

PRISONER OF WAR OR ILLEGAL ENEMY COMBATANT?
AN ANALYSIS OF THE LEGAL STATUS AND RIGHTS OF THE GUANTÁNAMO DETAINEES

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ABSTRACT

The objective of this thesis is to explore and analyze some of the major difficulties, challenges, and debates involved with the issue over which status and rights to afford to those detained in the War on Terrorism, in particular the Guantánamo detainees. Unlike conflicts of the past, the War on Terrorism is being waged against very unconventional enemies. Because of this, the Bush Administration, foreign governments, human rights groups, and both governmental and non-governmental organizations are currently engaged in a critical debate over which legal status and rights should be afforded to these enemies upon their detention.

If any agreement is to be made regarding the legal status of the Guantánamo detainees, it is important to obtain a basic understanding of the issue itself as well as both sides of the debate. In order to do this, three core issues are explored. Firstly, what are President Bush's strategic reasons for refusing to grant the Guantánamo detainees prisoner of war (POW) status and what are the steps that the Administration has taken to ensure that its strategies in approaching the War on Terror are protected? Secondly, what are the counter arguments to the Bush Administration's position, who is voicing these arguments, and why? Finally, what impact does the Administration's position have on how and to what extent the War on Terror is waged?

Once these questions have been explored, the thesis concludes that the Bush Administration's approach to the War on Terror has proven to be reckless. The security threat posed by terrorism should not obscure the importance of human rights. An anti-terrorism policy that ignores human rights is a gift to terrorists. It reaffirms the violent instrumentation that breeds terrorism as it undermines the public support needed to defeat

it. A strong human rights policy that respects the detainee's right to due process and to not be subjected to torture, cannot replace the actions of security forces, but is an essential complement. A successful anti-terrorism policy must endeavor to build strong international norms and institutions based on human rights, not provide a new rationale for avoiding and undermining them. If the Bush Administration remains on its present path, the rights of the Guantánamo detainees will continue to be violated and, as a result, threaten the rights of others who depend on the fair application of the law.

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Nicole McDonald
April, 2008

DEDICATION

For all political prisoners of the past, present and to come...

LIST OF NON-STANDARD ABBREVIATIONS

CIA	Central Intelligence Agency
CSRT	Combatant Status Review Tribunal
DOD	Department of Defense
DNI	Director of National Intelligence
FAA	American Federal Aviation Administration
GPW	The Geneva Convention Relative to the Treatment of Prisoners of War
Gitmo	Refers to the US Naval Base at Guantánamo Bay, Cuba
ICRC	International Committee of the Red Cross
IHL	International Humanitarian Law
LTC	Lieutenant Commander
MCA	Military Commissions Act of 2006
MG	Major General
POW	Prisoner of War
UDHR	Universal Declaration of Human Rights
UN	United Nations

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CHAPTER ONE INTRODUCTION

1.1 – Introduction

Although terrorism is not a new phenomenon, the horrific events of September 11, 2001, shocked the world as many watched coordinated al-Qaeda led terrorist attacks unfold on their television screens. Of the four commercial airliners that were hijacked that day, three were successful in reaching their targets: the two towers of the World Trade Center in New York City, and the Pentagon in Washington, D.C. The casualties, economic damage, and public outrage that followed these attacks were unprecedented. Approximately 3,000 people from 78 countries died as a result of these tragic events, and the world community was forced to focus its attention on the wide-spread threat of international terrorism. As a response to this threat, the United States declared a “War on Terrorism.”¹ In a speech to Congress on September 20th, 2001, President George W. Bush proclaimed that this was a “war [that] would not end until every terrorist group of global reach has been found, stopped, and defeated.”²

On October 7, 2001, the War on Terrorism formally began when the United States and its allies launched a combined special forces and air assault against Afghanistan, the state that was giving al-Qaeda sanctuary. The legal rationale for this attack was one of self-defense. The US claimed that it was defending itself against reasonably anticipated future attacks by al-Qaeda resulting from the Taliban government’s unwillingness to intervene to stop such activities from being planned and carried out from Afghanistan.

¹ According to the US Department of Defense, ‘terrorism’ is defined as “the calculated use of violence or the threat of violence to inculcate fear; intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological.” For the purpose of this thesis, this is what is meant when referring to terrorism.

² David C. Rapoport, “The Four Waves of Modern Terrorism”, in Audrey Kurth Cronin and James M. Ludes, Eds. *Attacking Terrorism: Elements of a Grand Strategy*, (Washington, D.C.: Georgetown University Press, 2004), 46.

The war in Afghanistan was over relatively quickly. By December 7, the last al-Qaeda/Taliban stronghold fell, and on December 22 an interim government was sworn in. In spite of its short duration, thousands of Taliban and al-Qaeda fighters were captured during the attacks. Although the war in Afghanistan had ended, the War on Terror had just begun, and so in January 2002, the US military began transporting some of the prisoners captured in Afghanistan to Camp X-Ray at the US Naval Base in Guantánamo Bay, Cuba.

Since their detention, the legal status of these prisoners has been subject to heavy international debate. Many foreign governments and human rights organizations argue that these prisoners, or at least the captured Taliban fighters, should be afforded prisoner-of-war (POW) status under the Geneva Conventions.³ The Bush Administration in the US, however, maintains that although the Taliban fighters are covered by the 1949 Geneva Conventions, they are not to be treated as POWs because they allegedly fail to meet international standards as lawful combatants.

The debate over the legal status and rights of the Guantánamo detainees eventually made its way to the Supreme Court. Unfortunately, the Court's June 2006 ruling regarding the illegality of military commissions has done little to lessen the intensity of the debate. Following the Supreme Court's ruling, the Bush Administration introduced the 2006 Military Commissions Act (MCA). The MCA essentially nullifies the Court's ruling and legalizes the Administration's actions in the War on Terror thus far. Because of this, the debate over the treatment of these detainees has continued.

³ The Geneva Conventions are a series of international agreements that created and developed international humanitarian law to protect wounded combatants and those who assist them, prisoners of war and civilians during times of war and other conflicts. Hilaire McCoubrey, *International Humanitarian Law: The Regulation of Armed Conflicts*, (Aldershot, Great Britain: The Dartmouth Publishing Company Limited, 1990).

Before delving deeper into the arguments made by both sides of this debate, it is important to examine the Geneva Conventions, in particular the Third Geneva Convention, which is often referred to as the Prisoner of War Convention (GPW). The Geneva Conventions are generally accepted as the basis of international law, and each side of this debate has rooted some of its arguments in the GPW. This chapter will next indicate why the legal status and rights of the Guantánamo detainees have become an important subject of study and will identify the core questions that will be addressed in this thesis. Finally, an outline of each chapter's contents will be listed.

1.2 - Context

Since their arrival at Guantánamo Bay, the legal status and treatment of those captured during the attacks on Afghanistan have continued to garnish international attention and have produced a heated debate. On one side is the Bush Administration and its supporters who maintain that detainees in the War on Terrorism should not be afforded POW status and the rights that are associated with that status. On the other side, many US and international experts argue that the United States is acting both illegally and immorally in refusing to afford POW status to some of these prisoners.⁴

Oddly enough, both sides have relied heavily upon the Geneva Conventions – in particular on the Third Convention – to bolster their arguments. In order to better understand the reasons for this, it is necessary to take a brief look at the creation and general provisions of the Prisoner of War Convention itself.

⁴ Examples of such experts include: the UN Commission on Human Rights, the International Federation for Human Rights, the International Committee of the Red Cross, Great Britain's Supreme Court of Judicature, the Supreme Court of Canada, the governments of Malaysia and Germany, Human Rights Watch, Amnesty International, the American Civil Liberties Union, the U.S. Lawyers Committee for Human Rights, the U.S. Anti-Defamation League, the Association of the Bar of the City of New York, the Law Society of England and Wales, and the U.S. National Assembly of Criminal Defense Lawyers, to name a few.

I – The Creation of the Geneva Conventions

The issue of how to treat and handle prisoners of war did not make an appearance in international law until the 1899 Hague Conventions which led to the creation of the Regulations Concerning the Laws and Customs of War on Land. These Regulations, which were revised in 1907, devoted 17 articles to prisoners of war.⁵ The articles address important issues, such as whether prisoners of war are in the power of the enemy government, or of the soldiers who captured them. However, they stated that the capturing government could hold prisoners in custody in order to stop them from taking up arms once again, but in doing so they had to treat them humanely, and provide them with the same care they provided their own troops. In addition to this, the government could require the detainees to work; however, this work could in no way be connected with war operations.⁶

During the First World War, the Hague Regulations governed the treatment of seven million prisoners of war. Although they provided general guarantees, dealing with the issue of prisoners of war was nevertheless difficult. With no legal basis, the Red Cross created a central agency for prisoners of war to ensure that these regulations were being carried out. For example, the inspection of internment camps by neutral delegates helped to regulate the conduct of detaining powers.

The experience of this war led to the Third Geneva Convention - otherwise known as the Convention Relative to the Treatment of Prisoners of War, or the Prisoner

⁵ These articles (4-20) make up the second chapter of the first section of the Regulations Concerning the Laws and Customs of War on Land, which was signed in Hague on October 18, 1907.

⁶ Chapter II, Section I of the Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on the Land. The Hague, 18 October, 1907. Available: <<http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/1d1726425f6955aec125641e0038bfd6>>. Retrieved: May 10, 2006.

of War Convention - which was signed in Geneva, Switzerland on June 17, 1925, by 128 nations. It was officially adopted in 1929 as an extension to the rights guaranteed by the Hague Conventions of 1899 and 1907. In 1949 the Prisoner of War Convention was revised and was adopted on August 12 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War. On October 21, 1950, the Third Geneva Convention entered into force.

Marjorie Cohn summarizes this convention well in her article “Geneva Conventions” when she states that:

As amended in 1949, the Third Geneva Convention...sets forth criteria to determine who is a POW, a protected person under this convention. Where a doubt arises about whether a person is a POW, a competent tribunal must decide his or her status; in the meantime, the person must be afforded the protections of this convention. POWs are entitled at all times to humane treatment and respect for their personal dignity and honor. Their lives and health must not be endangered. They must be protected against violence or intimidation, insults, and public curiosity. They must be maintained in conditions as favorable as those for the forces of the detaining power. No physical or mental torture, nor any other form of coercion, may be inflicted on POWs to secure information from them. POWs who refuse to answer questions may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind. POWs are bound to give only their surnames, first names and rank, date of birth, and “army, regimental, personal or serial number.”⁷

1.3 – Objectives and Core Questions

The objective of this study is to explore and analyze some of the major difficulties, challenges, and debates involved with the issue over which status and rights to afford to those detained in the War on Terrorism. Unlike many conflicts in the past, the War on Terrorism is being waged against very unconventional enemies. Because of this,

⁷ Marjorie Cohn, “Geneva Conventions,” "Geneva Conventions," Microsoft Encarta Online Encyclopedia, 2007. Available at <http://encarta.msn.com/encyclopedia_762529232_1/Geneva_Conventions.html>.

the Bush Administration, foreign governments, human rights groups, and both governmental and non-governmental organizations are currently engaged in a critical debate over which legal status and rights should be afforded to these enemies upon their detention. As a paper presented to the American Society of Criminology in November of 2005 noted:

Dealing with combatants, of any type, is likely to be a difficult security challenge in any conflict situation, regardless of whether the combatants are organized or semi-organized (i.e. paramilitary, militia, mercenary, rebel, revolutionary, guerrilla, resistance fighter, freedom fighter, terrorist, or insurgent). An even greater challenge exists, theoretically, ethically, and legitimately in sorting out “legals” from “illegals” among the many combatants one is likely to encounter in foreign lands – ranging from women to children, to disabled and deranged, to the variety of insurgents and sympathizers, to “criminals” and “terrorists” and their networks and subcultures.⁸

If any agreement is to be made regarding the legal status of the Guantánamo detainees, it is important to obtain a basic understanding of the issue itself as well as both sides of the debate. In order to do this, three core issues must be explored. Firstly, what are President Bush’s strategic reasons for refusing to grant the Guantánamo detainees POW status and what are the steps that the Administration has taken in order to ensure that its strategies in approaching the War on Terror are protected (i.e. the 2006 Military Commissions Act)? By examining this issue I am hoping to tease out some of the fundamental changes that have taken place in the way that war is now being conducted.

Secondly, what are the counter arguments to the Bush Administration’s position, who is voicing these arguments, and why? The answer to this is important because it will

⁸ Tom O’Connor and Mark Stevens, *The Handling of Illegal Enemy Combatants*, November 2005. [Paper presented to the American Society of Criminology Meeting in Toronto]. Available at: <http://faculty.newc.edu/tconnor/430/430lect16.htm>.

highlight the fact that the development of the protection of human rights is characterized by a continuous tension between state sovereignty and human dignity.

Finally, what impact does the Bush Administration's position have on how and to what extent the War on Terror is waged? This is an extremely important question to explore because it will likely help to predict the way in which future wars are conducted.

1.4 – Approach and Reading Guide

This thesis will explore the new dimensions that the War on Terror has brought to bear upon international humanitarian law. In particular, it will examine how the legal status and rights of the detainees have been affected since this war began. In order to do this, the thesis is divided into 5 chapters. The first chapter is intended to present the reader with a clear picture of what the thesis is about and why the issue of the treatment of terrorist detainees is important.

The second chapter will briefly look at the events which led up to the internment of terrorists and suspected terrorists at the Guantánamo Bay detention center. It will provide the background information needed to obtain a comprehensive idea of how the debate arose over which status to afford to the detainees in the War on Terror. It will explore the events that occurred between the 9/11 terrorist attacks and detainees being taken to Camp X-Ray – the prison camp in which a number of those captured during the attacks on Afghanistan in 2001 are currently being held.

