www.latimes.com/news/la-na-torture25sep25-story.html#page=1>.

<sup>127</sup> *Id.*

<sup>128</sup> United States v. Passaro, 577 F.3d 207, 211 (4th Cir. 2009).

<sup>129</sup> *Id.* at 212.

<sup>130</sup> Ned Parker, *U.S. Restricts Movement of its Diplomats in Iraq*, L.A. TIMES (Sept. 19, 2007), available at <http://articles.latimes.com/2007/sep/19/world/fg-blackwater19/2>.

<sup>131</sup> *Passaro*, 577 F.3d at 222.

<sup>132</sup> *Id.* at 211.

<sup>133</sup> *Id.*

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the individual responsible for these rocket attacks.<sup>134</sup> Mr. Wali surrendered to U.S. forces in June 2003.<sup>135</sup> The commanders detained him and he was restrained with leg shackles and wrist bindings, while wearing a hood over his head.<sup>136</sup> Mr. Wali was placed under 24-hour guard.<sup>137</sup>

Mr. Passaro was authorized to interrogate Mr. Wali by the CIA commander at Asadabad.<sup>138</sup> The interrogation consisted of repeatedly throwing Mr. Wali to the ground, hitting him on the arms and legs with a heavy, foot-long flashlight, and, while wearing combat boots, kicking Wali in the groin with enough force to lift him off the ground.<sup>139</sup> The interrogation continued while Mr. Wali's condition worsened over the two-day interrogation period.<sup>140</sup> During the third day, Mr. Wali collapsed and died.<sup>141</sup> The following month, Mr. Passaro returned to North Carolina and a year later, a federal grand jury indicted him on "two counts of assault with a dangerous weapon with intent to do bodily harm" and "two counts of assault resulting in serious bodily injury."<sup>142</sup>

*Passaro* was the first case that held federal courts have jurisdiction over a non-military American citizen for committing assault abroad while conducting military missions. Mr. Passaro's conviction put interrogators on notice that their actions may lead to a criminal conviction. Although Mr. Passaro was not conducting interrogations at Guantanamo, it is likely that similar techniques were used on Guantanamo detainees. Despite the public outcry concerning the abuse of prisoners and indefinite detention, Congress has not codified preventive detention, nor has it ended it.<sup>143</sup> Moreover, the Supreme Court has not delineated the parameters of the Authorized Use of Military Force's ("AUMF") authority to detain.<sup>144</sup>

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Passaro*, 577 F.3d at 211.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 212.

<sup>141</sup> *Passaro*, 577 F.3d at 212.

<sup>142</sup> *Id.*

<sup>143</sup> Sophia Brill, Comment, *The National Security Court We Already Have*, 28 YALE L. & POL'Y REV. 525, 535 (2010).

<sup>144</sup> *Id.*

## VII. GOVERNMENT REFORM MEASURES

The public relations nightmare the government was dealing with indicated that a drastic change in the treatment of detainees had to take place. Allegations of prisoner abuse were not only being claimed at Guantanamo, but also at Abu Ghraib,<sup>145</sup> a scandal that made worldwide headlines. The government first responded with the Detainee Treatment Act of 2005, which detailed techniques that could be used to question detainees. The Supreme Court ruling in *Hamdan* stated that the military commissions, which simply conduct military trials, did not follow the military justice code. The government responded by signing the Military Commission Act of 2006, which provided that Guantanamo detainees were no longer eligible for the U.S. court system. Further, the Military Commission Act of 2009 stated Guantanamo detainees could not make claim to the rights afforded under the Geneva Convention.

