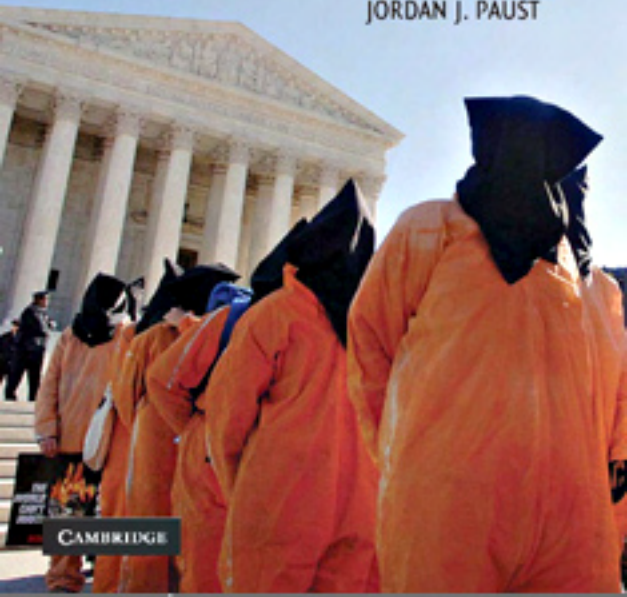
BEYOND THE LAW

The Bush Administration's Unlawful Responses in the "War" on Terror

JORDAN J. PAUST



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This book provides detailed exposition of violations of international law authorized and abetted by secret memos, authorizations, and orders of the Bush administration – in particular, why several Executive claims were in error, what illegal authorizations were given, what illegal interrogation tactics were approved, and what illegal transfers and secret detentions occurred. It also provides the most thorough documentation of cases demonstrating that the President is bound by the laws of war; that decisions to detain persons, decide their status, and mistreat them are subject to judicial review during the war; and that the commander in chief power is subject to restraints by Congress.

Tests for combatant and prisoner of war status are contrasted with Executive claims and the 2006 Military Commissions Act. Special military commissions contemplated by President Bush are analyzed along with the Supreme Court's decision in *Hamdan* concerning their illegal structure and procedures, as well as problems created by the 2006 Military Commissions Act.

Jordan J. Paust is the Mike and Teresa Baker Law Center Professor of International Law at the Law Center of the University of Houston. He received an A.B. and a J.D. from the University of California–Los Angeles and an LL.M. from the University of Virginia, and he is a J.S.D. Candidate at Yale University. Professor Paust has also been a Visiting Edward Ball Eminent Scholar University Chair in International Law at Florida State University, a Fulbright Professor at the University of Salzburg, Austria, and a member of the faculty of the U.S. Army Judge Advocate General's School, International Law Division. He has served on several committees on international law, human rights, laws of war, terrorism, and the use of force in the American Society of International Law. He is currently co-chair of the American Society's International Criminal Law Interest Group. He was the Chair of the Section on International Law of the Association of American Law Schools and was on the Executive Council and the President's Committee of the American Society of International Law. He has published works in several countries, many of which address treaties, customary international law, jurisdiction, human rights, international crimes, and the incorporation of international law into U.S. domestic law.

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JORDAN J. PAUST
University of Houston Law Center



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PREFACE

Within a few months after al Qaeda's unlawful terroristic attacks inside the United States on September 11, 2001, the Bush administration embarked on a "dirty war" response to terrorism involving methods of detention, treatment, and interrogation that Vice President Cheney had generalized as responses on "the dark side." The "dirty war" would involve at least cruel and inhumane treatment of captured human beings and the forced disappearance of various detained persons, despite the fact that cruel and inhumane treatment and forced disappearance are well-known examples of conduct that is absolutely proscribed under several treaties of the United States and customary international law. In fact, both forms of manifest illegality are among recognized peremptory prohibitions of the highest sort that apply in all contexts without exception.

The "dark side" methods, Cheney had argued, should be "done quietly," but they were used so widely and for so many years that complete secrecy was not possible. Opposition by various U.S. military, Federal Bureau of Investigation (FBI), and Central Intelligence Agency (CIA) personnel contributed to increased public exposure. When pictures of outrageous abuse of detainees at Abu Ghraib, Iraq, became widely publicized, the secrecy of Executive plans and authorizations, despite vigorous denial of their existence, began to unravel. Soon a series of classified memos and letters were leaked that demonstrated the role that several lawyers and others had played in attempts to deny international legal protections to al Qaeda and Taliban detainees, to reclassify their status, and to subject them to unlawful coercive interrogation tactics with alleged impunity. Yet, even as these and other evidence of a common plan had been disclosed, the denials, falsehoods, and misdirections continued – a few bad apples at the bottom; we do not

"torture"; conduct depicted in the Abu Ghraib photos (e.g., stripping persons naked, hooding, and use of dogs) was not approved; everyone held at Guantanamo has been properly screened and they are all "terrorists"; there are no secret detention sites; water-boarding is a professional interrogation technique.

One of the memos was a February 7, 2002, memorandum by President Bush that authorized the denial of protections under the 1949 Geneva Conventions to every member of al Qaeda and the Taliban. The existence of other presidential memos and directives authorizing at least cruel and inhumane treatment and the secret detention and disappearance of human beings was reported in 2004, but greater details had emerged by the time President Bush publicly admitted in September 2006 that, indeed, "tough" interrogation tactics and secret detentions had been approved and would be continued by the CIA. These and other actions by the Bush administration sparked debate and litigation with respect to several matters of great significance under international, constitutional, and federal statutory law. In addition to creating individual civil and criminal responsibility for violations of international law, dirty war tactics have degraded this country, its values, and its influence. They have degraded those who used them and degraded those who did not oppose their use. As patriots of democratic freedom understand, they threaten our democracy and the rule of law.

This book provides a detailed exposition of the types of violations of treaties of the United States and customary international law authorized and abetted by previously secret memos, letters, directives, authorizations, and orders of President Bush, Secretary of Defense Rumsfeld, White House Counsel Gonzales, and various other lawyers and officials within the Bush administration – especially in Chapters One and Two. These chapters demonstrate why several of the claims in such memos were in serious and manifest error; what type of illegal authorizations and orders were actually given by the President, the Secretary of Defense, and various military commanders at Guantanamo and in Iraq; what type of other memos and authorizations existed in support of a common plan to violate the Geneva Conventions, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and human rights law; what type of illegal interrogation tactics were approved and used; what type of illegal transfers of persons occurred; and what type of unlawful secret detentions occurred. Chapter One also provides detailed attention to various

laws of war and human rights relevant to treatment and interrogation of detained persons and discusses why relevant rights and duties are absolute and remain so regardless of claims by the President and others to deny coverage to alleged terrorists and to all enemy combatants; why there can be leader responsibility for dereliction of duty in addition to the responsibility of direct perpetrators, aiders and abettors, and those who issued illegal authorizations or orders; and why under our Constitution and venerable judicial decisions and recognitions the President and all within the Executive branch are and must continue to be bound by the laws of war and other relevant international law. As noted, during the long history of the United States, no other President is known to have authorized violations of the laws of war concerning the transfer, treatment, and interrogation of human beings.

Chapter Two documents additional roles played by the President and several members of his administration and additional insight into the history of the inner-circle decisions to use the "dirty war" responses to terrorism that have already partly shaped the President's legacy. It also pays further attention to the details of relevant international legal restraints, the ultimate defeat of those within his administration who sought to make room for "dirty war" tactics in U.S. military manuals, the role of the McCain Amendment attached to the 2005 Detainee Treatment Act, and the role of other binding laws of the United States.

Chapter Three provides detailed inquiry into actual treaty-based and customary international legal tests for combatant status, combatant immunity, and prisoner of war status that should be applied with respect to persons detained during an actual war, such as those in Afghanistan and Iraq. These are contrasted with some of the claims made by the Executive to deny any such status and resultant protections to members of the regular armed forces of the Taliban – claims that are not in the interest of U.S. and foreign military personnel who might be captured today or in any future war. Attention is also paid to the fact that the United States cannot be at "war" with al Qaeda as such or with a tactic of "terrorism," certain dangers that can arise if the tests are changed, and relevant misconceptions and confusion evident in the 2006 Military Commissions Act.

The fact that the President is not above the law; that Executive decisions to detain persons, to decide their status, and to mistreat them are subject to judicial review even during actual war; and that the President's commander

in chief power is subject to certain restraints by Congress and to absolute restraints under the laws of war, among other international laws, provide general bases for the detailed inquiry set forth in Chapters Four and Five. Like Section E of Chapter One, these chapters provide pivotal details of law and the numerous judicial decisions that are in complete contrast to the Bush administration's unconstitutional and autocratic commander-above-the-law theory that the President should be able to engage in a "dirty war" unbound by any inhibiting domestic or international law and free from either any or any meaningful judicial supervision. Chapter One, Section E; Chapter Two, Sections C.2 and D; and Chapter Five, Section A provide the most thorough documentation of relevant trends in judicial decision known to date concerning such matters. Because international law is part of the law of the United States, has constitutional moorings, is relevant to the limits of presidential and congressional power, and can influence the content of constitutional and statutory law, some of the legal norms and trends in judicial decision identified are of interrelated and historic concern. They also should provide a basis for analysis of lawful responses to terrorism in the future and law's limitations on Executive power. During war and threats to national security, it is often the judiciary that has maintained the line between lawful and unlawful exercises of Executive power, a line that the Supreme Court maintained in *Rasul*, *Hamdi*, and *Hamdan*.

Chapter Six provides legal analysis of the special military commissions that the Bush administration contemplated for use in a "war" against al Qaeda and the Taliban. Serious shortfalls in the President's 2001 Military Commissions Order and 2002 Department of Defense Rules of Procedure and Evidence are analyzed along with the Supreme Court's landmark decision in *Hamdan* concerning the illegal structure of the military commissions and their unlawful procedures. Finally, structural and procedural problems with the commissions envisioned in the 2006 Military Commissions Act are addressed along with the reasons why Supreme Court decisions require that the Act be interpreted wherever possible in ways that comply with international law and, in any event, require that treaty law of the United States have primacy.

In this world, dark enough in places, we need not walk against the light. The "dirty war" and its dirty consequences should end.

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Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power, 2007 Utah L. Rev. 345 (2007)

Wayne Law Review

After 9/11, "No Neutral Ground" with Respect to Human Rights: Executive Claims and Actions of Special Concern and International Law Regarding the Disappearance of Detainees, 50 Wayne L. Rev. 79, 83–93 (2004)

Yale Journal of International Law

War and Enemy Status After 9/11: Attacks on the Laws of War, 28 Yale J. Int'l L. 325–35 (2003)

CHAPTER ONE

EXECUTIVE PLANS AND AUTHORIZATIONS TO VIOLATE INTERNATIONAL LAW CONCERNING TREATMENT AND INTERROGATION OF DETAINEES

A. INTRODUCTION

A common plan to violate customary and treaty-based international law concerning the treatment and interrogation of so-called terrorist and enemy combatant detainees and their supporters captured during the U.S. war in Afghanistan emerged within the Bush administration in 2002. The plan was developed within months after the United States had used massive military force in Afghanistan on October 7, 2001, against local members of al Qaeda and "military installations of the Taliban regime"[1] during the war in Afghanistan that is still ongoing. It was approved in January 2002 and led to high-level approval and use of unlawful interrogation tactics that year and in 2003 and 2004. A major part of the plan was to deny protections under the customary laws of war and treaties that require humane treatment of all persons who are detained during an armed conflict, regardless of their status and regardless of any claimed necessity to treat human beings inhumanely. The common plan and authorizations have criminal implications, as denials of protections under the laws of war are violations of the laws of war, which are war crimes.[2]

B. THE AFGHAN WAR, LAWS OF WAR, AND HUMAN RIGHTS

The October 7 Afghan war became an international armed conflict between U.S. combat forces and the Taliban regime, which had been a *de facto*

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government in control of some 90 percent of the territory of Afghanistan and had been recognized by a few states as the *de jure* government of Afghanistan.[3] The Taliban regime also had been involved in a belligerency with the Northern Alliance, an armed conflict to which the general laws of war applied even before U.S. entry into Afghanistan in October 2001.[4] Moreover, it was reported that during the belligerency thousands of members of the regular armed forces of Pakistan were involved in the armed conflict in support of the Taliban,[5] a circumstance that also had internationalized the armed conflict before to the U.S. intervention.

During an international armed conflict such as the war between the United States and the Taliban regime, all of the customary laws of war apply.[6] These also apply during a belligerency.[7] Customary laws of war include the rights and duties reflected in the 1949 Geneva Conventions,[8] which had been, and still are, treaties that are binding on the United States and Afghanistan and their nationals.[9] Common Article 1 of the Geneva Conventions expressly requires that all of the signatories respect and ensure respect for the Conventions "in all circumstances."[10] It is widely recognized that common Article 1, among other provisions, thereby assures that Geneva law is nonderogable, and that alleged necessity poses no exception[11] unless a particular article allows derogations on the basis of necessity.[12] Article 1 also provides that the duty to respect and to ensure respect for Geneva law is not based on reciprocal compliance by an enemy[13] but rests on a customary *obligatio erga omnes* (an obligation owing by and to all humankind)[14] as well as an express treaty-based obligation assumed by each signatory that is owing to every other signatory whether or not they are involved in a particular armed conflict.[15] Furthermore, Article 1 ensures that reprisals in response to enemy violations are not permissible.[16] Each recognition above assures that, indeed, as expressly mandated in Article 1, the rights and duties set forth in the Geneva Conventions must be observed "in all circumstances."