Chapter three serves two major purposes. The first is to highlight the key differences between an “illegal enemy combatant” and a “prisoner of war.” The second purpose is to delve into the debate of whether or not these detainees should be treated as illegal enemy combatants or as POWs. It will explore the Bush Administration's initial

standpoint on the treatment of detainees in the War on Terrorism, the criticisms of the Administration's actions, and the Administration's strategic reasoning for maintaining its position.

The objective of the fourth chapter is to underline the legal proceedings that resulted in the creation of the 2006 Military Commissions Act. The Bush Administration's position and the adoption of the 2006 Military Commissions Act has had an impact not only on the way that the war on terrorism is being conducted, but on how future conflicts may be conducted as well.

Finally, the fifth chapter will sum up the major arguments and findings made throughout the thesis and discuss their potential implications for the conduct of future wars.

CHAPTER TWO WHAT HAPPENED?

2.1 – September 11, 2001

At 8:46 am on Tuesday, September 11, 2001, American Airlines Flight 11 crashed into the North Tower of the World Trade Center in New York. Many who witnessed the crash were reportedly overcome with shock and bewilderment at how such a tragic accident could occur. These emotions quickly turned to fear however, when, 17 minutes later, United Airlines Flight 175 slammed into the South Tower of the World Trade Center.

It was only with the second plane crash that people began to realize that America was under attack. As the American Federal Aviation Administration (FAA) scrambled to regain control of US airspace, millions of people across the world watched the World Trade Center attacks being replayed over and over on their television screens, and wondered if and where anymore possible attacks would be, and who was behind them.

At 9:37 am the third attack was carried out when American Airlines Flight 77 plowed into the Pentagon in Washington, D.C. Fortunately, the section that was hit consisted mainly of newly renovated, unoccupied offices. However, as the bright flames and dark smoke enveloped the west side of America's military nerve, any lingering doubts about the terrorist nature of the attacks disappeared.

The fourth and final hijacked airplane, United Airlines Flight 93, slammed into a field in Shanksville, Pennsylvania at 10:03 am. Upon further investigation, the National Commission on Terrorist Attacks Upon the United States discovered that some of the passengers aboard this flight had decided to revolt against the terrorists to try to regain control of the airplane. The Commission believed that the passengers successfully

thwarted the terrorists' attacks on their original target, which many speculated was the White House, Capitol Hill, or Camp David.⁹

Less than 24 hours after the attacks began, the National Security Council and a small group of President Bush's key advisors determined that al Qaeda's leader, Osama bin Laden, was behind the day's vicious attacks. As a result of this, President Bush gave the Taliban regime of Afghanistan – the state that was believed to be harboring bin Laden – a list of ultimatums. Bush ordered the Taliban to:

Deliver to United States authorities all leaders of al Qaeda who hide in your land. Release all foreign nationals, including American citizens, you have unjustly imprisoned. Protect foreign journalists, diplomats, and aid workers in your country. Close immediately and permanently every terrorist training camp in Afghanistan, and hand over every terrorist, and every person in their support structure, to appropriate authorities. Give the United States full access to terrorist training camps, so we can make sure they are no longer operating. These demands are not open to negotiations or discussion. The Taliban must act, and act immediately. They will hand over the terrorists, or they will share in their fate.¹⁰

2.2 – Attacks on Afghanistan

The Taliban regime balked at Bush's demands and responded with a call for a holy war "if infidels invade an Islamic country."¹¹ As a result of their unwillingness to comply, on October 7, 2001, the US – initially joined by Britain and later by others – launched an attack against Afghanistan which they named "Operation Enduring Freedom." The initial objectives of this operation were to attack bin Laden's training

⁹ Wilson, Marshall, Kevin Fagan, Stacy Finz and Nanette Asimov, "FBI searching the passenger list of doomed S.F.-bound jet for clues", *The San Francisco Chronicle*, September 12, 2001.

¹⁰ Quote taken from George W. Bush's September 23, 2001, Presidential Address to a Joint Session of Congress. For a full transcript of this Address see, George W. Bush, "*We Will Prevail*", (New York: The Continuum Publishing Group Inc., 2003), 11-18.

¹¹ Stephen Tanner, *Afghanistan: A Military History from Alexander the Great to the Fall of the Taliban*, (New York: Da Capo Press, 2002), 294.

camps and facilities from the air, causing as many al Qaeda casualties as possible, and also to target the Taliban, with the presumed goal of destroying their morale and effecting their disintegration or submission.

Unfortunately, neither objective could be quickly realized. By the time the US and its allies were prepared to launch a counter-attack against bin Laden, he and his followers had long since dispersed to prepared hideouts and to villages and residential areas where they could easily blend in with the local populace. To rely solely on bombing was, as one distinguished academic remarked, like “using a blow torch to eradicate cancer.”¹²

The initial attacks on the Taliban were equally ineffective. Like the members of al Qaeda, the Taliban was able to disperse to safe locations, except where they had to man a front line. As a result, the air strikes were unable to cause the collapse of the Taliban as a fighting force and government. In fact, as Martin Ewans points out in his book, *Afghanistan: A Short History of its People and Politics*, “...the air bombardment seemed to do little more than increase the suffering being endured by the Afghans, both directly and as a result of the disruption of food convoys from Pakistan.”¹³

Because their initial methods for destroying al Qaeda and the Taliban were obviously not producing the results it had hoped for, the strategy of the Operation quickly changed. At the beginning of November, the US and its allies discarded an inhibition over joining forces with the Northern Alliance of Afghanistan.¹⁴ Within a few days of

¹² Sir Michael Howard, speaking at a Guardian/Royal United Services Conference, October 30, 2001. This was cited in Martin Ewans, *Afghanistan: A Short History of its People and Politics*, (New York: Harper Collins Publishers Inc., 2002), 289.

¹³ *Ibid.*

¹⁴ Laura Neack, *The New Foreign Policy: US and Comparative Foreign Policy in the 21st Century*, Lanham, Md: Rowman & Littlefield, 2003, p.132.

aligning themselves with the Northern Alliance, the members of Operation Enduring Freedom were able to obtain control over the northern towns of Taloqan, Kunduz and Herat, and by November 13, Taliban control over Kabul had collapsed.

Although it was making rapid progress in the north, the US pondered the problem of forming a proxy “Southern Alliance” that could match the achievements of the Northern one. The US did not have to worry about this problem for long, however, because on December 7, the Taliban abandoned Kandahar. Two days later, the vestige of Taliban rule in Afghanistan collapsed when Taliban in the province of Zabul, on the Pakistani border, surrendered.

Despite the fall of the Taliban regime, there was still the problem of al Qaeda. Because of al Qaeda’s clandestine nature, its members were able to disappear amidst a confused situation beyond the ability of US air power to correct. As a result, the ground troops of the US, its allies and the Northern Alliance, became the new driving force behind the attacks on Afghanistan. Although many members of al Qaeda were captured by these troops, bin Laden continued to elude his enemies. Even the American offer of a \$25 million reward for his capture was ineffective.

While the US and its allies fought to root out the Taliban and al Qaeda, the United Nations began working on an agreement that would serve as the starting point for rebuilding Afghanistan. Their efforts led to the creation of the Agreement on Provisional Arrangements in Afghanistan Pending Re-establishment of Permanent Institutions – or the Bonn Agreement – that was signed by representatives of the Afghan people on December 5, 2001. The objectives of the agreement were to establish an Interim

Authority to run the country and provide the basis of an interim system of law and governance.¹⁵

On December 22, 2001, the Interim Administration took office at a dignified ceremony in Kabul. The position of Chairman went to the moderate Pashtun Hamid Karzai. Unfortunately for Karzai, ruling Afghanistan has not proven to be easy. However, as William Maley states in his book, The Afghanistan Wars, "...the Bonn Agreement [which is] focused on state-building rather than a division of spoils, constitutes a promising start, indeed the best hope that Afghanistan has had for many a long year."¹⁶

2.3 – Captured Combatants

Even though the attacks on Afghanistan only lasted a couple of months, thousands of Taliban and al Qaeda fighters were captured – primarily by the Northern Alliance. The vast majority of the captured Taliban fighters were processed and released in Afghanistan. However, approximately 1,000 of the al Qaeda and Taliban prisoners were turned over to American forces for further questioning. Those turned over to the US military were deemed either too dangerous for release, or were suspected of committing war crimes.

On January 11, 2002, the US military began transporting some of the prisoners captured in Afghanistan to Camp X-Ray at the United States Navel Base at Guantánamo Bay, Cuba. The captives that were transferred there were considered by the American government to be, as President Bush put it, "the worst of the worst," with the most

¹⁵ For a more detailed breakdown of these objectives see, Robert Perito's, *Where is the Lone Ranger When We Need Him? America's Search for a Postconflict Stability Force*, (Washington, D.C.: United States Institution of Peace Press, 2004), 289-291.

¹⁶ William Maley, *The Afghanistan Wars*, (New York: Palgrave Macmillan, 2002), 275.

valuable information on terrorist operations. As of March 14, 2008 approximately 280 people were still being held at this detention center.¹⁷

2.4 – Camp X-Ray, Guantánamo Bay, Cuba

The US Naval Base at Guantánamo Bay, Cuba (sometimes abbreviated as GTMO or “Gitmo”) covers 116 square kilometers. It was first established in 1898 during the Spanish-American War when the US helped Cuban rebels regain control of Cuba from Spanish rule. In 1902 Cuba became an independent republic, and in 1903 the US negotiated a permanent lease for Gitmo with Cuba. This agreement was strengthened with the Treaty of 1934. The Treaty stipulated that the US would pay the Cuban government each year to lease the land; however, Cuba would continue to retain sovereignty over it. In addition, the Treaty can not be broken unless both parties agree to terminate it.¹⁸

Gitmo has served several purposes since its establishment: it functions as a refueling and maintenance port for US ships; it polices illegal drug trafficking into the US; and it has acted as a temporary refugee camp for Cuban and Haitian migrants. Despite its many purposes, Gitmo has become famous – or infamous rather – for the role it now plays in the detention of those captured in the war on terror that are considered to be the most dangerous and/or with the most valuable information on terrorist operations.¹⁹

¹⁷ US Department of Defense (News Release), “Defense Department Takes Custody Of A High-Value Detainee,” March 14, 2008. Available: <<http://www.defenselink.mil/releases/release.aspx?releaseid=11758>>.

¹⁸ US Naval Station, Guantánamo Bay, “History of Guantánamo Bay.” Available On-Line at: <<http://www.cnmc.navy.mil/Guantanamo/AboutGTMO/gtmohistgeneral/gtmohistgeneral>>.

¹⁹ Bill Scheppler, *Guantánamo Bay and Military Tribunals: The Detention and Trial of Suspected Terrorists*, (New York: The Rosen Publishing Group, Inc., 2005), 4-10.

When the first captives in the war on terror reached Guantánamo Bay, they were sent to Camp X-Ray. However, Camp X-Ray drew criticisms almost immediately. Its outdoor cells, which measured 6 feet by 8 feet with chain-link walls and wooden roofs, were called “scandalous cages,” offering little protection from the elements.²⁰ Because of the harsh criticism, construction on a new detention center began in late February, 2002 – this new facility is called Camp Delta. On April 29, 2002, Camp X-Ray was permanently closed, and all prisoners were transferred to Camp Delta. However, it is important to note that the term “Camp X-Ray” has come to be used as a synonym for all Guantanamo facilities (i.e. Camp Delta, Camp Echo & Camp Iguana) where prisoners from the US invasion of Afghanistan are detained.

2.5 – The Controversial Treatment of Camp X-Ray’s Detainees

Shortly after the suspected terrorists began to arrive at Camp X-Ray, stories of abuse and unlawful treatment by their American captors began to surface. The US was accused by a number of groups and agencies such as the Red Cross, Amnesty International, and even the FBI, of using excessive force that bordered on torture, including sleep deprivation, extended periods of isolation, lengthy interrogation, exposure to extreme temperatures, and threats using dogs.²¹ As Airat Vakhitor, a Russian Muslim, described shortly upon his release from Gitmo in March 2004:

²⁰ Matthew Monteverde, *America’s Presence in Iraq: Winning the Peace*, (New York, The Rosen Publishing Group, Inc., 2004), 11.

²¹ Neil Lewis, “Red Cross Finds Detainee Abuse in Guantánamo,” *The New York Times*. November 30, 2004. Available: <<http://www.nytimes.com/2004/11/30/politics/30gitmo.html>>.

Amnesty International, “End Human Rights Scandal in Guantánamo and Other Places,” *Amnesty International Press Release*, April 11, 2004. Available: <<http://web.amnesty.org/library/Index/ENGPOL300172004?open&of=ENG-USA>>.

Dan Eggen & Jeffrey Smith, “FBI Agents Allege Abuse of Detainees at Guantánamo Bay,” *The Washington Post*, December 20, 2004: p. A01. Available: <<http://www.washingtonpost.com/wp-dyn/articles/A14936-2004Dec20.html>>.

They would place a person in an investigative room and keep him there for several days handcuffed to the floor and prevent him from falling asleep by playing loud music, shining bright lights and so on. There was a program where we would be moved from one cell to another every 15 minutes continually over a period of three or four months.²²

In addition to the stories of alleged torture, critics of the Bush Administration's position on the Guantánamo detainees claim that the use of such methods violates international law. Moreover, it is alleged arbitrary detention and suppression of habeas corpus are also offenses.²³

As more people become aware of Camp X-Ray and the events that were – and still are – allegedly taking place there, the debate over the treatment and legal status of Guantánamo detainees has elicited increased international criticism. However, the US and its allies are engaged in a new type of war against an unconventional enemy. If the US is required to adhere to existing rules of war that were designed with state versus state warfare in mind, would this permit the successful prosecution of a war against terrorists who do not follow the rules of war? On the other hand, if it does disregard the laws of war, is it essentially erasing centuries of progress in international law and the defense of universal human rights? The appropriate balance between rights and security is something that both the US and the international community need to figure out soon because the legal status and rights afforded to the detainees in the war on terrorism will

²² Vladimir Isachenkov, "Former Inmate Tells of Quran Abuse," *The Moscow Times*, Wednesday, July 29, 2005; p.3.

