

USAWC STRATEGY RESEARCH PROJECT

GUANTANAMO BAY DETAINEES: NATIONAL SECURITY OR CIVIL LIBERTY

by

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The views expressed in this academic research paper are those of the author and do not necessarily reflect the official policy or position of the U.S. Government, the Department of Defense, or any of its agencies.

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ABSTRACT

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With the decision to transfer Al Qaeda and Taliban captives to detention facilities at Guantanamo Bay Naval Base, Cuba, the Pentagon headed into legally uncharted territory. The United States has neither recognized the detainees as prisoners of war, nor have they been charged with any crime. Consequently, unanswered questions regarding their legal status and continued incarceration have drawn heated criticism from human rights organizations worldwide. Although senior defense officials are working to develop an appropriate long-term plan, they will likely confront further legal challenges involving military tribunals and the eventual reclassification of some detainees as bona fide prisoners of war. The one certainty is that the military has undertaken an unprecedented prisoner operation with an undetermined end-state.

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This paper is dedicated to the memory of my father, MAJ (R) Francis Spatcher (1914-2000) and to all members of the United States Armed Forces for your courage, sacrifice, and unwavering dedication to the protection and defense of this great Nation.

I believe in the United States of America as a government of the people, by the people, for the people; whose just powers are derived from the consent of the governed; a democracy in a republic; a sovereign nation of many sovereign states; a perfect union, one and inseparable; established upon those principles of freedom, equality, justice and humanity for which American patriots sacrificed their lives and fortunes. I therefore believe it my duty to my country to love it, to support its constitution, to obey its laws, to respect its flag, and to defend it against all enemies.

—William Tyler

GUANTANAMO BAY DETAINEES: NATIONAL SECURITY OR CIVIL LIBERTY

The overall defense strategy of the United States and its allies is that of deterrence. We seek to deter aggression by making the penalties of such action exceed expected gains. Integral to deterrence is the assurance that the United States possesses both the means and the will to respond effectively to aggression regardless of its form

—FRANK C. CARLUCCI

Terrorism is not new to the world, but the response of civilized nations to these criminals and non-state actors has become much more contentious and complex. Previous attempts to deal with terrorists as war criminals have given them a legal status they are not entitled to hold. In the aftermath of September 11th, the United States has chosen to redefine the status accorded to international terrorists and their non-state sponsors. The terrorists themselves chose their status, and the international community led by the United States will define it on their behalf in a manner that is compassionate when compared to what these people did to their victims.¹

Certainly there is no shortage of world-wide opinion. Groups like Amnesty International and the International Committee of the Red Cross (ICRC), considered the foremost authority on the tenants of the Geneva Conventions, firmly believe the laws regulating international armed conflict which would give the detainees prisoner of war status, should apply. Attorneys representing some of the detainees are challenging their continued detention under the constitutional right not to be held without charge or reason. However, neither the White House, nor the Department of Defense believes these individuals should be considered prisoners of war under an accepted civil or military definition of those terms.

These “detainees”, as they are labeled, skirted international norms and abandoned their rights as sovereign nationals when they chose to participate in the stateless pursuit of terrorism. The sole purpose for their membership in the terrorist network was to kill and injure non-combatants in a deceitful campaign in pursuit of a goal that violates the international law of war, let alone pertinent national laws. Their allegiance is to an individual who has declared himself an enemy of the United States, and who has deviously appropriated any grievance he thinks will generate sympathy, to justify the taking of innocent life.²

Even though the United States has determined the detainees are not entitled to prisoner of war status as a matter of law, they have been provided most prisoner of war privileges as a matter of policy.³ This paper will examine potential legal courses of action in the prosecution of

these “unlawful combatants”, and the complex nature of any such judicial process. However, the one certainty that exists is that these rogue criminals will eventually be held accountable within a framework they created.

BACKGROUND

While they were the most destructive in American history, the attacks of September 11th were not the first carried out by foreign terrorist on U.S. soil. To gain a more complete picture of the threat, we must look at acts of terrorism in this country over the last decade. Including the 11 September hijackers, 48 foreign-born militant Islamic terrorists have been charged, or convicted, or have admitted their involvement in terrorism within the United States between 1993 and 2001. In addition to September 11th, the incidents attributed to these individuals include the murder of employees outside the headquarters of the Central Intelligence Agency (CIA) in 1993, the first attack on the World Trade Center in the same year, a plot to bomb the Brooklyn subway system in 1997, plots to bomb various New York City landmarks in 1993, and the Millennium plot to bomb Los Angeles International Airport. Outside of the United States, attacks against Americans have included the 2000 attack on the USS Cole in the waters off Yemen; bombings in August 1998 of the U.S. Embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, that killed at least 301 people and injured more than 5000 others; a bomb attack on U.S. service personnel in Dhahran, Saudi Arabia (Khobar Towers); and, involvement in operations against American forces in Somalia in 1993. All of these acts have been linked in some way to Osama bin Laden and the al Qaeda organization.⁴ Although other foreign and domestic terrorist groups threaten the United States, they pale in comparison; therefore, the focus of this study will be on al Qaeda.