Common Article 3 of the 1949 Geneva Conventions is an example of the customary and treaty-based law of war[17] that provides certain rights and duties with respect to any person who is not taking an active part in hostilities, thus including any person detained whether or not such a person had previously engaged in hostilities and regardless of the person's status. Common Article 3 also happens to expressly require that all such persons "shall in all circumstances be treated humanely," thereby assuring

that humane treatment is required regardless of claimed necessity or other alleged excuses. Although common Article 3 was developed in 1949 to extend protections to certain persons during an insurgency or armed conflict not of an international character,[18] common Article 3 now provides a minimum set of customary rights and obligations during any international armed conflict.[19]

Under the Geneva Conventions, any person who is not a prisoner of war has rights under the Geneva Civilian Convention, and there is no gap in the reach of at least some forms of protection and rights of persons.[20] For example, as noted, common Article 3 assures that any person detained has certain rights "in all circumstances" and "at any time and in any place whatsoever," whether the detainee is a prisoner of war, unprivileged belligerent, terrorist, or noncombatant.[21] Such absolute rights include the right to be "treated humanely"; freedom from "violence to life and person";[22] freedom from "cruel treatment and torture";[23] freedom from "outrages upon personal dignity, in particular, humiliating and degrading treatment";[24] and minimum human rights to due process in case of trial.[25] Article 75 of Protocol I to the 1949 Geneva Conventions assures the same minimum guarantees to every person detained, regardless of status.[26] Although the United States has not ratified the Protocol, the then Legal Adviser to the U.S. Secretary of State had rightly noted that the customary "safety-net" of fundamental guarantees for all persons detained during an international armed conflict found "expression in Article 75 of Protocol I," which the United States regards "as an articulation of safeguards to which all persons in the hands of an enemy are entitled," and that even unprivileged belligerents or terrorists "are not 'outside the law'" and "do not forfeit their right to humane treatment – a right that belongs to all humankind, in war and in peace."[27]

In addition to fundamental *erga omnes* and customary rights and protections under common Article 3 of the Geneva Conventions and customary law reflected in Article 75 of Protocol I, there are several other articles in the Geneva Civilian Convention that provide rights and protections. Article 4 of the Geneva Civilian Convention assures that foreign persons outside the territory of the United States are entitled to protections in Parts II and III of the Convention.[28] Part II applies to "the whole of the populations of the countries in conflict"[29] and protections therein include the duty of parties to an armed conflict, "[a]s far as military considerations

allow . . . to assist . . . persons exposed to grave danger, and to protect them against . . . ill-treatment."[30] Within Part III of the Convention, one finds additional rights and guarantees relevant to the treatment and interrogation of persons. For example, Article 27 recognizes that "[p]rotected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs"; it adds that "[t]hey shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity."[31] Article 31 requires that "[n]o physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties."[32] Article 32 supplements the prohibitions by requiring that parties to the Convention are "prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands . . . [which] applies not only to murder, torture, corporal punishment, mutilation and . . . [other conduct], but also to any other measures of brutality whether applied by civilian or military agents."[33] Article 33 includes the recognition that "all measures of intimidation or of terrorism are prohibited."[34]

Customary and treaty-based human rights are also relevant to the treatment and interrogation of human beings, and human rights law continues to apply during war.[35] Human rights law provides basic rights for every human being and includes the fundamental and inalienable right to human dignity.[36] Some human rights are derogable under special tests in times of public emergency or other necessity,[37] but many human rights are nonderogable and are therefore absolute regardless of claims of necessity during war or other public emergency and regardless of any other putative excuse.[38] Certain human rights are also peremptory *jus cogens* that cannot be derogated from and that preempt any other laws.[39]

Thus, in every circumstance every human being has some forms of protection under human rights law. With respect to treatment and interrogation of human beings, customary and treaty-based human rights law that is nonderogable under all circumstances and is also part of peremptory rights and prohibitions (*jus cogens*) requires that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[40] As customary and peremptory rights and prohibitions *jus cogens*, the prohibitions of torture and cruel, inhuman, or degrading treatment apply

universally and without any limitations in allegedly valid reservations or understandings during ratification of a relevant treaty,[41] such as those attempted with respect to the International Covenant on Civil and Political Rights (ICCPR)[42] or the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[43]

C. EXECUTIVE PLANS AND AUTHORIZATIONS

Despite such clear and absolute requirements under the laws of war and human rights law, the plan within the Bush administration to deny protections under international law that led to approval and use of illegal interrogation tactics rested on what White House Counsel Alberto Gonzales advised President Bush in January 2002 was a supposed "high premium on other factors, such as the ability to quickly obtain information,"[44] supposed "military necessity,"[45] and a claim that a supposedly "new paradigm renders obsolete Geneva's strict limitations on questioning."[46] However, none of these claims could possibly justify the plan to violate Geneva law and nonderogable human rights. Moreover, the Gonzales memo clearly placed the President on notice that the Geneva Conventions provide "strict limitations on questioning," but the President's subsequent decisions and authorizations, coupled with recommendations, decisions, authorizations, and orders of others within the administration and the military, set the common plan to deny Geneva protections and use illegal interrogation tactics in motion.

The 2002 Gonzales memo to the President addressed certain war crimes under one of two federal statutes that can be used to prosecute U.S. and foreign nationals for war crimes.[47] It expressly noted that a war crime includes "any violation of common Article 3 . . . (such as 'outrages against personal dignity')"[48] and rightly warned that "[s]ome of these provisions apply (if the GPW[49] applies) regardless of whether the individual being detained qualifies as a POW," a point that Legal Adviser to the Secretary of State William H. Taft IV had made two days earlier in a letter to John Yoo at the Office of Legal Counsel (OLC), Department of Justice (DOJ): "Even those terrorists captured in Afghanistan . . . are entitled to the fundamental humane treatment standards of Common Article 3 of the Geneva Conventions – the text, negotiating record, subsequent practice and legal opinion

confirm that Common Article 3 provides the minimal standards applicable in any armed conflict."[50]

The plan to deny Geneva protections and to authorize illegal interrogation tactics would be furthered, Gonzales opined, by "[a]dhering to your determination that GPW does not apply."[51] The memo to the President further claimed that "[a] determination that GPW is not applicable to the Taliban would mean that . . . [the federal criminal statute addressed supposedly] would not apply to actions taken with respect to the Taliban."[52] The latter claim is not true in view of numerous judicial decisions throughout our history reviewing Executive decisions concerning the status of persons during war[53] and affirming constitutionally based judicial power ultimately to decide whether and how the laws of war, as relevant law, apply,[54] points documented in detail in Chapter Four. Nonetheless, the claim is evidence of an unprincipled plan to evade the reach of law and to take actions in violation of Geneva law while seeking to avoid criminal sanctions. All were on notice of what the application of Geneva law required.

As the Gonzales memo noted, the President had previously followed the White House Counsel's advice on January 18 as well as that set forth in a Department of Justice formal legal opinion and the President had decided, in error, that GPW did not apply during the war in Afghanistan.[55] The Gonzales memo noted that "the Legal Adviser to the Secretary of State has expressed a different view," but Gonzales pressed the plan to adhere "to your determination that GPW does not apply" precisely because among the "consequences of a decision to adhere . . . to your earlier determination that the GPW does not apply to the Taliban" would be the supposed avoidance of "Geneva's strict limitations on questioning" so as to enhance "the ability to quickly obtain information." Another supposed consequence would be the avoidance of "foreclosing options for the future, particularly against nonstate actors." Most important, Gonzales supposed, a consequence of the determination would be a "[s]ubstantial reduc[tion] of the threat of domestic criminal prosecution [of U.S. personnel] under the War Crimes Act (18 U.S.C. 2441)" because it "would mean that Section 2441 would not apply to actions taken with respect to the Taliban," and the determination "would provide a solid defense to any future prosecution."[56] As noted above however, Geneva law clearly did apply and the President cannot foreclose judicial recognition of the reach and application of international law.

The day after Gonzales crafted his memo, an outraged Secretary of State Colin Powell sent a memo to the White House Counsel and the Assistant to

the President for National Security Affairs warning that "[t]he United States has never determined that the GPW did not apply to an armed conflict in which its forces have been engaged. . . . [T]he GPW was intended to cover all types of armed conflict and did not by its terms limit its application."[57] Such a warning was reiterated a week later in a memo by the Legal Adviser to the Department of State, William H. Taft IV, to White House Counsel Gonzales:

> The President should know that a decision that the Conventions do apply is consistent with the plain language of the Conventions and the unvaried practice of the United States in introducing its forces into conflict over fifty years. It is consistent with the advice of DOS lawyers and, as far as is known, the position of every other party to the Conventions. It is consistent with UN Security Council Resolution 1193 affirming that "All parties to the conflict [in Afghanistan] are bound to comply with their obligations under international humanitarian law and in particular the Geneva Conventions."[58]

Attorney General John Ashcroft, however, had been opposed to similar advice from the National Security Council and had urged the President to deny applicability of the Geneva Conventions and their protections in an effort to avoid criminal sanctions because:

> a Presidential determination against treaty applicability would provide the highest assurance that no court would subsequently entertain charges that American military officers, intelligence officials, or law enforcement officials violated Geneva Convention rules relating to field conduct, detention conduct or interrogation of detainees. The War Crimes Act of 1996 makes violation of parts of the Geneva Convention a crime in the United States.[59]

The President adhered to the erroneous decision until February 7, 2002 (four months after U.S. entry into the Afghan war), when the White House reversed itself and announced that the Geneva Conventions applied to the war in Afghanistan, but in a memorandum issued on that date the President authorized the denial of protections under common Article 3 of the Geneva Conventions to every member of al Qaeda and the Taliban.[60] This memorandum also authorized the denial of protections more generally by ordering that humane treatment be merely "in a manner consistent with the principles of Geneva" and then only "to the extent appropriate and

consistent with military necessity," despite the fact that (1) far more than the "principles" of Geneva law apply, (2) it is not "appropriate" to deny treatment required by Geneva law, and (3) alleged military necessity does not justify the denial of treatment required by Geneva law. The memorandum's language limiting protection "to the extent appropriate" is potentially one of the broadest putative excuses for violations of Geneva law. Necessarily, the President's memorandum of February 7, 2002, authorized and ordered the denial of treatment required by the Geneva Conventions and, therefore, necessarily authorized and ordered violations of the Geneva Conventions, which are war crimes.

With respect to members of al Qaeda in particular, the White House announced at that time that members of al Qaeda "are not covered by the Geneva Convention" and will continue to be denied Geneva law protections, supposedly because al Qaeda "cannot be considered a state party to the Geneva Convention."[61] As noted soon thereafter, however:

> [t]he White House statement demonstrates remarkable ignorance of the nature and reach of treaties and customary international law. First, any member of al Qaeda who is a national of a state that has ratified the relevant treaties is protected by them. Nearly every state, including Saudi Arabia, is a signatory to these treaties. Second, the 1949 Geneva Conventions are part of customary international law that is universally applicable in times of armed conflict and, as such, protect all human beings according to their terms. Third, common Article 3 provides nonderogable protections and due process guarantees for every human being who is captured and, like common Article 1, assures their application in all circumstances. Also, international terrorism and terrorism in war are not new and clearly were contemplated during the drafting of the treaties.[62]

The Legal Adviser to the State Department had also aptly warned that the portion of the Gonzales memo:

> [s]uggesting a distinction between our conflict with al Qaeda and our conflict with the Taliban does not conform to the structure of the Conventions. The Conventions call for a decision whether they apply to the conflict in Afghanistan. If they do, their provisions are applicable to all persons involved in that conflict – al Qaeda, Taliban, Northern Alliance, U.S. troops, civilians, etc.[63]

The plan involving White House Counsel Gonzales and President Bush evidenced in the Gonzales memo was legally inept for an additional reason. The memo openly admitted the unavoidable fact that "the customary laws of war would still be available. . . . Moreover, even if GPW is not applicable, we can still bring war crimes charges" against members of al Qaeda and the Taliban with respect to violations of the customary laws of war occurring during the war in Afghanistan.[64] Thus, the plan recognized that the customary laws of war apply to the war in Afghanistan and apply to members of al Qaeda and the Taliban, but the plan involved a design and decision to refuse to apply provisions of the Geneva Conventions that provide protections for such persons despite the unavoidable facts: (1) that as treaty law the Geneva protections also apply during the international armed conflict in Afghanistan; and (2) that Geneva protections are also widely recognized as constituting part of the customary laws of war that apply to international armed conflicts like the war in Afghanistan and, thus, to members of al Qaeda and the Taliban during and within that armed conflict.[65] Moreover, the Gonzales memo had paid no attention to similar protections and requirements under customary and treaty-based human rights law.

Behind the Gonzales-Bush plan was a memorandum written on January 9, 2002, that had also addressed possible war crime responsibility of U.S. nationals and designs for attempted avoidance of international and domestic criminal responsibility for interrogation tactics (that would later be approved) by claiming that Geneva law did not protect members of al Qaeda or the Taliban. The memo was written in the Office of Legal Counsel of the Department of Justice by John Yoo and Robert J. Delahunty for William J. Haynes II, General Counsel of the Department of Defense.[66] It was the DOJ memo that had been referred to in the Gonzales memo to President Bush and it was quickly "endorsed by top lawyers in the White House, the Pentagon and the vice president's office"[67] to further the common plan.

The Yoo-Delahunty memo had argued in support of denial of Geneva protections for members of al Qaeda that "the laws of armed conflict . . . [based in] treaties do not protect members of the al Qaeda organization, which as a non-state actor cannot be a party to the international agreements governing war."[68] As noted, however, protection of al Qaeda persons during an armed conflict does not depend on whether al Qaeda is a state actor or a party to law of war treaties.[69] The Yoo-Delahunty memo recognized that violations of common Article 3 of the Geneva Conventions are war

crimes,[70] but argued that the text and historic origins of common Article 3 support their preference that it only applies during a noninternational armed conflict.[71] As noted, however, common Article 3 is now part of customary international law that provides a set of rights and obligations during any international armed conflict.[72] Moreover, the same rights and obligations are mirrored in Article 75 of Protocol I, which the United States recognizes as customary international law applicable during international armed conflicts.[73] Yoo and Delahunty knew that their claim was completely contrary to developments in the customary laws of war recognized by the International Court of Justice and the International Criminal Tribunal for Former Yugoslavia,[74] but they thought that their reliance on a fifty-three-year-old text and "historical context" was preferable[75] despite the fact that it is well known that treaties are to be construed also in light of their object and purpose, subsequent practice, and developments and evolved meanings in customary international law.[76] Moreover, they did not address customary and treaty-based human rights law that provide the same fundamental rights and duties.

With respect to the Taliban, Yoo and Delahunty argued in support of denial of Geneva protections during the war in Afghanistan that Afghanistan "ceased . . . to be an operating State and therefore that members of the Taliban . . . were and are not protected by the Geneva Conventions."[77] Their ploy was hinged on a claim that Afghanistan had ceased to be a state and, thus presumably, had ceased to be a party to the Geneva Conventions. Therefore, U.S. citizens could supposedly ignore "the protections of the Geneva Conventions" and allegedly avoid criminal prosecution for future war crimes.[78] They confused the question of whether Afghanistan existed with the question of whether the Taliban government was a *de jure* or *de facto* government.[79] It did not suit their purpose that foreign states had recognized the Taliban government,[80] that the Taliban controlled some "90% of the country,"[81] that it had a government and could field an army in war, and that it was engaged in a war with the United States, so they downplayed or ignored such features of context. Incredibly, they also argued that even if the Geneva Conventions do not apply, the United States could prosecute members of the Taliban for war crimes, including, illogically, "grave violations of . . . basic humanitarian duties under the Geneva Conventions."[82] Of course, prosecution of members of the Taliban for war crimes is not legally possible if the laws of war do not apply to their actions, and if the laws of

war do apply they will restrain actions of U.S. nationals as well. The same is necessarily true with respect to violations of the Geneva Conventions as such.

Despite their argument, Afghanistan continued to be recognized as a state and a party to the Geneva Conventions;[83] the Taliban regime had been recognized as a *de jure* and a *de facto* government engaged in war;[84] the United Nations Security Council had recognized that the laws of war "and in particular the Geneva Conventions" applied to the war in Afghanistan before the U.S. military intervention and, after the use of military force by the United States in 2001, the Security Council expressly called "on all Afghan forces . . . to adhere strictly to their obligations under . . . international humanitarian law";[85] and although he initially followed the manifestly faulty advice of Yoo and Delahunty, President Bush finally recognized that the Geneva Conventions apply to the war in Afghanistan.[86] The International Committee of the Red Cross[87] and the international community more generally also had recognized the obvious fact that Geneva law applied.[88]

In August 2002, Assistant Attorney General Jay S. Bybee prepared a fifty-page memo for the CIA and addressed to White House Counsel Gonzales that became Executive policy. The memo attempted to justify torture as well as the intentional infliction of pain more generally as interrogation tactics.[89] The Bybee torture memo also argued that the infliction of pain is not necessarily torture.[90] Of course, the point is hardly relevant when Geneva and human rights law expressly prohibit not merely "torture," but also "violence," threats of violence, "cruel" treatment, "physical and moral coercion . . . to obtain information," "physical suffering," "inhuman" treatment, "degrading" treatment, "humiliating" treatment, and "intimidation" during interrogation.[91] Because each form of illegal treatment is clearly and absolutely prohibited under Geneva law, Jay Bybee and all who read the malevolent memo should have been on notice that Bybee's general claim that "necessity and self-defense could justify interrogation methods needed to elicit information . . . and provide justifications that would eliminate any criminal liability"[92] was completely erroneous with respect to Geneva law and war crime responsibility.[93] The claim also would be completely and patently erroneous with respect to both the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[94] and relevant customary, nonderogable, and peremptory human rights law.[95]

Similarly, inquiry whether President Bush and Alberto Gonzales ever condoned "torture" as such without addressing other prohibited conduct would be markedly incomplete.