²³ Some of these critics include: the UN Commission on Human Rights, the International Federation for Human Rights, the International Committee of the Red Cross, Great Britain's Supreme Court of Judicature, the Supreme Court of Canada, the governments of Malaysia and Germany, Human Rights Watch, Amnesty International, the American Civil Liberties Union, the U.S. Lawyers Committee for Human Rights, the U.S. Anti-Defamation League, the Association of the Bar of the City of New York, the Law Society of England and Wales, and the U.S. National Assembly of Criminal Defense Lawyers, to name a few.

not only affect the way in which the current war is waged, but it may also have an impact on future wars.

CHAPTER THREE THE DEBATE: ILLEGAL ENEMY COMBATANT OR POW?

Within the Pentagon, it was recognized as early as September 2001 that, in the planned military action, issues relating to the treatment and legal status of detainees would emerge. In an attempt to minimize some of the possible confusion, the United States Air Force's International and Operations Law Division circulated an unpublished document that contained the main outlines of an approach which continues to be influential today. As Adam Roberts points out in his article, "The Laws of War," this document clearly states that

Terrorists were to be treated as "unlawful combatants"; it was "very unlikely that a captured terrorist would be legally entitled to POW status under the Geneva Conventions"; however, there was a particular US interest in application of Law of Armed Conflict principles in the context of reciprocity of treatment of captured personnel." With regard to treatment upon capture, "if a terrorist is captured, Department of Defense members must at the very least comply with the principles of the spirit of the Law of Armed Conflict... A suspected terrorist captured by US military personnel will be given the protections of but not the status of POW."²⁴

Although over five years have passed since this document was first circulated, the Bush Administration continues to maintain this position. Before examining the Administration's strategic reasons for this, it is necessary to take a brief look at the major differences between an illegal enemy combatant and a POW.

3.1 – Key Differences Between a POW and an Illegal Enemy Combatant

As the Guantánamo example clearly illustrates, not all persons captured in the course of armed conflict are automatically entitled to POW status and the legal protections and rights associated with that status. In order to be protected as a POW,

²⁴ Adam Roberts, "The Laws of War", in Audrey Kurth Cronin and James M. Ludes, Eds. *Attacking Terrorism: Elements of a Grand Strategy*, (Washington, D.C.: Georgetown University Press, 2004), 202.

international law provides that the captured combatant should fulfill the following four conditions:

- (1) Be commanded by a person responsible for his subordinates;
- (2) Have a fixed distinctive sign recognizable at a distance;
- (3) Carry arms openly, and;
- (4) Conduct operations in accordance with the laws and customs of war.²⁵

Unless it is determined that a captured combatant does not fulfill the above requirements, then according to international law, the detaining power has the responsibility to ensure that the rights and protections that accompany POW status are met. For example, a few of these rights and protections include:

- If questioned, POWs are only obliged to give their name and rank, date of birth, and army serial number (or equivalent information). In addition, no torture or other form of coercion may be inflicted upon them in order to obtain any type of information.
- POWs cannot be punished for acts they have not committed or subjected to collective punishment.
- POWs have the right to practice their religion, send and receive letters, receive a copy of the Geneva Conventions, and appoint a representative among themselves to deal with the detaining authorities.
- POWs must be interned in premises which afford guarantees of hygiene. The detaining power has an obligation to provide food, clothing, shelter, and if necessary, the same medical care that is given to members of its own forces.
- Except with their consent, POWs are not to be separated from other prisoners of the same forces with which they were serving.²⁶

Illegal enemy combatants, on the other hand, are provided very little rights and protections under international law. The term “illegal enemy combatant” is currently used by those who view the War on Terror as an armed conflict in the legal sense – to refer to persons believed to belong to, or believed to be associated with terrorist groups –

²⁵ Third Geneva Convention – Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, Article 4 (A).

²⁶ Third Geneva Convention, Articles 17, 20, 24, 26, 27, 29, 30, 33 & 71.

regardless of the circumstances of their capture. As an official statement made of July 21, 2005 by the International Committee of the Red Cross (ICRC) maintains, unlike POWs, illegal enemy combatants

...may be prosecuted under domestic law for directly participating in hostilities. They may be interned for as long as they pose a serious security threat, and, while in detention, may under specific conditions be denied certain privileges under the Fourth Geneva Convention.²⁷ They may also be prosecuted for war crimes and other crimes and sentenced to terms exceeding the length of conflict, including the range of penalties provided for under domestic law.²⁸

Fortunately, a procedure for determining who is entitled to POW status is addressed directly in two treaties. The first of these – the Prisoner of War Convention – provides in Article 5 that, in cases of doubt, prisoners shall be treated as POWs “...until such time as their status has been determined by a competent tribunal.” The second treaty is the 1977 Geneva Protocol 1. In this, Article 45 suggests that a detainee has “the right to assert his entitlement to prisoner of war status before a judicial tribunal.” In other words, international law provides that detainees are to be granted POW status and the rights and privileges afforded to that status until a competent, judicial tribunal deems otherwise.

3.2 – The Taliban & al Qaeda: POWs or Illegal Enemy Combatants?

The 2001 war in Afghanistan – waged by the United States and several allied countries against the Taliban regime and the al Qaeda terrorist network – raised a couple of issues pertinent to the issue of lawful/unlawful combatancy.

²⁷ The Fourth Geneva Convention is the Convention Relative to the Protection of Civilian Persons in Time of War (The Civilian Convention). Basically anyone who does not meet the requirements to fall under the first three conventions – “The Wounded Convention”, “The Maritime Convention”, or “The Prisoner of War Convention” – would fall under this category.

²⁸ International Committee of the Red Cross, “The Relevance of IHL in the Context of Terrorism”, July 21, 2005. Available: <<http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList488/8C4F31C025CDDC1257045002CD4A2>>.

The first, and perhaps most obvious problem relates to the status of the captured Taliban fighters. As Yoram Dinstein notes in his book, *The Conduct of Hostilities Under the Law of International Armed Conflict*, “on one hand, the Taliban regime – on the eve of the war – was in *de facto* control of as much as 90 per cent of the territory of Afghanistan. On the other hand, the regime was unrecognized by the overwhelming majority of the international community.”²⁹ However, even though the Taliban regime was not officially recognized as Afghanistan’s government by the majority of the international community, this lack of recognition cannot erode the privileges of combatants under customary international law. In fact, Article 4 (A) (3) clearly states that POW status is meant to include “members of regular armed forces who profess allegiance to a government or an authority not recognized by the detaining power.” In light of this, the only way that members of the Taliban regime could be denied POW status is if they failed to fulfill the four conditions of lawful combatancy which were listed in section 3.1.³⁰

The second issue that emerged during the war in Afghanistan in regard to lawful/unlawful combatancy concerns the al Qaeda fighters. Although the United States and its allies focused their attacks on Afghani soil, the attacks were primarily aimed at eradicating the al Qaeda terrorist network rather than replacing the Taliban regime. Unlike the Taliban, al Qaeda openly and brazenly disregarded one of the conditions that would have guaranteed them POW status is caught later on – they failed to “conduct their

²⁹ Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*. (Cambridge: The Cambridge University Press, 2004), 47.

³⁰ The four conditions of lawful combatancy are: 1) being commanded by a person responsible for his subordinates; 2) having a fixed distinctive sign recognizable at a distance; 3) carrying arms openly, and; 4) conducting operations in accordance with the laws and customs of war.

operations in accordance with the laws and customs of war.”³¹ As Yoram Dinstein writes,

Al Qaeda’s contempt for this quintessential prerequisite qualification of lawful combatancy was flaunted in the execution of the original armed attack of 9/11. Not only did the al Qaeda terrorists, wearing civilian clothes, hijack US civilian passenger airliners. The most striking aspect of the shocking 9/11 events are that: (a) the primary objective target [the World Trade Center] was unmistakably a civilian objective: close to 3,000 innocent civilians lost their lives in the ensuing carnage; (b) [the targets] ... were struck by hijacked passenger airlines, which were used as flying bombs, in total oblivion to the fate of hundreds of civilian passengers in board. No group conducting attacks in such an egregious fashion can claim for its fighters prisoner of war status.³²

3.3 – The Bush Administration’s Position

Although the Bush Administration initially resisted distinguishing between the Taliban and al Qaeda captives, it eventually conceded that the Taliban detainees do qualify under the Geneva Conventions since they were essentially representatives of the Afghan government, and an international conflict had in fact arisen between two sovereign nation-states – the US and Afghanistan.³³ However, the Administration continues to refuse to grant full POW status to the Taliban because they claim that the Taliban do not meet all of the required conditions listed under Article 4 of the Geneva Conventions, such as wearing uniforms or a fixed distinctive sign that was recognizable at a distance.³⁴

³¹ Third Geneva Convention, Article 4 (A) (4).

³² Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, 49.

³³ O’Connor & Stevens, *The Handling of Illegal Enemy Combatants*.

³⁴ Alberto Gonzales, “Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict With al Qaeda and the Taliban,” January 25, 2002, in Mark Danner, *Torture and Truth: America, Abu Ghraib, and the War on Terror*, (New York: New York Review Books, 2004), 83-87.

In a February 7, 2002 memorandum from the White House to a number of senior Washington officials, some key reasons are outlined as the basis for refusing to grant the al Qaeda captives POW status. The memorandum asserts that al Qaeda is clearly not a party to the Geneva treaty (but rather a terrorist network), and further, its operatives are not “regular” armed forces fighting on behalf of a state, as the GPW specifies. In effect, al Qaeda is a stateless organization, beyond what the Geneva Conventions envisioned, and it acts with reckless disregard to any recognized rules of engagement. This being true, the Administration has some solid grounds for refusing to grant the al Qaeda detainees POW privileges.³⁵

3.4 – The Counter-Arguments: Who is Opposing the Bush Administration’s Position and Why?

Since the detainees began to arrive at Camp X-Ray, there has been a flood of criticism from a variety of groups and individuals who disagree with how the Bush Administration has chosen to handle these captives. Some of the most notable of these critics are the United Nations Commission on Human Rights (replaced by the United Nations Human Rights Council in April 2006), the International Committee of the Red Cross, Human Rights Watch, Amnesty International, the Federation for Human Rights, Great Britain’s Supreme Court of Judicature, the Supreme Court of Canada, the American Civil Liberties Union, the United States Lawyers Committee for Human Rights, the United States Defamation League, the Associate Bar of the City of New York, the Law Society of England and Wales, and the United States National Assembly of Criminal Defense Lawyers, to name a few. The Administration’s refusal to grant POW

³⁵ The White House, “Memorandum on the Humane Treatment of al Qaeda and Taliban Detainees”, February 7, 2002, in Mark Danner, *Torture and Truth: America, Abu Ghraib, and the War on Terror* (New York: New York Review Books, 2004), 105-106.

status to any of the Guantánamo detainees has been denounced for a number of reasons which can be placed into three categories: (I) Prior US Practice; (II) Present Impact, and (III) Future Consequences.

I – Prior US Practice

Some of the opposition to the Bush Administration’s position regarding the Guantánamo detainees comes from the fact that since the Geneva Conventions were concluded in 1949, the United States has never denied their applicability to either US or opposing forces engaged in armed conflict, in spite of several opportunities to do so. During the Vietnam conflict, US forces classified Viet Cong’s main force and local force personnel, as well as certain Viet Cong irregulars, as POWs.³⁶ This choice was made despite the existence of doubts and ambiguities over whether or not these forces met all four criteria of Article 4 of the Prisoner of War Convention. Any Viet Cong irregulars who were captured were to be classified as POWs so long as they were captured while engaging in combat or a belligerent act under arms. In fact, in one of the key directives issued by the US Military Assistance Command of Vietnam, it is clearly outlined under the “Responsibilities” section that:

All United States Military and DOD civilian personnel who take or have custody of a detainee will:

- (1) Comply with the provisions of the Geneva Conventions. Violation of the human provisions of the Conventions is an offence under the Uniform Code of Military Justice. Persons who commit violations of the Geneva Conventions may be subjected to a trial by court-martial.

³⁶ According to Annex A, “Criteria for Classification and Disposition of Detainees”, part of Directive 381-46 (December 27, 1967), these classifications are defined as the following: *Main Force* – Those Viet Cong military units which are directly subordinate to the central office for South Vietnam, a Front, Viet Cong military region, or sub-region; *Local Force* – The Viet Cong military units within a specific Viet Cong province or district; *Irregulars* – Organized forces composed of guerrilla, self-defense, and secret self-defense elements subordinate to village and hamlet level Viet Cong organizations. These forces perform a wide variety of missions in support of Viet Cong activities, and provide a training and mobilization base for maneuver and combat support forces.

- (2) Afford to each detainee in their custody treatment consistent with that of a prisoner of war, unless it has been determined by competent authority [i.e. military tribunal] in accordance with this directive that the detainee is not a prisoner of war.³⁷

In other words, even though the majority of the captured Viet Cong “irregulars” were not wearing a distinctive emblem or uniform, according to the directives handed out by the US Military Assistance Command, they were still to be treated as POWs – at least until a competent tribunal would determine otherwise. Like the detainees in Vietnam, many of those captured in the attacks on Afghanistan in 2001 were not wearing uniforms. However, to the chagrin of many observers, those captured in Afghanistan were not afforded the same rights as their Viet Cong counterparts.