### A. Detainee Treatment Act of 2005

In response to the Abu Ghraib prison controversy and other allegations of abuse against prisoners in the War on Terror, Congress enacted the Detainee Treatment Act of 2005 (“the Detainee Act”).<sup>146</sup> The Detainee Act created rules to govern interrogation techniques for those in Department of Defense (“DoD”) custody; imposed a global prohibition on cruel, inhumane, or degrading treatment of persons in U.S. custody; provided legal defenses for U.S. government personnel subject to a civil or criminal lawsuit; and set forth remedies for detainees to challenge their status under the Geneva Convention through the Combatant Status Review Tribunals and Administrative Review Boards.<sup>147</sup>

On October 5, 2005, the U.S. Senate approved an amendment

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<sup>145</sup> Abu Ghraib was the site for detainees during the most recent Iraq War. Photographs of detainees being criminally abused by U.S. soldiers were taken at the prison location. The scandal raised concerns about the interrogations that were being conducted by U.S. military members and civilian contractors. Rebecca Leung, *Abuse at Abu Ghraib*, CBS NEWS (May 5, 2004), <http://www.cbsnews.com/news/abuse-at-abu-ghraib/>.

<sup>146</sup> Charles Babington & Shailagh Murray, *Senate Supports Interrogation Limits*, WASH. POST (Oct. 6, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/05/AR2005100502062.html>.

<sup>147</sup> Bernard Hibbitts, *Detainee Treatment Act of 2005*, JURIST.ORG (Dec. 31, 2005, 8:58 PM), <http://jurist.org/gazette/2005/12/detainee-treatment-act-of-2005-white.php> [hereinafter Hibbitts].

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to the DoD appropriations bill for 2006.<sup>148</sup> The proposed amendment established approved interrogations techniques for handling detainees in DoD custody.<sup>149</sup> The amendment also established jurisdiction for any geographic location.<sup>150</sup> The President stated he would veto the bill, but the bill was nevertheless passed through compromises with further amendments to the bill.<sup>151</sup> Additions to the bill included a legal defense for military and civilian employees, procedures for detainee status review of detainees outside of the U.S., and training for detainee treatment for the Iraqi forces.<sup>152</sup> The Detainee Act was passed by Congress under Title X of Section A of the defense appropriations bill and signed into law by President Bush on December 30, 2005.<sup>153</sup> He stated that the act would be interpreted “ ‘in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with constitutional limitations on judicial power.’ ”<sup>154</sup>

The Detainee Act required that individuals detained in DoD facilities, including Guantanamo, were to be treated in accordance with the U.S. Army Field Manual on Intelligence Interrogation.<sup>155</sup> The law directed that detainees should be treated without cruel, inhumane, or degrading punishment—essentially, nothing that would violate the Fifth, Eighth, and Fourteenth Amendments of the Constitution.<sup>156</sup> The Detainee Act further stated that the Secretary of Defense would submit to the Armed Forces Committees of Congress the procedures for a review of all detainees within 180 days.<sup>157</sup> The Administrative Review Board ensured no statement was made through coercion and performed a check on the probative value of statements made.<sup>158</sup> A yearly report would include the number of detainees whose statuses were reviewed and procedures used at each loca-

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> Eric Schmitt & Tim Golden, *Lawmakers Back Use of Evidence Coerced From Detainees*, N.Y. TIMES (Dec. 17, 2005), available at <http://www.nytimes.com/2005/12/17/politics/17detain.html>.

<sup>152</sup> *Id.*

<sup>153</sup> Hibbitts, *supra* note 147.

<sup>154</sup> Alan W. Clarke, *De-Cloaking Torture: Boumediene and the Military Commissions Act*, 11 SAN DIEGO INT'L L.J. 59, 105 (2009).

<sup>155</sup> Hibbitts, *supra* note 147.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

tion.<sup>159</sup>

The report was to be unclassified, but was to contain a classified annex if needed.<sup>160</sup> The appellate review would be conducted by the United States Court of Appeals for the District of Columbia exclusively.<sup>161</sup> Appeals were limited to those individuals detained at Guantanamo Bay and who were subject to a Combatant Status Review Tribunal.<sup>162</sup>