Later, the media reported that President Bush "signed a secret order granting new powers to the CIA" and "authorized the CIA to set up a series of secret detention facilities outside the United States, and to question those held in them with unprecedented harshness."[96] A year earlier, just five days after 9/11, Vice President Cheney had gone on public television stating the U.S. military might "have to work . . . sort of the dark side" and "[a] lot of what needs to be done here will have to be done quietly, without any discussion, using . . . methods that are available to our intelligence agencies . . . to use any means at our disposal, basically, to achieve our objective."[97] When pressed by the interviewer concerning human rights restrictions placed on intelligence gathering and use of "unsavory characters," Cheney responded that "[y]ou need to have on the payroll some very unsavory characters if . . . you're going to be able to learn all that needs to be learned. . . . It is a mean, nasty, dangerous dirty business out there, and we have to operate in that arena."[98]

D. ILLEGAL INTERROGATION TACTICS

Pictures of outrageous abuse of detainees at Abu Ghraib, Iraq, disclosed in May 2004 demonstrated that some human beings in control of the U.S. military had been stripped naked with hoods placed over their heads and threatened with dogs near their bodies. Were these forms of patently illegal treatment isolated aberrations at the hands of a few errant soldiers or had the tactics of stripping naked, hooding, and use of dogs been approved at highest levels in the Bush administration and the military?

On October 11, 2002, Major General Michael B. Dunlavey, Commander of the Joint Task Force 170, Guantanamo Bay, Cuba, sought approval of various special interrogation tactics from General James T. Hill, Commander, United States Southern Command.[99] The Dunlavey request was in the form of a memorandum that also contained three enclosures bearing the same date: (1) a request for approval of three categories of listed techniques from Lieutenant Colonel Jerald Phifer;[100] (2) a memorandum by Lieutenant Colonel Diane E. Beaver, the Staff Judge Advocate, stating

that the tactics did not violate applicable federal law;[101] and (3) a legal brief by LTC Beaver addressing various tactics in the three categories and recommending approval of each tactic requested by LTC Phifer.[102] Among the Category I tactics requested by LTC Phifer and recommended by LTC Beaver was yelling (but "not directly in his ear or to the level that would cause physical pain or hearing problems").[103] Among Category II tactics were use of dogs, removal of clothing, hooding, stress positions, isolation for up to thirty days, twenty-hour interrogations, and deprivation of light and auditory stimuli.[104] The Category III tactics sought were "use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family," "[e]xposure to cold weather or water," "[u]se of a wet towel and dripping water to induce the misperception of suffocation," and "[u]se of mild, non-injurious physical contact."[105] LTC Beaver dismissed limitations in the Geneva Conventions and "international law" more generally with terse and manifestly faulty reasoning that because detainees are not prisoners of war "the Geneva Conventions do not apply."[106] General Hill forwarded the request to the Chairman of the Joint Chiefs of Staff on October 25, 2002.[107]

On November 27, 2002, Department of Defense (DOD) General Counsel William Haynes prepared an action memo seeking approval by Secretary Donald Rumsfeld of the request from Major General Dunlavey concerning use of specific tactics outlined in enclosures attached to the Dunlavey memo.[108] William Haynes stated that he believed that Deputy "Doug Feith and General Myers . . . join in my recommendation" that the Secretary authorize the specific tactics in Categories I and II, but not an advanced "blanket approval of Category III techniques" beyond one that had been listed in the Dunlavey request, the use of mild, noninjurious physical contact.[109] Secretary Rumsfeld approved the request on December 2, 2002.[110] Thus, by December 2, 2002, Secretary Rumsfeld had approved use of most of the specific tactics recommended in the Dunlavey memo. Sixteen of the approved tactics had not been permitted in a 1992 U.S. Field Manual on Intelligence Interrogations.[111] Among the sixteen tactics were those that are either patently illegal under Geneva and human rights standards or those that could be illegal in particular instances, including stripping detainees naked, use of hoods, use of dogs, yelling, stress positions, isolation for thirty days, light deprivation, and use of loud sounds as interrogation tactics.[112]

On January 15, 2003, Secretary Rumsfeld rescinded his general approval of these tactics, leaving open the possibility of specific approval in specific instances, and directed DOD General Counsel William Haynes to set up a Department of Defense Working Group to consider "exceptional" interrogation tactics and their legal implications.[113] The DOD Working Group, headed by Air Force General Counsel Mary Walker, issued a report on April 4, 2003, that perpetuated the common plan to authorize torture and other coercive measures and to deny protections and violate the Geneva Conventions by reiterating two completely and manifestly false but familiar conclusions within the administration: (1) that members of al Qaeda are supposedly not protected "because, *inter alia*, al Qaeda is not a High Contracting Party to the Convention," and (2) that with respect to members of the Taliban the Geneva Civilian Convention supposedly "does not apply to unlawful combatants,"[114] a phrase that is addressed in some detail in Chapter Three. As late as May 2004, Secretary Rumsfeld told a Senate Committee investigating widely publicized, widespread and criminal interrogation abuses in Iraq and reports of abuse at Guantanamo that the Geneva Conventions apply to all detainees in Iraq but, in his (and the President's) manifestly erroneous view, they do not apply to persons held at Guantanamo because they are all "terrorists."[115] Clearly, such a public message by the Secretary of Defense in the face of war crime abuse can abet criminal activity.

Writing in a prominent newspaper in May 2004, and with the then publicized criminal treatment and interrogation of detainees in mind, John Yoo continued to further the manifestly mistaken mantra of the Bush administration that every member of the armed forces of the Taliban can be denied prisoner of war status and, it would allegedly follow, they can be denied any protections under any portions of any of the Geneva Conventions.[116] In context, such a message also can abet war crime activity. Equally astounding, other DOD officials testified before the Senate Committee that techniques that admittedly were approved for use in Iraq such as use of dogs during interrogation and humiliating treatment did not violate international law.[117] The Senate Committee was told that approved interrogation tactics also included use of "fear up harsh" and "sleep management" up to seventy-two hours,[118] tactics that in given instances can clearly trigger war crime responsibility.

The Judge Advocate Generals of the Armed Services and other military lawyers had protested efforts by the DOD Working Group and others to

authorize such illegal interrogation tactics;[119] but on April 16, 2003, Secretary Rumsfeld approved twenty-four interrogation tactics from among thirty-five recommended by the DOD Working Group for use on detainees at Guantanamo. Secretary Rumsfeld stated that if the U.S. Commander, U.S. Southern Command required "additional interrogation techniques for a particular detainee," he should send a written request to be approved by the Secretary.[120] Some of the tactics had been authorized in the 1992 Field Manual, but others had not been.[121] It has been reported that tactics approved by Secretary Rumsfeld and implemented by Major General Geoffrey Miller at Guantanamo involved the use of dogs for interrogation, stripping persons naked, hooding for interrogation, stress positions designed to inflict pain, isolation in cold and dark cells for more than thirty days, other uses of harsh cold and heat, and the withholding of food.[122] In a given circumstance, some of these approved tactics might not constitute "torture" or "cruel" treatment; but each tactic, including use of "fear up harsh," could reach such a level of illegality and, in any event, it is quite obvious that each can constitute illegal treatment that is "physical suffering," "inhumane," "degrading," "humiliating," a use of "physical or moral coercion," or a use of "intimidation."[123] A tactic that violates any Geneva proscription is a war crime.[124] In the author's opinion, stripping a person naked for interrogation, the use of dogs for interrogation, hooding for interrogation, and the infliction of pain for interrogation are among the tactics that are patent violations of the laws of war that necessarily involve a number of proscribed forms of treatment under Geneva law. They also necessarily violate human rights law and our common dignity.

Decisions of international courts and committees and U.S. Army publications offer guidance concerning interpretation of related proscriptions. For example, in *Ireland v. United Kingdom*,[125] the European Court of Human Rights ruled that British interrogation tactics of wall-standing (forcing the detainees to remain for periods of some hours in a "stress position"), hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink "constituted a practice of inhuman and degrading treatment" proscribed under human rights law.[126] In 1996, the European Court recognized that where a detainee "was stripped naked, with his arms tied behind his back and suspended by his arms . . . [, s]uch treatment amounted to torture."[127] In another case, the European Court stated that treatment was "'degrading' because it was such as to arouse in its victims feelings of fear,

anguish and inferiority capable of humiliating and debasing them."[128] The International Criminal Tribunal for Former Yugoslavia also has identified criteria for determining whether certain conduct constitutes criminally sanctionable "torture"[129] or "cruel" or "inhuman" treatment.[130] Moreover, the Committee Against Torture created under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment has condemned the use of the following interrogation tactics as either torture or cruel, inhuman, or degrading treatment: (1) restraining in very painful conditions; (2) hooding under special conditions; (3) sounding of loud music for prolonged periods; (4) sleep deprivation for prolonged periods; (5) threats, including death threats; (6) violent shaking; and (7) using cold air to chill.[131] Earlier, a U.S. Army pamphlet addressing Geneva and other law of war proscriptions warned that an illegal means of interrogation of a detainee included "dunking his head into a barrel of water, or putting a plastic bag over his head to make him talk," adding: "No American soldier can commit these brutal acts, nor permit his fellow soldiers to do so."[132]

On August 18, 2003, at the request of Under-Secretary Stephen Cambone and Secretary Rumsfeld, Major General Miller was ordered to inspect and aid in upgrading interrogation efforts and tactics in Iraq.[133] During his visit from August 31 to September 9, Major General Miller brought the Rumsfeld April 16, 2003, list of tactics to Iraq and gave them to the Commander of the Joint Task Force-7, Lieutenant General Ricardo Sanchez. General Miller reportedly gave them to General Sanchez "as a potential model," and General Miller's team used them as "baselines."[134] Although conflicting reports exist whether General Miller warned General Sanchez not to apply them to detainees in Iraq, on September 14, 2003, General Sanchez "signed a memorandum authorizing a dozen interrogation techniques beyond Field Manual 34–52 – five beyond those approved for Guantanamo" – and Under-Secretary of Defense Stephen Cambone testified later before a Senate Committee that severe and "stress matrix" tactics, including the use of dogs to intimidate, had been approved by U.S. commanders in Iraq, whereas others added that such measures included use of hoods, "fear up harsh," isolation for longer than thirty days, "sleep management," and "sensory deprivation."[135] On October 12, 2003, the Sanchez memo was revised to exclude certain tactics and General Sanchez has stated that after issuing the revised memo he personally approved long-term isolation in

some twenty-five cases in Iraq.[136] As noted in more detail in Chapter Two, General Karpinski has stated that General Miller was sent to Iraq to assure that coercive interrogation tactics used at Guantanamo were used in Iraq. This is not surprising in view of the additional proof and admissions documented in Chapter Two that there was a common plan devised by high-level members of the Bush administration to use coercive interrogation against detainees in various secret places in a number of foreign countries and in view of President Bush's admission in 2006 that he had indeed approved the use of coercive interrogation tactics and secret incommunicado detention of persons and that this "program" will be continued.

It also was reported by the Independent Panel in 2004 that some fifty thousand persons had been detained at Guantanamo and at some twenty-five sites in Afghanistan and seventeen sites in Iraq,[137] that Rumsfeld's "augmented techniques for Guantanamo migrated to Afghanistan and Iraq where they were neither limited nor safeguarded,"[138] that "the chain of command ignored reports" of abuse,[139] and that "[m]ore than once a commander was complicit."[140] Among the many who were criticized was a high-ranking military lawyer in Iraq, Marc Warren, the CJTF-7 Staff Judge Advocate who failed "to initiate an appropriate response to the November 2003 ICRC [International Committee of the Red Cross] report on the conditions at Abu Ghraib."[141] The Independent Panel also noted that the 2002 DOJ "OLC opinions" had led some commanders and others in Iraq to believe that they could deny Geneva law protections to certain detainees and that General Sanchez approved improper tactics "using the reasoning from the President's memorandum" of 2002.[142] With respect to detainee abuse in Iraq, the International Committee of the Red Cross stated that from the start of the war in Iraq in 2003 they regularly informed highest level officials and others in Iraq that abuse of detainees was occurring and that the ICRC found "a broad pattern . . . and a system" of abuse.[143] Additionally, in January 2004, the ICRC spoke with Secretary Powell, National Security Adviser Condoleezza Rice, and Deputy Defense Secretary Paul Wolfowitz about prison abuse in Iraq and at Guantanamo Bay, Cuba.[144] Newer revelations about interrogation tactics at Guantanamo were revealed in an ICRC report to the Bush administration in July 2004. The ICRC labeled the Guantanamo interrogation process as "an intentional system of cruel, unusual and degrading treatment and a form of torture."[145]

After all of the revelations, reports, and outcry noted earlier and after U.S. prosecution of some low-ranking military personnel with respect to abuse of detainees in Iraq,[146] media reported the continued attempt of the administration to deny protections under the Geneva Conventions to a select group of detainees in Iraq and to transfer persons protected under common Article 3 and other articles of the Conventions from occupied territory to other countries for secret and coercive interrogation.[147] The administration's claim set forth in a previously secret March 19, 2004, draft DOJ memo prepared by Jack L. Goldsmith recognizes that everyone lawfully in Iraq is a protected person under the Geneva Conventions but argues that "protected persons," such as Iraqi nationals, can be transferred "from Iraq to another country to facilitate interrogation, for a brief but not indefinite period," and that persons who are not lawfully in Iraq can be denied protections and transferred to facilitate coercive interrogation.[148] Yet, the denial of protections under common Article 3 with respect to any detainee under any circumstances is a violation of Geneva law and, therefore, a war crime; and the transfer from occupied territory of any "protected person" under the Geneva Civilian Convention who is not a prisoner of war, such as those protected under common Article 3, is a war crime in violation of Article 49 of the Geneva Civilian Convention[149] as well as a "grave breach" of the Convention under Article 147.[150] The Charter of the International Military Tribunal at Nuremberg also lists "deportation . . . for any other purpose of civilian population of or in occupied territory" as a war crime.[151] It also lists "deportation . . . committed against any civilian population" as a crime against humanity.[152]

In addition to possible criminal[153] and civil liability here[154] or abroad[155] for the issuance of Executive plans, authorizations, or orders to deny protections under the laws of war and to engage in interrogation tactics and transfers of protected persons in violation of international law, civilian and military persons can be liable for conspiracy[156] and complicity[157] in connection with war crimes. Additionally, a president, cabinet officer, and military commander, among others, can be responsible for a separate offense of dereliction of duty.[158] The latter form of liability can exist, for example, when a leader (1) either knew or should have known that tactics in violation of international law had been committed, were being committed, or were about to be committed by persons under the leader's effective authority or

influence; (2) had an opportunity to act; and (3) failed to take reasonable corrective action under the circumstances.[159]