AL QAEDA (THE BASE)

During the 1980's, resistance fighters in Afghanistan developed a world-wide recruitment and support network with the aid of the United States, Saudi Arabia, and various other sympathetic Arab states in the region. After the 1989 Soviet withdrawal, this network which equipped, trained, and funded thousands of Muslim fighters, came under the control of Osama bin Laden and his al Qaeda organization. Al-Qaeda or “The Base,” is a conglomerate of groups spread throughout the world operating as a network. It has a global reach with a presence in Algeria, Egypt, Morocco, Turkey, Jordan, Tajikistan, Uzbekistan, Syria, Xinjiang in China, Pakistan, Bangladesh, Malaysia, Myanmar, Indonesia, Mindanao in the Philippines, Lebanon, Iraq, Saudi Arabia, Kuwait, Bahrain, Yemen, Libya, Tunisia, Bosnia, Kosovo, Chechnya, Dagestan, Kashmir, Sudan, Somalia, Kenya, Tanzania, Azerbaijan, Eritrea, Uganda, Ethiopia,

and in the West Bank and Gaza. Since its creation in 1988, Osama bin Laden has controlled al Qaeda. As such, he is both the backbone and the principal driving force behind the network.⁵

Osama bin Laden's power is founded on a personal fortune earned by his family's construction business in Saudi Arabia. Born in Saudi Arabia to a Yemeni family, bin Laden left Saudi Arabia in 1979 to fight against the Soviet invasion of Afghanistan. At that time, the Afghan jihad was backed with American dollars and had the support of the governments of Saudi Arabia and Pakistan. Bin Laden is alleged to have received security training from the CIA itself.⁶ While in Afghanistan, he founded the Maktab al-Khidmat (MAK), which recruited fighters from around the world and imported equipment to aid the Afghan resistance against the Soviet army. Once the Soviets withdrew, bin Laden's organization turned their aggression toward the United States and its allies in the Middle East.

Vertically, al Qaeda is organized with bin Laden, the emir-general, at the top, followed by other al Qaeda leaders and leaders of the constituent groups. Horizontally, it is integrated with 24 constituent groups. The vertical integration is formal, the horizontal integration, informal. Immediately below bin Laden is the Shura majlis, a consultative council. Four committees – military, religio-legal, finance, and media – report to the majlis. Handpicked members of these committees, especially the military committee, conduct special assignments for bin Laden and his operational commanders. To preserve operational effectiveness at all levels, compartmentalization and secrecy are paramount.⁷

Al Qaeda's current goal is to establish a pan-Islamic Caliphate throughout the world by working with allied Islamic extremist groups to overthrow regimes it deems "non-Islamic" and expelling Westerners and non-Muslims from Muslim countries⁸ In February 1998, al Qaeda issued a statement under the banner "The World Islamic Front for Jihad Against the Jews and Crusaders," saying it was the duty of all Muslims to kill U.S. citizens—civilian or military—and their allies everywhere.

While the al Qaeda organization has evolved considerably since events such as the embassy, World Trade Center, and Pentagon bombings, the basic structure of the consultative council remains in tact.⁹ Bin Laden's intention to expand his operations has been curbed by the post-bombing security and force protection measures, and the U.S. invasion into Afghanistan has forced him into an undetermined period of hiding; however, the violence generated by his militant followers continues. So how or when will this end? Members of both the academic and diplomatic communities agree that al Qaeda's role as an umbrella organization providing global reach will not be easily supplanted or duplicated. They do not believe terrorism will be stopped, but the momentum built up by al Qaeda over the last 15 years may be at least diminished in the

face of concerted international efforts to prevent it.¹⁰ Bin Laden made his own prediction on how it will end in a book entitled *America and the Third World War* which has been circulated among his followers:

It will end with the destruction of the Great Satan. It will end with the triumph of Islam. It will end with the annihilation of Israel and the United States of America and a return to a Muslim polity that is ruled in the purist Islamic tradition. We predict a black day for America and the end of the United States as the United States. America will retreat from our land and collect the bodies of its sons from the battlefields. Allah willing.¹¹ Sentiment in the United States was expressed on October 11, 2001, by President George W. Bush: Success or failure depends not on bin Laden; success or failure depends upon routing out terrorism where it may exist all around the world. He's just one person, a part of a network. And we're slowly, but surely, with determined fashion, routing that network out and bringing it to justice.¹²

SEPTEMBER MOURN

The worst international terrorist attack ever, involving four separate but coordinated aircraft hijackings, occurred in the United States on September 11, 2001. The 19 hijackers belonged to the al Qaeda terrorist network. Evidence indicates the hijackers used knives and box cutters to kill or wound passengers and the pilots, and then commandeer the aircraft, which they then used to destroy pre-selected targets. More than 3000 people were killed in these four attacks. More Americans died that day in New York, Washington, D.C., and in a field in Pennsylvania than were killed in the Japanese attack on Pearl Harbor.¹³ Citizens of 78 countries perished at the World Trade Center site. Leaders from around the world called the events of September 11th an attack on civilization itself.¹⁴

As analysts have predicted and the horror of September 11th confirmed, Islamist terrorists, especially al Qaeda, seek mass casualties, and are heedless of public opinion and conventional morality. Their deep hatred and suicidal fanaticism, their lack of rational political purpose, and their belief in divine sanction make the penalties and deterrents traditionally used against terrorists far less effective. Some of President Bush's civilian advisers want a tough new policy of military retaliation and preemption of terrorism, in place of tedious and uncertain criminal prosecution.¹⁵ It is likely the future holds an overabundance of both. In response to the egregious events of September 11th, U.S. forces were deployed to Afghanistan to root out and capture Taliban and al Qaeda fighters. With regards to the eventual criminal prosecution of the "unlawful combatants" captured during U.S. operations in Afghanistan, and currently being held

at Guantanamo Bay, Cuba, intense legal debate continues as to their precise status, as well as the applicability of the Geneva Conventions to the war in Afghanistan and the broader counter-terrorism effort.

