

FOR THE SAKE OF CONSISTENCY: DISTINGUISHING COMBATANT TERRORISTS FROM NON-COMBATANT TERRORISTS IN MODERN WARFARE

INTRODUCTION

The prosecution of Irek Hamidullin in an Article III federal court crystallized the result of years of heated debate amongst legal scholars, the military, and, most importantly, the executive branch. For the first time in the history of the United States, a military detainee enemy combatant was brought from Afghanistan to the United States to stand for a criminal trial in an Article III federal court. The defendant, Irek Hamidullin, was a known associate of the Taliban who orchestrated an attack in Afghanistan in November of 2009 and was captured by American forces thereafter. This concept—bringing a foreign combatant terrorist into our country for a criminal prosecution in a civilian tribunal for war-like conduct that took place on a foreign battlefield—has left many people, even federal judges, confused.

This article aims to offer a solution for prosecuting terrorists consistently and efficiently in the ever-expanding world of modern warfare. It argues that our country's approach to prosecuting terrorists has been wildly inconsistent, and that clarity and consistency are required moving forward. The executive branch, which directs the path the Department of Justice and military take in these arenas, has been the main instigator of the inconsistency. The decision whether to prosecute foreign, non-citizen terrorists in an Article III federal court or military tribunal/commission has become politicized, allowing political winds to dictate policy, albeit an inconsistent, unprincipled one.¹ The Bush administration sought to prosecute terrorists in military commissions.² Conversely, Barack Obama prefers Article III federal

1. See George M. Huckabee, *The Politicizing of Military Law—Fruit of the Poisonous Tree*, 45 GONZ. L. REV. 611, 621 (2010).

2. See Hilde Eliassen Restad, *The War on Terror from Bush to Obama: On Power and Path Dependency*, NORWEGIAN INST. OF INT'L AFFAIRS 1, 10–11 (2012).

courts where procedure and due process are more prevalent.³ These inconsistent approaches, which have been more criticized than applauded, provided a band-aid approach for a bullet hole wound that is our country's recent, and potentially future, approach to the prosecution of terrorists. This paper argues for a common sense, two-pronged approach. First, treat combatant terrorists as combatant Prisoners of War, prosecuting them in military commissions while treating non-combatant, domestic terrorists as such and prosecute them in Article III federal courts under domestic criminal law. Second, modernize the law of war so that it is applicable to the extremely different and constantly evolving realities of combat and war in the world today.

War has changed, and so should the laws tailored to govern its conduct. Though it is the prerogative of the President to exercise authority over foreign affairs and our military as Commander-in-Chief, attempts at grand schematic shifts every four to eight years have proven difficult to implement.⁴ Ultimately, this leaves the judiciary and legislatures confused in the muddled aftermath. The unfortunate truth is that terrorism is not going away. Therefore, it is the duty of our federal government to provide modern and practical leadership to its citizens, military, and the international community.

Part I of this comment will provide a thorough historical background on this topic. It will provide background on the controlling legal doctrines in this area and a detailed history of the prosecution of Irek Hamidullin. Part II will provide helpful background on military commissions. It will discuss the jurisdiction, chargeable offenses, and overall procedural and substantive operations of military commissions. Part III will explain the approaches of the Bush and Obama administrations and how the legal, political, and humanitarian debate we find ourselves in today is, in large part, due to inconsistent approaches from the executive branch. The executive decisions on where to prosecute terrorists were made using political considerations, rather than creating sustainable policy. Simple party politics and a public outcry for prosecutions guided policy that has created the current tornado of interests and arguments in this area, rather than principles of law.

3. *Id.* at 31; see also Nicholas Stephanopoulos, *Solving the Due Process Problem with Military Commissions*, 114 YALE L.J. 921, 924 (2005).

4. See Restad, *supra* note 2, at 45.

Part IV will present a solution focused on the need to distinguish whether the terrorist is a combatant or non-combatant terrorist. The outcome of this inquiry will determine things like trial venue and other procedural rights. Part IV argues that military courts and Article III federal courts have a distinct role in prosecuting terrorists. We have the ability to use both forums in the ways they were intended. Part IV will also discuss why military commissions must prosecute combatant terrorists, the drawbacks of trying combatant terrorists in federal courts, and the updates needed to bring the law of war into modern combat. This will show that combatant terrorists should be tried in military commissions. This solution will lead to a more practical application of the law by bringing the military courts into the modern age to effectuate their usage, promoting less forum shopping on behalf of the government, and instilling more consistency in application from one administration to the next.

Before delving into the specifics on military commissions and executive treatment, one must have a general understanding of the legal and historical backdrop to the law of war and how it was applied in *Hamidullin*.

I. HISTORICAL BACKGROUND AND HAMIDULLIN

A. *The Geneva Convention Protects POWs*

The Conventions establish varying degrees of treatment afforded to combatants and other actors in theatres of war.⁵ The Geneva Conventions (“Conventions”) were adopted as treaties—“formal, written agreement[s] between sovereign states.”⁶ The Conventions according to the International Community of the

5. Brett Shumate, *New Rules for a New War: The Applicability of the Geneva Conventions to Al-Qaeda and Taliban Detainees Captured in Afghanistan*, N.Y. INT’L L. REV. 1, 11 (2005) (noting the Conventions followed earlier eighteenth and nineteenth century international efforts to provide protection to combatants known as the Hague Conventions).

6. *What is a Treaty?*, DISCOVER DIPLOMACY, <http://diplomacy.state.gov/discoverdiplomacy/diplomacy101/issues/170661.htm> (last visited Dec. 16, 2016); *see also* U.S. CONST. art. VI, cl. 2 (“[A]ll Treaties made . . . shall be the supreme Law of the Land.”); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 253 (1984) (holding that a “treaty is in the nature of a contract between nations”); Howard S. Levie, *Enforcing the Third Geneva Convention on the Humanitarian Treatment of Prisoners of War*, 7 U.S. A.F. ACAD. J. LEGAL STUD. 37, 42 (1997) (affirming that the United States’s treaties, the Geneva Convention being one of them, are part of the supreme law of the land).

Red Cross (“ICRC”), “form the core of international humanitarian law, which regulates the conduct of armed conflict and seeks to limit its effects. They protect people not taking part in hostilities and those who are no longer doing so.”⁷ The Conventions were promulgated in 1949 and included four separate treaties establishing detailed rules for four separate status groups: (1) Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field; (2) Convention for the Amelioration of the Wounded, Sick, and Shipwrecked Members of the Armed Forces; (3) Convention Relative to the Treatment of the Prisoners of War; and (4) Convention Relative to the Protection of Civilian Persons in Time of War.⁸

The status group relevant to this article is the third, the Convention Relative to the Treatment of Prisoners of War (“GPW”).⁹ Jean Pictet, one of the foremost historical authorities on the law of war, stated that “[e]very person in enemy hands must have some status under international law: he is either a prisoner of war . . . a civilian . . . or . . . a member of the medical personnel *There is no* intermediate status; nobody in enemy hands can be outside the law.”¹⁰ As its title describes, the GPW is meant to govern the treatment of Prisoners of War (“POWs”) depending upon their combatant status.¹¹

For purposes of this comment, the most important article of the GPW is Article 4. Article 4 provides detailed criteria that must be met for a combatant to qualify as a prisoner of war.¹² Article 4(A)(1) states that any member of the armed forces of a High Contracting Party¹³ are deemed prisoners of war if they fall into

7. *Geneva Conventions and Commentaries*, INT’L COMM. OF THE RED CROSS (Apr. 1, 2016, 5:33 PM), <https://www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions>.

8. See Jason Callen, *Unlawful Combatants and the Geneva Conventions*, 44 VA. J. INT’L L. 1025, 1027 n.8 (2004).

9. See Shumate, *supra* note 6, at 12.

10. Jean Pictet, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, INT’L COMM. OF THE RED CROSS 51 (1958).

11. See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 3320, 3322 75 U.N.T.S. 135, 138 (describing who, as a matter of law, is a combatant and entitled to prisoner of war treatment).

12. *Id.*; see also William H. Ferrell, III, *No Shirt, No Shoes, No Status: Uniforms, Distinction, and Special Operations in International Armed Conflict*, 178 MIL. L. REV. 94, 102 (2003) (enumerating the four criteria that must be satisfied under Article 4 of the Third Convention for a combatant to be a POW).

13. See Shumate, *supra* note 6, at 12–13.

the enemy's hands.¹⁴ This codifies what we normally associate with the practices of warfare—if two sovereign states are in conflict, any detained member of the opposing force is a POW. The second category under Article 4(A)(2) pertains to militias and volunteer corps.¹⁵ It lays out four elements that must all be met in order to gain POW status if not granted under 4(A)(1).¹⁶ These four requirements are:

“(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.”¹⁷

There is a general consensus the test outlined in Article 4(A)(2) is what should be used in assessing whether an individual is a POW,¹⁸ and has been used to determine the same for terrorists in the modern context.¹⁹

At its core, Article 4 determines whether the detained individual is a lawful combatant POW or unlawful combatant.²⁰ A lawful combatant enjoys the “greatest protection under international law pursuant to the GPW.”²¹ Most importantly, a lawful combatant is allowed to engage in the conflict and may not be prosecuted for lawful acts of war because they are entitled to “combat immunity.” This means they may “kill or wound enemy combatants,

14. See Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 11, 6 U.S.T. at 3320, 75 U.N.T.S. at 138.

15. *Id.*

16. See Ferrell, *supra* note 12, at 102.

17. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 11, 6 U.S.T. at 3320, 75 U.N.T.S. at 138; see also Ferrell, *supra* note 12, at 102; Shumate, *supra* note 2, at 14–18 (discussing the intent behind each requirement).

18. See, e.g., Jeffrey Addicott, *Rightly Dividing the Domestic Jihadist from the Enemy Combatant in the “War Against Al-Qaeda”—Why It Matters in the Rendition and Targeted Killing*, 45 CASE W. RES. J. INT’L 259, 273–74 (2012) [hereinafter Addicott, *Rightly Dividing the Domestic Jihadist*]; Nicholas Rostow, *The Laws of War and the Killing of Suspected Terrorists: False Starts, Rabbit Holes, and Dead Ends*, 63 RUTGERS L. REV. 1215, 1218 (2010).

19. See *United States v. Hamidullin*, 114 F. Supp. 3d 365, 3756 (E.D. Va. 2015); *United States v. Lindh*, 212 F. Supp. 2d 541, 556–58 (E.D. Va. 2002).

20. See Addicott, *Rightly Dividing the Domestic Jihadist*, *supra* note 18, at 273–74.

21. See Shumate, *supra* note 6, at 14.

destroy other enemy military objectives and cause incidental civilian casualties” without fear of prosecution.²² Basically, combatants can engage in hostilities with immunity if they are doing so legally under the laws of war, similar to police officers policing with immunity if they are doing so lawfully under relevant state and federal law. Lawful combatants can only be prosecuted for violations of the laws of war.²³ The purpose behind detaining a POW is to prevent them from continuing to fight, not to punish them for their actions on the battlefield.²⁴ When investigated or prosecuted, the treaty affords POWs certain protections, such as “humane treatment, limits on interrogation, [and] trial rights equivalent to those afforded soldiers of the capturing military.”²⁵ POWs must also be returned to their homeland country at the conclusion of the conflict, unless they have been charged or convicted of a crime.²⁶ Mistreatment of POWs is considered a grave breach of the Conventions and international humanitarian law in general.²⁷

Conversely, unlawful combatants who fail to meet the requirements of Article 4(A)(2) do not receive the same treatment. Unlawful combatants participate in hostilities in varying degrees, but are not afforded the same combatant immunity that lawful combatants are.²⁸ Unlawful combatants can include “civilians . . . noncombatant members of the armed forces who, in violation of their protected status, actively engage in hostilities,”²⁹ and “irreg-

22. *Id.* at 19–20.

23. See Kenneth Anderson, *What to Do with Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 HARV. J.L. & PUB. POL’Y 591, 615–16 (2002) (asserting that POWs are liable to prosecution for violations of the “laws and customs of war”).