II – Present Impact

The Bush Administration’s position on the Guantánamo detainees has had a significant impact on the way in which the War on Terror is currently being conducted. Their position on this issue has not only reshaped the way in which war is waged, but it has also challenged the previously accepted laws of armed conflict. Because of this, the Administration has had to endure criticism in a number of areas, including: the detainees’ living conditions, the US interrogation tactics, and the justice system being used to determine the prisoners’ guilt or innocence. In addition to this, critics also argue that the Bush Administration is putting its own troops in danger, tarnishing America’s image, and affecting the relationship that the US has with other members of the international community.

³⁷ Annex A, “Inspections & Investigations: Prisoners of War – Determination of Eligibility”, Directive Number 20-5 (March 15, 1968), Articles 6 (a)(1) & 6 (a)(2)

i – Human Rights

Much of the opposition to the Administration's stance on the Guantánamo detainees has been in regard to the lack of human rights protections that these captives have received. Groups such as the International Committee of the Red Cross, Human Rights Watch, and Amnesty International immediately stepped up in order to ensure that these detainees' basic human rights were being met. As Professor Michael Byers wrote in an article entitled, "Prisoners on Our Conscience," "even if the detainees are not POWs, they remain human beings with human rights."³⁸ The Bush Administration has been criticized for failing to uphold the basic human rights of the captives in the following three areas: a) the living conditions provided at Guantánamo Bay; b) the interrogation methods used on the prisoners, and finally; d) the trial and punishment of these captives.

a) Living Conditions

The first of the detainees to arrive at Guantánamo Bay were greeted with the makeshift Camp X-Ray – consisting of small cages with chain link sides, concrete floors and metal roofs, offering scant shelter from the elements, and with very basic sanitary facilities. Asif Iqbal, a British detainee who was interviewed by Human Rights Watch, described his introduction to life in Camp X-Ray as the following:

In my cage there were two towels, one blanket, one small toothbrush, soap, flip flops, and an insulation mat to sleep on as well as two buckets, one with water and one to use as a toilet. [The restrictions on the detainees initially] were probably the worst things that we had to endure... In the first few weeks, we were not allowed to exercise at all; this meant that all day every day we were stuck in a cage of two meters by two meters. We were allowed out for two minutes a week to have a shower and then

³⁸ Michael Byers, "Prisoner on Our Conscience", *The Guardian Weekly*, January 17, 2002. Also available on-line: <<http://www.guardian.co.uk/GWeekly/Story/0,3939,634376,00.html>>.

returned to the cage... During the day we were forced to sit in the cell (we couldn't lie down) in total silence. We couldn't lean on the wire fence or stand up and walk around the cage.³⁹

Because of prisoner accounts such as this one, and with the pressure put on the Administration by human rights organizations, construction of a permanent detention center began in late February, 2002. Camp Delta is the result of the Administration's efforts to improve the living conditions of the Guantánamo detainees. The new 7-by-8 foot cells now include such accommodations as sinks with running water, flush toilets, and beds with mattresses, sheets, and blankets. In addition, the steel frame construction and sealed roofs offer far greater shelter from the wind, rain and sun.

Although the Administration's critics consider this an improvement, they argue that there is still much to be done regarding the inmates' living conditions. Some of the procedures that are applied to the prisoners by their US captives have caused both international and domestic outrage. For example, critics, such as the European Parliament, argue that the common practice of hooding the detainees, even temporarily, constitutes a violation of the 1984 Convention Against Torture and Cruel, Inhumane, or Degrading Treatment.⁴⁰ In addition to causing unnecessary mental anguish, this practice prevents the detainees from identifying anyone who causes them harm. The Center for Constitutional Rights also argues that forcefully shaving off the detainees' beards constitutes a violation of the right to human dignity under the 1966 International

³⁹ Statements of Shafiq Rascul, Asif Iqbel and Rhuhel Ahmed, "Detention in Afghanistan and Guantánamo Bay", released publicly on August 4, 2004 (para. 63, 65). Available on-line: <<http://www.ccr.ny.org/V2/reports/docs/Gitmo-compositestatementFINAL23july04.pdf>>.

⁴⁰ European Parliament, "European Parliament Resolution on the Situation of Detainees in Guantánamo," *European Parliament* [On-line], May 23, 2006. Available: <<http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B6-2006-0300&language=EN>>.

Covenant on Civil and Political Rights.⁴¹ Much of the opposition to the Administration's position argues that in order for the living conditions to improve, it is necessary for practices such as these to stop. As Michael Byers noted,

Although strict security arrangements are important in dealing with potentially dangerous individuals, none of these measures is necessary to achieving that goal. If human rights are worth anything, they have to apply when governments are most tempted to violate them.⁴²

b) Interrogation & Torture

A second highly controversial issue regarding the human rights of the detainees has to do with some of the US methods of interrogation. One argument cited frequently in the press for denying POW status to the detainees is that the US military would no longer be able to interrogate them in an effort to gain the desired intelligence concerning terrorist planned operations. As mentioned before, Article 17 of the Prisoners of War Convention requires prisoners to give only a few personal facts, including name, rank, and serial number. However, although most armies undoubtedly forbid their soldiers from divulging any more information than what is required, there is no actual prohibition against the detaining power from asking for more information.

Even though the Prisoner of War Convention clearly states that it is forbidden to use mental or physical coercion to extract information from prisoners, tactics such as trickery or promises of improved living conditions are not prohibited.⁴³ However, this same Article then goes on to provide that "...prisoners of war who refuse to answer may

⁴¹ Denbeaux, Mark & Joshua W. Denbeaux, "Report on Guantánamo Detainees: A Profile of 517 Detainees Through Analysis of Department of Defense Data," *The Center For Constitutional Rights* (February 2006). Seton Hall Public Research Paper No. 46. Available: <http://www.ohchr.org/english/bodies/hrc/docs/ngos/CCR_FIDH.pdf>.

⁴² Byers, "Prisoners on Our Conscience", para. 10.

⁴³ Third Geneva Convention, Article 17.

not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.”⁴⁴ Torture is never permitted in questioning a detainee, regardless of that person’s status.

Unfortunately, there have been many reports that claim that US officials are using various forms of torture as an interrogation tactic in the Guantánamo Bay facility. Dan Eggen, a writer for the *Washington Post*, recently wrote a piece on some of the questionable interrogation tactics being used on the detainees at Guantánamo Bay:

[In a 2004 internal survey] FBI employees said that they had witnessed 26 incidents of possible mistreatment...including previously reported cases in which prisoners were shackled to the floor for extended periods of time or subjected to sexually suggestive tactics by female interrogators.

In [another] allegation, one interrogator bragged to an FBI agent that he forced a prisoner to listen to “Satanic black metal music for hours,” then dressed up as a Catholic priest before ‘baptizing’ him.

One agent reported being told that while questioning the male captives, female interrogators would sometimes wet their hands and touch detainees’ faces in order to interrupt their prayers. Such actions would make some Muslims consider themselves unclean and unable to continue praying.

[Other] reported tactics...include wrapping a prisoner in an Israeli flag, subjecting others to extreme heat and cold, and aggressively using strobe lights on others.

[The final tactic mentioned in Eggen’s piece is described as] ...the “frequent flyer program”, in which detainees who were deemed uncooperative were placed on a list to be subjected to special sleep deprivation tactics. [For example], the prisoners were moved frequently from cellblock to cellblock at intervals of two to four hours to interrupt their sleep...⁴⁵

⁴⁴ *Ibid.*

⁴⁵ Dan Eggen, “FBI Reports Duct-Taping, ‘Baptizing’ at Guantánamo”, *The Washington Post*, January 3, 2007, p. A01, para. 7, 8, 9, 16, 18.

Another highly controversial interrogation tactic that US officials recently admitted to have used on the Guantánamo detainees is waterboarding. In February 2008, the director of the CIA, Michael Hayden, publicly acknowledged that some of the Guantánamo detainees had been waterboarded – that is, subjected to simulated drowning.⁴⁶

In spite of the fact that not all of the interrogation tactics listed above cause extreme pain, critics of these methods label them as torturous because of the psychological anguish that they cause. The American Civil Liberties Union is a staunch supporter of the detainees' rights in this regard, and has launched a law suit against the Bush Administration for allowing such practices to take place.⁴⁷

c) Trial & Punishment

Another major criticism regarding the treatment of Guantánamo detainees is grounded in the uncertainty regarding whether and when they will be tried and whether they will be held indefinitely or released. Shortly after the first prisoners began to arrive at Guantánamo Bay, the US indicated that the judicial process might have to wait until “after the war on terrorism is won,” at which distant point the detainees might be tried or released.⁴⁸ Critics argue that the Administration's ability to hold these captives indefinitely, without charge or trial, violates fundamental standards of human rights.

⁴⁶ Ed Pilkington, “US Issues 9/11-Related Charges Against Six Guantanamo Detainees,” *The Guardian*. Available: <<http://www.guardian.co.uk/world/2008/feb/11/guantanamo/print>>.

⁴⁷ American Civil Liberties Union, On-Line. “The Case Against Rumsfeld.” Available at: <http://www.aclu.org/safefree/torture/detention.html>

⁴⁸ Ambassador Prosper speaking in London, September 20, 2002. Owen Boycott, “Guantánamo Britain's Still a Threat, Says US”, *The Guardian*(London), September 21, 2002, 23.

ii – Endangering US Soldiers

Another criticism of the Bush Administration's position regarding the Guantánamo detainees has been voiced within the Administration itself. Some are concerned that, by refusing to grant those captured in the attacks on Afghanistan POW status, the Administration is unintentionally putting its own soldiers at a greater risk. If captured, US troops may not be able to claim POW status, given that they do not recognize that status for many of combatants that they capture. As Colin Powell pointed out to both the Counsel to the President and the Assistant to the President for National Security Affairs in a January 26, 2002 memo, “[failing to apply the Geneva Conventions could]...undermine the protections of the laws of war for our troops, both in this specific conflict and in general.”⁴⁹

iii – Tarnishing America's Image

Many critics also claim that the Bush Administration's position on the Guantánamo detainees is harming America's image. As Patrick Quinn, Lieutenant Governor of Illinois, writes,

dozens of ex-detainees, government ministers, lawmakers, human rights activists, lawyers and scholars in Iraq, Afghanistan and the United States concur that the detention system often is unjust and hurts the war on terror by inflaming anti-Americanism in Iraq and elsewhere.⁵⁰

Because of this perceived increase in anti-Americanism, prior to resigning, Secretary of Defense Donald Rumsfeld, began to question whether the Administration's

⁴⁹ Colin Powell, “Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan.” January 26, 2002, in Mark Danner, *Torture and Truth: America, Abu Ghraib, and the War on Terror* (New York: New York Review Books, 2004), 89.

⁵⁰ Patrick Quinn, “US War Prisons Legal Vacuum for 14,000”, *Yahoo News* [On-line], September 17, 2006. Available: <http://news.yahoo.com/slap/20060917/ap_on_re_mi_ea/in_american_hands_3&printer=1>.

actions were actually succeeding in eliminating more enemies than it was creating.⁵¹

Unfortunately, any reasonable doubt that anyone may have had on that score was eliminated by the April 2006 National Intelligence Estimate.⁵² As Senator Patrick Leahy noted:

Our intelligence agencies agreed and confirm what many of us have been saying and what the American people know intuitively: The global jihadist movement is spreading and adapting, it is “increasing in both number and geographic dispersion.” “If this trend continues”, that is, if we do not wise up and change course and adopt a new winning strategy, “threats to US interests at home and abroad will become more diverse, leading to increasing worldwide attacks.” Attacks have been increasing worldwide over the last five years of these failing policies and we are, according to the judgment of our own, newly reconstituted intelligence agencies, likely to increase further in the days and months and years ahead. [The National Intelligence Estimate] goes on to note ominously that “new jihadist networks and cells, with anti-American agendas, are increasingly likely to emerge.” And further, that the “operational threat will grow “particularly abroad, “but also in the Homeland.” This is chilling. The Bush-Cheney Administration has not only failed for five years to bring Osama bin Laden to justice, having yanked our special forces that had him on the run in Tora Bora and diverting them to Iraq, ...[but] has witnessed the spread of additional enemies with anti-American agendas.⁵³

In addition to this, critics, such as Jon Hillson Inglewood of the *L.A. Times*, claim that the Administration’s position does nothing more than place its arrogant nature on display for all to see.⁵⁴ If the Bush Administration had followed the procedures

⁵¹ Donald Rumsfeld, “Memorandum on the Global War on Terrorism,” *USA Today On-Line*, October 16, 2003. Available: < <http://www.usatoday.com/news/washington/executive/rumsfeld-memo.htm>>.

⁵² The National Intelligence Estimate was conducted by the Director of National Intelligence (DNI) who serves as the head of the Intelligence Community. The DNI also acts as the principal advisor to the President, the National Security Council, and the Homeland Security Council for intelligence matters related to the national security; and oversees and directs the implementation of the National Intelligence Program. A breakdown of this report is available on-line at: <http://www.dni.gov/press_releases/Declassified_NIE_Key_Judgments.pdf>.

⁵³ Leahy, “Statement on the Military Commissions Act”, September 28, 2006, para. 6.