With respect to corrective actions, especially after many of the ICRC reports and media revelations of abuse, we know of no new order by President Bush, Secretary Rumsfeld, or others to actually comply with the requirements of the Geneva Conventions concerning interrogation of detainees in or from Afghanistan or Iraq and, thus, to abandon the orders that merely Geneva "principles" should be applied and then only if "appropriate" and if "consistent with military necessity." Furthermore, we know of no corrective order concerning what media have reported as a presidential authorization of excessively harsh CIA interrogation tactics, especially cruel, inhumane, and degrading treatment. Moreover, serious investigation of all who appear reasonably accused of participating in a common plan to deny Geneva protections, authorizing and/or aiding and abetting violations of the Conventions, or being derelict in duty appears to be lacking. Additionally, there has been no effort by the President or two Attorneys General to stop lawyers in the Department of Justice from attempting to involve the judiciary in the continued denial of rights and protections of detainees required under the Geneva Conventions and other customary laws of war. For example, some government lawyers further the denial of rights and protections by continuing to claim in court briefs and argument that al Qaeda detainees supposedly have no rights under Geneva law because al Qaeda as such is not a party to the Conventions.[160] This had been part of the manifestly erroneous claim for denial of Geneva protections in the Yoo-Delahunty memo[161] adopted by the President[162] and rightly opposed by the Legal Adviser of the Department of State.[163] What is particularly disturbing is the attempt to mislead and misuse the judiciary to further the denial of required rights and protections. One judge had been misled.[164] Condemnatory language in the customary 1907 Hague Convention declaring that "it is especially forbidden . . . [t]o declare . . . inadmissible in a court of law the rights . . . of the nationals of the hostile party"[165] partly reflects the concern and criminalizes certain forms of denial of protection in a court of law. The criminal memoranda and behavior of various German lawyers in the German Ministry of Justice, high-level executive positions outside the Ministry, and the courts in the 1930s and 1940s that were addressed in informing detail in "The Justice Case"[166] also partly reflect the concern

regarding government lawyer attempts to use courts to further a denial of required rights and protections under the laws of war. Consequences for the German legal system were disastrous. Consequences for the direct victims included the outrages of the Holocaust, and consequences for a number of the lawyers included criminal convictions for, among other crimes, aiding and abetting violations of the laws of war.[167]

E. THE EXECUTIVE IS BOUND BY INTERNATIONAL LAW

The plan and authorizations to violate international law were not only illegal but were also unconstitutional. Under the Constitution, the President is expressly bound to faithfully execute the laws,[168] which include treaty law and customary international law.[169] The well-documented and unanimous views of the Founders and Framers and unanimous decisions and dicta of U.S. courts for some 200 years was that the President and every member of the Executive branch is bound by treaties and customary international law in times of relative peace and war.[170] Additionally, judicial power clearly exists to review the legality of Executive decisions and actions in time of war.[171]

Nonetheless, the Yoo-Delahunty memo offered an erroneous, unprofessional,[172] and subversive conclusion that is too typical within the Bush administration "that customary international law, whatever its source and content, does not bind the President, or restrict the actions of United States military, because it does not constitute federal law."[173] What apparently did not suit them and they simply ignored were unanimous affirmations by the Founders and Framers, over thirty federal cases (at least fifteen of which were Supreme Court cases), and three historic Opinions of Attorneys General recognizing that the President is bound by the customary law of nations.[174]

When reiterating and attempting to justify their error in their memo, they cited *United States v. Alvarez-Machain*,[175] but the ruling in that case was explicitly based on a very narrow ground – an interpretation of a bilateral extradition treaty that the majority found had not been violated. The Court did not state that the Executive can violate customary international law.[176] Yoo and Delahunty argued that the understanding at the time of the Framers was that the phrase "laws of the United States" did not include the law

of nations,[177] but this is completely erroneous[178] and, in any event, the President's constitutionally mandated duty expressly reaches "laws" in the broadest sense.[179]

Yoo and Delahunty engaged in complete fabrication when pretending that cases like *The Schooner Exchange v. McFaddon*[180] or *Brown v. United States*[181] had anything to do with a claim that the President can violate customary international law. In fact, in *Brown*, Justice Story addressed the well-known and unalterable requirement that the laws of war limit the President's powers and are fully binding during war:

> [B]y what rule . . . must he be governed? . . . [B]y the law of nations as applied to a state of war. . . . He has discretion vested in him as to the manner and extent; but he cannot lawfully transcend the rules of warfare. . . . He cannot lawfully exercise powers or authorize proceedings which the civilized world repudiates and disclaims.[182]

Next, they engaged in clear falsehood regarding the decision in *The Paquete Habana*[183] when stating that the Court considered customary international law to be mere common law,[184] that the Court "acknowledged that customary international law is subject to override by the action of the political branches,"[185] and that "the Court also readily acknowledged that the political branches and even the federal judiciary could override it at any time."[186] However, customary international law was not mere common law,[187] and *Paquete Habana* never stated that customary international law is common law. The ruling in *Paquete Habana* was that Executive seizures of enemy alien vessels and enemy aliens abroad in time of war in exercise of Executive war powers in the theater of war were void because they were in violation of customary international law despite Executive claims to the contrary.[188] The Court expressly affirmed that customary international law is part of the laws of the United States that must be ascertained and applied by the judiciary, never stated that presidential violations are controlling or that the political branches or the judiciary could override customary international law, and expressly denied an Executive interpretation of the customary laws of war, which is not surprising in view of the well-known recognition documented in Chapter Four that it is the judiciary that ultimately decides meaning of treaty-based and customary international law. Again, unanimous and constant expectations that the President is bound by customary international law had existed since the time of the Founding,

during the time of and within the decision in *Paquete Habana*, and thereafter until the last pronouncement one finds in Supreme Court opinions – in 1984, when Justice O'Connor recognized that power "delegated by Congress to the Executive Branch" as well as a relevant congressional–Executive "arrangement" must not be "exercised in a manner inconsistent with . . . international law."[189]

A few other examples are worth highlighting. In 1800, Justice Chase affirmed that war's "extent and operations are . . . restricted by the *jus belli*, forming a part of the law of nations."[190] In 1801, Chief Justice Marshall recognized that when the United States is at war "the laws of war, so far as they actually apply to our situation, must be noticed."[191] In 1865, Attorney General Speed recognized that it is not a presidential prerogative to violate the laws of war:

> That the law of nations constitutes a part of the laws of the land must be admitted. . . . From the very face of the Constitution . . . it is evident that the laws of nations do constitute a part of the laws of the land. . . . [T]he laws of war constitute much the greater part of the law of nations. Like the other laws of nations, they exist and are of binding force upon the departments and citizens of the Government, though not defined by any law of Congress. . . . [War] must be, under the Constitution, carried on according to the known laws and usages of war amongst civilized nations. Congress cannot abrogate them or authorize their infraction. The Constitution does not permit this Government to prosecute a war as an uncivilized and barbarous people.[192]

In 1870, Justice Field affirmed a consistent expectation and constitutional requirement that "[t]he power to prosecute war . . . is a power to prosecute war according to the law of nations, and not in violation of that law."[193] In 1901, a year after the first decision in *Paquete Habana*, the Supreme Court affirmed that Executive military powers during a war-related foreign occupation are "regulated and limited . . . directly by the laws of war . . . the law of nations."[194] And in 1936, the Court affirmed that "operations of the nation in . . . ["foreign"] territory must be governed by treaties . . . [as well as] the principles of international law."[195] More recently, Justice Stevens stressed the importance of "the constraints imposed on the Executive by the rule of law."[196] He rightly condemned torture of the mind imposed

through incommunicado detention and offered a prescient warning to Executive miscreants:

> Whether the information so procured is more or less reliable than that acquired by more extreme forms of torture is of no consequence. For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.[197]

F. CONCLUSION

As various memoranda, authorizations, and actions noted earlier demonstrate, there were plans to deny protections under the Geneva Conventions to persons detained during the armed conflicts in Afghanistan and Iraq. The plans to deny protections that are owed to other human beings under the Geneva Conventions were necessarily plans to violate the Conventions, and violations of the Conventions are war crimes. As such, they were plans to permit war crimes. Various memoranda, authorizations, orders, and actions also abetted the use of illegal interrogation tactics as part of a manifestly unlawful common plan to use coercive interrogation tactics and abetted illegal transfers of detainees out of occupied territory for prolonged detention and interrogation.

The role that several lawyers played directly in a dreadful process of denial of protections is particularly disturbing. Not since the Nazi era have so many lawyers been so clearly involved in international crimes concerning the treatment and interrogation of persons detained during war. Such a direct role in a process of denial of protections under the laws of war is far more serious than the loss of honor and integrity to power. It can form the basis for a lawyer's civil and criminal responsibility.[198] The evident role of some of the lawyers in the process of denial of protections was, as far as is known, not that of a lawyer providing advice to criminal accused after crimes had been committed, but the role of a lawyer directly advising how to deny protections in the future (which denials are violations of the laws of war and war crimes) and how to take presidential actions that allegedly would avoid the restraints of various criminal statutes and their reach to the President and others with respect to future conduct, especially with respect

to planned coercive interrogation. Several lawyers in the DOD Working Group, among others, did more. They approved and thereby aided and abetted the use of specific interrogation tactics that were either patently illegal or that clearly could be illegal in given instances.[199]

Whether or not civil and criminal sanctions will actually occur against various high-ranking civilians and military personnel, the plans, authorizations, and attempted justifications have degraded our military and left a shameful stain on our country that will not be removed. The resultant crimes have served terrorist ambitions, aided their recruitment of others, and exacerbated the continual armed conflict in Iraq.

I know of no other instance in the long history of the United States of a plan approved by lawyers and at the highest levels of our government systematically to deny human beings protections under the laws of war. I know of no other denial by a President of the United States of the fact that the laws of war apply to an international armed conflict during which U.S. armed forces engage an enemy in battle. I know of no other authorization of a President to deny treatment required under the Geneva Conventions. I know of no other instance in our history when a Secretary of Defense, top U.S. generals, or a DOD Working Group approved such denials of protection or the use of interrogation tactics that were either patently violative of the laws of war or could clearly constitute violations in various circumstances. Perhaps it is not surprising that eight former generals and admirals have called on President Bush "to support the creation of a comprehensive, independent commission to investigate and report on the truth."[200] It is not likely, however, that the Bush administration will investigate and prosecute all who might be reasonably accused. Civil sanctions, as alternatives, may be more effective in some cases.

The full truth about conspiratorial and complicit involvement and the embrace of what Vice President Cheney has correctly described as "the dark side" remains partly hidden. What is evident, however, is that when one walks on the "dark side" with evil one does not walk in the light with God. In this respect, the following recognition made during our Civil War and placed in the 1863 Lieber Code on the laws of war is particularly poignant: "[m]en who take up arms . . . in public war do not cease on this account to be moral beings, responsible to one another and to God."[201]

CHAPTER TWO

ADDITIONAL REVELATIONS CONCERNING TREATMENT, SECRET DETENTIONS, AND SECRET RENDITIONS

A. INTRODUCTION

As noted in Chapter One, whether or not they constitute "torture" or "violence to life and person," it is quite clear that what we saw in photos from Abu Ghraib, for example, the stripping of persons naked and hooding for interrogation purposes and the use of dogs for interrogation and even terroristic purposes, are among patently illegal interrogation tactics and treatment of detainees of any status covered by various treaty-based and customary international legal prohibitions of cruel, inhuman, degrading, and humiliating treatment, physical coercion, threats of violence, measures of intimidation, and terrorism during any armed conflict and regardless of purpose or feigned excuses on the basis of reciprocity, reprisals, or alleged necessity.[1] As noted also in Chapter One, President Bush, various members of his administration, and others within the Executive branch authorized, abetted, and/or tolerated these and other violations of international law. Moreover, these and other violations have not been ruled out by the administration, even after passage of the 2005 Detainee Treatment Act pressed by Senator McCain. The Bush administration has claimed a radical commander in chief power to violate any inhibiting international law and congressional legislation during an alleged "war" on "terrorism" that has lasted longer than World War II and that Congress has not declared or formally

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authorized and seems unending. Does this sweeping claim to unchecked Executive power form a basis for claims that when he and others in his administration authorize and condone the use of methods of interrogation and treatment of detained persons patently contrary to international law and domestic legislation, the secret detention and secret rendition to other countries of numerous human beings contrary to international law, the domestic surveillance of our phone calls and email contrary to domestic legislation, and the leaking of classified information contrary to domestic legislation that he and other U.S. officials and government personnel are acting "within the law"?

B. ACTORS, AUTHORIZATIONS, ABETMENTS, AND PUBLIC PAPER TRAILS

On December 1, 2005, during a speech at the Council on Foreign Relations Attorney General Alberto Gonzales, who as White House Counsel had previously abetted denials of detainee rights and protections under the laws of war,[2] stated that what happened at Abu Ghraib was "shocking," "horrific," and not allowed.[3] Despite his denial of authorizations to use certain tactics depicted in the Abu Ghraib photos, by the time of his speech it was well known that Secretary of Defense Donald Rumsfeld had expressly authorized the stripping of persons naked, use of dogs, and hooding as interrogation tactics, among other unlawful tactics, in an action memo on December 2, 2002,[4] and in another memo on April 16, 2003,[5] the Secretary adding that if additional interrogation techniques for a particular detainee were required he might approve them on written request.[6] There is no public evidence that the 2003 illegal authorization had been withdrawn before adoption of a necessarily inconsistent Department of Defense directive in September 2006 and there is no evidence that the patently illegal tactics have been completely ruled out by the Bush administration.

In an August 2005 interview, Brigadier General Janis Karpinski confirmed that Major General Geoffrey Miller was sent to Iraq in 2003 to assure that Secretary Rumsfeld's authorized interrogation tactics were used in Iraq. As Karpinski stated, "he said that he was going to use a template from Guantanamo Bay to 'Gitm-oize' the operations out at Abu Ghraib" and that a Rumsfeld memo was posted on a pole outside at Abu Ghraib:

> It was a memorandum signed by Secretary of Defense Rumsfeld, authorizing a short list, maybe 6 or 8 techniques: use of dogs; stress positions; loud music; deprivation of food; keeping the lights on, those kinds of things. And then a handwritten message over to the side that appeared to be the same handwriting as the signature, and that signature was Secretary Rumsfeld's. And it said, "Make sure this happens" with two exclamation points.[7]

In another interview, she stated that at her first meeting with Major General Miller:

> he used the expression that he was going to "Gitmoize" the operation. And military intelligence, they were all listening and pay[ing] attention and taking notes. . . . "It's going to change . . . we're going to change the nature of interrogation at Abu Ghraib." . . . Every day, there's more people arriving out at Abu Ghraib to be interrogators, and they either had experience in Afghanistan or down at Guantanamo Bay. Many of them were personally selected by Gen. Miller and sent to Iraq. . . . Many of them were contractors.[8]

In November 2005, David Addington, who has been Vice President Cheney's top lawyer and is now his chief of staff, openly advocated that the Bush administration continue its illegal policy of not complying with the minimal and absolute requirements concerning treatment of detainees of any status that are reflected in common Article 3 of the Geneva Conventions, a policy that he helped orchestrate in several ways.[9] Colonel Larry Wilkerson, former Chief of Staff to former Secretary of State Colin Powell, explained that:

> the Secretary of Defense, under the cover of the vice president's office, began to create an environment – and this started from the very beginning when David Addington . . . was a staunch advocate of allowing the president . . . to deviate from the Geneva Conventions. . . . [T]hey began to authorize procedures within the armed forces that led to . . . what we've seen. . . . [S]ome of the ways that they detailed were not in accordance with the spirit of the Geneva Conventions and the laws of war.[10]

Addington's unlawful policy received continued support from Under-Secretary of Defense Stephen A. Cambone and DOD General Counsel William J. Haynes.[11] Moreover, President Bush expressly authorized the

denial of absolute rights and protections contained in the Geneva Conventions and, thus, authorized violations of the Geneva Conventions in a February 7, 2002, memorandum that apparently has not been withdrawn.[12]

In October 2005, the United States Senate voted ninety to nine to approve an amendment to a defense appropriations bill offered by Senator John McCain (the McCain Amendment) that merely reaffirmed the absolute ban on use of torture and cruel, inhuman, and degrading treatment of any detainee in U.S. custody or control, but Vice President Cheney openly opposed any congressional reiteration of the prohibition.[13] The evident message from the Vice President and several of his associates in the administration has been that such forms of illegal treatment should continue under the Cheney-Bush-Addington-Gonzales plan and President Bush's earlier illegal authorizations and orders that have still not been withdrawn.[14] In fact, CIA Director Porter Goss has admitted that Agency techniques of interrogation would be restricted under Senator McCain's amendment.[15] Moreover, some CIA personnel have reported that approved Agency techniques include "striking detainees in an effort to cause pain and fear," "the 'cold cell' . . . [where d]etainees are held naked in a cell cooled to 50 degrees and periodically doused with cold water," and "'waterboarding' . . . [which produces] a terrifying fear of drowning,"[16] each of which is manifestly illegal under the laws of war and human rights law and can result in criminal and civil sanctions for war crimes.[17]