"UNLAWFUL COMBATANTS" DEFINED

According to Secretary of Defense Donald Rumsfeld, the Taliban and al Qaeda fighters imprisoned in Camp Delta, Guantanamo Bay Naval Station, Cuba, are not prisoners of war, but "unlawful combatants." The critical distinction is that a prisoner of war is entitled to the protections set forth in the 1949 Geneva Conventions. In contrast, an unlawful combatant is a fighter who does not act in accordance with the accepted rules of war, and therefore does not qualify for the Convention's protections. Buried within that simplistic answer, however, are a host of complexities and troubling implications.

Article IV of the Third Geneva Convention states that members of irregular militias, like al Qaeda, qualify for prisoner of war status if their military organization satisfies four criteria. The criteria are: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognized at a distance; (c) that of carrying arms openly; and, (d) that of conducting their operations with the laws and customs of war. Al Qaeda does not satisfy these conditions. Although Osama bin Laden could be considered "a person responsible for his subordinates," there is very little evidence to suggest there is any formal notion of a chain of command. Further, al Qaeda members deliberately attempt to blend into the civilian population, violating the requirements of having a "fixed distinctive sign" and "carrying arms openly." Also, they blatantly target civilians, which violates the "laws and customs of war."⁴⁶ Consequently, al Qaeda members clearly do not meet any of the criteria which would afford them prisoner of war status and should not be treated as such.

Even if not technically prisoners of war, al Qaeda captives still qualify for "humane treatment" under the "Body of Principles of All Persons under Any Form of Detention or Imprisonment," a resolution adopted by the United Nations General Assembly in 1988. The Administration's objection to affording the detainees full prisoner of war status likely has less to do with the conditions in which the captives are held than what the Administration plans to do with them in the long run. Under President Bush's military order of November 13, 2002, al Qaeda members and those who harbored them can be tried by military tribunals. The Supreme Court approved the use of such tribunals for unlawful combatants in the case of *Ex Parte Quirin* (1942).

Quirin and seven other German saboteurs were landed on beaches on Long Island and Florida by submarine. All were arrested and handed over to the military. The court held they were “unlawful combatants” who had entered the country secretly like spies. The court stated:

All citizens of nations at war with the United States or who give obedience to or act under the direction of any such nation shall be subject to the law of war and to the jurisdiction of military tribunals.¹⁷ The court defended the right of the president “in time of war and of grave national danger” to order the eight to be tried by military tribunals. They were duly hanged.¹⁸

Most of the public discussion of the President’s order and the *Quirin* case has centered on the question of when a defendant can be subject to the jurisdiction of a military tribunal rather than a civilian court. But whatever the answer to that question, *Quirin* takes for granted that only unlawful combatants can be tried by the sort of irregular tribunals contemplated by the President’s order. “Lawful” combatants, that is prisoners of war, are entitled to substantive and procedural protections not contemplated by Bush’s order. Consequently, the question of whether the al Qaeda fighters imprisoned at Guantanamo Bay are eventually designated prisoners of war rather than unlawful combatants, could potentially matter a great deal.

GUANTANAMO BAY – A CIVIL RIGHTS FREE ZONE?

The 1942 Bataan Death March, in which thousands of captured American and Filipino soldiers died as the Japanese forced them to trek across the Philippines, was one of the horrors of World War II that shocked nations into saying “never again.” Subsequently, over four months in 1949, diplomats crafted the modern Geneva Conventions – a set of rules on the conduct of warfare, designed to protect civilians and wounded or captured fighters. The four treaties still form the backbone of the world’s laws regulating warfare. But the capture of suspected al Qaeda fighters by U.S. forces in Afghanistan and their imprisonment at a Navy base in Guantanamo Bay, Cuba, is putting the rules to a new test.¹⁹

A little over a year ago, the U.S. Naval Base at Guantanamo Bay, Cuba, was considered a sleepy and isolated relic of the Cold War, a place where U.S. Marines and Cuban soldiers peered at each other from watchtowers as they had for decades, along a 17 ½ mile fence line. But in January 2002, life at Guantanamo Bay changed when prisoners began arriving, most of them captured on the battlefields of Afghanistan. The men were described by Secretary of Defense, Donald Rumsfeld, as “among the most vicious killers on the face of the earth.”²⁰ The

majority of the 620 inmates currently held in Camp Delta are believed to be citizens of Saudi Arabia; however, the latest count indicates a total of 44 other countries are represented.

Guantanamo Bay's greatest advantage as a detention site is its isolation, a U.S. Naval base on Cuba's southeast tip, accessible only with military permission. However, in transporting these captives to Guantanamo for imprisonment and future prosecution, we may be undermining our own position on the world stage as the champions of the rule of law.