24. See Shumate, *supra* note 6, at 19.

25. See Joan Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 AM. J. INT’L L. 345, 353 (2002) (discussing that POWs are entitled to certain treaty protections, such as humane treatment, limits on interrogation and trial rights); see also Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 11, at 6 U.S.T. at 3328, 75 U.N.T.S. at 146 (stating that POWs must at all times be humanely treated).

26. See Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 11, 6 U.S.T. at 3406, 3408, 75 U.N.T.S. at 224, 226.

27. See *id.*; see also Howard S. Levie, *Maltreatment of Prisoners of War in Vietnam*, 48 B.U.L. Rev. 323, 324 (1968) (explaining that mistreatment of prisoners of war is a violation of customary international law).

28. See Shumate, *supra* note 6, at 22–23.

29. REPORT ON TERRORISM AND HUMAN RIGHTS, INTER-AM. COMM’N H.R., ¶ 69 (2002), <http://www.cidh.org/terrorism/eng/part.b.htm>.

ular or part-time combatants, such as guerillas”³⁰ By choosing to engage in the conflict, unlawful combatants waive their combatant immunity and, if captured, can be tried under municipal law even if their conduct complied with the laws of war.³¹

There are certain provisions that apply to all the conventions. The most relevant of those provisions are Common Articles 2, 3, and 5. Common Article 2 states that “the present *Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties*, even if the state of war is not recognized by one of them.”³² The term “High Contracting Parties” means any state that was a signatory to the convention.³³ If the party in question is not a High Contracting Party, it must “embrace[], by words or actions, the provisions of the GPW” for it to apply to the conflict it is engaged in.³⁴ It is important to note that there is disagreement among scholars whether Common Article 2 must be satisfied for the other Articles of the GPW to apply.³⁵

Common Article 3 governs non-international armed conflicts that occur in the territory of one of the High Contracting Parties.³⁶ For the purposes of the Conventions, an international armed conflict is a conflict that occurs in more than one state, whereas a non-international armed conflict is one that occurs within only one state.³⁷ The characterization is purely a geographic one, and it gives insight to the type of wars and conflicts that occurred at the time of drafting. Scholars agree that Common Article 3 provides the baseline treatment of all detainees,³⁸ regardless of the conflict.³⁹ “[It] sets forth minimum standards for treat-

30. *Id.*

31. *Id.*

32. See Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 11, 6 U.S.T. at 3318, 75 U.N.S.T. at 136 (emphasis added).

33. See Shumate, *supra* note 6, at 12–13.

34. Cf. United States v. Hamidullin, 114 F. Supp. 3d 365, 374 (E.D. Va. 2015).

35. *Id.* at 375–77 (discussing disagreement amongst trial experts regarding the application of Article 2).

36. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 11, 6 U.S.T. at 3318, 3320, 75 U.N.S.T. at 136, 138.

37. Geoffrey Corn, *Thinking the Unthinkable: Has the Time Come to Offer Combatant Immunity to Non-State Actors*, STAN. L. & POL’Y REV. 253, 263 (2011).

38. John J. Gibbons, *Does 9/11 Justify a War on the Judicial Branch?*, 63 RUTGERS L. REV. 1101, 1104 (2011).

39. See Corn, *supra* note 37, at 266 n.52 (citing Geneva Convention Relative to the

ing enemy fighters.”⁴⁰ Common Article 3 embodies the humanitarian purpose of the Conventions, representing a shift from protecting the interests of sovereign states to protecting the interests of the each individual human being involved in the conflict.⁴¹

Lastly, Common Article 5 of the Conventions requires that if there is any doubt as to the status of the detainee under GPW Article 4, whether they are a POW or not, those individuals must be protected by the Convention until a “competent tribunal” has determined their status.⁴² These are known as Article 5 reviews.⁴³

Though the Convention’s importance for the international community cannot be overstated, it did leave questions open that have proven to be difficult for the United States, and the international community, to consistently answer.⁴⁴

B. United States v. Hamidullin: *A Combatant Tried By Civilians*

American forces captured Irek Hamidullin (“Hamidullin”) in 2009 in the aftermath of a failed attack at Camp Leyza, a border crossing between Afghanistan and Pakistan, in an infamous region called the Khowst province.⁴⁵ According to the indictment and motions filed by both parties, Hamidullin had been affiliated with the Taliban since 2001.⁴⁶ When the mission failed, Ha-

Treatment of Prisoners of War, *supra* note 11, at art. 16); *Commentary on the Geneva Conventions of 12 August 1949, Volume III*, INT’L COMM. OF THE RED CROSS, at 36–37 (1960).

40. See Rostow, *supra* note 18, at 1219.

41. See Corn, *supra* note 37, at 276.

42. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 11, 6 U.S.T. at 3324, 75 U.N.S.T. at 142.

43. See John B. Bellinger, III & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges For the Geneva Conventions and Other Existing Law*, 105 AM. J. INT’L L. 201, 224 n.120 (2011) (according to the commentary from the Convention, these tribunals are “not based on the law enforcement model; Article 5 tribunals are not courts”).

44. See *id.* at 201–02.

45. Frank Green, *Echoes of War, Part 2: A Duel in the Valley*, RICH. TIMES-DISPATCH (Oct. 25, 2015), http://www.richmond.com/news/local/article_82ed1f85-e389-599a-b949-dbf85d40d959.html (“[N]o man’s land between Afghanistan and Pakistan, arguably the most dangerous place (on Earth) . . . you do not show up there unless you’re ready to fight”); *Russian Taliban Fighter Pleads Not Guilty to Terrorism Charges in US Court*, THE GUARDIAN (Nov. 7, 2014), <http://www.theguardian.com/us-news/2014/nov/07/russian-taliban-pleads-not-guilty-terrorism-us-court>.

46. Superseding Indictment, *United States v. Hamidullin*, 114 F. Supp. 3d 365 (E.D. Va. 2015) (No. 3:14cr140) [hereinafter *Superseding Indictment*] (indicating that prior to his Taliban affiliation, he was a former officer and tank commander in the Soviet army);

midullin attempted to retreat while carrying an AK-47 but was shot and apprehended.⁴⁷ There was ample argument, both in the briefs and at trial, as to whether Hamidullin ever fired his weapon.⁴⁸ At trial, the government presented both a graphic video taken from a helicopter of bombs and machine gun fire being unleashed upon the insurgents, and video footage of Hamidullin's interrogation.⁴⁹ No Americans or Afghan police were killed or injured during the attack.⁵⁰

After being captured, the Department of Defense held Hamidullin at the United States Parwan Detention Facility at Bagram Airfield for five years.⁵¹ The Federal Bureau of Investigation ("FBI") took custody of Hamidullin to transport him to the United States to face criminal charges.⁵² The charges against Hamidullin listed in his fifteen-count indictment included: (i) providing material support to a known terrorist organization; (ii) attempting to destroy a United States military aircraft; and (iii) attempting to kill a United States citizen.⁵³ Hamidullin plead not guilty to all the charges.⁵⁴

The gravity of this case makes it different from most of the terrorism related cases that take place in Article III federal courts. Historically, those cases involved habeas petitions at the appel-

Russian Taliban Fighter First Afghan War Enemy Combatant Charged in U.S. Court, RT AMERICA (Nov. 4, 2014), <http://www.rt.com/usa/202247-russian-terrorism-hamidullin-indictment/>.

47. Superseding Indictment, *supra* note 46, at 6.

48. Defendant's Motion to Dismiss at 10, *United States v. Hamidullin*, 114 F. Supp. 3d 365 (E.D. Va. 2015) (No. 3:14cr140); Defendant's Motion to Suppress Lost Firearm at 3, *United States v. Hamidullin*, 114 F. Supp. 3d 365 (E.D. Va. 2015) (No. 3:14cr140).

49. *Jury Convicts Ex-Russian Soldier of Terror-Related Charges*, CBS NEWS (Aug. 7, 2015, 10:19 PM), <http://www.cbsnews.com/news/jury-convicts-ex-russian-soldier-of-terror-related-charges/>.

50. *Virginia Jury Convicts Russian Military Veteran in Taliban Attack Against U.S. Forces in Afghanistan*, N.Y. DAILY NEWS (Aug. 7, 2015), <http://www.nydailynews.com/news/crime/Virginia-jury-convicts-russian-veteran-taliban-attck-article-1.2318837>.

51. Gary Robertson, *Experts Spar in Virginia Court Over Status of Accused Russian Fighter for Taliban*, REUTERS (June 17, 2015), <http://www.reuters.com/article/us-usa-russian-taliban-idUSKBN00Y05G20150618>; see also *Russian Taliban Fighter Pleads Not Guilty to Terrorism Charges in US Court*, *supra* note 45.

52. *Russian Taliban Fighter First Afghan War Enemy Combatant Charged in U.S. Court*, *supra* note 46.

53. Superseding Indictment, *supra* note 46; see also Robertson, *supra* note 51.

54. Frank Green, *Accused Taliban Commander Pleads Not Guilty in Richmond's U.S. District Court*, RICH. TIMES-DISPATCH (Nov. 7, 2014, 12:42 PM), http://www.richmond.com/news/national-world/article_ec4a8c15-38b7-5334-b252-fcfc186be54b.html.

late level, detainee treatment at Guantanamo bay, or individuals who supported terrorists through “financing, recruiting, or other activities outside the theater of war.”⁵⁵ This case involved a “combatant captured on the battlefield, accused of being [a Taliban] commander of a 2009 attack against United States and Afghan forces.”⁵⁶

Hamidullin’s trial was set for August of 2015 in the Richmond division of the Eastern District of Virginia.⁵⁷ Hamidullin’s principal defense at both the motions hearing and the trial was that he was a lawful combatant who could not be prosecuted because his acts were lawful under the law of war.⁵⁸ In addition, Hamidullin’s attorneys argued that under the Conventions he was a lawful enemy combatant, and therefore not subject to the jurisdiction of a civilian court for a criminal trial.⁵⁹ His attorneys argued that the Taliban, as a group, satisfies the four requirements under GPW Article 4(A)(2) of the Conventions, and therefore, Taliban combatants would be lawful combatants with combatant immunity.⁶⁰ Thus, if Hamidullin had combatant immunity, he could not be prosecuted anywhere for allegedly shooting at United States aircraft or soldiers.⁶¹ His attorneys argued throughout the litigation that this case was the “first of its kind—a foreign national taken off a battlefield and brought into a U.S. courtroom for a criminal

55. Michael Cochrane, *Trial of Russian Taliban Could Shed Light on Law of War*, WORLD MAG. (Aug. 3, 2015), http://world.wng.org/2015/08/trial_of_russian_taliban_could_shed_light_on_law_of_war. See generally JENNIFER K. ELSEA & MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., R41156, JUDICIAL ACTIVITY CONCERNING ENEMY COMBATANT DETAINEES: MAJOR COURT RULINGS (2014) (describing recent judicial decisions on enemy combatant detainees).

56. See Cochrane, *supra* note 55.

57. See *Russian Veteran Taken from Afghanistan to U.S. for Terror Trial*, MOSCOW TIMES (Nov. 5, 2014), <https://themoscowtimes.com/articles/russian-veteran-taken-from-afghanistan-to-us-for-terror-trial-41060>.

58. See Frank Green, *Russian Taliban Can Be Prosecuted in Richmond, Judge Rules*, RICH. TIMES-DISPATCH (July 13, 2015, 10:20 PM) [hereinafter Green, *Russian Taliban Can Be Prosecuted in Richmond*], http://www.richmond.com/news/virginia/article_77d86298-6682-5a99-8c29-c43804bb130d.html.

59. *United States v. Hamidullin*, 114 F. Supp. 3d 365, 369–70 (E.D. Va. 2015) (No. 3:14cr140); Robertson, *supra* note 51.

60. *Hamidullin*, 114 F. Supp. 3d at 381.