With respect to CIA interrogation tactics, it has been reported that Alberto Gonzales "convened his colleagues in his . . . office in the White House," including "top Justice Department and Defense Department lawyers" in July 2002, just before the creation of the infamous Bybee torture memo, to approve illegal interrogation tactics such as "waterboarding."[18] It was also reported that "current and former CIA officers . . . [stated that] there is a presidential finding, signed in 2002, by President Bush, Condoleezza Rice and then-Attorney General John Ashcroft approving the techniques, including water boarding."[19] And, it was reported that President Bush authorized the CIA to secretly detain and interrogate persons in a September 17, 2001, directive known as a memorandum of notification and that harsh tactics were devised in late 2001 and early 2002.[20] Subsequently, the CIA disclosed the existence of a directive signed by President Bush granting the CIA power to set up secret detention facilities in foreign territory and outlining interrogation tactics that were authorized and another

document that contains a DOJ legal analysis specifying interrogation methods that the CIA was authorized to use against top al Qaeda members.[21] There is no indication that the presidential finding or directive has been withdrawn. In fact, during a speech in early September 2006, President Bush admitted that a CIA program has been implemented "to move . . . [high-value] individuals to . . . where they can be held in secret" and interrogated using "tough" forms of treatment and he stated that the CIA program will continue.[22]

Portions of a previously secret December 2002 CIA memo have also been disclosed during prosecution of a CIA civilian contractor in August 2006. The CIA memo notes that the Bush administration allowed three exceptions to prohibited restraints during interrogation of detainees by CIA personnel, although Geneva Convention and human rights prohibitions, for example, of torture, cruel, inhuman, degrading, or humiliating treatment, are patently peremptory. The December 2002 memo prohibits:

> any significant physiological aspects (*e.g.*, direct physical contacts, unusual mental duress, unusual physical restraints or deliberate environmental deprivations) – beyond those reasonably required [1] to ensure the safety and security of our officers and [2] to prevent the escape of the detainee – [3] without prior and specific headquarters guidance.[23]

When asked why President Bush would prefer that Geneva law strictures not apply, John Yoo, who had been a Deputy Assistant Attorney General in the Bush administration and primary author of the infamous Yoo-Delahunty 2002 memo, responded:

> Think about what you want to do when you have captured people from the Taliban and Al Qaeda. You want to interrogate them. . . . [T]he most reliable source of information comes from the people in Al Qaeda you captured. . . . [I]t seems to me that if something is necessary for self-defense, it's permissible to deviate from the principles of Geneva [including the prohibition of torture].[24]

Of course, it is widely known that alleged necessity does not permit violations of relevant Geneva law (such as common Article 3), the customary laws of war reflected therein, and nonderogable treaty-based, customary, and peremptory human rights.[25] John Yoo has also admitted that "some of the worst possible interrogation methods we've heard of in the press

have been reserved for the leaders of al-Qaeda that we've captured"[26] and, with remarkable candor and abandonment, "I've defended the administration's legal approach to the treatment of al-Qaida suspects and detainees," including the use of torture.[27] More recently, John Yoo has provided an honest, remorseless, and revealing set of admissions concerning inner-circle decisions to violate Geneva law. As he recounts, detention, denial of Geneva protections, and coercive interrogation "policies were part of a common, unifying approach to the war on terrorism";[28] instead of "following the Geneva Conventions" they decided whether such "would yield any benefits or act as a hindrance";[29] they knew that following Geneva law would "interfere with our ability to . . . interrogate"[30] since "Geneva bars 'any form of coercion.' "[31] For the inner circle, "[t]his became a central issue,"[32] and following " 'Geneva's strict limitations on . . . questioning' " "made no sense";[33] they calculated that "treating detainees as unlawful combatants would increase flexibility in detention and interrogation";[34] and the question became merely "what interrogation methods fell short of the torture ban and could be used"[35] as "coercive interrogation,"[36] which includes cruel, inhuman, and degrading treatment.[37] In view of the fact that a "common, unifying approach" was devised to use coercive interrogation tactics and President Bush has admitted that such tactics and secret detention have been used in other countries, it is obvious that coercive interrogation tactics migrated also to Iraq and Afghanistan as part of a common plan. It is also clear that several memos and letters (including the Yoo-Delahunty, Gonzales, Ashcroft, Bybee, and Goldsmith memos and letter); presidential and other authorizations, directives, and findings; and the 2003 DOD Working Group Report substantially facilitated the effectuation of the common, unifying plan to use coercive interrogation and that use of coercive interrogation tactics were either known or substantially foreseeable consequences.

C. THE WE DO NOT "TORTURE" PLOY AND REFUSALS TO PROSECUTE

In October through early December 2005, President Bush, Vice President Cheney, CIA Director Goss, Attorney General Gonzales, Secretary of State Rice, and others within the administration were canting an earlier refrain, "we do not torture,"[38] as if that is all that is proscribed under common Article 3 and other provisions of the 1949 Geneva Conventions; [39] Article 7 of the

International Covenant on Civil and Political Rights;[40] Articles I and XXV of the American Declaration of the Rights and Duties of Man;[41] Articles 55(c) and 56 of the United Nations Charter;[42] Articles 2, 4, and 16 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);[43] and the customary, nonderogable, peremptory, and universally applicable laws of war and human rights reflected therein.[44] When interpreting Article 7 of the International Covenant, the Human Rights Committee created by the Covenant provided an important recognition concerning related responsibilities of states: "Complaints about ill-treatment must be investigated. . . . Those found guilty must be held responsible, and the alleged victims must themselves have effective remedies at their disposal, including the right to obtain compensation."[45] In a later admonition, the Committee reminded parties to the treaty that "it is not sufficient" merely to make violations "a crime."[46] States should report "the provisions of their criminal law which penalize torture and cruel, inhuman and degrading treatment or punishment, specifying the penalties applicable to such acts, whether committed by public officials or other persons acting on behalf of the State, or by private persons . . . [and t]hose who violate article 7, whether by encouraging, ordering, tolerating or perpetrating prohibited acts, must be held responsible"; States have a duty to afford protection against such acts "whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity"; "[a]mnesties are generally incompatible with" such duties; and "States must not deprive individuals of the right to an effective remedy . . . "[47]

More recently, the United Nations Security Council has reaffirmed "its condemnation in the strongest terms of all acts of violence or abuses committed against civilians in situations of armed conflict . . . in particular . . . torture and other prohibited treatment."[48] The Security Council also demanded that all parties to an armed conflict "comply strictly with the obligations applicable to them under international law, in particular those contained in the Hague Conventions of 1899 and 1907 and in the Geneva Conventions of 1949"[49] and emphasized "the responsibility of States to comply with their relevant obligations to end impunity and to prosecute those responsible for war crimes, genocide, crimes against humanity and serious violations of international humanitarian law."[50]

Despite such requirements, for more than five years the Bush administration has furthered a general policy of impunity by refusing to prosecute

any person of any nationality under the War Crimes Act or alternative legislation,[51] the torture statute,[52] genocide legislation,[53] and legislation permitting prosecution of certain civilians employed by or accompanying U.S. military forces abroad.[54] Additionally, there has been no known criminal investigation during the last five years of U.S. military personnel or persons of any other status for authorizing or participating in the manifestly illegal transfer of non–prisoner of war detainees from occupied territory in violation of the Geneva Conventions,[55] illegal rendition in violation of the CAT and other international law,[56] or the crime against humanity known as forced disappearance of individuals that President Bush admitted has been and will continue to be engaged in at least under a CIA program of secret detention and what President Bush cryptically refers to as "tough" interrogation.[57]

Under pressure during a European trip in early December 2005 to admit that more than torture is proscribed, Secretary Rice shifted the administration's previous stance. She announced in guarded language that, "as a matter of U.S. policy," U.S. "obligations under the CAT, which prohibits cruel, inhumane and degrading treatment . . . extend to U.S. personnel wherever they are."[58] However, U.S. obligations to prohibit cruel, inhuman, and degrading treatment are not limited to those under the CAT; U.S. obligations under that treaty and others are not merely U.S. policy but are also law; and "U.S. obligations under the CAT" are more extensive than the administration admits, especially in view of the fact that an attempted U.S. reservation that sought to avoid the treaty's unyielding prohibition of all forms of cruel, inhuman, and degrading treatment and to cover merely those that are prohibited under domestic U.S. law by the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution is necessarily incompatible with the object and purpose of the treaty and, as such, is void *ab initio* as a matter of law.[59]

In early September 2006, President Bush refuted the policy announced by Secretary Rice when he stated that various "tough" CIA interrogation tactics during secret detention have occurred and will continue[60] and the public has been on notice for several years concerning what the "tough" tactics have entailed.[61] A week later, Secretary Rice dispelled any notion that the administration's policy has been to comply with absolute bans under international law of any form of cruel, inhuman, or degrading treatment. In a letter to the Senate's Armed Services Committee, Secretary Rice

offered her "department's view" that "there is not . . . any inconsistency with respect to the substantive behavior that is prohibited" by the same phrase in Common Article 3 of the Geneva Conventions "and the behavior that is prohibited . . . as that phrase is defined in the U.S. reservation to the Convention Against Torture" and that U.S. compliance with prohibitions reflected in the reservation to the CAT will "fully satisfy the obligations of the United States with respect to the standards" in common Article 3 of the Geneva Conventions.[62] However, the legal propriety of this viewpoint is in serious error.

First, not all forms of cruel, inhuman, and degrading treatment that are proscribed in the CAT and in the Geneva Conventions would be covered by the reach of what are merely U.S. domestic prohibitions under three constitutional amendments.[63] Second, there has been no attempted reservation to common Article 3 or any other article of the Geneva Conventions like that attempted with respect to the CAT and it would be outrageous to suggest that a putative reservation to one multilateral treaty can override the reach and meaning of another multilateral treaty that has never had a similar reservation attached to it. This is especially the case with respect to a putative reservation to the CAT that has been denounced by the Convention's Committee Against Torture and is void *ab initio* as a matter of law and of no legal effect. Secretary Rice also claimed that:

> it is appropriate for a state to look to its own legal framework, precedents, concepts and norms in interpreting these terms and carrying out its international obligations. Such practice in the application of a treaty is an accepted reference point in international law. . . . [and] the prohibitions found in the Detainee Treatment Act of 2005 [which limit coverage in a manner like the putative U.S. reservation to the CAT] fully satisfy the obligations of the United States with respect to the standards [in "Common Article 3"].[64]

This claim is also in fundamental error for reasons noted earlier. Moreover, domestic law of a single party to a multilateral treaty cannot provide complete, authoritative content or be determinative regarding the meaning of the treaty.[65] As Justice Scalia recognized with respect to the proper interpretation of treaties:

> The question before us in a treaty case is what the two or more sovereigns agreed to, rather than what a single one of them, or the legislature of a

> single one of them, thought it agreed to. And to answer the question accurately, . . . whatever extratextual materials are consulted must be materials that reflect the mutual agreement (for example, the negotiating history) rather than a unilateral understanding. Thus, we have declined to give effect . . . even to an explicit condition of ratification adopted by the full Senate, when the President failed to include that in his ratification.[66]

Our courts have recognized more generally that "[t]he subject of treaties . . . is to be determined by the law of nations"[67] and that "[w]henever doubts and questions arise relative to the validity, operation or construction of treaties, or of any articles in them, those doubts and questions must be settled according to the maxims and principles of the laws of nations."[68] James Wilson also remarked during formation of the Constitution that "[t]o pretend to define the law of nations which depended on the authority of all the Civilized Nations of the World, would have a look of arrogance."[69]

D. SECRET DETENTIONS, SECRET RENDITIONS, AND FORCED DISAPPEARANCE*

After 9/11, the Bush administration authorized roundups of hundreds of foreign persons within the United States and their disappearance for weeks or months in a gulag operated in the name of antiterror that has apparently done little to provide real security but much to enrage a people who feel that they were really singled out because of their religious preferences and national origin[70] in violation of basic human rights[71] – much like the shameful incarceration of loyal Americans of Japanese ancestry in concentration camps on the West Coast during World War II[72] while real German prisoners of war were released on parole in Texas and real German saboteurs had landed in Florida and New York,[73] but no German or Italian Americans were detained without trial because of their racial heritage or alleged collective disloyalty. After September 11, the Executive branch also refused to release

* This section is reproduced with permission of *The Wayne Law Review*. Revised from Jordan J. Paust, *After 9/11, "No Neutral Ground" with Respect to Human Rights: Executive Claims and Actions of Special Concern and International Law Regarding the Disappearance of Detainees*, 50 Wayne L. Rev. 79 (2004).

the names and whereabouts of thousands of persons detained as "special interest" immigration detainees (so-called special interest INS detainees),[74] as material witnesses,[75] and as persons detained without trial as alleged security threats here, at Guantanamo Bay, Cuba, and elsewhere.[76] With respect to immigration detainees, an essay by Professor Joan Fitzpatrick in 2002 had identified the problem posed by "unprecedented policies of detention and secrecy"[77] and the fact that the Department of Justice had "refused to reveal the identities of the detainees, and ordered state and local jails to keep their identities a secret from the press and public."[78] She also noted with respect to refusals to disclose names and secret hearings that in 2001 "[t]he Chief Immigration Judge issued an order directing his colleagues to close removal hearings and conceal docket entries in 'special procedures' cases designated by the INS, even where terrorism grounds were not in issue and all evidence was unclassified."[79]

As noted, President Bush also has admitted that there has been a program of secret detention and secret rendition of persons outside the United States and that this program will continue.[80] The program has involved the detention of thousands of individuals in Afghanistan and Iraq; at Guantanamo Bay, Cuba; and in many other places without disclosing the whereabouts of all persons detained or their names, whether or not secret detention was under the control of CIA or (until September 7, 2006) U.S. military personnel. Such forms of secret detention are violations of the customary and *jus cogens* prohibition of forced disappearance that can lead to civil and criminal sanctions.[81]

In addition to other customary and treaty-based international law concerning illegal rendition and forced disappearance of persons, European countries have relevant regional obligations. Article 8(2) of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment[82] requires signatories to provide the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment full information on all places where persons deprived of their liberty are held. The European Court of Human Rights has held that a state violates Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[83] if the authorities fail to take reasonable measures to prevent the disappearance of a person with respect to whom there is a particular risk of disappearance.[84] Furthermore,

Articles 2 and 13 are violated by the failure of authorities to carry out an investigation of disappearances.[85] Clearly also, European officials cannot rightly be complicit in violations of such obligations and the rights of persons secretly detained and/or transferred through their territory.