As has already happened, and will surely continue to happen for the duration, the constitutionality of the confinement of the Guantanamo Bay detainees has been challenged. Specifically, in *Coalition of Clergy v. Bush*, the plaintiffs contend that the detainees have been denied due process, the right to be informed of the charges against them, and the right to legal counsel. In this first test case, heard in federal district court in Los Angeles, the court found in favor of the Government. The court held that the detainees have never been within territory over which the United States is "sovereign," and that they therefore fall outside the protection of our Constitution. The Administration could have chosen to defend the case by arguing that the detainees are being processed in accordance with the law applicable to enemy combatants; that the right to counsel was applicable at this time given the circumstances of the war against terrorism; and, that a general regard for the Geneva Convention on the treatment of captives in war satisfies American constitutional standards. However, rather than argue the case on the merits of the actual claims, the Bush Administration relied on the fact that a 1903 lease agreement and a 1934 treaty, granted the United States power to "exercise complete jurisdiction and control" over Guantanamo Bay, while Cuba would retain "ultimate sovereignty."²¹ This is a very superficial argument. While formal sovereignty may remain with Cuba, it is in name only. The practical aspects of sovereignty clearly reside with the United States.

To excuse ourselves from the application of the U.S. Constitution on the basis of Cuba's empty, technical reservation of "sovereignty" is to say the laws and values which make up our Constitution are geographically bound -- that the Constitution does not follow the flag. This position effectively renders Guantanamo Bay a "humanitarian-free zone"—a place where there is no law, but only power.²² Without question, we need to act swiftly and decisively when dealing with those who threaten our national security; however, this process appears to be a dangerous and perhaps unnecessary departure from the basic principles upon which this nation was founded.

DETAINEE LEGAL STATUS – COUNSEL FOR THE DEFENSE

He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself.

—Thomas Paine

POINT: THE LEGAL LIMBO – DON'T LIKE THE LYRICS AND YOU CAN'T DANCE TO IT

Approximately 650 people from more than 40 countries are being detained by the U.S. military at Guantanamo Bay Naval Base without being allowed access to legal representation and without being charged. Attorneys for several of the detainees have asked a U.S. federal appeals court to overturn an earlier court ruling which determined that although the prisoners do have rights, they cannot enforce them in U.S. courts because Guantanamo Bay is not a U.S. territory. Joseph Margulies, a Minneapolis attorney representing two Britons and an Australian, said this situation “raises the specter of arbitrary, unlimited detention.”²³ Further, human rights groups and international legal scholars charge that neither the actual geographical location of where a person is being held, nor their nationality, affects his or her rights according to international humanitarian law. They believe that all people charged under any form of detention or imprisonment, including prisoners of war and others “arrested, detained, or interned for reasons related to armed conflict,”²⁴ have numerous fundamental rights recognized under international and humanitarian law. Groups such as Amnesty International (AI) and Human Rights Watch (HRW) contend that these laws apply even to individuals suspected of the worst possible crimes—genocide, crimes against humanity, and war crimes.

On April 14, 2002, Amnesty International released a 63-page report entitled “Memorandum to the U.S. Government on the Rights of People in U.S. Custody in Afghanistan and Guantanamo Bay,” which in detailed terms criticizes the failure of the U.S. Government to comply with international law standards in the detention and treatment of detainees in Afghanistan and Guantanamo Bay. The report summarizes the specific concerns of both the humanitarian and legal communities, and states that the U.S. Government has:

- Transferred and held people in conditions that may amount to cruel, inhuman, or degrading treatment, and that violate other minimum standards relating to detention;
- Refused to inform people in its custody of all their rights;
- Refused to grant people in its custody access to legal counsel, including during questioning by U.S. and other authorities;

- Refused to grant people in its custody access to the courts to challenge the lawfulness of their detention;
- Undermined the presumption of innocence through a pattern of public commentary on the presumed guilt of the people in its custody in Guantanamo Bay;
- Failed to facilitate prompt communications with or grant access to family members;
- Undermined due process and extradition protections in cases of people taken into custody outside of Afghanistan and transferred to Guantanamo Bay (as in the case of three suspected al Qaeda members arrested in Kosovo);
- Threatened to select foreign nationals for trial before military commissions (executive bodies lacking clear independence from federal courts and with the power to hand down death sentences without the right of appeal to an independent and impartial court);
- Raised the prospect of indefinite detention without charge or trial, or continued detention after acquittal, or repatriation that may threaten the principle of *non-refoulement*²⁵ (“non-return”—laws which protect refugees from being returned to places where their lives or freedoms could be threatened).

The memorandum concludes by requesting that the U.S. Government assess all of its actions concerning those in its custody in Afghanistan and Guantanamo Bay and ensuring that it complies, not only with U.S. law, but also with international human rights.²⁶

HUMAN RIGHTS OBLIGATIONS UNDER THE GENEVA CONVENTIONS

In spite of U.S. efforts to allay international criticism, controversy continues to surround the detention of the prisoners being held at Guantanamo Bay Naval Base. At issue is the scope of applicability of the Geneva Conventions, a series of treaties that provide international humanitarian legal standards for states parties during armed conflict, and the U.S. Government's failure to conform fully to their obligations under the Conventions. Specifically, the U.S. Government's unilateral decision to deny all detainees prisoner of war (POW) status, and its decision categorically to except al Qaeda detainees from any coverage by the Conventions, suggests the U.S. Government may have improperly interpreted its legal obligations under the Conventions.