61. *Id.* at 380–81; see also Frank Green, *Prosecution of Hamidullin Broke Ground*, RICH. TIMES-DISPATCH (Oct. 24, 2015, 10:30 PM), http://www.richmond.com/news/article_086a959b-9a80-5261-85a6-57eafae5d4b6.html. Todd Marcum, the man who shot Hamidullin, was “conflicted on the question” and said “I’d be inclined to see him as a soldier,” and “[a]t what point do you lose combatant status because of religious fervor?” *Id.*

trial.”⁶² Hamidullin’s attorneys said “[t]his prosecution is fundamentally unfair,” and that “[t]his is a unique case. It has presented the court with issues that have never been presented in court before.”⁶³

On August 7, 2015, the jury returned a verdict of guilty on all fifteen counts brought against Hamidullin after only eight hours of deliberation.⁶⁴ John P. Carlin, Assistant United States Attorney General for national security, said “[t]his case once again demonstrates our resolve to find and bring to justice, using all available tools, those who target U.S. citizens and interests around the world.”⁶⁵ On December 3, 2015, Judge Henry Hudson sentenced Hamidullin to life imprisonment plus thirty years for his conduct in the attack.⁶⁶

Now, having provided sufficient background of the controlling law in this area and the story of *Hamidullin*, what follows is a breakdown of what military commissions are and how they operate.

II. WHAT ARE MILITARY COMMISSIONS?

A. *Military Commissions Prosecute Law of War Violations and the President Has Power Over Them*

The United States armed forces use military commissions to prosecute violations of the laws of war, usually committed by captured enemy combatants.⁶⁷ A military commission may try any non-U.S. citizen who is determined to be an “unlawful enemy

62. See Green, *Russian Taliban Can Be Prosecuted in Richmond*, *supra* note 58.

63. *Id.*; Frank Green, *Russian Jihadist Hamidullin Sentenced to Life, Tells Judge, “I Do Not Accept Your Law,”* RICH. TIMES-DISPATCH (Dec. 3, 2015), http://www.richmond.com/news/local/crime/article_a0907687-5ba2-5f2d-ab8d-97d1ea5b5b28.html.

64. See Frank Green, *Federal Jury In Richmond: Russian Insurgent Guilty of All Charges*, RICH. TIMES-DISPATCH (Aug. 7, 2015, 9:30 PM), http://www.Richmond.com/news/local/crime/article_1699d04d-0a24-5668-b082-a81fa463a769.html.

65. *Id.*

66. Press Release, U.S. Dep’t of Justice, *Russian Taliban Fighter Sentenced to Life in Prison* (Dec. 3, 2015), <http://www.justice.gov/usao-edva/pr/Russian-taliban-fighter-sentenced-life-prison>.

67. HUMAN RIGHTS WATCH, Q AND A: MILITARY COMMISSIONS ACT OF 2006 2 (2006) [hereinafter HUMAN RIGHTS WATCH, Q AND A], <https://www.hrw.org/legacy/backgrounder/usa/qna1006/usqna1006web.pdf>.

combatant”.⁶⁸ The offenses typically charged in military commissions are any violation of the law of war, war crimes, and related terrorism offenses.⁶⁹ The Military Commissions Act (“MCA”) also allows for prosecution of offenses such as conspiracy and material support of terrorism (“MST”), though there is plentiful debate on whether those are war crimes and punishable by commissions.⁷⁰

Article I of the United States Constitution, specifically the Define and Punish Clause therein, provides the “source of authority to prosecute enemy soldiers for violations of the law of nations (or war crimes) in military commissions.”⁷¹ Congress’s power to move criminal prosecutions to a different forum is also limited in Article III and the Fifth and Sixth Amendments, which all contain various aspects of jury requirements.⁷²

Along with other noted exceptions,⁷³ the Supreme Court has recognized an exception allowing military commissions to try enemy belligerents who violate the international law of war.⁷⁴ Military commissions are not meant “to maintain internal discipline within the U.S. armed forces (courts-martial) or to fill a jurisdictional gap based on exigency (military tribunals conducted during martial law or in occupied territory).”⁷⁵ Commissions are meant to prosecute violations of the law of war by non-citizen, lawful and unlawful combatants.

The military commissions in use today are known as law-of-war commissions and were upheld by the Supreme Court in *Ex Parte Quirin*.⁷⁶ Though judicial and scholarly commentary has been critical, “*Quirin*’s holding—that the Constitution allows the exercise of military jurisdiction over enemy belligerents who violate the law of war—remains intact.”⁷⁷ The Court stood by this

68. *Id.* at 3.

69. *Id.* at 2, 4.

70. *Id.* at 4.

71. Jonathan Hafetz, *Policing the Line: International Law, Article III, and the Constitutional Limits of Military Jurisdiction*, 2014 WIS. L. REV. 681, 685 (2014); *see also* U.S. CONST. art. 1, § 8, cl. 10.

72. *See* Hafetz, *supra* note 71, at 685–86.

73. *Id.* at 686, nn.19–22.

74. *Ex parte Quirin*, 317 U.S. 1, 45–46 (1942); Hafetz, *supra* note 71, at 686 n.23.

75. *See* Hafetz, *supra* note 71, at 686.

76. *Id.* at 683; *see Quirin*, 317 U.S. at 1 (1942) (upholding the use of military commissions).

77. Hafetz, *supra* note 71, at 695.

holding in *Yamashita* and *Eisentrager*, justifying the use of commissions and establishing that “international law recognized the authority of the military commission to try the particular offense in question.”⁷⁸

When read broadly, *Quirin* can be interpreted to allow the President to choose the forum—military or civilian—where an enemy soldier who has violated the law of war can be prosecuted.⁷⁹ These commissions operate under a criminal exception to Article III jurisdiction based on the status of the offender and nature of the alleged offense.⁸⁰

B. *Military Commissions Try War Crimes, But Historical Definitions of War Crimes Are Murky When Applied to Terrorists*

Much of the debate discussing the problems associated with military commissions centers around its lack of sufficient standards for procedure and due process.⁸¹ The international community and human rights activists attack the commission system, arguing they are inherently unfair, put defendants at a comparative disadvantage, and do not comport with international law.⁸² Conversely, those in favor of commissions argue that the implemented procedures are sufficient and the idea of guaranteeing foreign terrorists the same constitutional protections afforded to everyday citizen criminals is preposterous.⁸³

78. *See id.* at 698.

79. *Id.* at 695. Though this article argues that violations of the law of war should be tried in military commissions, it argues against the forum shopping that has been the policy of the Obama administration. *See* Eric Holder, Att’y Gen., Dep’t of Justice, Speech at Northwestern University School of Law (Mar. 5, 2012), <http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law> (“Several practical considerations affect the choice of forum.”).

80. Hafetz, *supra* note 71, at 683.

81. *See generally* Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (finding problems with the government’s policy on detaining enemy combatants); *see also* *US: New Legislation on Military Commissions Doesn’t Fix Fundamental Flaws*, HUMAN RIGHTS WATCH (Oct. 8, 2009, 1:37 PM), <https://www.hrw.org/news/2009/10/08/us-new-legislation-military-commissions-doesnt-fix-fundamental-flaws>.

82. *See* *Military Commissions*, HUMAN RIGHTS WATCH, <https://www.hrw.org/legacy/background/usa/qna1006/2.htm> (last visited Dec. 16, 2016).

83. *See* Pamela Geller, *Obama Brings Taliban Chief to U.S. for Trial*, WorldNetDaily (Nov. 9, 2014, 3:58 PM), <http://www.wnd.com/2014/11/obama-brings-taliban-chief-to-u-s-for-trial/>.

Military commissions are not “Article III” courts, meaning their power does not derive from Article III of the United States Constitution.⁸⁴ Therefore, the same constitutional requirements that attach to Article III courts do not apply to military commissions.⁸⁵ For example, defendants before a military commission have no right to demand a jury trial.⁸⁶ Historically, military commissions have applied the same procedural rules used in courts-martial.⁸⁷ The commissions under the MCA have jurisdiction over those who “have engaged in hostilities against the United States or its coalition partners, or who have purposefully and materially supported such hostilities.”⁸⁸ They cannot be used to try United States citizens.⁸⁹ The MCA dictates that a qualified military judge preside over the panels of five military officers, except when the death penalty is being sought, in which case twelve panel members are required.⁹⁰ The President, or his subordinates, has the authority to “write procedural rules, interpret them, enforce them, and amend them.”⁹¹ The MCA also lists the minimum set of rights afforded to those accused.⁹²

84. *Ex parte Quirin*, 317 U.S. 1, 38–39 (1942).

85. Jennifer Elsea, CONG. RESEARCH SERV., RL31191, TERRORISM AND THE LAW OF WAR: TRYING TERRORISTS AS WAR CRIMINALS BEFORE MILITARY COMMISSIONS 35 (2001).

86. *Quirin*, 317 U.S. at 45.

87. JENNIFER ELSEA, CONG. RESEARCH SERV., RL33688, THE MILITARY COMMISSIONS ACT OF 2006: ANALYSIS OF PROCEDURAL RULES AND COMPARISON WITH PREVIOUS DOD RULES AND THE UNIFORM CODE OF MILITARY JUSTICE 2 (2007) [hereinafter ELSEA, ANALYSIS OF THE MILITARY COMMISSIONS ACT OF 2006].

88. Holder, *supra* note 79.

89. *See Ex parte Milligan*, 71 U.S. 2, 121–22 (1866) (finding that the use of military tribunals to try United States citizens is unconstitutional when civilian courts are in operation); *see also* HUMAN RIGHTS WATCH, Q AND A, *supra* note 67, at 3.

90. National Defense Authorization Act for Fiscal Year 2010, 123 Stat. 2190, 2579, 2589–90 (2009) (codified as amended at 10 U.S.C. §§ 948m(a), 949m(c)(1) (2012)); ELSEA, ANALYSIS OF THE MILITARY COMMISSIONS ACT OF 2006, *supra* note 87 at 15. The judge also makes all calls related to the admissibility of evidence and how to treat classified information. *Id.* Military Commissions have the same power to compel witnesses to appear for the trial that U.S. courts with criminal jurisdiction have. *See* National Defense Authorization Act for Fiscal Year 2010, 123 Stat. 2190, 2579, 2589–90 (2009) (codified as amended at 10 U.S.C. § 949j(b)(1) (2012)). The MCA has been attacked because the MCA does not provide both sides equal opportunity to obtain evidence or compel witnesses—defense counsel only has a “reasonable opportunity” to do so. U.S. DEP’T OF DEF., OFFICE OF MILITARY COMM’NS, MANUAL FOR MILITARY COMMISSIONS 50 (2012), www.mc.mil/portals/0/pdfs/2012manualformilitarycommissions.pdf.

91. *See* ELSEA, ANALYSIS OF THE MILITARY COMMISSIONS ACT OF 2006, *supra* note 87, at 17.

92. *See id.* at 18, 20–21, 30, 35 (including the following: the right to be informed of the charges as soon as practical, presumption of innocence, right against self-incrimination,

The MCA, in terms of sentencing power, may sentence a defendant to “any punishment not forbidden by [the MCA or the Uniform Code of Military Justice (“UCMJ”)], including the penalty of death”⁹³ A death sentence cannot be imposed until the commission proceedings have finished, all appeals have been exhausted, and the President approves the sentence.⁹⁴

The commissions’ post-trial procedures have arguably been opposed more than any other realm of the commissions.⁹⁵ The first line of appellate review under the MCA is the Court of Military Commission Review (“CMCR”). The CMCR cannot grant relief “unless an error of law prejudiced a substantial trial right of the accused.”⁹⁶ Similar to the UCMJ and Article III federal courts, the MCA “prohibits the invalidation of a verdict or sentence due to an error of law unless the error materially prejudices the substantial rights of the accused.”⁹⁷ A defendant may appeal any issue of law to a CMCR.

After exhausting the CMCR, the accused may then appeal to the D.C. Circuit. Lastly, the United States Supreme Court may review the decision by the D.C. Circuit if certiorari is granted. Additionally, an accused may petition the convening authority for

protection against double jeopardy, right not to testify, right to the opportunity to present evidence and cross-examine witnesses, right to have access to evidence related to sentencing, right to military counsel (though self-representation is also allowed) and an opportunity to appeal verdicts based on “whether the final decision was consistent with the standards and procedures specified” in the MCA).