⁵⁴ Jon Hillson Inglewood, “Guantánamo Base Shows U.S. Arrogance,” *The Los Angeles Times*. January 3, 2002, B12.

prescribed by the Geneva Conventions to begin with, and had allowed the Guantánamo detainees status to be determined by a competent tribunal, then it would have quickly realized that most of these captives would have likely failed to meet the conditions needed to obtain POW status anyway. Michael Byers also maintains that had the Bush Administration followed the Conventions' procedures, it would have gained a lot more respect from the international community, and its operational structure would still likely be quite similar to what it is today.⁵⁵

iv – Relationship With the International Community

Shortly after the first captives began to arrive at the Guantánamo Bay prison facilities, Colin Powell warned the Administration that its position on the legal status of these detainees “will undermine critical support among critical allies, making military cooperation more difficult to sustain.”⁵⁶ Perhaps the Administration would have been better off had it taken Powell's forewarning into more serious consideration. Although the US strategy for winning the War on Terror is predicated on creating an international environment inhospitable to terrorists and all who support them, democratically elected leaders must also be responsive to their constituents. Unfortunately, the treatment of the Guantánamo detainees has fostered animosity towards the US, thereby undermining its efforts to gain international support. As Gerald Fogarty points out in his article, “Guantánamo Bay: Undermining the Global War on Terror,”

Even governments stalwartly behind the war are under siege from their populations. In Australia and the United Kingdom, for example, the governments are under increasing pressure to withdraw from the coalition because of public belief that

⁵⁵ Michael Byers, “Discussion on Canada's Involvement in Afghanistan.” Political Studies 990 Seminar. The University of Saskatchewan. Saskatoon. January 25, 2007.

⁵⁶ Powell, “Draft Decision Memorandum for the President on the Applicability of the Geneva Conventions to the Conflict in Afghanistan”, 89.

America's treatment of Australian and British detainees violates the principles that the coalition of the willing aims to uphold.⁵⁷

In addition to this, as Powell also noted, "Europeans and others will likely have legal problems with extradition or other forms of cooperation in law enforcement, including in bringing terrorists to justice."⁵⁸

The Administration's actions in the War on Terror may also provoke other countries to investigate and possibly to prosecute US officials and troops for war crimes. Take Italy, for example. Italy is currently conducting investigations into US actions in regard to the kidnapping of suspected terrorist, Hassan Mustafa Osama Nasr. The Italian secret police were aggressively pursuing a criminal terrorism case against Nasr, an Egyptian cleric, with the help of American intelligence officials, when Nasr suddenly disappeared. When Italian police began investigating, they were startled to find evidence that some of the CIA officers who had helped them investigate Nasr were involved in his abduction. Italy has since charged 13 people identified as CIA officers and operatives of illegally abducting Nasr and flying him to Egypt for questioning. If convicted, they face a maximum penalty of 10 years in prison.⁵⁹

Obviously, incidents such as these undermine the coalition against terror. In order for the War on Terror to be successful, the US and its allies need to work closely together not only in their operations to capture or kill terrorist leaders, but also in working towards fostering democratic reforms. However, critics argue that when America can be seen

⁵⁷ Gerard Fogarty, "Guantánamo Bay: Undermining the Global War on Terror", *Parameters: US Army War College Quarterly – The United States Army's Senior Professional Journal*, Autumn 2005, pp. 54-71.

⁵⁸ Powell, "Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan", 89.

⁵⁹ Stephen Grey and Don Van Natta Jr., "Italian Anger Over U.S. Terror Tactics Deepens Rift," *International Herald Tribune* [On-line], Monday, June 27, 2005. Available: <<http://www.iht.com/articles/2005/06/26/news/cia.php>>.

abandoning its democratic values, its checks and balances, its great legal traditions and becoming more autocratic and less accountable, how is that going to help foster democratic reforms elsewhere? As Senator Patrick Leahy once observed, “ ‘Do as I say and not as I do’ is not a motto that has ever successfully inspired trust or credibility.”⁶⁰

III – Future Consequences

Now that prior US practice and the present impacts of the Bush Administration’s refusal to grant the Guantánamo detainees POW status have been examined, it is important to take a brief look at some of the consequences that this decision will likely have – not only in regards to the way in which the War on Terror is waged, but also on the way in which future conflicts will be affected.

One of the potential future consequences of the Administration’s position was vocalized by the US Attorney General at the time, Alberto Gonzales, when he noted that “concluding that the Geneva Convention does not apply may encourage other countries to look for technical ‘loopholes’ in future conflicts to conclude that they are not bound by GPW either.”⁶¹ In other words, this could very possibly lead to the weakening or even the disappearance of a landmark of humanity in international law. The Geneva Conventions are the result of history, political experience and wisdom, military honor and interest, and universal ethical standards. The Geneva Conventions are found at the core of the laws of war – which strikes a balance between military necessity and requirements of humanity. Critics are concerned that disregarding the Geneva Conventions would cause a great loss for a body of international law that has reached an exceptional level of universal respectability. By pushing these Conventions aside, the US will destroy much

⁶⁰ Leahy, “Statement on the Military Commissions Act”, September 28, 2006, para. 7.

⁶¹ Gonzales, “Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban”, January 25, 2002, 86.

of the progress that has been made in the last 50 years in regards to human rights and warfare. Colin Powell's January 26, 2002 memo perhaps best articulates the critics' overall reasoning as to why the Geneva Conventions provide the most flexible and suitable framework when compared to other laws that could arguably apply to the Guantánamo detainees:

- By providing a more defensible legal framework, it preserves our flexibility under both domestic and international law.
- It provides the strongest legal foundation for what we actually intend to do.
- It presents a positive international posture, preserves US credibility and moral authority by taking the high ground, and puts us in a better position to demand and receive international support.
- It maintains POW status for US forces, reinforces the importance of the Geneva Conventions, and generally supports the US objective of ensuring its forces are accorded protection under the Convention.
- It reduced the incentives for international criminal investigations directed against US officials and troops.⁶²

3.5 - The Bush Administration's Strategic Reasoning for Maintaining its Position

In spite of the long list of criticisms against the Administration's stance on the Guantánamo detainees, the Administration continues to defend its position for a number of strategic reasons. In refusing to grant POW status to the prisoners, the US is able to gain tactical advantages in the following areas: (I) the conditions of detention, (II) the interrogation tactics used, (III) the terms of release, and (IV) the judicial proceedings.

I – Conditions of Detention

With regard to conditions of detention, the Bush Administration gains a couple of strategic advantages in refusing to grant the Guantánamo detainees POW status. First,

⁶² Powell, "Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan," 89.

the US government wishes to keep the detainees more segregated from one another than the POW regime's provisions would permit. According to Article 22 of the Third Geneva Convention, "...prisoners shall not be separated from prisoners of war belonging to the armed forces with which they were serving at the time of their capture, except with their consent." However, the Administration has argued that keeping the detainees together has the potential of undermining their counter-terrorism strategy. For example, in a legal briefing by Diane Beaver to the US Department of Defense on October 11, 2002, she claims that "...because detainees have been able to communicate among themselves and debrief each other about their respective interrogations, their interrogation resistance strategies have become more sophisticated."⁶³

A second strategic advantage that the US gains in its refusal to grant the Guantánamo detainees POW status is that it does not have to recognize certain POW privileges, such as the right to receive musical instruments or sports outfits. This gives the US a financial advantage in that it does not have to spend any money on the detainees in regards to "luxury" items. On February 7, 2002, the White House released a fact sheet on the status of the Guantánamo detainees which not only gave numerous detailed assurances about the treatment of these captives, but it also indicated that they would not receive some of the specific privileges normally afforded to POWs, including:

- Access to a canteen to purchase food, soap, and tobacco;
- A monthly advance of pay;
- The ability to have and consult personal financial accountants, or; the ability to receive scientific equipment, musical instruments, or sports outfits.⁶⁴

⁶³ Diane Beaver, "Legal Brief on Proposed Counter-Resistance Strategies", October 11, 2002, in Mark Danner, *Torture and Truth: America, Abu Ghraib, and the War on Terrorism*, (New York: New York Review Books, 2004), 170.

⁶⁴ White House, Official Press Secretary, "Fact Sheet of Detainees at Guantánamo", February 7, 2001. Available: <<http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html>>.

II - Interrogation Tactics

The most contentious advantage of refusing to grant the detainees POW status, has to do with the questioning of the captives. According to Article 17 of the Prisoner of War Convention,

Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information... [In addition], no physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant disadvantageous treatment of any kind.

Unfortunately, one of the United States' key strategies for combating terrorism lies in its ability to question and, even through a bit of coercion if necessary, obtain more information about terrorist operations from the Guantánamo detainees. If granted POW status, these captives would have the right to maintain silence concerning their operations, the highly controversial interrogation methods would be forced to stop, and the Bush Administration would lose a potentially valuable counter-terrorism tool in regard to intelligence gathering. In order to maximize the possibility of obtaining critical information for the Guantánamo detainees, the Administration modified its definition of what constitutes torture, and created a list of approved and prohibited interrogation tactics.

i – Modified Definition of Torture

Following the 9/11 attacks, the Bush Administration quickly realized that the war on terrorism would not be decided by manpower or weaponry, as in the Second World War, but rather by locating terrorists and learning about when and where any future

attacks might come. As John Arquilla, a professor of Defense Analysis at the US Naval Postgraduate School and a consultant to the Pentagon on terrorism once noted, “this is a war in which intelligence is everything. Winning or losing depends on it.”⁶⁵

As a result of this, the Administration set out to search for ways to maximize its intelligence gathering capabilities. Inter-office memos began to circulate around government departments and agencies, such as the White House, Pentagon and Department of Defense, how best to extract information from captured suspected terrorists. On August 1, 2002, in a memo to Alberto Gonzales, the Assistant Attorney General, Jay S. Bybee redefined torture when he stated that

...we conclude that torture as defined and proscribed by Sections 2340-2340A⁶⁶, cover only extreme acts. Severe pain is generally of the kind difficult for the victim to endure. Where the pain is physical, it must be at an intensity akin to that which accompanies serious physical injury such as organ failure. Severe mental pain requires suffering not just at the moment of infliction but also requires lasting psychological harm, such as seen in mental disorders like posttraumatic stress disorder. Additionally, such severe mental pain can only arise from the predicated acts listed in section 2340.⁶⁷ Because the acts inflicting torture are extreme, there is significant range of acts that though they might constitute cruel, inhumane, or degrading treatment or punishment fail to rise to the level of torture.⁶⁸

⁶⁵ Seymour Hersh, *Chain of Command: The Road From 9/11 to Abu Ghraib*, (New York: Harper Collins Publishers, 2004), p. 2.

⁶⁶ Sections 2340 & 2340A of the US Constitution define and proscribe torture. A copy of the US Constitution is available on-line at: <<http://www.usconstitution.net/const.html>>.

⁶⁷ These predicated acts are: “(a) the intentional infliction or threatened infliction of severe physical pain or suffering; (b) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (c) the threat of imminent death; or (d) the threat that another person will immediately be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.”

⁶⁸ Jay Bybee, “Memorandum for Alberto Gonzales Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A,” in Mark Danner *Torture and Truth: America, Abu Ghraib, and the War in Terror*, (New York: New York Review Books, 2004), p. 155.

ii – Approved Interrogation Tactics

Shortly after Bybee’s memo made its rounds, Defense Secretary Donald Rumsfeld began to approve specific interrogation techniques for extracting information from Taliban and al Qaeda detainees being held at Camp X-Ray. By April 2003, there was a list of 24 interrogation techniques that were approved by Rumsfeld⁶⁹. A few of these interrogations techniques are:

- *“Fear up Harsh”*: Significantly increasing the fear level in a detainee.
- *“Futility”*: Invoking a felling of futility in a detainee.
- *“We Know All”*: Convincing a detainee that the interrogator already knows the answers to the questions that he is asking.
- *“Establish Your Identity”*: Convincing a detainee that the interrogator has mistaken him for someone else.
- *“File and Dossier”*: Convincing a detainee that the interrogator has a damning and inaccurate file that must be fixed.
- *“Environmental Manipulation”*: Altering the environment to create moderate discomfort, such as by adjusting the temperature or introducing an unpleasant smell.
- *“Sleep Adjustment”*: Adjusting the sleeping times of a detainee.
- *“False Flag”*: Convincing detainees that individuals from a country other than the US are interrogating them.
- *“Isolation”*: Isolating a detainee from other detainees for up to 30 days.

⁶⁹ For a comprehensive list of Rumsfeld’s approved interrogation techniques, see Appendix 1.

iii - Prohibited Interrogation Tactics⁷⁰

In spite of the fact that Donald Rumsfeld's list of approved interrogation tactics appears to be quite extensive, there were a few interrogation tactics that were proposed by Guantánamo interrogators but were rejected straight away. These include the use of scenarios designed to convince a detainee that death or severely painful consequences are imminent for him or his family; and exposing the prisoner to cold weather or cold water, with the appropriate medical monitoring.⁷¹

In addition to these, after being internationally criticized by groups such as the European Human Rights Commission, Amnesty International, and Human Rights Watch, Rumsfeld also banned a number of interrogation techniques that he had initially approved in December 2002. In April 2003 the following interview techniques were placed on the rejected interrogation tactics list:

- The forced shaving of the head or beard.
- Hooding during transportation and interrogation.
- Interrogations for up to 20 hours.
- The use of mild, non injurious contact.
- Stress positions, such as standing for prolonged periods of time.
- Removing a detainee's clothing.

⁷⁰ This list was extracted from a number of recently declassified interoffice memos that were circulated from August 1, 2002, to April 16, 2003. They can all be found in Mark Danner's book, *Torture and Truth: America, Abu Ghraib, and the War on Terror*, and include: Memo: Jay Bybee to Alberto Gonzales (August 1, 2002); Memo: Lieutenant Commander (LTC) Jerald Phifer to Major General (MG) Michael Dunlavey (October 11, 2002); Memo: LTC Diane Beaver, Staff Judge Advocate, to MG Michael Dunlavey (October 11, 2002); Memo: MG Michael Dunlavey to General James Hill (October 11, 2002); Memo: General James Hill to General Richard Myers (October 25, 2002); Memo: William Haynes II, General Council, to Donald Rumsfeld (December 2, 2002); Memo: Donald Rumsfeld to General James Hill (January 15, 2003); Memo: Donald Rumsfeld to William Haynes II (January 15, 2003), and; Memo: Donald Rumsfeld to General James Hill (April 16, 2003).