In *Hamdan v. Rumsfeld*,<sup>163</sup> the Supreme Court stated a number of holdings: it found that the Detainee Treatment Act did not deprive the Supreme Court of jurisdiction, military commissions were not expressly authorized by any congressional act, military commissions' procedures violated the Uniform Code of Military Justice ("UCMJ"), and military commissions did not satisfy Geneva Convention standards.<sup>164</sup> This meant that the detainees held at Guantanamo would be held under the Supreme Court's jurisdiction, and as such, the military commissions were not following the proper UCMJ procedures. Moreover, the military trials were not within the principles of the Geneva Conventions.<sup>165</sup>

### B. Military Commissions Acts

Following the Supreme Court's ruling in *Hamdan*, Congress passed the Military Commission Act of 2006<sup>166</sup> ("MCA of 2006"). The MCA of 2006 mandated that Guantanamo captives were no longer entitled to access the U.S. civil justice system, and thus all outstanding habeas corpus petitions were stayed.<sup>167</sup> Further, the MCA of 2006 established a tribunal process that was intended to be compliant with the Geneva Conventions.<sup>168</sup> The MCA of 2006 stipulated that the military commissions would have jurisdiction "to try . . . any offense made punishable by this chapter . . . or the law of war, whether such offense was committed before, on, or after September

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<sup>159</sup> *Id.*

<sup>160</sup> Hibbitts, *supra* note 147.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> 548 U.S. 557 (2006).

<sup>164</sup> *See id.*

<sup>165</sup> *Id.* at 626.

<sup>166</sup> 10 U.S.C. § 948d (2006).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

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11, 2001[.]”<sup>169</sup> The MCA of 2006 would allow the CIA to continue its interrogations of suspected terrorists.<sup>170</sup> Additionally, military and intelligence personnel were given legal protections for any future lawsuits filed by those individuals they were interrogating.<sup>171</sup> The MCA of 2006 also contained the procedures for the conduct of such interrogations.<sup>172</sup> The MCA of 2006 was drafted to be comparable to the commissions enacted during the Revolutionary War, Civil War, and World War II.<sup>173</sup>

On June 12, 2008, the U.S. Supreme Court held in *Boumediene v. Bush*<sup>174</sup> that the MCA of 2006 could not remove the right of Guantanamo captives to access the U.S. federal court system.<sup>175</sup> All previous Guantanamo captives’ habeas petitions were eligible to be reinstated.<sup>176</sup> The judges considering the captives’ habeas petitions would be debating whether the evidence justified a classification of “enemy combatant.”

The Military Commissions Act of 2009 (“the MCA of 2009”) added that a non-citizen who was part of Al-Qaeda at the time of an offense would be subject to a military commission, otherwise known as a military trial.<sup>177</sup> However, the main purpose of the MCA of 2009 was to update provisions relevant to the Guantanamo habeas corpus cases.<sup>178</sup> Moreover, the MCA of 2009 stated, “[n]o alien unprivileged enemy belligerent subject to trial by military commission under this chapter may invoke the Geneva Conventions as a basis for a private right of action.”<sup>179</sup>

As of February 2013, the military commissions have convicted six Guantanamo detainees.<sup>180</sup> One issue that the military commis-

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> The White House Office of Communications, *Fact Sheet: The Military Commissions Act of 2006*, 2006 WL 2950497, at \*1 (Oct. 17, 2006).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at \*2.

<sup>174</sup> 553 U.S. 723 (2008).

<sup>175</sup> *Id.* at 789.

<sup>176</sup> *Id.* at 793.

<sup>177</sup> Stephen I. Vladeck, *The Laws of War as a Constitutional Limit on Military Jurisdiction*, 4 J. NAT’L SECURITY L. & POL’Y 295, 326 (2010) (discussing the Military Commission Act of 2009 and how it expanded on parts of the Military Commission Act of 2006).

<sup>178</sup> *Noriega v. Pastrana*, 130 S. Ct. 1002, 1004 (2010) (Thomas, J., dissenting).

<sup>179</sup> 10 U.S.C. § 948b(e) (2014).