93. National Defense Authorization Act for Fiscal Year 2010, 123 Stat. 2190, 2579, 2589-90 (2009) (codified as amended at 10 U.S.C. § 948m(d) (2012)). Two-thirds of the panel members must agree for sentences up to ten years, three-fourths of the panel must agree for longer sentences, and a unanimous panel, both at the guilty phase and sentencing phase, is required to impose death. ELSEA, ANALYSIS OF THE MILITARY COMMISSIONS ACT OF 2006, *supra* note 87, at 30–31.

94. See ELSEA, ANALYSIS OF THE MILITARY COMMISSIONS ACT OF 2006, *supra* note 87, at 31.

95. See *id.* at 32 (highlighting concerns regarding the efficacy of a defendant’s appeal and that it *barred habeas corpus* relief); see also Aryeh Neier, *The Military Tribunals on Trial*, N.Y. REV. OF BOOKS (Feb. 14, 2002), <http://www.nybooks.com/articles/2002/02/14/the-military-tribunals-on-trial/#fnr-18> (discussing issues with the procedural guarantees of military tribunals and Laurence Tribe’s call for the Bush Military Order to be regulated by Congress).

96. ELSEA, ANALYSIS OF THE MILITARY COMMISSIONS ACT OF 2006, *supra* note 87, at 33–35; see also National Defense Authorization Act for Fiscal Year 2010, 123 Stat. 2190, 2579, 2589-90 (2009) (codified as amended at 10 U.S.C. § 950(f) (2012)).

97. ELSEA, ANALYSIS OF THE MILITARY COMMISSIONS ACT OF 2006, *supra* note 87, at 33; see also National Defense Authorization Act for Fiscal Year 2010, 123 Stat. 2190, 2579, 2589-90 (2009) (codified as amended at 10 U.S.C. §§ 859, 950a(a) (2012)).

a new trial “on the ground of newly discovered evidence or fraud on the military commission,” if done within two years after the conviction becomes final.⁹⁸

Per the 2006 MCA statute, commissions may be used to try “offenders or offenses [designated] by statute or by the law of war.”⁹⁹ The MCA of 2006 granted the President express authority to convene military commissions, thereby eliminating the requirement to adhere exactly to the procedural rules of courts-martial.¹⁰⁰ Though this moved the commissions closer to courts-martial—in terms of procedural sufficiency—than they were before *Hamdan*, the same groups that took issue with the procedures used before continue to demand heightened procedural and due process guarantees.¹⁰¹

The MCA of 2006 defines “unlawful enemy combatant” as “a person who has engaged in hostilities or who has purposefully and materially supported hostilities . . . who is not a lawful enemy combatant” or as “a person who, before, on, or after the date of the enactment of the [MCA of 2006], has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal [(“CSRT”)] or another competent tribunal” determined by the President or Secretary of Defense.¹⁰² This is the personal jurisdiction of the MCA.¹⁰³ As previously discussed in case law and general discussion, those critical of commissions, including courts, take great issue with treating offenses such as material support and conspiracy as violations of the law of war because of the debate and uncertainty about whether they are indeed violations.¹⁰⁴ Courts have also found CSRTs to not be competent tribu-

98. R.M.C. 1210.

99. 10 U.S.C. § 821 (2006).

100. See ELSEA, ANALYSIS OF THE MILITARY COMMISSIONS ACT OF 2006, *supra* note 87, at 6.

101. See, e.g., HUMAN RIGHTS WATCH, Q AND A, *supra* note 67, at 2–5; Morris Davis, *Military Commissions for Terrorism Suspects Are a Proven Failure*, AL JAZEERA AM. (Nov. 11, 2014, 2:00 AM), <http://america.aljazeera.com/opinions/2014/11/military-commissions-guantanamobayterrorismsuspects.html>.

102. 10 U.S.C. § 948a(1) (2006).

103. See ELSEA, ANALYSIS OF THE MILITARY COMMISSIONS ACT OF 2006, *supra* note 87, at 8.

104. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 567, 600 (2006); HUMAN RIGHTS WATCH, Q AND A, *supra* note 67, at 4.

nals for purposes of satisfying Common Article 5 of the Geneva Convention.¹⁰⁵

The MCA has subject matter jurisdiction over “any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant.”¹⁰⁶ The statute provides a lengthy list of triable offenses under military commissions, though the list was not intended to be exhaustive.¹⁰⁷ Some of the listed offenses include: terrorism, providing material support for terrorism, wrongfully aiding the enemy, and conspiracy and attempts to commit those defined acts.¹⁰⁸ The contents of this list elicit controversy across different interest groups, including the international community and the judiciary. For instance, in *Hamdan*, a plurality of the Supreme Court agreed conspiracy is not a war crime under the traditional law of war.¹⁰⁹ Additionally, historical precedent has not supported the inclusion of “material support for terrorism” as a war crime.¹¹⁰

From a geographic perspective, the law of war has historically applied within the territorial boundaries of an armed conflict between two belligerents.¹¹¹ Generally, it has not applied “to conduct occurring on the territory of neutral states or on territory not under the control of a belligerent, to conduct that preceded the outbreak of hostilities, or to conduct during hostilities that do not amount to an armed conflict.”¹¹²

105. See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 783–85 (2008).

106. 10 U.S.C. § 948d(a) (2006); ELSEA, ANALYSIS OF THE MILITARY COMMISSIONS ACT OF 2006, *supra* note 87, at 10.

107. *Id.* §§ 950p–950w (2006); ELSEA, ANALYSIS OF THE MILITARY COMMISSIONS ACT OF 2006, *supra* note 87, at 10–11. It was also not meant to permit for ex post facto crimes or to apply retroactively. *Id.* at 11.

108. See ELSEA, ANALYSIS OF THE MILITARY COMMISSIONS ACT OF 2006, *supra* note 87, at 10–11.

109. *Hamdan*, 548 U.S. at 601–11.

110. ELSEA, ANALYSIS OF THE MILITARY COMMISSIONS ACT OF 2006, *supra* note 87, at 12.

111. *Id.* at 13.

112. *Id.* There is scholarly disagreement as to what constitutes an armed conflict and which armed conflicts are covered by international law. Compare Int’l Comm. of the Red Cross, Opinion Letter: How is the Term “Armed Conflict” Defined in International Humanitarian Law? (Mar. 2008), <https://www.icrc.org/eng/assets/files/other/opinion-paper-arm-conflict.pdf>, with *United States v. Hamidullin*, 114 F. Supp.3d 365, 375–76 (E.D. Va. 2015) (summarizing defense expert testimony arguing that the law of war should apply to non-international armed conflict).

Importantly, a war crime generally requires a “nexus between the conduct and armed hostilities.”¹¹³ Throughout the Military Commission Instruction No. 2 (“MCI No.2”) is the phrase, “in the context of and was associated with armed conflict,” which is how the nexus is spelled out therein.¹¹⁴ The definition does not require “a declaration of war” or “ongoing mutual hostilities.”¹¹⁵ It states that “[a] single hostile act or attempted act” can be enough for the nexus

so long as its magnitude or severity rises to the level of an “armed attack” or an “act of war” or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force.¹¹⁶

In traditional armed conflict, such as either of the world wars, it is generally easy to identify when hostilities begin and end.¹¹⁷ Today’s style of conflict is different. The Global War on Terror (“GWOT”) “does not have clear boundaries in time or space, nor is it entirely clear who the belligerents are.”¹¹⁸ Modern conflicts often do not have a specific start and end date.¹¹⁹ Further, the groups in conflict are often not traditional armies of sovereign nations that fight for, and owe allegiance to, their home country.¹²⁰ Thus, the international community’s war on terrorism is likely to be a never-ending, sliding scale of conflict that opposes the strongest, most threatening radical group at the time. In light of this amorphous, flexible, yet frightening system of warfare, the legal rules adjoining that system must be specifically tailored to meet its demands.

The preceding discussion on the legal boundaries that military commissions operate within establishes the requisite background needed in order to appreciate how they have been used. As will be

113. U.S. DEP’T OF DEF., MILITARY COMMISSION INSTRUCTION NO. 2, at 3 (2003).

114. *Id.* at 3–15.

115. *Id.* at 3.

116. *Id.*

117. ELSEA, ANALYSIS OF THE MILITARY COMMISSIONS ACT OF 2006, *supra* note 87, at 13 n.61.

118. *Id.* at 13

119. *See, e.g., id.*

120. *See* Tung Yin, *Ending the War on Terrorism One Terrorist at a Time: A Noncriminal Detention Model for Holding and Releasing Guantanamo Bay Detainees*, 29 HARV. J.L. PUB. POLY 149, 205–06 (2005).

discussed in Part III, the Executive Branch has largely used these military commissions inconsistently and without principled legal application.

III. THE EFFECTS OF DIFFERING EXECUTIVE TREATMENT

A. *The Bush Administration: 9/11 and the Catch-All Response*

Following the terrorist attacks on September 11, 2001, Congress responded swiftly and strongly by passing the Authorization for Use of Military Force Against Terrorists (“AUMF”) on September 14, 2001.¹²¹ This resolution granted the President the authority to use “all necessary and appropriate force against those who” had “planned, authorized, committed, or aided” the 9/11 attacks.¹²² President Bush’s administration dubbed the campaign the “Global War on Terror” and his legal team argued it granted him wide and broad presidential war powers because it was “vital to give the Chief Executive the power he needed to keep America safe.”¹²³ Following the passing of the AUMF, the Bush administration began to engage in practices and policies that the international community regarded as conflicting with established international law and principles.¹²⁴

In November 2001, through a military order, President Bush declared that all accused terrorists were to be tried by secret military commissions.¹²⁵ As part of the order, President Bush stated that detainees subject to these commissions would have no recourse in the United States courts to appeal a verdict or be provided any opportunity to obtain relief.¹²⁶ John Bellinger III, legal advisor to the National Security Council under President Bush, criticized the military order, stating a “small group of administra-

121. See Restad, *supra* note 2, at 5, 9 (noting fears of another terrorist attack “permeated the administration”).

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

123. Restad, *supra* note 2, at 6; Scott Wilson & Al Kamen, “Global War on Terror” Is Given New Name, WASH. POST (Mar. 25, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/03/24/AR2009032402818_pf.html.

124. See *id.*; see also COUNCIL OF EUR., GUANTANAMO: VIOLATION OF HUMAN RIGHTS AND INTERNATIONAL LAW? 7, 28 (2007).

125. Military Order of November 13, 2001: Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

126. See *id.* at 57,835–36.

tion lawyers drafted the president's military order establishing the military commissions, but without the knowledge of the rest of the government, including the national-security adviser, me, the secretary of state, or even the C.I.A director."¹²⁷

On February 7, 2002, President Bush classified all members of al-Qaeda, the Taliban, and related forces as unlawful enemy combatants.¹²⁸ As previously discussed,¹²⁹ the unlawful combatant classification strips these groups of the protections afforded to POWs under the Third Geneva Convention.¹³⁰ After an intense legal debate between the State Department, the Department of Justice, the Department of Defense, and the Office of the Vice President, the Bush administration concluded that the Taliban failed to meet the requisite four-pronged test under GPW Article 4(A)(2), discussed above.¹³¹ The disagreement pertained to how the government should apply the four factors and whether combatants were the only groups intended to receive POW status under the GPW.¹³²

Those who disagreed with the Bush administration's position cited instances where the United States gave POW status to certain "non-conventional" groups, most notably the Viet Cong during the Vietnam War.¹³³ They asserted that even if POW status is not granted to the detainees, the detainees should still be afforded the protection of Common Article 3, which, as described above,

127. Restad, *supra* note 2, at 12 (quoting Murphy & Purdum, *Farewell to All That: An Oral History of the Bush White House*, VANITY FAIR (Feb. 2009), <http://www.vanityfair.com/news/2009/02/bush-oral-history200902>).