1. Definitions of Forced Disappearance in Violation of International Law

The secret detention and processing of various detainees engaged in by the Executive branch after 9/11 and for the past five years fit within the definition of forced disappearance of persons that is absolutely proscribed by international law in all circumstances. For example, the Inter-American Convention on the Forced Disappearance of Persons defines forced disappearance as an:

> act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.[86]

Similarly, the United Nations General Assembly Declaration on the Protection of All Persons from Enforced Disappearance[87] addresses the nature of enforced disappearance as a circumstance involving persons who are "arrested, detained or abducted against their will or otherwise deprived of their liberty by [, for example,] officials . . . followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law."[88] U.S. courts have recognized and applied similar definitional orientations. For example, in *Forti v. Suarez-Mason*,[89] a federal district court stated that causing a disappearance in violation of customary international law can be characterized by two elements: "(1) abduction by state officials or their agents; followed by (2) official refusals to acknowledge the abduction or to disclose the detainee's fate."[90]

2. Impermissibility of Secret Detentions Under International Law

As the *Restatement of the Foreign Relations Law of the United States* recognizes, "causing the disappearance of individuals" is absolutely prohibited under international law;[91] constitutes a violation of the customary human rights of the persons who disappear;[92] and constitutes a violation of a peremptory prohibition *jus cogens*.[93] Thus, forced disappearance is a prohibition that preempts more ordinary international law and allows for no derogation under any circumstances.[94] Similarly, the Human Rights Committee under the International Covenant on Civil and Political Rights has declared that "unacknowledged detention" of persons is a violation of human rights law and is "not subject to derogation."[95] U.S. cases also recognize that forced disappearance violates customary and treaty-based international law and can lead to civil sanctions against those who authorize, tolerate, or engage in the practice.[96] Additionally, both Congress[97] and the Executive[98] have made the same recognitions with respect to foreign violations.

Within the Americas, the preamble to the Inter-American Convention on the Forced Disappearance of Persons affirms "that the forced disappearance of persons violates numerous non-derogable and essential human rights enshrined in the American Convention on Human Rights, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights."[99] Additionally, the Convention on Forced Disappearance recognizes that forced disappearance is a crime that is "a grave and abominable offense against the inherent dignity of the human being, and one that contradicts the principles and purposes enshrined in the Charter of the Organization of American States,"[100] and affirms "that the systematic practice of the forced disappearance of persons constitutes a crime against humanity."[101] With respect to criminal sanctions, Article IX of the Convention mirrors customary international law concerning customary international crimes and nonimmunity when it prohibits the use of domestic "[p]rivileges, immunities, or special dispensations" with respect to criminal prosecutions of perpetrators for the crime of forced disappearance.[102] Indeed, state involvement, support, or acquiescence can constitute elements of the offense and, as such, cannot logically provide any sort of immunity or excuse. Similarly, other articles prohibit any "defense of

due obedience to superior orders or instructions that stipulate, authorize, or encourage forced disappearance"[103] and assure that "[t]he acts constituting forced disappearance shall not be deemed to have been committed in the course of military duties."[104]

More generally, Article X of the Inter-American Convention assures that "[i]n no case may exceptional circumstances such as a state of war, the threat of war, internal political instability, or any other public emergency be invoked to justify the forced disappearance of persons."[105] Article X adds: "[i]n such cases, the right to expeditious and effective judicial procedures and recourse shall be retained as a means of determining the whereabouts or state of health of a person who has been deprived of freedom, or of identifying the official who ordered or carried out such deprivation of freedom."[106] Article XI provides additional rights, duties, and safeguards:

> Every person deprived of liberty shall be held in an officially recognized place of detention and be brought before a competent judicial authority without delay, in accordance with applicable domestic law.
>
> The States Parties shall establish and maintain official up-to-date registries of their detainees and, in accordance with domestic law, shall make them available to relatives, judges, attorneys, any other person having a legitimate interest, and other authorities.[107]

The United Nations General Assembly Declaration on the Protection of All Persons from Enforced Disappearance generally mirrors several provisions contained in the Inter-American Convention. For example, the preamble to the U.N. Declaration states that "enforced disappearance undermines the deepest values of any society committed to respect for the rule of law, human rights and fundamental freedoms, and that the systematic practice of such acts is of the nature of a crime against humanity."[108]

Article 1 of the U.N. Declaration also affirms:

> 1 Any act of enforced disappearance is an offence to human dignity. It is condemned as a denial of the purposes of the Charter of the United Nations and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and reaffirmed in international instruments in this field.
>
> 2 Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law

> guaranteeing, inter alia, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment and punishment . . . [109]

Perhaps because of the need to alleviate the suffering experienced by family members of those who disappear, an earlier U.N. Standard Minimum Rules for the Treatment of Prisoners[110] states that "[a]n untried prisoner shall be allowed to inform immediately his family of his detention and shall be given all reasonable facilities for communicating with his family and friends."[111]

Similarly, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War requires that all persons in the territory of a party to an international armed conflict or in occupied territory "shall be enabled to give news of a strictly personal nature to members of their families wherever they may be, and to receive news from them."[112] Yet, in occupied territory, only "where absolute military security so requires," a non–prisoner of war rightly detained without trial under Geneva law standards can "be regarded as having forfeited rights of [private] communication."[113] However, even such persons who are detained in occupied territory cannot simply disappear or have their names kept secret. As the authoritative Commentary to the Geneva Civilian Convention prepared by the International Committee of the Red Cross (ICRC) explains, "[t]he Detaining Power is, however, in no way released from its obligation to notify the arrest to its official Information Bureau for transmission to the official Information Bureau of the country of which the person concerned is a national."[114] More generally:

> [a]s soon as he is interned, or at the latest not more than one week after his arrival in a place of internment . . . every internee shall be enabled to send direct to his family, on the one hand, and to the Central Agency, provided for by Article 140, on the other, an internment card . . . informing his relatives of his detention, address and state of health. The said cards shall be forwarded as rapidly as possible and may not be delayed in any way.[115]

Furthermore, "[i]nternees shall be allowed to send and receive letters and cards . . . "[116] As the authoritative Commentary to the Geneva Convention states, "[t]he right of internees to carry on correspondence is absolute. Restrictions may be imposed on it in certain circumstances, but the

right must never be completely suppressed. The Detaining Power, however, retains its right to censor internees' correspondence, as stated expressly in Article 112."[117]

Importantly, Article 143 of the Geneva Civilian Convention forbids the disappearance of detainees by requiring that the ICRC have access to all protected persons and the ability to freely interview detainees. Article 143 provides:

> Representatives or delegates . . . shall have permission to go to all places where protected persons are, particularly to places of internment, [or] detention. . . . They shall have access to all premises occupied by protected persons and shall be able to interview the latter without witnesses, personally or through an interpreter.
>
> Such visits may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure. Their duration and frequency shall not be restricted . . . [118]

Before the creation of the 1949 Geneva Conventions, the forced disappearance of persons was recognized as a violation of the laws of war in *United States v. Altstoetter* (The Justice Case):[119]

> "Night and Fog" prisoners "were kept secretly and not permitted to communicate in any manner with their friends and relatives. This is inhumane treatment. . . . [T]he victim was held incommunicado and the rest of the population only knew that a relative or citizen had disappeared in the night and fog; hence, the name of the decree. If relatives or friends inquired, they were given no information. If diplomats or lawyers inquired concerning the fate of . . . [a victim], they were told that the state of the record did not admit of any further inquiry or information."[120]

Additional international laws of great significance to any person who works or travels abroad require, without exception, that foreign persons who are "arrested . . . or detained in any . . . manner" shall be free to communicate with consular officers of their State and to have access to them, and the consulate officers from their State shall have the same freedoms[121] as well as "the right to visit" their nationals who are "in prison, custody or detention, to converse and correspond with . . . [them] and to arrange for . . . [their] legal representation."[122] Nonderogable rights of communication and visitation have generally been of major import to the United States as the

U.S. Government seeks to protect U.S. nationals detained or arrested abroad and they should not be placed in jeopardy.

Like the Inter-American Convention, the U.N. Declaration recognizes that "[n]o order or instruction of any public authority, civilian, military or other, may be invoked to justify an enforced disappearance,"[123] and "[n]o circumstances whatsoever, whether a threat of war, a state of war, internal political instability or any other public emergency, may be invoked to justify enforced disappearances."[124] Furthermore, "[t]he right to a prompt and effective judicial remedy as a means of determining the whereabouts or state of health of persons deprived of their liberty and/or identifying the authority ordering or carrying out the deprivation of liberty is required . . . "[125] and "[a]ny person deprived of liberty shall be held in an officially recognized place of detention and, in conformity with national law, be brought before a judicial authority promptly after detention."[126] With respect to names and locations of detainees, the U.N. Declaration further requires:

> 2. Accurate information on the detention of such persons and their place or places of detention, including transfers, shall be made promptly available to their family members, their counsel or to any other persons having a legitimate interest in the information. . . .
>
> 3. An official up-to-date register of all persons deprived of their liberty shall be maintained in every place of detention. Additionally, each State shall take steps to maintain similar centralized registers. The information contained in these registers shall be made available to the persons mentioned in the preceding paragraph, to any judicial or other competent and independent national authority and to any other competent authority entitled under the law of the State concerned or any international legal instrument to which a State concerned is a party, seeking to trace the whereabouts of a detained person.[127]

From this brief survey of relevant international legal norms, it is evident that the Bush administration's continued program of secret detentions and secret renditions is in serious violation of several treaties as well as customary international law concerning human rights, the prohibition of forced disappearance, Geneva law, the right of foreign persons to communicate with their consulate, and the concomitant rights of foreign consulates to communication, visitation, and representation of their nationals.

E. MANGLING MILITARY MANUALS

In May 2006, media reports indicated that a nearly final draft of a new Army Field Manual on interrogation contained major changes from previous manuals and would perpetuate unlawful treatment during interrogation of alleged terrorists and unprivileged belligerents that was authorized by several members of the Bush administration and military commanders at Guantanamo Bay and Iraq. The new draft was being created under the supervision of Stephen Cambone,[128] who opposes use of legally required minimum protections for all detainees under customary international law reflected in common Article 3 of the Geneva Conventions.[129] Media also reported that DOD "civilian leaders" had argued "that the Geneva Convention does not apply to terrorists or irregular fighters" and that the new draft manual should create two separate sets of interrogation tactics – one for prisoners of war and the other for non–prisoners of war, and the latter set "would allow tougher techniques."[130] Despite the DOD civilian leader assertion, however, it is widely known that there are no gaps in the reach of at least some forms of Geneva law protection during any armed conflict to detainees of any status and that the absolute rights, duties, and responsibilities reflected in common Article 3 are among the legal provisions that apply to detainees of any status.[131] Moreover, as noted earlier, human rights law and other customary and treaty-based international laws that are part of the constitutionally bsed laws of the United States also prohibit the use of torture or cruel, inhuman, or degrading treatment against any human being in any context for any purpose.

Finally, after the significant rejection by the Supreme Court in *Hamdan v. Rumsfeld* of the Bush administration's claim that common Article 3 does not apply to detainees captured during armed conflicts in Afghanistan and Iraq and held at Guantanamo,[132] Deputy Defense Secretary Gordon England issued a memo requiring compliance with common Article 3 by U.S. military personnel as of July 7, 2006.[133] Behind the scenes, many military lawyers had let civilian officials know that if this had not occurred there would have been a firestorm of protests and resignations by JAG officers. However, other members of the administration still oppose application of common Article 3 in any other context and President Bush has stated that the unlawful CIA program of coercive interrogation will continue.[134]

The Deputy Defense Secretary and professional military lawyers prevailed again on September 5, 2006, when he issued a Department of Defense Directive setting forth new DOD policy applicable "during all armed conflicts, however such conflicts are characterized, and in all other military operations."[135] The new DOD Directive, applicable to military personnel and others subject to DOD control, requires:

> All detainees shall be treated humanely and in accordance with U.S. law, the law of war, and applicable U.S. policy.[136]
>
> All persons subject to this Directive shall observe the requirements of the law of war, and shall apply, without regard to a detainee's legal status, at a minimum the standards articulated in Common Article 3 of the Geneva Conventions of 1949 . . . , as construed and applied by U.S. law, . . . in the treatment of all detainees. . . . Note that certain categories of detainees, such as enemy prisoners of war, enjoy protections under the law of war in addition to the minimum standards prescribed in Common Article 3 . . . [137]
>
> Detainees and their property shall be accounted for and records maintained according to applicable law . . . [138]

At the same time, a new Army Field Manual on Human Intelligence Collector Operations[139] was presented to the public. The manual states:

> the handling and treatment of sources must be accomplished in accordance with applicable law and policy. Applicable law and policy include U.S. law; the law of war; relevant international law; relevant directives. . . . The principles and techniques of HUMINT [human intelligence] collection are to be used within the constraints established by U.S. law including the following: . . . [listing, among others, three of the 1949 Geneva Conventions and adding with respect to each: "(including Common Article 3)"] . . . Detainee Treatment Act of 2005 . . . [140]

The manual also lists several interrogation tactics that are not to be employed, including some that had been previously authorized in administration memos and other documents,[141] such as the stripping of persons naked and hooding for interrogation, the use of dogs for interrogation, use of extreme cold or heat, and water-boarding.[142]

F. THE 2005 DETAINEE TREATMENT ACT AND OTHER BINDING LAWS OF THE UNITED STATES

When the McCain Amendment was finally placed in legislation, it was noticeably restricted. The general ban on cruel, inhuman, or degrading treatment or punishment in the amendment was limited in the 2005 Detainee Treatment Act (which is part of a Defense Appropriations Act) to treatment or punishment "prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984."[143] Moreover, it did not expressly include "torture" and was limited to persons "in the custody or under the physical control of the United States Government,"[144] which presumably includes persons under physical control of U.S. government personnel or others acting on behalf of the U.S. government but does not mirror the more extensive requirements of the CAT,[145] much less those in other relevant treaties and universally applicable customary international law. Thus, not all cruel, inhuman, or degrading treatment is covered by the 2005 legislation, and it does not mirror the legal rights and prohibitions contained in several treaties of the United States and customary laws of war and human rights law or the more extensive obligations of the United States that exist under the CAT despite certain putative U.S. reservations and understandings with respect to the CAT.[146]

Nevertheless, there was no intent of Congress to override either treaty-based or customary international legal rights and duties when it enacted the 2005 Defense Appropriations Act, and because there is a well-recognized requirement based in Supreme Court decisions and doctrine that there must be a clear and unequivocal expression of congressional intent to override as part of a five-step process concerning conflicts between treaties and federal statutes, relevant treaty-based rights and duties remain among the operative laws of the United States.[147] Moreover, even if such an intent of Congress had been expressed clearly and unequivocally, the traditional "rights under" a treaty exception to the last in time rule recognized in Supreme Court decisions[148] would assure the primacy of treaty-based rights to freedom from all forms of cruel, inhuman, and degrading treatment over subsequent legislation. More specifically, with respect to rights and duties

under the customary and treaty-based laws of war, precedent requires that they prevail as well.[149]

In any event, other federal statutes that the Executive must faithfully execute allow criminal and civil sanctions for various forms of torture and cruel, inhuman, degrading, and humiliating treatment expressly or by incorporating relevant international law by reference.[150] Additionally, with respect to Executive implementation of human rights, Executive Order 13107 requires that it "shall be the policy and practice of the government of the United States . . . fully to implement its obligations under the international human rights treaties to which it is a Party and that all executive departments and agencies . . . shall perform . . . [their] functions so as to respect and implement those obligations fully."[151]

G. CONCLUSION

As demonstrated in Chapter One and in this chapter, what has especially marked the Bush administration's "war" on terrorism are the violations of customary and treaty-based international law that have been authorized and abetted in connection with the detention, rendition, treatment, and interrogation of human beings within and outside the United States. "Dirty war" treatment and tactics have involved violations of human rights law; the 1949 Geneva Conventions and other laws of war; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the American Declaration of the Rights and Duties of Man; the United Nations Charter; customary law prohibiting forced disappearance of human beings; and various customary international legal rights and proscriptions reflected in relevant treaties. What has also marked the administration has been the direct involvement of several of its civilian lawyers in the effectuation or abetment of a common plan to deny rights and protections of human beings under customary and treaty-based laws of war and human rights law, often in opposition to legal professionals in the military and the Department of State.