⁷¹ Note: Waterboarding (the use of a wet towel and dripping to induce the misperception of suffocating) was also on Rumsfeld's list of prohibited interrogation tactics. However in February 2008, the Director of the CIA, Michael Hayden, publicly admitted to using waterboarding as an interrogation technique on some of the Guantánamo detainees (i.e. Khalid Shaikh Muhammad).

- The use of dogs to frighten a detainee.

Through revising its definition of torture and creating a list of approved and prohibited interrogation tactics, the Bush Administration aimed to legitimize the interrogation methods being used on the Guantánamo detainees. If the Administration were to grant the detainees POW status, these methods would become null and void and a valuable method of combating terrorism would be lost.

III – Release of Prisoners

A third area where the US gains a strategic advantage in refusing to grant POW status to the Guantánamo detainees concerns their eventual release. The Third Geneva Convention codifies a practice that is normally followed after a war – the release and repatriation of POWs. By labeling the detainees illegal enemy combatants rather than POWs, the Bush Administration is able to avoid three potential problems. In his article, “The Laws of War”, Adam Roberts summarizes these as follows:

First, there may not be a clear end of hostilities: Although the war in Afghanistan may be concluded at a definite date, it may be decades before the “war on terror” can be declared to be over for the United States. Second, unlike POWs in a “normal” inter-state war, some of the prisoners concerned might continue to be extremely dangerous after release given their training, their motivation to commit acts of terrorism, and lack of government control over them. Third, their countries of origin might refuse to accept them back, except perhaps as prisoners.⁷²

In other words, from a strategic point, the US has enabled itself to hold the detainees for an unlimited amount of time, even without bringing charges against them - so long as the Administration maintains that these detainees pose a threat to the United States’ national security and that they do not meet the requirements to receive POW status.

⁷² Roberts, “Laws of War”, 208.

IV – Judicial Proceedings

The Bush Administration's decisions on the Supreme Court's judicial proceedings relating to the Guantánamo detainees have been the subject of considerable legal and political debate, in the US and elsewhere, with regard to their constitutionality, practicability, and advisability. In spite of this, the Administration continues to deny these captives POW status for a number of strategic reasons.

First, Article 5 of the Prisoner of War Convention clearly states that if there is any doubt whatsoever as to the status of a captured combatant, then that combatant is entitled to the protections and rights of a POW until their actual status has been determined by a competent tribunal. However, shortly after the captives began to arrive at Camp X-Ray, President George W. Bush was advised not to apply the Prisoner of War Convention to any of the Taliban or al Qaeda detainees. In fact, on January 25, 2002, Alberto Gonzales, then a White House Counsel, sent the President a memo in which he stated that, "...a determination that GPW does not apply to al Qaeda and the Taliban eliminates any argument regarding the case-by-case determinations of POW status."⁷³ In other words, the interpretation of the Bush Administration was that the Geneva Conventions obliged belligerents to convene a competent tribunal to review the combatant status of prisoners only when their status was in doubt. Since the Administration was sure that the prisoners did not qualify for POW status, there was no need for a review.

Secondly, by regarding all of the detainees as illegal enemy combatants rather than POWs, the Bush Administration is able to substantially reduce the threat of domestic

⁷³ Alberto Gonzales, "Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban", January 25, 2002, in Mark Danner, *Torture and Truth: America, Abu Ghraib, and the War on Terror*, (New York: New York Review Books, 2004), 84.

prosecution under the War Crimes Act. The War Crimes Act of 1996 was signed into law by President Clinton once it was passed by the United States Congress with an overwhelming majority. This Act defines a war crime to include a “grave breach of the Geneva Conventions,” and applies if either the victim or perpetrator is an American national or a member of the US Armed Forces. If found guilty or committing a war crime, a penalty as stiff as life imprisonment or even death may be imposed.

Because an illegal enemy combatant is arguably not covered by the Geneva Conventions, any actions taken with respect to the Guantánamo detainees could fall outside of the War Crimes Act. In addition, Gonzales’s January 25, 2002 memo to the President also notes that by determining that the Prisoners of War Convention (GPW) does not apply to these captives, the Bush Administration would be guarded effectively from misconstruction or misapplication of the War Crimes Act for several reasons:

- First, some of the language of the GPW is undefined (it prohibits for example, “outrages upon personal dignity” and “inhumane treatment”), and it is difficult to predict with confidence what actions might be deemed to constitute violations of the relevant provisions of GPW.
- Second, it is difficult to predict the needs and circumstances that could arise in the course of the war on terrorism.
- Third, it is difficult to predict the motives of prosecutors and independent councils who may in the future decide to pursue unwarranted changes based on [the War Crimes Act]. Your determination would create a reasonable basis in the law that [the War Crimes Act] does not apply, which would provide a solid defense to any future prosecution.⁷⁴

A third strategic advantage that is gained in refusing to grant the Guantánamo detainees POW status is that the Administration is able to avoid a number of problems that could potentially arise if they were to follow the judicial procedures which are

⁷⁴ Gonzales, “Decision Re Application of the Geneva Convention on Prisoner of War to the Conflict with al Qaeda and the Taliban”, 85.

outlined in the Third Geneva Convention. Article 82 of this Convention clearly specifies that any sentence of a POW must be "...by the same courts according to the same procedures as in the case of members of the armed forces of the Detaining Power." If the US were to follow this provision, then the detainees' cases would be handled through regular US military courts. Consequentially, if tried using the military courts, the detainees would be able to appeal any decisions made against them.⁷⁵ The potential problem for the Bush Administration is that the appeals procedure could provide opportunity for the Guantánamo detainees and their lawyers to prolong the legal process and attract publicity.

Another potential problem is outlined by Adam Roberts in his article, "The Laws of War." He notes that the Administration was also concerned that,

...in cases involving defendants with no documents and no willingness to collaborate in any of the procedures, and where evidence might be based largely on intelligence sources, it could be difficult to provide evidence that met high standards of proof of direct personal involvement in terrorist activities.⁷⁶

In addition, by allowing the proceedings to take place in an open court, members of al Qaeda and other terrorist groups would have the opportunity to learn valuable information from the evidence presented. For example, they could become familiarized with the strengths and weaknesses of the US methods of intelligence gathering.

⁷⁵ The normal procedure for US armed forces personnel is through the appellate court of each service, then through the US Court of Appeals for the Armed Forces, and then on to the Supreme Court.

⁷⁶ Roberts, "The Laws of War", 209.

CHAPTER FOUR THE LEGAL MERRY-GO-ROUND

The debate over the legal status and rights of the Guantánamo detainees has become so intense that some of the core issues of the debate have made their way up to the Supreme Court of the United States. Remarkably, when the Administration disagreed with the Supreme Court’s rulings, it had the ability to adopt new legislation which essentially rendered the Court’s decision null and void. The implementation of the 2006 Military Commissions Act (MCA) is an example of this. The MCA is extremely important because it will have a profound impact on the way in which the war on terror is conducted. In addition, it will likely have a lasting effect in the way in which future conflicts are waged as well. Before examining the MCA and the advantages that it affords to the Bush Administration, it is important to take a brief look at the key events which led up to its ultimate creation.

4.1 - The Creation of the 2006 Military Commissions Act

I – Rasul vs. Bush

Shortly after the prisoners began to arrive at Camp X-Ray, the Center for Constitutional Rights filed a *habeas corpus*⁷⁷ petition entitled *Rasul vs. Bush* in the District of Columbia Circuit Court. This petition represented two Australians and twelve Kuwaitis (including Shafiq Rasul, Asif Iqbal and David Hicks), who were captured during hostilities in Afghanistan and were being held in US military custody at the Guantánamo Bay naval base. Unfortunately for these detainees, the Administration argued, and the court agreed, that under the 1950 Supreme Court case *Johnson vs.*

⁷⁷ *Habeas corpus* is one of the oldest principles of English and American law. Latin for “you have body” it requires the government to show a legal basis for holding a prisoner.

Eisentrager,⁷⁸ “the privilege of litigation does not extend to aliens in military custody who have no presence in any territory over which the United States is sovereign.”⁷⁹

In spite of this, *Rasul vs. Bush* eventually made its way to the United States Supreme Court. After much deliberation, the Supreme Court ruled 6-3 that the Guantánamo detainees can, in fact, use federal courts to challenge their captivity. Jennifer Elsea and Kenneth Thomas sum up the Supreme Court’s decision best in their report, “Enemy Combatant Detainees: *Habeas Corpus* Challenges in Federal Court”:

[US courts do have] jurisdiction over the Guantánamo detainees based on the facts that Guantánamo is effectively a US territory and is “far removed from any hostilities,” and that the detainees are “being held indefinitely without the benefit of any legal proceeding to determine their status.” Noting that the Writ of *Habeas Corpus* (“Writ”) has evolved as the primary means to challenge executive detentions, especially those without trial, the Court held that jurisdiction over *habeas* petitions does not turn sovereignty over to the territory where the detainees are held. Even if the *habeas* statute were presumed not to extend extraterritorially, as the government urged, the Court found the complete jurisdiction and control the United States exercises under its lease with Cuba would suffice to bring detainees within the territorial and historical scope of the Writ.⁸⁰

II – Combatant Status Review Tribunals

In response to the Supreme Court’s decision in the *Rasul vs. Bush* case, the Pentagon announced the creation of Combatant Status Review Tribunals (CSRTs) to

⁷⁸ In *Johnson vs. Eisentrager*, German nationals convicted by military commissions in China of violating the laws of war and imprisoned in a US administered prison in Germany, sought writs of *habeas corpus* on the ground that the military commission violated their rights under the constitution and their rights under the 1929 Geneva Convention. In their ruling, the Supreme Court based their decision to prohibit these detainees from claiming *habeas corpus* on three important points: (1) A non-resident alien has no access to US courts during wartime; (2) The US Constitution does not confer a right of personal security or immunity from military trial and punishment upon an alien engaged in hostile service of a government at war with the US, and; (3) Non-resident enemy aliens, captured and imprisoned abroad, have no right to a writ of *habeas corpus* in the US.

⁷⁹ Jennifer Elsea & Kenneth Thomas, “Enemy Combatant Detainees: *Habeas Corpus* Challenges in Federal Court”, in the *Congressional Research Service Report for Congress*, September 26, 2006, p. 3. Available: <<http://www.fas.org/sgp/crs/natsec/RL33180.pdf>>.

⁸⁰ *Ibid.*, 3.

determine each of the detainee's "enemy combatant" status. As noted in a Department of Defense news release, these tribunals were created to serve as a forum for the captives to contest their status as enemy combatants. In addition, by establishing the CSRTs, the Administration was able to meet the obligation of Article 5 of the Geneva Prisoner of War Convention.⁸¹ If the tribunal made a determination that a detainee was not an enemy combatant, then the detainee was to be released and transferred to their country of citizenship or other disposition consistent with domestic and international obligations, as well as US foreign policy. However, if the CSRT found that the detainee was, in fact, an enemy combatant, then that detainee would be deemed eligible for trial by military commission.⁸²

On the surface the formation of the CSRTs looks like a positive step forward in assuring that the detainees' rights to due process are being met. However, it is important to note that these hearings are inherently flawed. To date, they have all been conducted based on the assertion by the President's Administration that detainees in the war on Afghanistan are not eligible for prisoner of war status according to the terms of Article 4 of the Prisoner of War Convention.⁸³ As a result, any detainees are automatically to be regarded as unlawful enemy combatants.

⁸¹ Article 5 of the Prisoner of War Convention: "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present convention until such time as their status has been determined by a competent tribunal."

⁸² US Department of Defense news release, "Combatant Status Review Tribunal Order Issued," July 7, 2004. Available: <<http://www.defenselink.mil/releases/release.asp?releaseid=7530>>.

⁸³ In order to be considered a POW, Article 4 of the Prisoner of War Convention states that a detainee must meet the following four criteria: "(a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly, and; (d) that of conducting their operations in accordance with the laws and customs of war."

III – Hamdan vs. Rumsfeld

One of the detainees who was judged to be an enemy combatant following his CSRT was Salim Ahmed Hamdan. As George Fletcher notes in his article, “The Hamdan Case and Conspiracy as a War Crime,”

...Hamdan was a Yemeni living in Afghanistan and for reasons of ideology and economic need, he served as bin Laden’s personal driver for about 5 years leading up to 9/11. Other than drive his boss around and attend some meetings, he did nothing more to promote the attacks of 9/11. Yet his driving and his knowledge of al Qaeda’s nefarious purposes struck the military as sufficient to charge him with entering a conspiracy to kill civilians and engage in other terrorist acts.⁸⁴

Because of this, Hamdan’s trial by military commission began in Guantánamo Bay in the late summer of 2004. From the start, the prosecution tried to exclude him from the room during the testimony of a witness against him. Obviously this was because the government wanted to protect its sources. Unfortunately, this unusual procedure (which is permitted in the Department of Defense regulation governing military commissions), is in stark contrast to the widely accepted canons of federal, constitutional and international law. As a result, the defense immediately sought an injunction in federal court to prevent the trial from continuing. The defense’s efforts paid off when on November 8, 2004, US District Judge James Robertson ordered the Pentagon to halt Hamdan’s trial, stating that the military commissions were unlawful and could not continue in their current form.⁸⁵

⁸⁴ George Fletcher, “The Hamdan Case and Conspiracy as a War Crime: A New Beginning for International Law in the US,” *Journal of International Criminal Justice*, (Oxford: Oxford University Press, 2006), p. 443.