<sup>180</sup> Jennifer K. Elsea, *Comparison of Rights in Military Commission Trials and Trials in Federal Criminal Court*, CONG. RES. SERVICE 10 (Mar. 21, 2014), <http://fas.org/sfp/crs/>



sions have faced is timing because of the Ex Post Facto Clause. The Court of Appeals for the District of Columbia held in *Al-Bahlul v. United States*<sup>181</sup> that the court could not uphold the defendant's conviction for providing material support for the September 11, 2001 attacks.<sup>182</sup> The military commission nonetheless convicted Al-Bahlul of the offense, but the Court of Appeals held that this would violate the Ex Post Facto Clause.<sup>183</sup> Therefore, the court system cannot convict an individual of a crime that was not codified at the time it was committed. The MCA of 2006 and 2009 took steps to bring finality to the status of detainees at Guantanamo. The U.S. government was attempting to keep the detainee cases out of the federal court system, while the federal court system was pushing back to hear all the detainee cases.

### VIII. POSSIBLE FUTURE FOR THE DETAINEES

The military tribunal that was utilized under the AUMF authorized a military response against those responsible for the attacks on September 11, 2001.<sup>184</sup> The AUMF was an executive order by the President on November 13, 2001 requiring detention and a military trial for noncitizens "at an appropriate location designated by the Secretary of Defense outside or within the United States" when "there is reason to believe that such individual" is a member of Al-Qaeda or had "engaged in [or] aided . . . acts of international terrorism" intended to produce "injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy."<sup>185</sup> The government faces the dilemma of what to do with the detainees now that combat operations have concluded in Afghanistan. One proposal was for a National Security Court to decide the legal fate of the detainees. A second proposal was to completely shut down Guantanamo and move all the detainees out in a variety of ways, including sending

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natsec/R40932.pdf.

<sup>181</sup> 767 F.3d 1 (D.C. Cir. 2014).

<sup>182</sup> *Id.* at 29.

<sup>183</sup> *Id.* at 30-31. The Ex Post Facto Clause ensures that an individual will not be charged for a crime that took place before the enactment of the statute making the act illegal. BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>184</sup> Authorization for Use of Military Force, Pub L. No. 107-40, 115 Stat. 224 (proposed Sep. 18, 2001) (codified at 50 U.S.C. § 1541).

<sup>185</sup> Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833, at 57834 (proposed Nov. 13, 2001).

them to prisons in other countries.

### A. A National Security Court

President Barak Obama has advocated for Congress to end the indefinite detention facilities and the extra-judicial tribunal system that began under the Bush administration.<sup>186</sup> A proposal by two law professors in 2007 sought to create a National Security Court.<sup>187</sup> They recommended that Congress would include an Article III judge on the National Security Court to determine whether there was a valid detention.<sup>188</sup> Furthermore, Congress would define who is an enemy and establish rules pertaining to classified evidence.<sup>189</sup> The federal courts have held it is unconstitutional to use classified evidence as a basis to validate the ongoing detention.<sup>190</sup> When the evidence is “unclassified or disclosed, it [becomes] evident that the government’s ‘terrorist’ claims were based on [un]provable hearsay and biased sources.”<sup>191</sup> However, Congress and President Obama stated that they would not seek to establish this new court.<sup>192</sup> The Department of Justice then stated it would continue to hold the detainees at Guantanamo with the authority provided in the AUMF.<sup>193</sup> Instead of a National Security Court, the District of Columbia District Court has become the equivalent of one.

The D.C. Circuit has issued rulings on nearly twenty “publicly available” cases pertaining to the detainees at Guantanamo.<sup>194</sup> The D.C. Circuit has ruled on the requirements to detain and the evidence

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<sup>186</sup> Charlie Savage, *Amid Hunger Strike, Obama Renews Push to Close Cuba Prison*, N.Y. TIMES (Apr. 30, 2013), available at <http://www.nytimes.com/2013/05/01/us/guantanamo-adds-medical-staff-amid-hunger-strike.html?pagewanted=all>.