128. *Id.* at 10; see also Jeffrey F. Addicott, *Efficacy of the Obama Policies to Combat Al-Qaeda, the Taliban, and Associated Forces—The First Year*, 30 PACE L. REV. 340, 348 (2010).

129. See *supra* Part I.A.

130. See Shumate, *supra* note 6, at 28.

131. Restad, *supra* note 2, at 10.

132. *Id.*; see also Gibbons, *supra* note 38, at 1104 ("The executive departments were not unanimously in support of the White House's position that the military and the CIA were not bound in their treatment of detainees by the provisions of the Geneva Conventions and implementing statutory prohibitions. In February 2002, the State Department's Chief Legal Advisor sent a memorandum to the White House legal staff explaining why the Geneva Conventions, and in particular Common Article 3, which deals with the treatment of all detainees, applied to the conflict in Afghanistan. Thus, it is clear that the White House's decision to defy the Supreme Court's announcement in *Rasul v. Bush* and *Al Odah v. United States* was made with full knowledge of the controversial nature of that decision.").

133. See, e.g., George S. Prugh, *Application of Geneva Conventions to Prisoners of War*, INT'L L. OF WAR ASS'N, http://lawofwar.org/vietnam_pow_policy.htm (last visited Dec. 16, 2016).

“contains minimal wartime protections” for all combatants.¹³⁴ Jack Goldsmith, who was a legal adviser for the Department of Defense and later head of the Office of Legal Counsel (“OLC”), stated that amidst the internal legal struggles going on during this time, the result created “a giant hole, a legal hole of minimal protections, minimal law.”¹³⁵

Historians observe that the approach of the Bush administration was simply a continuation of the Reagan administration.¹³⁶ In 1980, amendments to the Conventions, known as Protocol I, attempted to classify non-uniformed fighters who failed to follow the laws of war as POWs and have the Conventions protect them.¹³⁷ The Senate never ratified Protocol I, and this policy determination lived on to become the analysis the Bush administration relied on post-9/11.¹³⁸ Most allied countries did ratify Protocol I by 2001.¹³⁹

Shortly after September 11, 2001, President Bush and Congress determined that the United States was at war. President Bush and his legal team took the declaration of war as the triggering event that activated the Executive’s war powers and interpreted those powers broadly.¹⁴⁰ The Bush administration generally followed one of three options when dealing with terrorists: (1) indefinitely detain the terrorist, classifying them as an enemy combatant, without judicial review; (2) if they were non-citizens, charge the individuals, whether lawful or unlawful combatants, and try them in military tribunals for law of war violations; or (3) classify them as unlawful combatants and try them in Article III federal courts.¹⁴¹ This afforded the President a great degree of

134. Restad, *supra* note 2, at 11 (quoting Murphy & Purdum, *supra* note 127); *see also* Hamdan v. Rumsfeld, 548 U.S. 557, 628–30 (2006) (holding that Article 3’s provisions were applicable); *supra* Part I.A.

135. Restad, *supra* note 2, at 11.

136. *Id.* at 10.

137. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; *see also* Leila Nadya Sadat, *A Presumption of Guilt: The Unlawful Enemy Combatant and the U.S. War on Terror*, 37 DENV. J. INT’L L. & POL’Y 539, 544 n.27 (2008).

138. Restad, *supra* note 2, at 10–11.

139. *Id.* at 11.

140. *Id.* at 10.

141. George C. Harris, *Terrorism, War, and Justice: The Concept of the Unlawful Enemy Combatant*, 26 LOY. OF L.A. INT’L AND COMPARATIVE L. REV. 31, 32 (2003).

breadth when determining whether to bring charges (if any), what kinds of charges to bring, and what forum to choose—all while knowing what law would be applied.

The selection of Guantanamo Bay as the location to detain these individuals was deliberately planned. Ever since acquiring jurisdictional treaty rights in 1903, “all U.S. presidents had taken the position that aliens held [at Guantanamo Bay] were without either statutory or constitutional habeas corpus rights.”¹⁴² Consequently, there was no obligation to provide due process rights to the individuals being held at Guantanamo Bay.¹⁴³ Therefore, according to the Bush administration, because al-Qaeda did not observe the rule of law, the Convention on POW treatment did not apply.¹⁴⁴

What the procedures used at Guantanamo Bay initially lacked, that Common Article 5 requires, is for a competent tribunal to determine the status of the detainee if there is any doubt under GPW Article 4. From the text of GPW Article 4, these “[Common] Article 5 reviews” require an individual determination by a tribunal, not a group determination by an individual.¹⁴⁵ In 2002, the Inter-American Commission on Human Rights asked the United States to hold the required tribunals to determine detainees’ statuses.¹⁴⁶ The administration responded, saying that under the President’s broad executive power, he was justified in making a status determination for the entire group (al-Qaeda), therefore nullifying the need for any Common Article 5 reviews.¹⁴⁷

So, not only did the Bush administration deny the alleged terrorists their review by a competent tribunal, guaranteed and recognized by international law and the international community, but it also denied them any access, regardless of the charge or procedural posture, to the United States court system. Ultimately, as the direction of the Bush administration was taking hold, it also began to be challenged in the courts.¹⁴⁸

142. Restad, *supra* note 2, at 12.

143. *Id.*

144. *Id.*

145. Shumake, *supra* note 6, at 66–68.

146. Restad, *supra* note 2, at 12.

147. *See id.*

148. *Id.* at 16.

In 2004, the Supreme Court in both *Hamdi v. Rumsfeld* and *Rasul v. Bush*, decided against the Bush administration.¹⁴⁹ At issue in *Hamdi* was whether a United States citizen, detained as an enemy combatant due to his affiliations with the Taliban, could seek independent review assessing the legality of his detention.¹⁵⁰ Hamdi was captured in the Afghan combat zone, detained there for a period of time, and then brought to the United States.¹⁵¹ Most of the Justices agreed that President Bush was authorized to detain persons under the AUMF.¹⁵² However, the fundamental disagreement among them was whether the federal judiciary has the right to involve itself in matters generally overseen by the executive and legislative branches, per the Constitution.¹⁵³ Justices O'Connor, Rehnquist, Kennedy, and Breyer jointly held that a "citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision-maker."¹⁵⁴

In response, Secretary of State Donald Rumsfeld set up Combatant Status Review Tribunals ("CSRTs") to provide added procedural due process in this area.¹⁵⁵ These CSRTs were established to determine whether individuals detained at Guantanamo Bay were "properly classified as enemy combatants and to permit each detainee the opportunity to contest such designation."¹⁵⁶

President Bush's second term in the White House exhibited a different legal approach to the war on terror largely due to the Supreme Court's treatment of his administration's agenda towards detaining and prosecuting terrorists. In 2006, the Court is-

149. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 509, 538 (2004) (holding that the United States government has the right to detain enemy combatants, but United States citizen combatants have the due process right to challenge their detainment before an impartial authority); *Rasul v. Bush*, 542 U.S. 466, 470, 473, 483–84 (2004) (holding that the United States' degree of control over Guantanamo Bay justifies the application of habeas corpus rights to detainees in such sovereign territories).

150. *Hamdi*, 542 U.S. at 510–13.

151. *Id.* at 510.

152. *Id.* at 518, 541, 573.

153. See *id.* at 528.

154. *Id.* at 533.

155. Restad, *supra* note 2, at 17.

156. *Id.* This was in response to the Supreme Court calling for more sufficient procedures at Guantanamo Bay. See generally ELSEA & GARCIA, *supra* note 55.

sued a 5–3 ruling in *Hamdan v. Rumsfeld*, which challenged the administration's use of military commissions without congressional authority to do so.¹⁵⁷ *Hamdan* involved a Yemeni national who was part of the Taliban, captured abroad, transported to Guantanamo Bay, and ultimately deemed eligible for trial by a military commission for the offense of conspiracy to commit a violation of the law of war.¹⁵⁸ The Court took issue with the fact that the military commissions had been established by presidential order and not by express authority from Congress.¹⁵⁹ The *Hamdan* Court's main holding was that the CSRTs did not comply with the UCMJ or the law of war, as incorporated in the UCMJ and embodied in the 1949 Geneva Conventions, which the Court held applicable to the armed conflict with al Qaeda.¹⁶⁰ The Court held that the commissions did not meet the requisite standards from a procedural perspective, noting that they needed to be on par with court-martial proceedings, established by the UCMJ, and used for American military officers.¹⁶¹ The Court said that the Bush administration could not proceed with military commissions without congressional approval and that Common Article 3 of the Conventions applied to the Global War on Terror.¹⁶² Consequently, the Court effectively guaranteed detainees the rights of humane treatment and legal process. National Public Radio said that the ruling was "the most important ruling on executive power in decades, or perhaps ever."¹⁶³

Congress quickly reacted to the *Hamdan* ruling, passing the Military Commissions Act of 2006.¹⁶⁴ The aim of the legislation

157. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 593–94 (2006) (holding that the military commission system was not expressly authorized by a congressional act and that the procedures used at Guantanamo did not comport with the requirements under the UCMJ or the Geneva Conventions).

158. *Id.* at 556; see ELSEA, ANALYSIS OF THE MILITARY COMMISSIONS ACT OF 2006, *supra* note 87, at 4.

159. *Hamdan*, 548 U.S. at 590–95.

160. See *id.* at 594–95; ELSEA, ANALYSIS OF THE MILITARY COMMISSIONS ACT OF 2006, *supra* note 87, at 5–6. For a more complete discussion of *Hamdan*, see generally JENNIFER ELSEA, CONG. RESEARCH SERV., R522466, *Hamdan v. Rumsfeld: MILITARY COMMISSIONS IN THE "GLOBAL WAR ON TERRORISM"* (2006).

161. *Hamdan*, 548 U.S. at 624.

162. See *id.* at 631–33.

163. Nina Totenberg, *Hamdan v. Rumsfeld: Path to a Landmark Ruling*, NAT'L PUB. RADIO (Sept. 5, 2006, 12:01 AM), <http://www.npr.org/templates/story/story.php?storyId=5751355>.

164. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600; Addicott,

was to create procedures that the commissions system could use while still remaining within the confines that the Court laid out in *Hamdan*.¹⁶⁵ The legislation, however, functioned as more of a push back against the Court's ruling rather than a grateful appreciation for having been given direction. The Act authorized substantive and procedural aspects of the commissions system that the Court struck down in *Hamdan*, including a broadened definition of "unlawful enemy combatant," narrowed interpretations of the Geneva Conventions, and stripping the Supreme Court of habeas corpus jurisdiction over enemy combatants, among others.¹⁶⁶ Barack Obama, a United States Senator at the time the Act was passed, criticized the Bush administration for timing the legislation close to the midterm elections, so that no one from Congress would oppose the Bill for fear of retaliatory political attack advertisements.¹⁶⁷ Meanwhile, the international community continued to disavow the attempts at progress by the Bush Administration. In 2007, the Council of Europe demanded extension of POW status to detainees or alternatively that the United States at least satisfy Common Article 5 and require a "competent tribunal" to determine their appropriate status.¹⁶⁸

Two years after *Hamdan*, the Court revisited this arena in the case of *Boumediene*, which was also decided against the Bush administration.¹⁶⁹ *Boumediene* involved a consolidation of cases regarding enemy combatants held at Guantanamo Bay who had filed habeas petitions similar to the one at issue in *Hamdan*. The Court held that aliens detained at Guantanamo Bay were entitled to challenge the legality of their detention through habeas petitions and that a provision of the Military Commissions Act of 2006, which stripped the federal courts of jurisdiction, was an unconstitutional suspension of the writ of habeas corpus.¹⁷⁰ As part

Rightly Dividing the Domestic Jihadist, *supra* note 18, at 276 ("Not only did this law strongly refute all reasonable doubt that Congress did believe that the War on Terror was a real war [M]ilitary commissions were established by federal law and authorized to try 'any alien unlawful enemy combatant.'").

165. Restad, *supra* note 2, at 20.

166. *Id.* at 21.