President Bush authorized the deprivations of rights and protections under the Geneva Conventions and has admitted more recently that a program of secret detentions and renditions has occurred and will continue as part of his effort to assure that "harsh" interrogation tactics are used

against certain detainees. As noted in Chapter One, I know of no other authorizations of a President during the long history of the United States to deny treatment and protections required under the laws of war. Furthermore, I know of no other authorizations of a President of the United States to engage in a program of "dirty war" tactics of secret detentions and renditions that constitute the forced disappearance of human beings in violation of customary and treaty-based international law. His shameful authorizations have degraded the authority of the United States, its values, and its influence. Resultant war crimes have undoubtedly contributed to increased violence in Afghanistan and Iraq and have served as a terrorist recruitment tool. Such are the consequences that will partly define his legacy.

"Verily I say unto you, inasmuch as ye have done it unto one of the least of these my brethren, ye have done it unto me." *Matthew* 25:40.

CHAPTER THREE

WAR AND ENEMY STATUS

A. INTRODUCTION

On September 11, 2001, the United States suffered shocking terroristic attacks on the World Trade Center in New York and the Pentagon in Washington, D.C. Most agree that the attacks were perpetrated by Osama bin Laden and some of his al Qaeda followers and that these same nonstate actors had been behind previous attacks on the U.S.S. *Cole* and U.S. embassies in Kenya and Tanzania. On October 7, 2001, the United States used massive military force in self-defense against such ongoing processes of armed attack by bin Laden and members of al Qaeda in Afghanistan. At that time, the United States also used massive military force against members of the armed forces of the Taliban regime in Afghanistan. This upgraded an ongoing belligerency or international armed conflict in Afghanistan between the Taliban and the Northern Alliance and triggered application of the laws of war with respect to U.S. military responses in the Afghan theater of war.[1]

By November 13, 2001, President Bush had made the erroneous claim that the September 11 attacks were acts of international terrorism of such an intensity as to create "a state of armed conflict" and that they amounted to acts of "war" by bin Laden and his followers.[2] The Bush administration also argued that it had a right to detain any member of al Qaeda and other persons allegedly posing threats to national security without

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trial as "enemy" or "unlawful" combatants whether or not they were captured inside Afghanistan or in connection with the October 7 war with the Taliban.[3] Quite inconsistently, the White House also claimed that the war with the Taliban regime did not trigger application of laws of war contained in the 1949 Geneva Conventions. This error was finally admitted by February 8, 2002, when the White House agreed that the law of war applied to the war with the Taliban, but the administration shifted its argument to one seeking a sweeping denial of prisoner of war status for every member of the armed forces of the Taliban.[4] Such schizophrenic claims are not merely illogical and devoid of legal merit but also can have dangerous consequences with respect to permissible forms of nonstate actor violence, application of the laws of war in actual armed conflicts, and protections of members of the armed forces of the United States and other states.

Despite manipulated rhetoric or claims to unbounded power, did the laws of war apply to the September 11 attacks? What is the legal status under the laws of war of various types of persons detained or being prosecuted by the United States? Perhaps more important for the United States and the international community, is there a need to revise the laws of war in view of bin Laden's use of terrorism and various U.S. responses?

B. THE UNITED STATES CANNOT BE AT "WAR" WITH AL QAEDA OR "TERRORISM"

Contrary to the assertion of President Bush, the United States simply cannot be at war with bin Laden and al Qaeda as such, nor would it be in the overall interest of the United States for the status of war to apply merely to conflicts between the United States and al Qaeda. Bin Laden was never the leader or member of a state, nation, belligerent, or insurgent group (as those entities are understood in international law) that was at war with the United States. Armed attacks by such nonstate, nonnation, nonbelligerent, noninsurgent actors such as bin Laden and members of al Qaeda can trigger the right of selective and proportionate self-defense under the United Nations Charter against those directly involved in an armed attack,[5] but even the use of military force by the United States merely against bin Laden and al Qaeda in foreign territory would not create a state of war between the United States and al Qaeda.

The lowest level of warfare or armed conflict to which certain laws of war apply is an insurgency. For an insurgency to occur, the insurgent group would have to have the semblance of a government, an organized military force, control of significant portions of territory as its own, and its own relatively stable population or base of support within a broader population. Al Qaeda never met any of the criteria for insurgent status, especially the requirements that it have a government and control of significant portions of territory as its own. Belligerent status under the laws of war is based on the same criteria for insurgent status plus outside recognition by one or more states either as a belligerent or a state.[6] Al Qaeda never met the criteria for insurgent status and certainly lacked any outside recognition as a belligerent, nation, or state. Indeed, al Qaeda is not known to have even purported to be or to have the characteristics of a state, nation, belligerent, or insurgent.

In view of this, any conflict between the United States and al Qaeda as such cannot amount to war or trigger application of the laws of war.[7] Thus, outside the context of an actual war to which the laws of war apply, members of al Qaeda who were not otherwise attached to the armed forces of a belligerent or state cannot be "combatants," much less "enemy" or so-called unlawful combatants, or prisoners of war as those terms and phrases are widely known in both international and U.S. constitutional law. In addition, "war" or "armed conflict" and the laws of war could not have applied to the September 11 attacks by al Qaeda operatives, even though the attacks undoubtedly triggered other international laws involving civil and criminal responsibility and universal jurisdiction, including human rights violations and crimes against humanity in connection with the targeting of the World Trade Center.

With respect to the September 11 attacks as such, any attempt to expand the concept of war beyond the present minimal levels of belligerency and insurgency would be extremely dangerous because certain forms of nonstate actor violence and targetings that otherwise remain criminal could become legitimate and create an extended, but unwanted, form of combatant immunity. Two such targetings would have been the September 11 attack on the Pentagon, a legitimate military target during armed conflict or war (except for the means used, a civilian airliner with civilian passengers and crew), and the previous attack on the U.S.S. *Cole*, another legitimate military target during armed conflict or war. Similarly, a radical extension

of the status of war and the laws of war to terroristic attacks by groups such as al Qaeda (and there are or predictably will be many such groups engaged in social violence) would legitimize al Qaeda attacks on the President (as commander in chief) and various U.S. "military personnel and facilities" in the United States and abroad – attacks that were of special concern to President Bush, as noted in his November 13 Military Order. Applying the status of war and the laws of war to armed violence below the level of an insurgency can have the unwanted consequence of legitimizing various other combatant acts and immunizing them from prosecution.

No leader of any country other than the United States is known to have even suggested a need for such a radical change in the status of war, the threshold levels concerning applicability of the laws of war, and actual application of various laws of war (including an array of competencies, rights, immunities, and obligations thereunder) to terrorist targetings by groups such as al Qaeda and selective and proportionate responsive measures against such groups that do not involve the use of military force against the military of some other *de facto* or *de jure* state. It is not clear that even President Bush contemplated the corrupting consequences of such an extension of the status of war or the laws of war. Moreover, such consequences would not be in the overall and long-term interests of either the United States or the international community.

C. THE STATUS OF VARIOUS DETAINEES AND THE LEGAL TEST FOR COMBATANT STATUS

Whether there is a need for revision of the laws of war that applied during the armed conflict of an international character in Afghanistan on and after October 7, 2001, is a separate issue. With respect to the 1949 Geneva Conventions and the 1977 Protocols thereto, the caretaker of Geneva law, the International Committee of the Red Cross (ICRC), sees no need for revision of Geneva law in view of the war in Afghanistan. However, the ICRC does openly express the need for greater compliance. In rare public statements, the ICRC, like several European allies, has criticized the United States for its initial refusal to recognize that the laws of war applied to the armed conflict with the Taliban, for its mischaracterization of the status of Taliban military detainees held in Afghanistan and at Guantanamo Bay, and for its refusal to

grant members of the armed forces of the Taliban prisoner of war status as required under Geneva law.[8] The ICRC also confirms that compliance with Geneva law "in no manner constitutes an obstacle to the struggle against terror and crime."[9] More generally, there is no significant need to revise the laws of war, including Geneva law, because of the al Qaeda attacks on September 11 or the October 7 international armed conflict in Afghanistan. Some have made sophistic, overly broad generalizations concerning the alleged status of various types of persons detained by the United States after September 11, but there is no need to adopt radically new claims concerning the status of various persons detained by the United States, such as those who were (1) merely members of al Qaeda, (2) members of the armed forces of the Taliban, or (3) U.S. citizens who were members of one or the other or both. Extension of combatant or individual belligerent status to mere members of al Qaeda – or denial of combatant or individual belligerent status to members of the armed forces of the Taliban – would not merely be legally inappropriate but also could have seriously harmful consequences. In particular, this would extend a radically new reach of combat immunity to mere members of al Qaeda and a radically new denial of combat immunity to members of the armed forces of various states. It also should be noted that during an armed conflict, certain non-POWs within an actual theater of war or directly connected to an actual war who pose a real threat to security can be detained without trial while they continue to pose such a threat and detention is necessary, although they are entitled to judicial review of the propriety of their detention. Furthermore, prisoners of war can be detained without trial for the duration of the armed conflict.[10] Additionally, any such person (and a person of any status) can be prosecuted for an international crime that he or she is reasonably accused of having committed.

The test for combatant or individual belligerent status under the laws of war is straightforward. It is membership in the armed forces of a party to an armed conflict of an international character. Thus, privileged or lawful belligerents include members of the armed forces of a state, nation, or belligerent during an armed conflict. They do not include insurgents engaged merely in an armed conflict not of an international character to which common Article 3 of the Geneva Conventions applies.[11] Because al Qaeda lacks even insurgent status, clearly they would not include persons who were merely members of al Qaeda and such persons would be unprivileged

fighters if they engaged in armed violence during an actual war (and they would lack combatant immunity and be subject to prosecution for violations of relevant domestic law with respect to their unprivileged belligerent acts of violence[12]), unless they were directly attached to enemy armed forces during wars in Afghanistan or Iraq. By improperly classifying nearly all of the members of al Qaeda's terrorist network as "enemy combatants," the Bush administration actually turns combatant status on its head, deflates the well-recognized meaning of "combatant," and unwittingly perpetuates the unwanted consequences of a war paradigm favored by al Qaeda.

As noted in U.S. military texts, "[a]nyone engaging in hostilities in an armed conflict on behalf of a party to the conflict" is a "combatant"[13] and "[c]ombatants . . . include all members of the regularly organized armed forces of a party to the conflict."[14] Article 1 of the Annex to the 1907 Hague Convention expressly states that belligerent status will "apply . . . to armies" and expressly sets forth additional criteria to be met merely by "militia" or "volunteer corps."[15] The customary 1863 Lieber Code[16] also affirmed: "So soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses."[17] Today, Article 4(A)(1) of the Geneva Convention Relative to the Treatment of Prisoners of War[18] (GPW) has actually expanded the prisoner of war (POW) status that exists for members of "armies" or "armed forces" to include such status for members of certain militia forming part of the armed forces of a party to an armed conflict.

Of course, members of the armed forces of the Taliban were not simplistically mere "militia" or subject to the need to comply with additional criteria for combatant status beyond the determinative criterion of membership in an armed force or army of a state, nation, or belligerent. Although some confuse the two, the tests for combatant status and prisoner of war status can be different for certain types of combatants. For example, both combatant status and prisoner of war status with respect to members of the armed forces of a state, nation, or belligerent are based on a single determinative criterion – membership in the armed forces.[19] However, prisoner of war status for certain "militia" or members of "volunteer corps" not attached to the armed forces of a party to an armed conflict hinges on applicability of various additional criteria, as noted below concerning POW status. With respect to an actual armed conflict (as opposed to the September 11

attacks as such), adding the word "enemy" to "combatant" has no legal consequence. Enemies in a war who are "combatants" are indeed "enemy combatants" and prisoners of war. Thus, U.S. soldiers captured during an actual war are "enemy combatants."

D. COMBATANT IMMUNITY

Importantly, enemy combatants during an armed conflict of an international character are privileged to engage in lawful acts of war such as the targeting of military personnel and other legitimate military targets. Such acts are privileged belligerent acts or acts entitled to combat immunity if they are not otherwise violative of the laws of war or other international laws (e.g., those proscribing aircraft sabotage, aircraft hijacking, genocide, or other crimes against humanity).[20] Violations of the laws of war are war crimes; violators are not entitled to immunity and are thus prosecutable. However, lawful acts of war are covered by the rule of combat immunity and cannot properly be criminal under domestic law, nor can they be judged elements of domestic crime or acts of an alleged conspiracy to violate domestic law. The laws of war should not be changed to provide otherwise. As former General and Professor Telford Taylor once wrote:

> War consists largely of acts that would be criminal if performed in time of peace. . . . Such conduct is not regarded as criminal if it takes place in the course of war, because the state of war lays a blanket of immunity over the warriors. But the area of immunity is not unlimited, and its boundaries are marked by the laws of war.[21]

Language in several cases is also informing. In *United States v. Ohlendorf*,[22] decided during the subsequent Nuremberg proceedings, it was recognized:

> Many of the defendants seem to assume that by merely characterizing a person a partisan, he may be shot out of hand. But it is not so simple as that. If the partisans are organized and are engaged in what international law regards as legitimate warfare, . . . they are entitled to be protected as combatants. . . . The language used in the official German reports . . . show[s], however, that combatants were indiscriminately punished only for having fought against the enemy. This is contrary to the law[s] of war.[23]

If lawful combat actions could be the basis for domestic crimes, U.S. military personnel would be placed in serious danger in any future armed conflict involving U.S. military forces. The United States rightly expects as a matter of venerable law that combat actions of U.S. armed forces that are not violative of international law will be immune from prosecution under the domestic laws of various countries in which they operate and that captured U.S. military personnel will be treated as prisoners of war. There is no need to make changes in the laws of war that will change such results or provide ready pretexts for denial of combatant or prisoner of war status to U.S. or other military personnel. Similarly, a decision to deny combat immunity to members of the armed forces of the Taliban with respect to lawful acts of war would be illegal and could have serious unwanted repercussions for U.S. military personnel in the future by deflating the well-recognized meaning of the term "combatant."

Some who argue that members of the armed forces of the Taliban should be denied either combatant or prisoner of war status stress partial language from an old U.S. Supreme Court case, *Ex parte Quirin*,[24] that was decided before the creation of the 1949 Geneva Conventions and much of the modern law and practice of warfare. In any event, *Ex parte Quirin* actually involved prosecution of a set of combatants for war crimes, that is, for one of the exceptions to combat immunity for those combatants who engage in a violation of the laws of war. Thus, *Ex parte Quirin* actually provides implied support for the principle of combat immunity for lawful acts of combat. Defendants in that case were clearly "enemy belligerents" or enemy combatants, but they were prosecutable for war crimes[25] "because [their particular acts of engaging in a combat mission "without uniform" were at that time period] in violation of the law of war"[26] and thus, the defendants were combatants,[27] but had nonetheless "violated the law of war applicable to enemies."[28] Thus, the war crimes engaged in by particular individuals (as opposed to those engaged in by other members of the armed forces of Germany) resulted in a lack of combat immunity for those individuals with respect to their particular acts.[29] However, this did not result in a lack of combatant status for those individuals (or the rest of the German armed forces), a lack of combat immunity for lawful acts of war, or a lack of access to federal courts concerning the propriety of their detention and prosecution.[30] *Ex parte Quirin* also affirmed that judicial power exists to finally determine the legal status of detainees under and in accordance with

international law that the judiciary identifies and interprets: "From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes . . . the status, rights and duties of enemy . . . individuals."[31] Other federal courts also have reaffirmed the role of the judiciary to address international legal issues concerning prisoner of war status, the propriety of detention, and provisional characterizations by the Executive during war.[32]

Some use the regrettable and technically oxymoronic phrase "unlawful combatant" in an inappropriate way that confuses separate issues regarding personal status (e.g., as a combatant or noncombatant who is not privileged to engage in warfare) and the lack of immunity for personal acts committed in violation of the laws of war. If one is a combatant under the laws of war, one is not an "unlawful combatant" and one does not become an "unlawful combatant" merely because other members of the armed forces or unit to which one belongs commit war crimes. More generally under the laws of war, mere membership (even in a criminal organization) is not a crime and one cannot become an "unlawful" combatant or lose POW status merely because other members of the armed forces violate the laws of war. Additionally, during war reprisals against any detainee and "collective punishment" (i.e., punishment of an individual not for what he or she has done but for the acts of others) are war crimes. An attempt to deny combatant status to all members of the armed forces of one's enemy because of the acts of some of its members, the practice of the Bush administration with respect to all members of the Taliban, merely serves unlawful policies that form the foundation for such prohibitions. Furthermore, as expressed in common Article 1, Geneva law must be applied "in all circumstances."