<sup>187</sup> Jack L. Goldsmith & Neal Katyal, Op-Ed., *The Terrorists’ Court*, N.Y. TIMES (July 11, 2007), available at [http://www.nytimes.com/2007/07/11/opinion/11katyal.html?\\_r=0](http://www.nytimes.com/2007/07/11/opinion/11katyal.html?_r=0).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Boumediene*, 553 U.S. at 816-17.

<sup>191</sup> Susan M. Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction without a Difference?*, 38 U.C. DAVIS L. REV. 609, 619 (2005).

<sup>192</sup> Peter Baker, *Obama to Use Current Law to Support Detentions*, N.Y. TIMES (Sept. 23, 2009), available at <http://www.nytimes.com/2009/09/24/us/politics/24detain.html>.

<sup>193</sup> Brill, *supra* note 143, at 530.

<sup>194</sup> *Id.* at 528 (discussing that the District Court for the District of Columbia has essentially become the national security court since the decision to consolidate habeas corpus cases following *Rasul v. Bush*, 542 U.S. 466 (2004)).

that may be used by the U.S. government.<sup>195</sup> The judges who have decided habeas corpus appeals have approved long-term preventive detention, dependent on the government showing the individual has been “a member of Al-Qaeda, the Taliban, or associated forces,” by a preponderance of the evidence.<sup>196</sup> Most rulings on the detention of individuals have referenced the Case Management Order (“CMO”) by Judge Thomas Hogan.<sup>197</sup> The CMO provides rules on the government’s obligation to disclose evidence and provide adequately similar evidence to that of classified government information.<sup>198</sup> Furthermore, these rules establish parameters on the undue burden of allowing hearsay evidence, and the process of evidentiary hearings.<sup>199</sup>

A National Security Court is a suitable solution for the issue of housing detainees because the legal system will bring closure to their legal status. Military operations include reliance on classified information that is likely used when capturing the detainees. Congress would establish the rules of evidence pertaining to the classified information, which would lessen the concerns of revealing it to the enemy. However, Congress has shown reluctance in creating this court, and instead has allowed the D.C. Circuit to essentially take on that role. Until the government considers creating a National Security Court, the D.C. Circuit is a viable alternative. The D.C. Circuit can continue to hear cases pertaining to the detainees, and the American legal system that our nation was based on can bring closure to those still detained.

### B. Shutting Down Guantanamo

By the end of the Bush administration, the number of detainees fell to 250, and at the end of Obama’s first term the number was down to 215.<sup>200</sup> President Obama is apparently making efforts to shut down Guantanamo. In the coming months, the Obama Administration is attempting to move the detainees, including sending 64 indi-

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<sup>195</sup> *Id.* at 529.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 531.

<sup>198</sup> Brill, *supra* note 142, at 531.

<sup>199</sup> *Id.*

<sup>200</sup> Ernesto Hernández-López, *Guantanamo as a “Legal Black Hole”: A Base for Expanding Space, Markets, and Culture*, 45 U.S.F. L. REV. 141, 170 (2010); Judith Resnick, *Detention, The War on Terror, and the Federal Courts: An Essay in Honor of Henry Monaghan*, 110 COLUM. L. REV. 579, 619 (2010).

viduals to other countries.<sup>201</sup> The President has communicated with other heads of state to bring a close to the Guantanamo issue before he leaves office.<sup>202</sup> As of February 2011, Guantanamo Bay still held approximately 173 detainees at Camp Delta.<sup>203</sup> The U.S. has looked at sending the detainees from Guantanamo to Latin America.<sup>204</sup> One possibility is Uruguay that took custody of six detainees in December 2014.<sup>205</sup> The U.S. still has grave concerns about many of the prisoners, particularly those from Yemen, who pose a significant terrorist threat.<sup>206</sup> The administration also has concerns with the effect of the recent attempt to open diplomatic relations with Cuba and the cost to maintain Guantanamo.<sup>207</sup>

Shutting down Guantanamo may serve a purpose; however, closing the facility by releasing detainees is a decision that may cost American lives. Many of the detainees are held in Guantanamo on very serious allegations, or because they were caught fighting U.S. forces abroad. Sending the detainees to prisons in other countries may be beneficial, but the countries must have adequate facilities to hold them. Those countries must support America's fight to end terrorism. Releasing a detainee to a country suspected of aiding a terrorist organization is the equivalent of arming a detainee and letting him walk out of prison to immediately engage in combat against the U.S.