167. *Id.*

168. *Id.*

169. *Boumediene v. Bush*, 553 U.S. 723, 732–33 (2008) (holding that foreign terrorists detained at Guantanamo Bay have constitutional rights to challenge their detention in United States's courts).

170. *See id.* at 732–33.

of the AUMF, the Deputy Secretary of Defense set up CSRTs to initially determine the status, under the Conventions and other international law, which should attach to detainees.¹⁷¹ The Court held that the CSRTs did not meet the standards that would eliminate the need for a habeas review.¹⁷²

However, the case was decided 5–4 with vehement dissents by Chief Justice Roberts and Justice Scalia.¹⁷³ Chief Justice Roberts began his dissent, joined by Justices Scalia, Thomas, and Alito, by stating:

Today the Court strikes down as inadequate the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants. The political branches crafted these procedures amidst an ongoing military conflict, after much careful investigation and thorough debate The majority merely replaces a review system designed by the people's representatives with a set of shapeless procedures *to be defined by federal courts at some future date*.¹⁷⁴

Justice Scalia began his dissent in similar fashion, stating: “Today, for the first time in our Nation’s history, the Court confers a constitutional right . . . on alien enemies detained abroad by our military forces in the course of an ongoing war.”¹⁷⁵ He went as far to say that “[t]he game of bait-and-switch that today’s opinion plays upon the Nation’s Commander in Chief will make the war harder on us. It will almost certainly cause more Americans to be killed.”¹⁷⁶ He also stated that the standard set forth in majority’s opinion would ensure that “how to handle enemy prisoners in this war will ultimately lie with the branch that knows least about the national security concerns that the subject entails.”¹⁷⁷

B. *The Obama Administration: Different Approach, Similar Result*

When Barack Obama was running for president in the 2008 election, he promised he would be the polar opposite of the Bush

171. *Id.* at 733.

172. *Id.* at 792.

173. *Id.* at 730.

174. *Id.* at 801 (Roberts, C.J., dissenting) (emphasis added).

175. *Id.* at 826–27 (Scalia, J., dissenting) .

176. *Id.* at 827–28.

177. *Id.* at 831.

administration when it came to combating terrorism.¹⁷⁸ He vowed that the United States would not engage in the practice of torturing combatants, that Guantanamo Bay would be closed, that military commissions would be no more, that detainees would not be held indefinitely, and that the United States would “regain international respect for the manner in which the United States fought its battles.”¹⁷⁹ Members of President Obama’s administration felt that the Bush administration had created a “double standard” that the United States was applying to international human rights law.¹⁸⁰ They reasoned that the United States applied one standard to its own conduct, and another standard to the rest of the world.

From the outset, President Obama hoped to institute fundamental policy changes in his administration. On his second day in office, President Obama signed an executive order to close Guantanamo as soon as possible, and no later than a year from the date of the order.¹⁸¹ His administration also dropped the term “enemy combatants” and instead began using the term “unprivileged enemy belligerents,” though some felt that this status change amounted to little actual change in application and operation.¹⁸² Hina Shamsi, an attorney for the American Civil Liberties Union, said that “[i]n key elements [the Obama administration’s policies] are a continuation of the Bush administration.”¹⁸³ The Center for Constitutional Rights said, “[t]his is really a case of old wine in new bottles.”¹⁸⁴

In a speech on national security delivered in May of 2009, President Obama criticized the approach of the Bush era and laid out

178. See Restad, *supra* note 2, at 6.

179. *Id.* at 6–7.

180. See *id.* at 28.

181. *Id.* at 29.

182. See John Bellinger, *Bagram: More on Wind-down of Obama’s Guantanamo*, LAWFARE (Nov. 10, 2013, 10:52 PM), <https://www.lawfareblog.com/bagram-more-wind-down-obamas-guantanamo>; Del Quentin Wilber & Peter Finn, *U.S. Retires ‘Enemy Combatant,’ Keeps Broad Right to Detain*, WASH. POST (Mar. 14, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/13/AR2009031302371.html>; William Glaberson, *U.S. Won’t Label Terror Suspects as ‘Combatants,’* N.Y. TIMES (Mar. 13, 2009), http://www.nytimes.com/2009/03/14/us/politics/14gitmo.html?_r=0.

183. Restad, *supra* note 2, at 30 (quoting Randall Mikkelsen, *Guantanamo Inmates No Longer ‘Enemy Combatants’*, REUTERS (Mar. 14, 2009, 5:05 PM), <http://www.reuters.com/article/us-obama-security-combatant-idUSTRE52C59220090314>).

184. *Id.* (quoting Mikkelsen, *supra* note 183).

a framework of his own.¹⁸⁵ While attacking the previous administration for instituting an ineffective and unsustainable “framework that failed to rely on our legal traditions and time-tested institutions, and that failed to use our values as a compass,” President Obama promised to work with Congress moving forward.¹⁸⁶ In the same speech, President Obama laid out his plan for the various groups of Guantanamo detainees, “an announcement that proved to be a harbinger of future difficulties.”¹⁸⁷ President Obama explained that:

[S]ome [detainees] would be tried in federal courts (for violations of federal law); a second group would be tried by reconstituted military commissions (for violations of laws of war); the third group had been ordered released by the courts; the fourth group were those deemed safe to transfer to other countries; and the fifth group were those who could neither be tried nor released—in other words, they would have to be subject to “prolonged detention.”¹⁸⁸

Also in 2009, President Obama announced he would consider restarting the military commission system, though he had voted against it in 2006 and campaigned on abolishing its usage in 2007 and 2008.¹⁸⁹ Congress enacted the Military Commissions Act of 2009, improving upon the MCA of 2006.¹⁹⁰ The 2009 amendments “provide[] additional procedural safeguards, including tighter restrictions on the admission of hearsay and additional protections against the use of coerced evidence, [and] maintains the same substantive offenses [from the MCA of 2006].”¹⁹¹ It also set Common Article 3 of the Conventions as the baseline treatment to be afforded to detainees.¹⁹² The MCA of 2009 defined the Obama administration’s new status of “unprivileged enemy belligerent” as “someone who either engaged in hostilities against the United States or its coalition partners; or someone who purposefully and

185. See Barack Obama, Remarks by the President on National Security (May 21, 2009), <https://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09>.

186. *Id.*

187. Restad, *supra* note 2, at 28.

188. *Id.* at 28–29.

189. *Id.* at 5–7, 30; see *supra* notes 178–79 and accompanying text.

190. See Military Commissions Act of 2009, Pub. L. No. 111-84, § 1801–07, 123 Stat. 2190, 2574 (codified at 10 U.S.C. § 948a) (2012); see also Addicott, *Rightly Dividing the Domestic Jihadist*, *supra* note 18, at 276 (noting the MCA of 2009 “provided some additional due process protections for the accused”).

191. See Hafetz, *supra* note 71, at 700.

192. Restad, *supra* note 2, at 30–31.

materially supported hostilities against the United States or its coalition partners.”¹⁹³

Though the new MCA was an improvement upon the first and provided a more appropriate venue for trying law-of-war violations, human rights activists maintain that it is a “substandard system of justice.”¹⁹⁴ Morris Davis, a former prosecutor at Guantanamo Bay, argued that military commissions were not working and federal courts would provide a quicker, more efficient, and more effective method.¹⁹⁵ In taking this position, he noted that there have only been six military commission trials from 2001 to 2012, and that two of those six were horrible war criminals that have served their shorter military commission sentences and are now in their home countries.¹⁹⁶ During this time, hundreds of terrorism-related cases have been successfully tried in federal courts, and usually resulted in higher sentences than those from military commissions by a wide margin.¹⁹⁷

Eventually, President Obama began to shift his approach to the federal justice system. In November of 2009, his administration announced that Khalid Sheikh Mohammed, the self-proclaimed mastermind of September 11, and four others were to be tried in federal court in New York.¹⁹⁸ However, in a fashion void of clarity, President Obama announced five others were to be tried in a military commission.¹⁹⁹ When Attorney General Eric Holder announced this decision, the MCA of 2009 had already

193. *Id.* at 31.

194. *US: New Legislation on Military Commissions Doesn't Fix Fundamental Flaws*, HUMAN RIGHTS WATCH (Oct. 8, 2009), <https://www.hrw.org/news/2009/10/08/us-new-legislation-military-commissions-doesnt-fix-fundamental-flaws>.

195. See Morris Davis, *Guantanamo's Deepening Failure*, SALON (Feb. 7, 2012, 11:00 AM), http://www.salon.com/2012/02/07/guantanamos_deepening_failure/.

196. *Id.*; see also Restad, *supra* note 2, at 31.

197. Davis, *supra* note 195; see Gibbons, *supra* note 38, at 1112 (“[N]early 450 alleged terrorists have been tried in the federal courts, and the conviction rate is 87 percent.”). See generally *Getting Away With Torture, the Bush Administration and Mistreatment of Detainees*, HUMAN RIGHTS WATCH 1–4 (2011), <https://www.hrw.org/report/2011/07/12/getting-away-torture/bush-administration-and-mistreatment-detainees> (summarizing the practices of the Bush administration); Editorial, *Politics Over Principle*, N.Y. TIMES (Dec. 15, 2011), <http://www.nytimes.com/2011/12/16/opinion/politics-over-principle.html?r=0> (commenting on the Obama administration).

198. See Restad, *supra* note 2, at 31; see also Charlie Savage, *Accused 9/11 Mastermind to Face Civilian Trial in N.Y.*, N.Y. TIMES (Nov. 13, 2009), <http://www.nytimes.com/2009/11/14/us/14terror.html>.

199. Savage, *supra* note 198; see Gibbons, *supra* note 38, at 1112.

been signed into law and “all unlawful enemy combatants that had violated the law of war . . . should be processed for prosecution by means of a military commission, not a domestic criminal trial,” adding to the lack of clarity in bringing others to federal court.²⁰⁰

This announcement was a turning point for the Obama administration’s agenda for combating terrorism, and was a substantial policy shift from the Bush administration. Republicans were furious with the decision and publicly attacked President Obama for such a drastic shift in a sensitive realm of American politics.²⁰¹ Even local New York politicians on both sides of the aisle disliked the idea.²⁰² The civilian population was abhorred with the thought of bringing terrorists into their own courts and affording terrorists the constitutional guarantees one receives when they enter the United States and are placed in our courts.²⁰³ President Obama reassured the population that these concerns and feelings of uneasiness would go away when Mohammed was sentenced to death.²⁰⁴ Unfortunately for President Obama, the pressure did not subside and New York politicians’ resistance compelled Attorney General Eric Holder to move the trial out of Manhattan.²⁰⁵

Two years later, in March 2011, President Obama lifted the self-imposed freeze on new military commission trials at Guantanamo Bay.²⁰⁶ Following the Republican victories in November of 2011, Congress voted to prohibit the transfer of any Guantanamo prisoners to the United States.²⁰⁷ Consequently, President Obama lost his chance to try Mohammed and the four others anywhere in the United States. On April 4, 2011, Holder stated that the five

200. See Addicott, *Rightly Dividing the Domestic Jihadist*, *supra* note 18, at 289.

201. See *id.* at 288–89.

202. See *id.*

203. *Keep Terrorists Out of Civilian Courts*, AMERICAN CTR. FOR LAW & JUSTICE, <http://aclj.org/war-on-terror/keep-terrorists-out-of-civilian-courts-582> (last visited Dec. 16, 2016); Geller, *supra* note 83.

204. See Restad, *supra* note 2, at 32.

205. *Id.*; see Addicott, *Rightly Dividing the Domestic Jihadist*, *supra* note 18, at 288–89 (“[T]he outcry from the American people was so great that the Obama Administration was forced to suspend the decision . . .”).