⁸⁵ Carol Leonnig & John Mintz, “Judge Says Detainees’ Trials are Unlawful: Ruling is Setback for Bush Policy,” *The Washington Post*, November 9, 2004, p. A01.

The defense's victory was short lived, however. On July 15, 2005 the US District Court of Appeals unanimously upheld President Bush's power to create military commissions to try Hamdan, thereby overturning Judge Robertson's November 8th order. In response, Hamdan's military lawyer, Navy Lt. Cmdr. Charles Swift denounced the military commission set up to try Hamdan as a "kangaroo court." In addition, seven retired senior military officers and lawyers warned in a joint statement that if the military commissions were allowed to proceed unchecked, then it is very possible that foreign tyrants would organize similar court hearings for US military personnel and "hide their oppression under US precedent."⁸⁶

These warnings did not go unheeded, and on November 7, 2005, the Supreme Court announced that it was going to hear the *Hamdan vs. Rumsfeld* case to decide whether or not President Bush has the power to set up military commissions, and whether or not detainees facing military trials could go to court in the United States to secure protections granted in the Geneva Conventions. After much deliberation, on June 29, 2006, the Court ruled 5-3 that the military commissions system for Guantánamo Bay did, in fact, violate US and international law because "...it had the power to convict based on evidence the accused would never see or hear."⁸⁷ As a result, President Bush did not have the sole authority to hold tribunals and needed to get authorization from Congress to do so.

⁸⁶ Jeffrey Smith, "Detainees Trials are Upheld: Court Backs Bush on Military Panels," *The Washington Post*, July 16, 2005, p. A01.

⁸⁷ Supreme Court of the United States. "Hamdan v. Rumsfeld, Secretary of Defense, et. al.," Argued March 28, 2006 – Decided June 29, 2006. Available: <<http://www.supremecourtus.gov/opinions/05pdf/05-184.pdf>>.

IV –The Military Commissions Act of 2006

In response to the Supreme Court’s ruling in *Hamdan vs. Rumsfeld*, the Bush Administration pressed Congress to pass a bill to legalize the Guantánamo military commissions, and to endorse many of the methods used by US intelligence officers to get information from terrorist suspects. As a result, the Military Commissions Act gained the approval of Congress on September 29, 2006. The Senate joined the House in embracing Bush’s view that the battle against terrorism justifies the imposition of extraordinary limits on a defendant’s traditional rights in the courtroom.⁸⁸ In order to underline this belief, the newly formulated Military Commissions Act (MCA) includes restrictions on a suspect’s ability to challenge his detention, examine all evidence against him, and bar testimony allegedly acquired through coercion of witnesses.

On October 17, 2006, President Bush signed the Military Commissions Act into law. He said that the extraordinary measure was justified by the extraordinary circumstances of the fight against terrorism. “It is a rare occasion when a president can sign a bill he knows will save American lives,” he said before signing the measure. “I have that privilege this morning.”⁸⁹

4.2 - The Military Commissions Act & the Administration’s Position

The MCA has essentially given the Administration the legal footing that it needs to continue to maintain its initial position. The two most notable areas that Administration benefits from the provisions of the MCA is in regard to the judicial procedures and interrogation methods used on the Guantánamo detainees.

⁸⁸ Charles Babington & Jonathan Weisman, “Senate Approves Detainee Bill Backed by Bush,” *The Washington Post*, September 29, 2006, p. A01.

⁸⁹ Michael Fletcher, “Bush Signs Terrorism Measure: New Law Governs Interrogation, Prosecution of Detainees,” *The Washington Post*, October 18, 2006, p. A04.

I - Military Commissions

In order to dissipate these potential problems that accompanied “normal” judicial procedures, the MCA makes provisions for trial by military commissions instead. Under most justice systems, prisoners have a variety of rights. These rights include the right to know the evidence against them; the right to protect themselves against self-incrimination; the right to legal counsel; the right to be present during their trial, and; the right to have witnesses against them cross-examined. However, the Bush Administration’s Military Commission’s Act of 2006⁹⁰ has taken away most of these prisoners’ rights. In these military commissions, rules for admissible evidence are more lenient than in civilian and military courts. For example, hearsay and coerced testimony are admissible. In addition, the prosecution is able to keep the evidence secret from the defendant and his/her lawyer.⁹¹

Military commissions can also be held in secret, and are not open to the public, and unlike US civil and military courts, decisions made by military commissions cannot be appealed to federal courts. It is possible, however, to petition for a panel of review to look into an appeal. Ultimately though, as Commander in Chief the President has the final word over any appeals. In addition, only members of the executive branch are involved in the trial – no impartial arbiter is provided.

By denying POW status to the Guantánamo detainees, the Bush Administration has been able to evade the traditional methods of prosecuting captives involved in

⁹⁰ On September 28th and 29th, 2006, the US Senate and the US House of Representatives, respectively, passed the Military Commissions Act of 2006 – a highly controversial bill that allows the President to designate certain people with the status of illegal enemy combatants, there by making them subject to military commissions in which they have fewer civil rights that in regular trials.

⁹¹ American Civil Liberties Union, “Military Commissions Act.” Available On-line: <http://www.aclu.org/safefree/detention/commissions.html>.

international conflict. In addition, the Military Commissions Act has helped in limiting the detainees' ability to prolong the legal process through appeals and attract unwanted publicity. In essence, the Administration has had much to gain in denying the Guantánamo detainees POW status and introducing the Military Commissions Act.

II - The Military Commissions Act and Torture

One of the advantages that the Military Commissions Act gives to the Administration is that, although it does spell out specific interrogation techniques that are forbidden, it also grants retroactive legal protection to military and intelligence personnel who previously participated in “rough” questioning of terrorism suspects. In addition, the Act also allows the Administration to continue a once secret CIA program for detaining people suspected of terrorism and using tough interrogation techniques on those believed to have information about plots against the United States. However, Bush claims that these measures are justified because

This program has been one of the most successful intelligence efforts in American history. It has helped prevent attacks on our country. And... [it] will ensure that we can continue using this vital tool to protect the American people for years to come.⁹²

4.3 - Criticisms of the Military Commissions Act

In spite of President Bush's confidence in the Act, this legislation is already being challenged by several lawsuits. “This issue is clearly going to be in the courts for years,” said Anthony Romero, executive director of American Civil Liberties Union. “It is unconstitutional and un-American.”⁹³ Remarkably, some of the opposition towards the

⁹² *Ibid.*

⁹³ *Ibid.*

Act has come from within the United States government itself. As Vermont's Senator, Patrick Leahy, passionately stated,

Passing laws that remove the few checks against the mistreatment of prisoners will not help us win the battle for the hearts and minds of the generation of young people around the world being recruited by Osama bin Laden and al Qaeda. Authorizing indefinite detention of anybody the government designates – without any proceeding and without any recourse – if what our worst critics claim the United States would do, not what American values, traditions and our rule of law would have us do.

This is not just a bad bill, this is a dangerous bill.⁹⁴

Instead of promoting the legal and human rights of the Guantánamo detainees, critics argue that the Military Commissions Act actually legalizes the Administration's disregard for these rights. The majority of the opposition to this Act is essentially based upon three arguments I) on the grounds that the Act is unconstitutional; II) on the grounds that the Act is also applicable to US citizens, and; III) on a series of other grounds.

I - The Act is Unconstitutional

As Karen DeYoung noted in an article in *The Washington Post*, by signing into the law the Military Commissions Act "...the Administration has formally notified the US District Court that it no longer has jurisdiction to consider hundreds of habeas corpus petitions filed by inmates at the Guantánamo Bay prison in Cuba."⁹⁵

Habeas corpus is one of the oldest principles of English and American law. Latin for "you have the body," it requires the government to show a legal basis for holding a prisoner. The Military Commissions Act, however, includes a provision which removes

⁹⁴ Statement of Patrick Leahy on the Military Commissions Act, S. 3939. September 28, 2006. Available: <http://lwhay.senate.gov/press/200609/092806c.html>.

⁹⁵ Karen De Young, "Court Told it Lacks Power in Detainee Cases," *The Washington Post*, October 20, 2006; A18, para. 1.

judicial review of all habeas claims.⁹⁶ This has caused a number of both current and former diplomats, military lawyers, federal judges, law professors and law school deans, the American Bar Association, former US Secretary of State, Colin Powell, and even President Bush's former Solicitor General, Kenneth Star, to voice grave concerns with the stripping of the habeas corpus provisions of the Act.⁹⁷ As Wisconsin Senator Russell Feingold stated in a 2006 speech to Congress,

Many, many dedicated patriotic Americans have grave reservations about this particular provision of the bill. They have reservations not because they sympathize with suspected terrorists. Not because they are soft on national security. Not because they don't understand the threat we face. No. [We] are concerned about this provision because we care about the Constitution, because we care about the image that America presents to the world as we fight the terrorists. Because we know that the writ of habeas corpus provides one of the most significant protections of human freedom against arbitrary government action ever created. If we sacrifice it here, we will head down a road that history will judge harshly and our descendants will regret.⁹⁸

II - The Act Applies to US Citizens

The Military Commissions Act has also been denounced by critics who assert that its wording makes possible the permanent detention and torture of anyone – including American citizens – based on the decision of the President. Because of the broad language used, critics argue that the Act allows for too much unchecked presidential power, and as a result of this undermines the basic principles of democracy itself.

⁹⁶ Military Commissions Act of 2006, S. 950j. Finality of Proceedings, Findings, and Sentences, (b).

⁹⁷ David Welna, "Senators Spar Over Restoring Habeas Corpus," *National Public Radio*. Available On-Line at: <<http://www.npr.org/templates/story/story.php?storyId=7779879>>.

⁹⁸ Russell Feingold, "Examining Proposals to Limit Guantánamo Detainees' Access to Habeas Corpus Review," *Hearing before the Committee on the Judiciary, United States Senate, One Hundred and Ninth Congress, Second Session, September 25, 2006*, Page S10361. Available: <http://www.fas.org/irp/congress/2006_hr/habeas.html>

According to Bill Goodman, Legal Director of the Center for Constitutional Rights, and Joanne Mariner, the Deputy Director of the Americas division of Human Rights Watch, this act redefines unlawful enemy combatant in such a broad way that it refers to any person “who is engaged in hostilities or who has purposefully and materially supported hostilities against the United States.”⁹⁹ Consequently, this makes it possible for US citizens to be designated unlawful enemy combatants because “...it could be read to include anyone who has donated money to a charity for orphans in Afghanistan that turns out to have some connection to the Taliban or a person organizing an anti-war protest in Washington, D.C.”¹⁰⁰ As a result of this many critics argue that the Military Commissions Act sends the wrong message not only to the international community, but also – in particular – to the American public at large.

III - Other Grounds

The Military Commissions Act has been criticized on a number of other grounds. First, as Amnesty International was quick to point out, this Act “contravenes human rights principles.”¹⁰¹ Amnesty International’s reasons for determining this are, among other things, that the Act will:

- Permit the executive to convene military commissions to try “alien unlawful combatants,” as determined by the executive under a dangerously broad definition, in trials that would provide foreign nationals so labeled with a lower standard of justice than US citizens accused of the same crimes. This would violate the prohibition on the discriminatory application of their rights.

⁹⁹ Military Commissions Act of 2006, S. 948a. Definitions, 7(a).

¹⁰⁰ Joanne Mariner, “Military Commissions Act of 2006: A Short Premier – Part One of a Two-Part Series”, Findlaw [On-line] October 9, 2006. Available: <<http://writ.news.findlaw.com/mariner/20061009.html>>.

¹⁰¹ Amnesty International. “US Congress Gives Green Light to Human Rights Violations in the ‘War on Terror’”, September 29, 2006. Available: <<http://web.amnesty.org/pages/stoptorture-060930-features-eng>>. For a list of things that Amnesty International thinks that every one should know about the Military Commissions Act, see Table 3.1.

- Permit the use in military commission trials of evidence extracted under cruel, inhuman or degrading treatment or punishment.
- Give the military commissions the power to hand down death sentences after trials that did not meet international standards.
- Permit the executive to determine who is an “enemy combatant” under any “competent tribunal” established by the executive, and endorse the Combatant Status Review Tribunal, the wholly inadequate administrative procedure that has been employed in Guantánamo to review individual detentions.
- Prohibit any person from invoking the Geneva Conventions or their protocols as a source of rights in any action in any US court.
- Narrow the scope of the War Crimes Act by not expressly criminalizing acts that constitute “outrages upon personal dignity, particularly humiliating and degrading treatment” banned under international law. Amnesty International believes that the USA has routinely failed to respect the human dignity of detainees in the “war on terror.”
- Endorse the Administration’s “war paradigm” – under which the USA has selectively applied the laws of war and rejected international human rights law. The legislation would backdate the “war on terror” to before the 11 September 2001 in order to be able to try individuals in front of military commissions for “war crimes” committed before that date.¹⁰²

In addition, many critics believe that the Military Commissions Act undermines the basic foundations of democracy. As Jonathan Turley argued, this Act is

...a huge sea of change for our democracy. The framers created a system where we did not have to rely on the good mood of the president. In fact, Madison said that he created a system essentially to be run by devils, where they could do no harm, because we didn’t rely on their good motivations. Now we must.¹⁰³

Finally, many critics worry about how investigations into possible wrongdoings in the War on Terror will likely be conducted by members of the international community rather than from within the US itself. For example, the Center for Constitutional Rights and the International Federation for Human Rights have begun legal proceedings in

¹⁰² *Ibid.*

¹⁰³ Keith Olbermann, interview with Jonathan Turley. “National Yawn as Our Rights Evaporate: New Law Redefines Habeas Corpus; Law Professor explains on ‘Countdown’”. October 18, 2006. Available: <<http://www.msnbs.msn.com/id/15318240>>.