## IX. CONCLUSION

The events of September 11, 2001 have changed the way Americans see the world. Our new enemies, terrorists, specifically Al-Qaeda and the Taliban, are viewed from a different perspective. The Bush Administration responded by authorizing military action in Afghanistan and detaining non-citizens in the new Global War on

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<sup>201</sup> Missy Ryan & Adam Goldman, *U.S. Prepares to Accelerate Detainee Transfers From Guantanamo Bay Prison*, WASH. POST (Dec. 24, 2014), [http://www.washingtonpost.com/world/national-security/us-prepares-to-ramp-up-transfers-from-guantanamo/2014/12/24/46685a86-8ab9-11e4-a085-34e9b9f09a58\\_story.html](http://www.washingtonpost.com/world/national-security/us-prepares-to-ramp-up-transfers-from-guantanamo/2014/12/24/46685a86-8ab9-11e4-a085-34e9b9f09a58_story.html).

<sup>202</sup> *Id.*

<sup>203</sup> Carol Rosenberg, *Guantanamo Detainee Who Died Was to Be Held Indefinitely*, MIAMI HERALD (Feb. 3, 2011), <http://www.mcclatchydc.com/2011/02/03/108050/suspected-taliban-commander-dies.html>.

<sup>204</sup> Ryan & Goldman, *supra* note 201.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

Terrorism. After the influx of detainees at facilities in Afghanistan, the U.S. moved them to Guantanamo, a site with prior controversies concerning non-citizens.

Detaining enemy forces is an inherent part of an armed conflict. An individual captured can be classified in a few different categories for detention. The Geneva Convention has been the international agreement used by most nations for the ethical and humane treatment of persons captured during conflict. The Global War on Terrorism brought to the forefront a new category of individuals, terrorists. These individuals do not fight on behalf of a recognized political party or government, but rather conduct operations to instill fear in a civilian populace.

The U.S. government did not recognize the Taliban or Al-Qaeda as individuals under the Geneva Conventions. The U.S. even discovered that some of its own citizens were fighting against her in Afghanistan and at home. Those U.S. citizens have the same rights as other U.S. citizens facing criminal charges in this country. A separation of rights between U.S. citizens and non-citizens has been established leaving the non-citizens' legal rights in question in Guantanamo.

The country, and the world, has heard from a number of previous detainees about the treatment they received while in U.S. custody. There were a number of "suspicious" deaths of detainees while in U.S. custody. As word of this treatment spread, the national and international community began to raise questions concerning the treatment and rights of the detainees. As public pressure mounted, the U.S. had to make a change that began with charging Mr. Passaro with abuse of a detainee. Congress then followed with the Detainee Act, the MCA of 2006, and the MCA of 2009.

Guantanamo has been the center of controversy since the U.S. first gained control of the land from Cuba. The debate on the present controversy dates back to the early 2000s. President Obama has stated since his first run for the Presidency that he planned on shutting down Guantanamo. The number of detainees has significantly dropped since he first took office. With less than two years remaining in his presidency, we can expect a significant reduction in detainees. There have been recommendations about establishing a National Security Court to bring finality to the status of the detainees, but President Obama does not see this as a viable option. Nevertheless, the Court of Appeals for the District of Columbia has become a

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version of this proposed court.

One thing remains certain, the country is still in the midst of the Global War on Terrorism and cannot stall in its decision making. This country cannot afford to willingly hand over terrorists in an attempt to appease any other country. However, we must still set an example to the world and treat these detainees as we would want our armed forces to be treated when detained by an opposing force—whether that force is another country or an organization with no affiliation to another country.