206. See Evan Perez, *Obama Restarts Terrorism Tribunals*, WALL ST. J., Mar. 8, 2011, at A1.

207. See Restad, *supra* note 2, at 32, 39.

individuals would be tried in a military commission at Guantanamo Bay.²⁰⁸

C. *Where Does this Inconsistency Leave Us?*

As President Obama's tenure as Commander-in-Chief comes to an end, the question of how and why we find ourselves in the current legal and jurisdictional predicament for combating terrorism is difficult to answer. It is difficult to parse out because although the approaches have been similar in some ways, the primary difference is Obama's use of federal courts to try non-citizen, and even combatant, terrorists.²⁰⁹

As one can see, President Obama fell short of the promises he ran on during his campaign. For instance, though he banned waterboarding, "he has not managed to close Guantanamo, end military commissions, or solve the problem of detainees being held indefinitely."²¹⁰ President Obama has even opposed his previous views through action, signing into law the National Defense Authorization bill in 2011, which "makes indefinite detention of terror suspects explicitly lawful."²¹¹ However, he and his administration did make progress with the MCA of 2009, which showed that his Justice Department was more accepting of international law and integrating it into the American approach. The Justice Department also prosecuted a large number of terrorists in federal courts, garnering effective results to put actual terrorists behind bars.

208. *See id.* at 32. For a recent, interesting development on judicial interpretation of the MCA, see the D.C. Circuit's en banc opinion and concurrences, in *Al Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014). The case overruled *Hamdan v. United States (Hamdan II)*, 696 F.3d 1238 (D.C. Cir. 2002) regarding the ability of the MCA to prosecute conduct that occurred before its inception. The concurring opinions of Judges Brown and Kavanaugh show deference to the use of commissions and their place in our judicial system. *See Hafetz, supra* note 71, at 703–06 (summarizing majority and concurring opinions).

209. *See Addicott, Rightly Dividing the Domestic Jihadist, supra* note 18, at 287–88 (discussing Obama's use of federal courts and downplaying the law of war); *see, e.g., "Underwear Bomber" Umar Farouk Abdulmutallab Handed Life Sentence*, THE GUARDIAN (Feb. 16, 2012), <http://www.theguardian.com/world/2012/feb/16/underwear-bomber-sentenced-life-prison>. *See generally* Holder, *supra* note 79. The irony of this approach is that, though the choice of federal courts can be justified as one based in human rights and due process, it can just as equally be justified behind closed doors as being about desire for convictions with longer sentences.

210. Restad, *supra* note 2, at 7.

211. *Id.*

The Obama administration took an important stance in its respect for, and implementation of, international law and standards concerning the detainment and prosecution of terrorists. However, in the end, the administration chose an easier route to effectuate results rather than putting the time and resources into fixing a system that needed tweaking and updating. The amendments to the MCA of 2009 were important, but the choice to make Article III federal courts the predominant venue to try non-citizen combatant terrorists put the United States on a legally unsteady and publicly condemned platform.

President Bush and his administration were by no means perfect in their approach. They established Guantanamo Bay, despite its questionable international legality and uncertainty for how the international community would receive it. They also began the military commission system without Congressional involvement and rendered ineffective the applicability of the Geneva Conventions.²¹² The administration's inability to alter their course in light of Supreme Court decisions and other problems became apparent. Supporters of President Bush would argue that when President Obama put forth the MCA of 2009, he "placed himself squarely behind this post-9/11 legal edifice" and, in a way, agreed with the Bush administration's approach to the commission system.²¹³

Regardless of the political and policy debates between President Bush and President Obama, it is tough to put aside the difficulties that Congress, the Judiciary, and the public have faced in these grand scale shifts of approach, policy, and execution that our executives have used to prosecute terrorists. For an area that will play an increasingly important role both domestically and internationally in the future, American officials must lead with a *more balanced and consistent approach*. A continuance of grand schematic shifts every four to eight years will negatively affect our ability to legally combat terrorism and be an international leader in doing so. The effects of this inconsistency are widespread. What follows is a proposed solution to achieve a legally-based, principled application of the law to eliminate this inconsistency and bring America to the forefront of legal initiatives to effectively and humanely prosecute terrorists.

212. *Id.* at 10–12.

213. *Id.* at 38.

IV. THE NEED TO DISTINGUISH

A. *Why Distinguishing the Type of Terrorist Will Mean Consistent Application*

As this comment has shown, the only consistent element in our nation's approach to trying terrorists has been its inconsistency. Part III discussed the main driving force behind such inconsistencies, the Executive Branch.²¹⁴ Presidents Bush and Obama turned an area that should be based on principled application of domestic—but also largely influenced by international—laws of war into just another topic for basic party politics.²¹⁵ The solution this article presents is intended not to strip any constitutional power from the President, but to create consistency in an area that demands it. There are certain topics which transcend the preferences of President of the United States, especially when they involve international players on an international scale attempting to devise international solutions to international problems.²¹⁶ This is one of those areas. The United States often takes charge in leading the global community and setting the example moving forward, and it has the same opportunity here.

The solution this comment proposes is based on a fundamental concept that—from a purely legal perspective—all terrorists are not created equal, and should not be treated equally in their trial *venue*.²¹⁷ For a long time, both the legal courts and court of public opinion have put all terrorists into a single group.²¹⁸ We have tended to define terrorists purely from their overarching goal, rather than the means by which they achieve that goal.²¹⁹ Though

214. See *supra* Part III.

215. See Restad, *supra* note 2, at 6–7.

216. Some examples might be world financial crises, combating communism, fighting a world war, international efforts on climate change, countries working together on anti-corruption efforts, and, of course, countries working together to fight terrorism and capture terrorists.

217. See generally Addicott, *Rightly Dividing the Domestic Jihadist*, *supra* note 18 (attacking a similar idea, but using different approaches and justifications).

218. See Geoffrey S. Corn, Hamdan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict, 40 VAND. J. TRANSNAT'L L. 295, 296 (2007) (advocating for updates to the law in response to the changing nature of warfare). See generally Shumate, *supra* note 6, at 3 (discussing updates to the law of war).

219. See Addicott, *Rightly Dividing the Domestic Jihadist*, *supra* note 18, at 262–63, 265.

their overarching goal is terrifying, unjustified, and threatening to the civilized world, their means can vastly differ. Criminal defendants and enemy combatants are prosecuted on their specific offenses, not their group mentality or ideological pursuits.²²⁰ This explains, to a degree, why terrorists are not given lawful combatant immunity, why they cannot gain POW status under international law, why our Presidents struggle with where to detain and prosecute them, and why we have our glaring inconsistencies in the first place.

This comment proposes a process that can be embodied in a single question—what kind of terrorist are you? Admittedly, the question seems odd at first, but further explanation unfolds the purpose of this question. There are two kinds of terrorists. The first are terrorists that kill innocent civilians in public places, with no military purpose or warfare-based strategic goal.²²¹ The second are terrorists that engage in warfare, within theaters of combat, against military targets (soldiers, service members, members of a tactical force, etc.), and with military objectives.²²² Brothers Dzhokhar and Tamerlan Tsarnaev, responsible for the Boston marathon bombing, are in the first group. Irek Hamidullin is in the second group.

This initial distinguishing element between combatant and non-combatant terrorists is core to the solution provided in this article and should determine where the individual is placed for trial. Non-combatant terrorists, like the Tsarnaev brothers, San Bernadino shooters, and those responsible for September 11, should be tried and prosecuted in an Article III federal court or in a criminal court in the jurisdiction where the harm occurred.²²³

220. See *id.* at 266–68.

221. See, e.g., Michael S. Schmidt & Richard Pérez-Peña, *F.B.I. Treating San Bernardino Attack as Terrorism Case*, N.Y. TIMES (Dec. 4, 2015), <http://www.nytimes.com/2015/12/05/us/tashfeen-malik-islamic-state.html>; Katherine Q. Seeyle, *Dzhokhar Tsarnaev Is Guilty on All 30 Counts in Boston Marathon Bombing*, N.Y. TIMES (Apr. 8, 2015), <http://www.nytimes.com/2015/04/09/us/dzhokhar-tsarnaev-verdict-boston-marathan-bombing-trial.html>.

222. Even the Department of Justice defines “domestic terrorism” and “international terrorism” differently. See 18 U.S.C. § 2331 (2012). There have been other instances of differing definitions and a need to accurately distinguish the “unlawful enemy combatant who uses terror as a tactic of war from the domestic jihadist who uses terror as a tactic of hatred.” Addicott, *Rightly Dividing the Domestic Jihadist*, *supra* note 18 at 269–70, 272 (2012).

223. See Addicott, *Rightly Dividing the Domestic Jihadist*, *supra* note 18 at 283 (dis-

Irek Hamidullin, and other combatant terrorists engaging in warfare, should be tried and prosecuted in military commissions. The two groups, from a legal perspective, are quite different. One is a radical civilian and the other a modern-day combatant soldier. Their conduct, their purposes, where their acts occur, whom they harm, and the laws it does or does not violate, are all vastly different compared to the average differences between defendants.²²⁴

There are, of course, gray areas where distinguishing between combatant and non-combatant terrorists would not be as simple to effectuate. These differences can be settled based upon: (i) the conduct the individual is engaged in when apprehended and its purpose; (ii) whether the target is civilian or military;²²⁵ (iii) the location of the activity; and (iv) whether the individual is acting alone or with an organized force with a semblance of a command structure. These factors provide only a few examples. In fact, there are a multitude of factors that could go into this determination, creating a totality-of-the-circumstances type of inquiry, where, applying these facts to a legal standard, the combatant or non-combatant nature predominates and that determination is made. The point of this determination—to distinguish the type of terrorist—is to distinguish these individuals by applying *facts* to an *objective* standard or inquiry defined by law, and *not* by the political gamesmanship of Presidents.

In light of these differences between terrorists, their venue for trial should be different. As an expert in the field put it, “[t]he inability to set bright lines of distinction between al-Qaeda unlawful enemy combatants and domestic jihadists is not just a failure in definition; it is a failure in leadership and does tremendous damage to America’s commitment to abide by the proper rule of law.”²²⁶ This initial determination provides a clear and easily implementable mechanism that can eliminate the inconsistency that has plagued this legal minefield for the past decade.

cussing the main federal statutes used to prosecute domestic terrorists).

224. *See id.* at 262 (“If the American government cannot properly differentiate between an enemy combatant and a domestic criminal, it is little wonder that attendant legal positions associated with investigation techniques, targeted killings, arrest, detention, rendition, trial, and interrogation are subject to never-ending debate.”).

225. This is not to say that someone targeting civilians could not be a combatant terrorist.

226. Addicott, *Rightly Dividing the Domestic Jihadist*, *supra* note 18, at 264.

B. *Military Commissions Must Prosecute Combatant Terrorists*

In order to implement such a mechanism, military commissions must remain a venue option for trial. Military commissions are able to prosecute combatant terrorists.²²⁷ As explained in Part II, military commissions have steadily improved the procedural guarantees and overall due process afforded to the enemy combatants brought there for trial.²²⁸ The commissions instituted in 2004 were too closed off, lacked procedural sufficiency, put defendants at a disadvantage at trial, and did not garner support or consensus from both sides of the aisle, much less the international community as a whole. However, the commissions have been moving in the right direction ever since. Obviously, when it comes to needing a solution to satisfy a large group of constituents, not everyone is going to be happy. Plenty of people, from the international community to United States's own elected officials, heavily criticize both the commissions-based approach and the Article III federal court approach. The commissions must maintain their structure as is, but also be willing to listen to the international community when relevant updates are necessary. Compromise must be garnered for consistency to be obtainable. The commissions represent "a flexible construct that Congress should have broad latitude to interpret to advance United States security interests, including through broad criminal jurisdiction in military commissions."²²⁹

First, military commissions are capable of providing a fair venue and can meet all of the requirements that international law demands. For instance, the commissions are capable of making the initial determination as to whether an individual is a combatant or non-combatant terrorist. Also, pleasing to the international community, military commissions making this initial determination satisfy the Article 5 requirement under the Conventions that

227. See Kenneth Anderson, *What to Do With Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantánamo Bay Naval Base*, 25 HARV. J.L. & PUB. POL'Y 591, 593–94 (2002).