THE GENEVA CONVENTIONS AND THE SCOPE OF THEIR PROTECTION

There are four Geneva Conventions, signed in 1949 and supplemented by two additional Protocols, signed in 1977. Convention I, For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, and Convention II, For the Amelioration of the Condition

of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, enumerate protections guaranteed to members of the armed forces who fall ill or are injured during an armed conflict. Convention III, Relative to the Treatment of Prisoners of War, and Convention IV, Relative to the Protection of Civilian Persons in Time of War, describe protections guaranteed to individuals who are taken into enemy custody during an armed conflict. Protocol I, relating to the Protection of Victims of International Armed Conflicts, and Protocol II, relating to the Protection of Victims of Non-International Armed Conflicts, extend protections of the Geneva Conventions to individuals combating foreign occupation or internally racist regimes, as well as to victims of internal conflicts.²⁷

Most relevant to the Guantanamo Bay detainees are the Third and Fourth Conventions. The Third Convention defines categories of individuals entitled to POW classification, articulates the procedure for classifying a prisoner whose status is unclear, and enumerates the rights of detainees classified as POWs. Article 4 of the Third Convention defines several categories of persons entitled to classification as prisoners of war, as previously mentioned, including persons “who have fallen into the power of the enemy” and who are (1) members of armed forces of a party to the conflict; or (2) members of other militias or volunteer corps, which are commanded by a person responsible for subordinates; have a fixed and distinctive symbol, recognizable at a distance; carry arms openly; and conduct operations in accordance with the laws of war. Article 5 explains that “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 outlined in Article 4, such persons shall enjoy the protections of the present Convention until such time as their status has been determined by a competent tribunal.”²⁸ Human rights groups and detainee defense attorneys interpret this to mean that the U.S. Government is obliged to recognize the POW status of Guantanamo Bay prisoners who clearly fit into an Article 4 category, and must allow a competent tribunal to determine the status of those whose status is ambiguous.

The U.S. Government has classified the Guantanamo Bay detainees as “unlawful combatants,” also referred to as “unprivileged combatants,” designating them as fighters who are not entitled to the privileges of POW status; however, this does not exclude them from all rights under the Geneva Conventions. Article 4 of the Fourth Convention professes a broad protection of individuals “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.” The only caveat to this encompassing protection is that the prisoners must be nationals of a state bound by the Convention.

The International Red Cross has interpreted the Third and Fourth Conventions to embrace all persons who fall into enemy custody during an armed conflict, and does not recognize an exception for “unlawful combatants.” The advocacy group Human Rights Watch contends that “nobody in enemy hands can fall outside the law,” and prisoners detained by an enemy in an armed conflict are either protected by the Third Convention as prisoners of war, or by the Fourth Convention as civilians. Further, their interpretation of the language of the Conventions is that at a minimum, persons who fought on behalf of al Qaeda and who are nationals of a state party to the Conventions are within the scope of their protections.²⁹ They do make a good case.

The Crimes of War Project, a collaborative organization of journalists, lawyers, and scholars formed in 1999, at American University in Washington, D.C., opined that the U.S. Government's current policy of categorically refusing to apply the Geneva Conventions to the al Qaeda detainees contradicts customary legal interpretations of the scope of the Conventions. They stated, “U.S. policy at best misinterprets, and at worst ignores this legal reality, and potentially renders the U.S. in breach of its treaty obligations.”³⁰ However, their principal criticism of the U.S. position is not the government's improper categorization of the detainees under Article 4 of the Third Convention. Rather, it is the government's failure to make individualized determinations about the status of each prisoner, and its outright neglect of Article 5, which requires that any controversy regarding detainee status be determined by a competent tribunal. The clear purpose of Article 5, and the corresponding procedures set forth in U.S. military law, is to ensure that the assessments of a prisoner's status is a fair and objective determination.³¹ Beyond violating its explicit legal obligations under Article 5, the Administration's unilateral determination of the prisoners' collective status, absent a finding of an objective tribunal, undermines U.S. credibility.

CONSEQUENCES OF SELECTIVELY APPLYING THE GENEVA CONVENTIONS

The Geneva Conventions set forth legal standards and procedures for the treatment of all nationals of states party to the conventions who are captured by enemy forces during an armed conflict. The circumstances of the detention and treatment by the U.S. Government of the prisoners currently being held at Guantanamo Bay fail to conform to the Geneva Conventions in several respects. In particular, the Third Convention outlines the duties of a detaining power to convene a competent tribunal to determine the legal status of any individuals taken prisoner, and to afford those individuals the rights and privileges of prisoners of war until that determination is made. In addition, the complete refusal to recognize the Conventions with

respect to prisoners classified as members of al Qaeda ignores the text and customary interpretation of the Fourth Convention.

As one of the most powerful nations in the world, the United States may be setting a dangerous precedent for the future application and interpretation of the Geneva Conventions. In the interest of its own credibility, as well as the future safety of its own armed forces, the U.S. Government must carefully consider its position and ensure it is not practicing selective compliance with respect to its obligations under the Conventions. Tom Wilner, the attorney representing 12 Kuwaiti detainees, summed up the general concern of both human rights and legal advocates:

Every American citizen who goes abroad depends not only on the protection of U.S. military forces, but the protection of the rule of law abroad to protect them, and when we sacrifice that for people, we put our own people in harm's way. We should not be the model around the world for sacrificing the rule of law.³²

U.S. GOVERNMENT POSITION – “IN TIME OF WAR AND GRAVE NATIONAL DANGER”

The world now will begin to see what we meant by a fair system that will enable us to bring people to justice, but at the same time protect our citizenry.