Germany against Donald Rumsfeld, former Attorney General Alberto Gonzales, former CIA director George Tenet, and other senior US civilian and military officers, for their alleged roles in the abuses committed at Iraq's Abu Ghraib prison and the US detention facility at Guantánamo Bay, Cuba.¹⁰⁴

¹⁰⁴ Adam Zagorin, "Exclusive Charges Sought Against Rumsfeld Over Prison Abuse", *Time Magazine* [On-line]. November 10, 2006. Available: <<http://www.time.com/time/nation/article/0,8599,1557842.00.html>>.

CHAPTER FIVE CONCLUSIONS

5.1 – The Administration’s Actions and the Consequences

The international terrorist threat to the United States and allied interests was demonstrated dramatically on September 11, 2001, but the formulation of an effective grand strategy to respond has yet to be fashioned. Finding such a response will likely be challenging because, as Ron Wheeler once noted, “the shadowy nature of terrorism, its transnational character, and its threat to both the safety of civilians and the sanctity of the political process present a difficult challenge for democratic governments.”¹⁰⁵ The Bush Administration’s immediate response to the attacks was to initiate a “war on terrorism.” President Bush claimed that this was a war that “...would not end until every terrorist group of global reach has been found, stopped, and defeated.”¹⁰⁶

Since the war on terrorism began, thousands of suspected terrorists have been captured by the US and allied forces. Of these, those deemed to be the most dangerous have been transported to Camp X-Ray in Guantánamo Bay, Cuba. From the time the first pictures of these detainees arriving at Camp X-Ray were made public, the US handling of questions and concerns relating to the treatment and legal status of prisoners in the war on terror has caused widespread concern and criticism. In order to better understand some of the major difficulties, challenges, and debates involved with the issue over which status to afford to the Guantánamo detainees, several critical questions were posed at the

¹⁰⁵ Ron Wheeler, “A ‘Fourth Option’ for International Morality in an Age of Terror,” in The University of Saskatchewan’s, *The 2003 Whelen Lecture Featuring Michael Ignatieff*, (Saskatoon, Sk.: University of Saskatchewan Extended Division, 2004), 19.

¹⁰⁶ David C. Rapoport, “The Four Waves of Modern Terrorism,” in Audrey Kurth Cronin and James M. Ludes, Eds., *Attacking Terrorism: Elements of a Grand Strategy*, (Washington, D.C.: Georgetown University Press, 2004), 46.

beginning of the thesis:

- 1 – What are President Bush’s strategic reasons for refusing to grant the Guantánamo detainees POW status?
- 2 – What are the counter-arguments to the Bush Administration’s position? Who is voicing these arguments and why?
- 3 – What impact does the Bush Administration’s position have on how and to what extent the war on terror is waged?

Each of these questions is important to consider when analyzing the legal status and treatment of prisoners in the war on terror because they offer separate and distinct insights into the war and its changing nature.

Through exploring the first question it has become possible to distinguish some of the fundamental changes that have taken place in the way in which war is now being conducted. For example, since the war on terrorism began, there have been ample grounds for questioning whether military operations involving actions against terrorists constitute a new or wholly distinct category of war. The coalition operations of Afghanistan and the larger war against terrorism of which they are apart are not completely unlike past wars. In fact, many forms of military action and issues raised since September 11, 2001, are quite similar to those that have been brought up in previous military operations and concern issues already addressed by the laws of war.

However, since the war in Afghanistan began in October 2001, it has become painfully clear that there are difficulties in applying the laws of war to counterterrorist operations. For example, a war that is centered around ending terrorism by capturing suspected terrorists involves many complex issues which the existing laws of war do not

address. And yet, abiding by the law, whether it be domestic or international, only when it best suits your interests, risks creating a whole new set of problems. The principle of reciprocity in the observance of laws is extremely important and valuable. If the US is perceived as ignoring certain basic norms, then there will likely be negative consequences in regard to their relationships with their allies as well as with their enemies. Failure to strictly adhere to previously accepted laws may also affect the conduct of states in other conflicts. It also involves endangering respect for the rights of Americans who may be taken prisoner in the future. Although some of the Administration's critics agree that a couple of the US positions are defensible – such as the contention that certain prisoners would not qualify for POW status as prescribed by the 1949 Geneva Conventions – they argue that many aspects of US policy and procedures are poorly presented, and in some instances do not appear to be fully thought out.

The legal status, treatment, and rights of prisoners have become significant issues in the war on terror. If it is perceived that the US is treating prisoners inhumanely, or regarding their treatment and status as being in international legal limbo, then there is the risk of a general weakening of the prisoner of war regime. In addition, the treatment and legal status given to the detainees could have serious implications for any coalition personnel taken prisoner in the future.

On examination of the Administration's strategic reasons for not granting the Guantánamo detainees POW status and the counter-arguments to the Administration's position, it is obvious that the development of human rights protections are characterized by a continuous tension. On one hand, the global community is structured in accordance

with the principle of state sovereignty. On the other hand, there are certain standards of human dignity that have a degree of authority in the relations between states. Although states do recognize that they can be held accountable by other states and by international organizations for the manner in which they observe human rights, the boundaries between state sovereignty and human dignity are not always clear.

The tension between state sovereignty and human rights became quite apparent following the events of 9/11. Since these attacks, numerous well-documented violations of international human rights law have occurred. The United States passed emergency legislation allowing the executive branch and police to circumvent the accepted principles of human rights, including liberal democracy and the rule of law. Since 9/11, these actions have been and continue to be justified by the “war on terror.”

The Administration’s position on the prisoner issue has also had a huge impact on the way in which the war on terror is conducted. Because of the transnational nature of terrorism, the war on terrorism has necessitated that the US government cooperate with many governments, in every region of the world. Specific forms of cooperation have ranged from allowing US investigators access to suspected terrorists captured abroad to joining the US in military action in Afghanistan and Iraq. Unfortunately, the US handling of detainees in the war on terror has ultimately led to a weakening of international solidarity. For example, a number of America’s allies may become hesitant to handing over any of the detainees that they capture during the course of the war on terror because they are unsure whether or not these prisoners will be treated humanely or afforded their proper rights.

5.2 – Where Do We Go From Here?

In order to have even a chance at effectively combating terrorism, international cooperation is essential. Unfortunately, crafting a grand strategy against a non-state threat such as terrorism will be extremely challenging. A global war centered around counter-terrorist operations against non-state actors has never been conducted before. Previously agreed upon laws of war do not adequately cover all of the complexities associated with the war on terror.

Fortunately, in the past, international agreements have almost always been born out of major conflict. As David Bederman points out in his book International Law Frameworks:

One can almost linearly chart the progress of new international organizations, new substantive rules of international conflict and new procedures of dispute settlement between international actors by the dates that mark the end of cataclysmic wars: The 1763 Definitive Peace (concluding the Seven Years of War), the 1815 Final Act of Vienna (ending the wars of the French Revolution and Napoleon, 1791-1815), the 1919 Treaty of Versailles and the Covenant League (completing the First World War, 1914-1918), and the 1945 Charter of the United Nations (marking the end of World War Two, 1939-1945). It thus appears that international law is the step-child of war and destruction offering a utopian hope of order and moral renewal.¹⁰⁷

It appears as though the war on terror will be no exception to this trend. Although most would agree that this war is unlike anything the world has ever experienced, the manner in which to respond is heavily debated.

The Bush Administration's approach to the war on terror has proven to be reckless. It promotes a multilateral approach, but is quick to proceed unilaterally if it suits its own interests. The Administration has disregarded both domestic and

¹⁰⁷ David Bederman, *International Law Frameworks*, (New York: Foundation Press, 2001), 3.

international law, and has even created new laws, such as the 2006 Military Commissions Act, when the Supreme Court deems their actions to be illegal and unconstitutional. It is certainly understandable that, in times of fear, the citizenry defers to authority and closes its eyes against the wrong perpetrated in the name of their protection. However, when prevention translates into the detention and punishment of individuals for what the government suspects they may do rather than what it can prove they have done, it cannot be justified in a democratic society.

Ultimately, the security threat posed by terrorism should not obscure the importance of human rights. As Benjamin Franklin once noted, “they that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.” An anti-terrorism policy that ignores human rights is a gift to terrorists. It reaffirms the violent instrumentation that breeds terrorism as it undermines the public support needed to defeat it. A strong human rights policy that respects the detainee’s right to due process and right to not be subjected to torture, cannot replace the actions of security forces, but it is an essential compliment. A successful anti-terrorism policy must endeavor to build strong international norms and institutions on human rights, not provide a new rationale for avoiding and undermining them. Although the Military Commissions Act may provide the US with some short term security, in the long run the Act can do nothing more than erode both domestic and international human rights that have taken centuries to form.

The treatment and legal status that the Administration has denied to the Guantánamo detainees is in violation of both domestic and international law. The safeguards of the criminal process were put into place for a reason, and whenever a

democratic government imposes punishment or deprives a person of their liberty without adhering to these principles, it does more harm than good. In addition, the Administration's presumption of a right to hold these detainees until the war on terrorism is over is absurd. The global war on terrorism will never be over because it is based on defeating all terrorist organizations of global reach, and not just al Qaeda. Terrorism has been used as a tactic for centuries, and it is not likely to disappear over night.

With respect to the Guantánamo detainees, the Bush Administration is openly disregarding the legal framework that is fundamental, not only to the defendant's rights, but to the rights of all people. As Michael Ratner points out "its assertion of the power to imprison people indefinitely, without charges and court review, is the very conduct that the United States has forcefully condemned in other countries."¹⁰⁸ Having the Administration ignore the illegality of executive detention undercuts a system of justice and procedures that is necessary in insuring that only the guilty are punished.

In addition, any use of torture or methods of interrogation parallel to torture should be abhorrent to all societies who call themselves civilized. As Pope Pius XII once said, "the treatment of prisoners of war and of the civilian population of occupied areas is the most certain measure and index of the civilization of a people and a nation."¹⁰⁹ Pope Pius' words still ring true today, and without respect for the international and US legal framework, the rights of the Guantánamo detainees will continue to be violated and, as a result, threaten the rights of others who depend on the fair application of the law.

¹⁰⁸ Michael Ratner, "The War on Terrorism: The Guantánamo Prisoners, Military Commissions, and Torture," in Cynthia Brown, ed., *Lost Liberties: Ashcroft and the Assault on Personal Freedom*, (New York: The New York Press, 2003), 150.

¹⁰⁹ Levie, Howard Levie, *Prisoners of War in International Armed Conflict*, (Washington, D.C.: Naval War College Press, 1978), v.

Appendix 1 US Approved Interrogation Tactics¹¹⁰

Approved Tactic	Description
Direct	Asking straightforward questions
Incentive/Removal of Incentive	Providing a reward or removing a privilege, beyond those that are required by the Geneva Conventions
Emotional Love	Playing on the love that a detainees has for an individual or group
Emotional Hate	Playing on the hatred that a detainee has for an individual or group
Fear Up Harsh	Significantly increasing the fear level in a detainee
Fear Up Mild	Moderately increasing the fear level in a detainee
Reduced Fear	Reducing the fear level in a detainee
Pride and Ego Up	Boosting the ego of a detainee
Pride and Ego Down	Attacking the ego of a detainee
Futility	Invoking a feeling of futility in a detainee
We Know All	Convincing a detainee that the interrogator already know the answers to the questions that he is asking
Establish Your Identity	Convincing a detainee that the interrogator has mistaken him for someone else
Repetition Approach	Continuously repeating the same question to a detainee during the interrogation
File and Dossier	Convincing a detainee that the interrogator has a damning and inaccurate file that must be fixed
Mutt and Jeff	Pairing a friendly interrogator with a harsh one
Rapid Fire	Questioning in a rapid succession without allowing the detainees to answer
Silence	Staring at the detainee to encourage discomfort
Change of Scenery Up	Removing a detainee from the standard interrogation setting - generally to a more pleasant locate, but not a worse one
Change of Scenery Down	Moving a detainee from the standard interrogation setting to a less comfortable one
Dietary Manipulation	Changing the diet of a detainee, but with no intended deprivation of food or water and without having an adverse cultural or medical effect
Environmental Manipulation	Altering the environment to create moderate discomfort, such as adjusting the temperature or introducing an unpleasant smell
Sleep Adjustment	Adjusting the sleeping times of a detainee
False Flag	Convincing detainees that individuals from a country other than the US are interrogating them
Isolation	Isolating a detainee from other detainees for up to 30 days

¹¹⁰ ¹¹⁰ This list was extracted from a number of recently declassified interoffice memos that were circulated from August 1, 2002, to April 16, 2003. They can all be found in Mark Danner's book, *Torture and Truth: America, Abu Ghraib, and the War on Terror*, and include: Memo: Jay Bybee to Alberto Gonzales (August 1, 2002); Memo: Lieutenant Commander (LTC) Jerald Phifer to Major General (MG) Michael Dunlavey (October 11, 2002); Memo: LTC Diane Beaver, Staff Judge Advocate, to MG Michael Dunlavey (October 11, 2002); Memo: MG Michael Dunlavey to General James Hill (October 11, 2002); Memo: General James Hill to General Richard Myers (October 25, 2002); Memo: William Haynes II, General Council, to Donald Rumsfeld (December 2, 2002); Memo: Donald Rumsfeld to General James Hill (January 15, 2003); Memo: Donald Rumsfeld to William Haynes II (January 15, 2003), and; Memo: Donald Rumsfeld to General James Hill (April 16, 2003).

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