228. See *supra* Part II; see also Warren Richey, *Obama Endorses Military Commissions for Guantánamo Detainees*, CHRISTIAN SCI. MONITOR (Oct. 29, 2009), <http://www.csmonitor.com/USA/Justice/2009/1029/p02s01-usju.html>; Beth Van Schaack, *Military Commissions Act of 2009: New AND Improved?*, INTLAWGRRLS (Oct. 28, 2009), <http://www.intlawgrrls.com/2009/10/military-commission-act-of-2009-new-and.html>.

229. Hafetz, *supra* note 71, at 706.

a “competent tribunal” determine the individual’s status.²³⁰ If it is determined that the terrorist is a combatant, the commission is well-suited to try the combatant in a fair trial—affording the accused all the procedural guarantees and due process needed in light of the amendments to the MCA. It is important to note here that this solution does not, in any way, aim to change the appeal rights of the defendants tried before the commissions. Maintaining the rights to appeal to the CMCR, D.C. Circuit, and United States Supreme Court should remain.

Second, using military commissions makes more sense from a legal expertise perspective. Military judges will be applying military law, the law of war—which has elements of international law throughout—to military actors being tried for conduct in violation of those laws. Combatant terrorists are in violation of the international law of war, so they should be tried for such conduct in the venue best suited to correctly interpret the applicable law. Non-combatant terrorists are in violation of domestic criminal law, so Article III federal judges are best suited to interpret those laws. The Honorable Henry Hudson, presiding over the Hamidullin trial, stated at the jurisdictional motion hearings: “I’m obviously blazing a new frontier here,” and “[t]his is somewhat of a clouded issue, murky at best.”²³¹ He is not the first Article III federal judge to make such statements.²³² Even if the MCA is not perfect, it has steadily improved over time and provides the correct legal mechanism to provide clarity and consistency moving forward.²³³ This decision, where to try terrorists, must be based on principled application of the law, not whatever party is in the White House or the agenda of a single individual, even if that individual is elected.

230. See *supra* Part I.

231. Cochrane, *supra* note 55.

232. See Jeffrey Addicott, *Second Circuit’s Decision Provides Unique Window Into Enemy Combatant Decisions*, JURIST (Nov. 26, 2013), <http://jurist.org/forum/2013/11/jeffrey-addicott-ghailani-combatant.php>. (noting the “obvious ‘discomfort’ that federal judges encounter when mixing law of war concerns with domestic criminal process”).

233. Addicott, *Rightly Dividing the Domestic Jihadist*, *supra* note 18, at 277 (“[B]oth congressional acts [MCA 2006 & 2009] fully acknowledge the existence and validity of the unlawful enemy combatant and that the proper rule of law to apply is not domestic criminal law but rather the law of war.”); see also Richey *supra* note 228; Van Schaack, *supra* note 228.

Third, federal courts have been used not for their expertise in handling the law of war, but simply because they garner convictions and afford non-citizen defendants constitutional rights that normally only come with United States citizenship. President Obama's plan to use Article III courts with non-combatant terrorists, which he has done,²³⁴ is in line with this solution. However, his administration diverged from that path when it decided to bring Hamidullin, a combatant terrorist, to an Article III court for trial.

Proponents who favor Article III courts favor them largely for one reason—results.²³⁵ The argument is that because military commissions have gotten fewer convictions or that the convictions get reversed on appeal, that the commission system is irreversibly flawed. Alternatively, because Article III courts get more convictions and longer sentences, they are better. First, if we judge a criminal system on its ability to get convictions alone, that brings up concerns for its ability to provide a fair, impartial venue to apply the law. Simply because Article III courts are getting “results” does not mean that they are the *right* results. The commission system has shown its ability to be adaptable by providing added procedural protections. Applying the law of war to terrorist soldiers in a completely different forum does not warrant giving them the exact same procedural guarantees afforded to citizen criminals. Instead, they should be afforded the procedures and due process that international law demands. The commissions are now better suited to meet these demands and thus, should be used.

C. *Why Article III Courts Are Not the Answer for Combatant Terrorists*

There are multiple practical and policy based reasons why federal courts are not, and commissions are, better suited to handle combatant terrorist trials. Practically speaking, the continued use of Article III courts in the future will further muddle United States military law, the law of war, and international law with domestic federal law, ultimately confusing judges at all procedur-

234. See, e.g., *In re Tsarnaev*, 780 F.3d 14, 15 (1st Cir. 2015).

235. See Davis *supra* note 101; Gibbons, *supra* note 38, at 1112 (“[N]early 450 alleged terrorists have been tried in the federal courts, and the conviction rate is 87 percent.”).

al levels. Academics have warned of the infusing of international law and other types of law into judicial decision-making.²³⁶ Further, military judges and military attorneys are better suited, have been given the appropriate training and resources to handle such matters, and understand the true operation of military the law and how to interpret it.

Second, the use of Article III courts allows for politicized forum shopping on behalf of the executive. The President having the choice of forum is not the problem, but when political reasons get infused into the decision, it stains the process. The choice must be principled—the law of war and international law can provide that. When it is not a choice made from clear legal principles to be consistently applied, it transforms the existing uneasiness associated with forum shopping into something worse by diminishing the hope for consistent application.

Third, an argument favoring Article III venue is that commissions do not allow for jury trials, and that this is an important element to notions of a fair trial and fair procedure. However, a counterargument can be made that a civilian trial in a federal court is less fair and more likely to convict a terrorist than a military commission.²³⁷ After a two-week trial, the jury in *Hamidullin* needed only eight hours to find him guilty of all fifteen counts, the majority of which were conspiracy and attempt charges that were largely supported by circumstantial evidence.²³⁸

Lastly, federal courts are not as capable of dealing with highly classified military information as military courts are. The Classified Information Procedure Act (“CIPA”) governs the handling and monitoring of all sensitive information used for litigation purposes between litigants.²³⁹ Though CIPA is effective, it does not quell concerns of airing out information in a full-blown trial that the prosecution or defense wishes to use. If information is used at trial, it becomes a part of the record and is publicly available information. When it comes to cases prosecuting combatant

236. See generally Eugene Volokh, *Foreign Law in American Courts*, 66 OKLA. L. Rev. 219 (2014) (stating there are times when American law should not reference foreign law).

237. Gibbons, *supra* note 38, at 1112 (“[N]early 450 alleged terrorists have been tried in the federal courts, and the conviction rate is 87 percent.”)

238. See Green, *supra* note 64.

239. See Classified Information Procedures Act, 18 U.S.C. app. III §§ 1–16 (2012 & Supp. II. 2015).

terrorists, the United States does not want to publicize sensitive information that any individual or group could use for harmful purposes. Military commissions are closed proceedings and much better suited at handling and protecting sensitive information, especially when a majority of the information used to prosecute a terrorist consists of such information.

D. To Reach Effective Compromise and Consistency, The Law of War Must be Modernized

The general consensus regarding terrorists is that they do not get POW status under the Geneva Convention because they fail to meet the test laid out in Article 4 of the GPW and because the Conventions do not apply to non-international armed conflicts, as discussed in Part I of this article.²⁴⁰ Though this is the controlling document for the law of war, and had tremendous influence over the drafting of the Military Commissions Act of 2006, it needs to be modernized.

The Conventions were drafted nearly seventy years ago in 1949. Those involved in the drafting process were naturally accustomed to war in that era. However, no one can disagree that warfare today is dramatically different than the warfare of most of the twentieth century.²⁴¹ The idea of giving a combatant terrorist POW status along with the protections that attach to this status has been met with the general assertion that it violates the law of war.²⁴² However, warfare today is different and the laws, like any other in a changing environment, must be updated.

The suggested updates are two-fold: (1) amend the four part test under Article 4 of the GPW, using the initial determination of combatant or non-combatant terrorist to determine status and appropriate venue,²⁴³ and (2) apply the Third Geneva Conven-

240. See *supra* Part I. According to the ICRC and most Geneva Convention interpretations, non-international armed conflicts are “protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State [party to the Geneva Convention].” INT’L COMM. OF THE RED CROSS, *supra* note 39, at 5.

241. See Roy S. Schondorf, *Extra-State Armed Conflicts: Is There a Need for a New Legal Regime*, 37 N.Y.U. J. INT’L L. & POL. 1, 2–3 (2004).

242. See *United States v. Hamidullin*, 114 F. Supp. 3d 365, 373–77 (E.D. Va. 2015).

243. This determination would likely require factors or elements to be applied as Article 4 has done. The suggested amendment is not asking that the factors be removed or

tion—the GPW—to non-international armed conflicts. Most militant groups today would fail to meet the four-part test under the current Article 4 of the GPW, which determines if the individual is a lawful or unlawful combatant. Moreover, most conflicts fought today are no longer traditional, international armed conflicts between two or more states, but instead are non-international armed conflicts between states and/or various groups and factions. If the United States keeps applying these laws as they currently are, it will essentially render the old definitions and rules of law useless because they will never be able to be applied in the modern context. Thus, if we continue on this path, the number of “legal” POWs will be overcome by the number of detained combatant soldiers that can easily fall into the legal no man’s land similar to that which occurred at Guantanamo Bay and resulted in the inconsistent application of legal principles, as previously discussed.

Combatant terrorists are the POWs of today’s wars, and should be treated as such. In order to ensure that they receive fair and humane treatment, along with a fair trial before a military commission, combatant terrorists should receive POW status and the international legal protections that attach. Affording these individuals POW status does not mean the law must condone their organization as a lawful fighting body. Terrorist groups are, and should remain, in violation of the law of war for how they fight wars and the tactics they use against civilians. This requirement is identical to the already existing last prong of the four-part test in Article 4, which states that the individual must be a member of a group that abides by the law of war.²⁴⁴ This prong is important and must remain in order to prosecute these combatant terrorists for violating the laws of war as a group, even if, as in Hamidullin’s case, his individual conduct on the battlefield would not violate the law of war. Being a member of the Taliban, or any other terrorist group, must remain a violation of the law of war. Making this change to the laws of war will not affect the United States’ ability to detain these individuals or interrogate them for valuable information. After all, POWs are allowed, under interna-

wholesale changed, but rather just tweak, add, or remove specific factors in order to make the test applicable to modern warfare.

244. See *supra* Part I.

tional law, to be detained until the end of hostilities.²⁴⁵ This suggestion is similar to the previously discussed Protocol I, which attempted to include “non-uniformed” fighters who failed to follow the laws of war as POWs and protected by the Conventions. Most allied countries have ratified Protocol I, and the United States should as well as it seeks to be a leader combating terrorism. This change also acts as a bargaining chip to ensure more consensus approval from both sides of the aisle as to how our country handles prosecuting terrorists moving forward. Affording combatant terrorists POW protection in conjunction with a principled application of commonsense legal principles to determine trial venue puts the United States on a stronger, more consistent, and more internationally accepted legal footing for prosecuting terrorists.

CONCLUSION

With the devastating terror attacks of September 11 . . . terrorism is no longer exclusively just another criminal offense to be investigated by the [F.B.I.] and handed over to an Assistant U.S. Attorney for prosecution . . . [t]he proper rule of law is not domestic criminal law, but the law of war. This simple common sense distinction is largely lost on a bilious sea of political and ideological distortion.²⁴⁶

As the all-encompassing fight against terrorism wages on, it is important that the United States is consistent with the international community and that they act in concert with one another. The inconsistencies of the past have spun domestic and international policies into a tornado of muddled law and political gamesmanship when prosecuting international terrorists. Allowing for the preliminary distinguishing determination and the proposed amendments to the law of war helps the United States accomplish its goal of a more consistent application of laws—both domestically and abroad—with those of the international community. In addition to gaining consistency, the initial determination practice described above modernizes the law of war and affords combatant terrorists POW status, which allows an easily interpretable policy with potential for establishing uniformity

245. See Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 11, 6 U.S.T. at 3406, 3408, 75 U.N.T.S. at 224, 226.

246. Addicott, *Rightly Dividing the Domestic Jihadist*, *supra* note 18, at 260.

amongst our allies in the fight against terrorism. This streamlined process will lead to less forum shopping, less politicizing the choice of forum decision, and—most importantly—more consistency through the principled application of laws carefully tailored to tackle the realities and challenges of modern warfare.

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