—George W. Bush

COUNTERPOINT: THESE ARE NOT YOUR DADDY'S PRISONERS OF WAR

Terrorism is a difficult crime for legal systems to handle. The September 11th attacks, because of their scale and audacity, and al Qaeda, because of its size and international character, are an especially big challenge. Therefore, the government is obliged to take “exceptional, preventive, and repressive measures.”³³ The war on terrorism is a war not envisaged when the Geneva Convention was signed in 1949. In this war, global terrorists transcend national boundaries and internationally target the innocent.³⁴ The United States sees the al Qaeda prisoners whom it has in custody as important tools in its effort to root out and shut down Osama bin Laden's terrorist network. However, international concerns urging Washington to resolve the legal ambiguity surrounding the detainees, and questioning the manner in which they are dealing with these prisoners threatens to further complicate the effort:

We've known for months now, ever since the government started reacting to the terror attacks of September 11th, that we would be living through fascinating legal times. And it

has become increasingly clear – as new facts meet new laws or old laws are applied to new facts – which lawyers and judges in the legal war on terror will be cruising in large part into uncharted waters, void of clear legal precedent and authority.³⁵

DEFENDING THE GUANTANAMO DETENTIONS

The first detainees arrived at Guantanamo Bay Naval Base in January 2002. Not all of them were taken from the battlefields of Afghanistan; at least six of the current detainees were brought over from Bosnia. To date none of them has been formally charged or had access to lawyers or courts. The U.S. Government argues it has a right to hold the men as enemy combatants while officials interrogate them and consider the next step.³⁶

It should not be that difficult to understand why America has been so hesitant in moving any of the al Qaeda prisoners toward trial. They are considered part of a ruthless terrorist conspiracy.³⁷ In particular, the detainees being held at Guantanamo Bay Naval base are considered the most hardened of thousands of fighters captured during the war in Afghanistan. They are said to have no compunction about killing people.³⁸ Air Force General Richard Myers, Chairman of the Joint Chiefs of Staff, said of the prisoners, “These are people who would gnaw through hydraulic lines in the back of a C-17 to bring it down. So, these are very, very dangerous people.” No one wants to be responsible for releasing someone who later turns out to have played a role in a terrorist attack.

Any decision to either release or prosecute a detainee will likely only result after a long and tedious interrogation and investigatory process. First, U.S. intelligence and law enforcement officials must agree that a detainee has no more information to offer. U.S. military commanders have so far characterized the captives as providing a window to the workings of Osama bin Laden’s network, both from the recruiting standpoint as well as how they carry out operations.³⁹ Then they must determine if the detainee could be subject to trial, or needed as a future witness at any military tribunal the Department of Defense may establish. At the same time, they must agree that the prisoner would not present a future terrorist threat. Finally, U.S. diplomats would need to negotiate a method of repatriation. In any case, the procedure will be slow and deliberate. However, the Bush Administration has made it clear that expediency is not a priority; their greater concern is security. There is fear that al Qaeda will track down anyone who is released and try to get information from them, forcibly if need be, on such things as U.S. interrogation methods, security procedures, details of other detainees, and any potential weakness in security at Guantanamo.⁴⁰ Even Defense Secretary Donald Rumsfeld has stated, “I don’t want to be the world’s jailer.” However, Pentagon officials have “come to a grudging acceptance” that it is just too risky to send such dangerous people back to nations, in the

foreseeable future, which could eventually release them to resume their practice of attacking American troops.

PRISONER OF WAR STATUS: PROSECUTION AND PUNISHMENT

Perhaps the greatest criticism the U.S. Government has received has been its interpretation of international law and the laws of warfare. Specifically, Washington has thus far refused to grant the detainees official prisoner of war (POW) status despite intense international pressure. President Bush has stood firmly in his conviction that the detainees will not be classified as POWs because, "These are killers, these are terrorists, and they know no countries. The only thing they know about country is when they find a country that's been weakened and they want to occupy it like a parasite."⁴¹ Therefore, members of the Administration and Pentagon staffers insist they be referred to as "unlawful combatants" or "battlefield detainees."⁴²

The reasons for classifying the prisoners as detainees rather than POWs go deeper than mere semantics. Examining some of the reasons unveils a host of unprecedented legal difficulties. First, Al Qaeda fighters are not members of a formal Afghan army, but rather of a stateless terrorist organization with a global network. According to the 1949 Geneva Conventions, a combatant must be part of an identifiable army or militia and subscribe to the international laws of warfare, clearly criteria al Qaeda members fail to meet.⁴³ Conferring POW status would have negative implications for interrogations. Under Article 17 of the Geneva Conventions, POWs need only provide their name, rank, and serial number. Instead, U.S. military and FBI officials want to preserve the legal flexibility that they have in interrogating the detainees at great length about alleged terrorist plots. Secondly, according to Ruth Wedgwood, Professor of International Law and Diplomacy at John Hopkins University:

If you concede they are lawful combatants, then you're implicitly conceding they had the right to target military installations like the Pentagon. In a war, a soldier is not guilty of homicide.....You would be potentially insulating them from any criminal liability.⁴⁴

Lastly, once hostilities are over, prisoners of war are released and sent home. In this case, where the prisoners are not soldiers but terrorists, this would be tantamount to simply releasing hardened criminals from prison.

AMERICA'S OPTIONS

If the decision is eventually made to try any of the prisoners, the United States has a number of legal options. All represent a different balance of advantages and disadvantages, both from America's point of view and in terms of fighting international terrorism:

- United Nations (UN) Security Council Tribunal: The advantages of this approach are that the court would be seen as independent and impartial and would probably have the maximum legal authority of any approach under international law. The Security Council could compel cooperation from all UN members, and such an approach might win support in the Arab world, as well as the West, especially if Islamic judges are involved. However, it would be expensive, complicated, and time-consuming to set up. Also, many Americans would likely be unhappy with the idea of handing over al Qaeda prisoners to international justice. The American Government has already rejected this proposal.⁴⁵
- Prosecution at Home: The Pentagon has said that in most cases it would like to send suspects back to their own countries, if prosecution can be guaranteed. One of the advantages of this approach for America is that it involves other countries directly in the effort to defeat and dismantle al Qaeda. One of the disadvantages is that legally the U.S. cannot stipulate how other countries should conduct their trials.
- U.S. Criminal Justice System: So far this is the only forum in which American authorities have chosen to prosecute al Qaeda and other terrorists. Although the American Government has justified the need for special military tribunals by arguing that ordinary criminal trials are too risky for such determined terrorists, they have undermined these arguments with precedent cases. A number of al Qaeda operatives involved in the 1993 World Trade Center bombing, as well as those who bombed America's African embassies, have already been tried and convicted in federal court. One advantage is that they provide the most secure form of impartial justice that America has to offer—dealing with terrorists no differently than they would with any American citizen. A conviction in federal court carries the most weight with Americans and foreigners. Such trials would treat the terrorists as ordinary criminals, denying them the status they crave as martyrs or heroic warriors. The disadvantages are that judges, jurors, and the courts themselves could become terrorist targets; conviction in a federal court requires high standards of proof; intelligence sources might be compromised; and, there is always the chance appeal or acquittal.

- U.S. Military Justice System: This format would have standing in international law, make it easier to protect intelligence sources and participants in the trial itself (there is no jury) and, unlike federal trials, could be held abroad. Because they would provide the alleged terrorists with the same rights to counsel, appeal, and other constitutional protections that accused American soldiers receive, they would also allow America to claim that it had met its international obligations and had held fair and independent trials for alleged al Qaeda members. Some Americans, especially families of the victims of the September 11th attacks, may find military trials unsatisfactory and prefer to see justice done more openly in federal court.
- Military Tribunals: The Pentagon is drawing up guidelines for military tribunals under President Bush's 13 December 2001 Executive Order. The idea of the tribunals is to put the suspects on trial faster and in greater secrecy than an ordinary criminal court. The order allows the tribunals to impose penalties, including death, by a majority vote of American military officers sitting as judges; allows a lower standard of proof and looser standard of evidence than in any regular American court; permits trials to be held in secret; and, denies the accused the right to choose a lawyer or to appeal against the verdict to a federal court (i.e., there is no recourse to anyone outside the military or executive branch, the parties behind the prosecution). Since the publication of the order, and the ensuing outcry of human rights groups and legal experts, American officials have indicated that the accused may be given some of these rights, but to date have not committed themselves to any specific concessions. The singular advantage of the tribunals would be that it would make it much easier to convict al Qaeda terrorists. However, their disadvantages are significant. They may be illegal under both international and American law (and it could take years to make that determination), and they will garner very little international support, even among America's European allies. Further, they run the risk of establishing a precedent for repressive regimes all over the world to conduct similar secret military trials with impunity.
- Indefinite Detention: The U.S. has said it is considering detaining the prisoners indefinitely which would be against international law. Prisoners of war are only allowed to be detained until the end of a conflict, at which point they must be either charged or released. However, the U.S. has made it clear that its war against terror is ongoing and may never end.
- Release. If the U.S. fails to find any evidence of war crimes, the prisoners should be released according to international law. If their home countries wanted to prosecute

them for other charges, the U.S. would consider handing over the suspects, but it would depend on its extradition treaty with the country involved.⁴⁶

The unprecedented nature of the September 11th attacks and the magnitude of damage and loss of life they have caused have led a number of officials to assert that the acts were not just criminal acts, they were “acts of war.” On November 13, 2001, President Bush signed a Military Order pertaining to the detention, treatment, and trial of certain non-citizens as part of the war against terrorism. The order makes it apparent that the President plans to treat the attacks as acts of war rather than criminal acts. This distinction has more than rhetorical significance; it sends a clear message that the Administration is leaning heavily in favor of prosecuting those responsible as war criminals, trying them by special military tribunal rather than in federal court.⁴⁷

CONCLUSION

Although the current crisis does not fit the typical circumstances associated with war crimes committed by otherwise lawful combatants in recognized theaters of war, there is precedent for convening military commissions or tribunals to try enemy belligerents for conspiring to commit violations of the laws of war outside of any recognized war zone. In this instance, it is the recommended course of action. For this type of crime, military tribunals, which are composed of a panel of trained military officers who serve as jury and judge, have many practical advantages over our criminal justice system, which was never designed to deal with war crimes or crimes against humanity. Such commissions are more efficient, less costly, and more likely to provide swift and sure justice:

Our criminal justice system, which requires a unanimous finding of guilt beyond a reasonable doubt by twelve jurors, is designed to err on the side of letting the guilty go free rather than convicting the innocent. However, when this nation is faced with terrorist attacks that inflict mass murder or hundreds of millions of dollars of damage in a single instance, we can no longer afford procedures that err so heavily on the side of freeing the guilty. Protection of society and the lives of thousands of potential victims become paramount.⁴⁸

A public trial in federal court could be used to the terrorists’ advantage by allowing them to force the government to release sensitive information. Further, a trial of suspected terrorists could become an international media circus, could be subject to endless appeals, and it is unlikely an impartial jury could be convened anywhere in the United States. This is not to

suggest that the detainees should be denied due process. In a military tribunal, the accused retain the right to counsel, to confront witnesses, dispute evidence, and present evidence in their defense. Those accused of terrorist activities are due no more.⁴⁹

Thirty years ago, American prisoners of war were being brutalized in North Vietnam, and an outraged American Government sought to shame their captors into respecting the Geneva Conventions. It reminds us that the issue is not about whether we sympathize with accused terrorists. It is about protecting a set of rules that protect all people, including American service men and women taken captive in war. It is about preserving America's right to complain when Americans are mistreated overseas.⁵⁰ A military tribunal, the most likely forum for any prosecutions, should work provided they are established to abide by the principles of the presumption of innocence and proof beyond reasonable doubt. A death penalty conviction should require a unanimous verdict and detainees should be able to file appeals up to the U.S. Supreme Court. We should not seek to do an end run around our Constitution by claiming that it does not apply by virtue of geography; the Constitution should follow the flag.⁵¹

WORD COUNT = 9,187

ENDNOTES

¹ "Head to Head: Guantanamo Prisoners," 16 January 2002; available from <http://bbc.co.uk/1/hi/world/americas/1763307.stm>; Internet; accessed 23 November 2002.

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³ Merle D. Kellerhals, Jr., "Bush Says Geneva Convention Applies to Taliban, Not al Qaeda," 7 February 2002, available from <http://usinfo.state.gov/topical/pol/terror/02020707.htm>; Internet; accessed 23 November 2002.

⁴ Steven A. Camarota, "How the Terrorists Get In," *The Public Interest* 149 (Fall 2002): 66.

⁵ "Blowback," 26 July 2001: available from <http://www.janes.com>; Internet; accessed 29 December 2002.

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⁷ "Blowback," 2.

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⁹ "Blowback", 2.

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¹¹ Ibid, p. 185.

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¹⁵ Robert B. Silvers and Barbara Epstein, *Striking Terror* (New York: New York Review Books, 2002), 6.

¹⁶ Michael C. Dorf, "What is an "Unlawful Combatant and Why it Matters: The Status of Detained Al-Qaeda and Taliban Fighters," 23 January 2002; available from <http://writ.findlaw.com/dorf/20020123.html>; Internet; accessed 16 February 2003.

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¹⁸ Ibid.

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²⁰ Jeffrey Kaye, "Update: The Detainees," 22 January 2003; available from <http://www.pbs.org/newshour/bb/military>; Internet; accessed 16 February 2003.

²¹ Anupam Chander, "Guantanamo Detainees Provide New Test for Laws of War," 5 February 2002; available from <http://writ.news.findlaw.com>; Internet; accessed 16 February 2003.

²² Ibid, 3.

²³ "Lawyers Seek Help for Guantanamo Bay Detainees," 3 December 2002; available from <http://www.abc.net.au/am/s739630.htm>; Internet; accessed 7 December 2002.

²⁴ Bruce Zagaris, "Amnesty International Report Criticizes Detention Policy on Counterterrorism War," June 2002; available from <http://web.lexis-nexis.com/universe/printdoc>; Internet; accessed 19 November 2002.

²⁵ Ibid.

²⁶ Ibid, 3.

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²⁸ Ibid, 2.

²⁹ Ibid, 3.

³⁰ Ibid, 4.

³¹ Ibid, 5.

³² "Lawyers Seek Help for Guantanamo Bay Detainees," 2.

³³ Jonathon Fowler, "U.N. Rights Chief: Try Guantanamo Terror Suspects or Send Them Home," 4 December 2002; <http://story.news.yahoo.com/news>; Internet; accessed 7 December 2002.

³⁴ Ari Fleisher, "White House Says Geneva Conventions Will Apply to Taliban Prisoners at Guantanamo Bay: An Interview with the White House Press Secretary," interview by Leon Harris and Kelly Wallace, Cable News Network (CNN) Live Event, 7 February 2002.

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⁴³ *Ibid*, 2.

⁴⁴ Karen Branch-Brioso, "Bush Camp Has Yet to Explain How Detainees Might Be Tried," *St. Louis Post-Dispatch*, 27 January 2002, sec. B, p. 1 (1869 words) [database on-line]; available from Lexis-Nexis; accessed 19 November 2002.

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⁵⁰ Tom Malinowski, "What to Do with Our 'Detainees'," 28 January 2002; <http://hrw.org/editorials/2002/uspow012802.htm>; Internet; accessed 7 December 2002.

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