In view of this, broad-brush generalizations concerning all al Qaeda or all Taliban are both intellectually and legally deficient. Lawful combatant status, combat immunity, and POW status for members of the armed forces of a party to an armed conflict rest either on the individual's membership or personal conduct and not on some form of collective guilt or punishment. Today under GPW, even a prisoner of war being prosecuted for or who has been convicted of war crimes does not lose POW status or protections. No changes in relevant laws of war are needed, and some changes could have dire consequences for U.S. soldiers and afford enemies of the United States a pretext for denial of present legal protections. As noted, the Bush administration's classification of members of al Qaeda as "enemy combatants"

deflates the meaning of combatant and if so-called enemy combatants are prosecuted at Guantanamo for engaging in acts that would be lawful acts of warfare, including carrying weapons and targeting lawful military targets, such a misuse of the phrase "enemy combatant" can provide greater danger to military personnel who are actually "enemy" "combatants" and prisoners of war during armed conflicts. The proper phrase for a member of al Qaeda who has no combatant status would be unprivileged fighter.

E. LEGAL TESTS FOR PRISONER OF WAR STATUS

With respect to prisoner of war status, the Geneva Convention Relative to the Treatment of Prisoners of War sets forth separate categories of persons who are entitled to prisoner of war status during an armed conflict of an international character.[33] The 1949 Convention's list of six separate categories involved a clear change of certain prior interpretations of coverage under the 1929 Convention. Under express terms of the treaty, only one category out of six contains criteria limiting prisoner of war status to those belonging to a group that carries arms openly, wears a fixed distinctive sign recognizable at a distance, and conducts operations generally in accordance with the law of war. Under GPW Article 4(A)(2), these limiting criteria expressly apply only to certain "militias or volunteer corps" or "organized resistance movements." They expressly do not apply to "[m]embers of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces" covered under 4(A)(1) or to "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power" covered under 4(A)(3).[34]

With respect to the armed forces of a party to the armed conflict in Afghanistan (such as those of the Taliban and the United States), the determinative criterion for prisoner of war status is membership. Thus, members of the armed forces of each party qualify as prisoners of war under GPW Article 4(A)(1), if not 4(A)(3), and the authoritative ICRC has expressly recognized combatant and POW status for all members of the armed forces of the Taliban. Moreover, POW status does not inhibit the ability to detain enemy POWs for the duration of an armed conflict, whether or not particular POWs can also be prosecuted for war crimes or other violations of

international law. Indeed, prisoners of war subject to prosecution do not thereby lose their status as a prisoner of war. There is no need to change the laws of war in that regard.

F. DANGEROUS CONSEQUENCES CAN ARISE IF THE LEGAL TESTS ARE CHANGED

A new extension of the four criteria expressly applicable only to one of six categories addressed in GPW Article 4(A), that is, those covered in 4(A)(2), to the "armed forces" of a party to an armed conflict (who are presently covered by Article 4(A)(1)), would result in a nonsensical, policy-thwarting denial of POW status to all members of the armed forces of a party to an armed conflict whenever several members do not wear a fixed distinctive sign recognizable at a distance or several members violate the laws of war. Such an approach is illogical and contrary to normal approaches to treaty interpretation; it would seriously threaten POW status, combat immunity, and protections for soldiers of various countries including U.S. military; and it would be inconsistent with general state practice (which is also relevant for treaty interpretation). In Afghanistan and more generally and in conformity with widespread state practice, several types of U.S. soldiers (e.g., special forces) and various regular soldiers at different times have used camouflage and have otherwise attempted to blend in with local flora or geography in an effort to avoid being recognizable at a distance, as they prefer not to be clearly recognizable at all. Indeed, various U.S. soldiers in Afghanistan have not only not met the criterion of wearing distinctive emblems or signs recognizable at a distance but also have been spotted wearing Afghan civilian clothing and sporting beards to "blend in."[35]

Thus, under the nonsensical approach, all U.S. soldiers could be denied prisoner of war status during the conflict in Afghanistan and an upgraded war with Iraq. Furthermore, under the nonsensical approach, Lieutenant Calley's war crimes at My Lai and those of other U.S. military personnel there and elsewhere would have required a denial of POW status to any member of the armed forces of the United States captured in Vietnam.[36] As it is not unlikely, although regrettable, that during any armed conflict war crimes will be committed by some soldiers on each side, the nonsensical approach thwarts policies behind the prohibition of collective punishment

and would provide a pretext for enemies of the United States to deny POW status, combatant status, and combat immunity to U.S. soldiers. There is no need to change the laws of war to adopt such a nonsensical approach.

G. THE MISCONCEIVED MILITARY COMMISSIONS ACT OF 2006

When Congress adopted the Military Commissions Act of 2006,[37] it adopted a scheme concerning the status of an "enemy combatant" that made matters worse. The scheme differentiates between a "lawful enemy combatant" and an "unlawful enemy combatant,"[38] and thus, uses the terms "enemy" and "combatant" to describe an "unlawful enemy combatant" who may in fact be an unprivileged fighter (within or outside of the context of an armed conflict) or a noncombatant who is not privileged to engage in warfare, neither one of which is a "combatant" under international law. Moreover, some persons who impermissibly engage in armed terrorist violence outside the context of an actual armed conflict in Afghanistan or Iraq do not seem to be covered under the statute's definition of "unlawful enemy combatant," as the words "enemy" and "combatant" imply a limitation to circumstances of actual armed conflict or war.[39] Additionally, the first type of "unlawful enemy combatant" set forth in the legislation is limited to "a person who has engaged in hostilities or who has purposely and materially supported hostilities . . . who is not a lawful enemy combatant."[40] The word "hostilities" has a similar limiting effect,[41] especially when used to describe the conduct of persons labeled as an unlawful "enemy" "combatant."

The first type of "unlawful enemy combatant" may also be overinclusive. Depending on how the relevant statutory provision is interpreted, it may contain an improper sweeping denial of lawful combatant status to "a person who is part of the Taliban,"[42] as members of the regular armed forces of the Taliban involved in the international armed conflict in Afghanistan are entitled to prisoner of war status and combatant status under treaty-based and customary laws of war.[43] Moreover, as at least one federal court has rightly recognized, the GPW:

> does not permit the determination of prisoner of war status in such a conclusory fashion. Article 4 . . . defines who is considered a "prisoner of war". . . . If there is any doubt as to whether individuals satisfy the Article 4

> prerequisites, Article 5 entitles them to be treated as prisoners of war "until such time as their status has been determined by a competent tribunal." . . . Nothing in the Convention itself . . . authorizes the President of the United States to rule by fiat that an entire group of fighters covered by the . . . [GPW] falls outside of the Article 4 definitions of "prisoners of war."[44]

Similarly, nothing in the Convention or international law more generally would allow the sweeping denial by legislative fiat of POW status and the right to have one's status determined by a competent tribunal should any doubt arise. In fact, such a denial would violate the Convention and violations of the Convention are war crimes. Because Congress intended to comply with the Geneva Conventions and did not clearly and unequivocally express an intent to override any of their provisions,[45] the statutory provision should be interpreted so as to avoid any such sweeping denial.

Such an avoidance is possible, since the relevant subsection identifies a person who is an "unlawful enemy combatant" and excludes from that category a person "who is not a lawful enemy combatant." While doing so, the subsection uses the phrase "including a person who is part of the Taliban" after the phrase "lawful enemy combatant" in the following language: "who is not a lawful enemy combatant (including a person who is part of the Taliban . . .)." In view of the placement of the inclusive listing of members of the Taliban, the subsection might be read to identify as persons excluded from the category of "unlawful enemy combatant" and included as a lawful enemy combatant certain persons, "including a person who is part of the Taliban." This interpretation makes sense, as members of the armed forces of the Taliban should have the status of lawful enemy combatant under international law.

The first type of "unlawful enemy combatant" also might include other persons who are entitled to prisoner of war status under the 1949 Geneva Conventions. The definition in § 948a (1) includes a person who has engaged in hostilities "who is not a lawful enemy combatant." Section 948a (2) lists categories of persons who are lawful enemy combatants, but the list may be inclusive and not exclusive. The categories of persons listed in § 948a (2) do not mirror the categories of persons entitled to prisoner of war status under GPW Article 4(A)(1)–(6). For example, § 948a (2) does not include any person who would be entitled to POW status under GPW Article 4(A)(4)–(6).

Section 948a (2)(A) includes "a member of the regular forces of a State party engaged in hostilities against the United States," but GPW Article 4(A)(1) does not contain the limiting word "regular"[46] and also covers as prisoners of war "members of militias or volunteer corps forming part of such armed forces." Section 948a (2)(C) includes "a member of a regular armed force who professes allegiance to a government engaged in such hostilities but not recognized by the United States," but GPW Article 4(A)(3) uses the broader phrase "who profess allegiance to a government or an authority."

Thus, several types of persons who are entitled to prisoner of war status are not covered in the list of categories of "lawful enemy combatant" in § 948a (2) and, under one interpretation, those not listed could be an "unlawful enemy combatant" if (1) the list of categories in § 948a (2) is thought to be exclusive, and (2) if Article 4 of the GPW did not have primacy as treaty law of the United States. However, federal statutes must be interpreted so as to be consistent with treaty law.[47] This is possible in this instance if the list in § 948a (2) is considered to be inclusive and not exclusive. Furthermore, as explained in Chapter Five, Section D, there was no expression of a congressional intent to override the 1949 Geneva Conventions (or any other treaties of the United States) and under venerable Supreme Court precedent there must be a clear and unequivocal expression of congressional intent to override a treaty or the treaty will retain its primacy as law of the United States. As noted also, even if there had been such a clear and unequivocal congressional expression, Supreme Court cases recognize the primacy of "rights under" a treaty as well as the laws of war more generally even when portions of subsequent legislation that are not inconsistent with "rights under" treaties and the laws of war might otherwise prevail. Moreover, as noted in Chapter Five, Senator McCain expressed the views of his colleagues when enacting the Military Commissions Act that there was no intent to deviate from Geneva law. For these reasons, § 948a (1) and (2) should be interpreted to recognize lawful "enemy combatant" status for those persons who are entitled to such a status under international law.

Also problematic with respect to the first category of an "unlawful enemy combatant" is the statute's use of the phrase "materially supported hostilities." One who merely materially supports hostilities is not a fighter or "combatant." Thus, it seems illogical to label as a "combatant" one who merely supports combat. Would a Middle East arms dealer from a neutral country who supplies members of al Qaeda with weapons be a "combatant"?

Would a Saudi banker who finances the sale of arms by the arms dealer be a "combatant"? Would a British book vendor who supplies members of the Taliban with training and weapons manuals be a "combatant"? They would not be "combatants" under the laws of war or even unprivileged "belligerents." Furthermore, they would not be "enemies," lawful military targets during an actual war, or violators of the laws of war. The phrase "materially supports" also seems to be improperly vague and overly broad. Perhaps Congress had in mind an enemy fighter during an actual war who is not a prisoner of war or a combatant entitled to combatant immunity when it enacted this subsection, but the language used is potentially overly broad.

The purpose of this type of classification is evident in § 948c, as military commissions under the statute have jurisdiction only over "[a]ny alien unlawful enemy combatant."[48] Under Geneva law, a prisoner of war must be tried "by the same courts according to the same procedures as in the case of members of the armed forces of the Detaining Power."[49] The United States is therefore bound by treaty law to prosecute prisoners of war either in federal district courts or in general courts-martial, where U.S. service members might be prosecuted for war crimes. Importantly, human rights treaties and numerous bilateral friendship, commerce, and navigation treaties also require that foreign nationals have equality of treatment and equal protection.[50] Because one tries to interpret a federal statute consistently with international law, it would be logical and policy-serving to read any of § 948a's language in a manner that best preserves the rights of any prisoner of war to not be labeled as an "unlawful enemy combatant," and thus, to not be subjected to a military commission that has no jurisdiction over U.S. military personnel who might be reasonably accused of war crimes. Additionally, as there was no clear and unequivocal expression of congressional intent to override the GPW, Supreme Court case law requires that the GPW have primacy.[51] The primacy of GPW also mandates that § 948a be interpreted consistently with the GPW.

Under the Military Commissions Act, the second category of "unlawful enemy combatant" is potentially more sweeping. Section 948a (1)(ii) does not facially exclude the persons listed in § 948a (2) or any person entitled to prisoner of war status, although proper construction of § 948a would not permit inclusion of "lawful enemy combatants" listed under subsection (2) within the meaning of the reach of subsection (1)(ii), which covers "unlawful enemy combatants." Otherwise, there are no limiting criteria

contained in subsection (1)(ii) other than that the person "has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal (CSRT) or another competent tribunal established under the authority of the President or the Secretary of Defense." With such an approach to determination of status, any person could find themselves labeled an "unlawful enemy combatant" by a CSRT or "competent tribunal" under the control of the executive.[52] This alone requires vigilant judicial review of status determinations by the Executive branch.[53] International law requires judicial review of the propriety of detention of an individual whether or not status is determined initially by the Executive or by the legislature,[54] and the judiciary should be vigilant in fulfilling such treaty-based and customary international legal requirements. There is another problem connected with § 948a (ii), as it contains no standards whatsoever. If the subsection involves a delegation of legislative power to the Executive without any standards, there is a violation of the nondelegation doctrine.[55] If there is no delegation of legislative power, then the subsection would be *ultra vires* because Congress would be legislating where it has no legislative power.

Trusting the Executive branch, without any standards, to properly determine "enemy" "combatant" status has already proven to be highly problematic. In fact, in *In re Guantanamo Detainee Cases*,[56] Judge Green found that the Combatant Status Review Tribunal (CSRT) procedures utilized "to confirm that the petitioners are 'enemy combatants' subject to indefinite detention violate the petitioners' rights to due process of law" and that some of the petitioners "have stated valid claims under" GPW.[57] Judge Green stated that *Rasul*[58] requires "recognition that the detainees at Guantanamo Bay possess enforceable constitutional rights"[59] and that *Hamdi*[60] requires that "an individual detained by the government on the ground that he is 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 decisionmaker.'"[61]

The CSRT procedures failed such tests in two ways. First, the procedures failed "to provide the detainees with access to material evidence upon which the tribunal affirmed their 'enemy combatant' status and . . . [failed] to permit the assistance of counsel to compensate for the government's refusal to disclose classified information directly to the detainees."[62] "The second category of defects . . . [included] the vague and potentially overbroad

definition of 'enemy combatant' in the CSRT regulations."[63] Judge Green addressed the overly broad definition used in the CSRT process and noted that the government claimed a right to detain without trial "individuals who never committed a belligerent act or who never directly supported hostilities."[64] Demonstrating how overly broad and nonsensical the government claims have been, Judge Green noted that the court:

> explored the government's position on the matter by posing a series of hypothetical questions to counsel at the December 1, 2004 hearing on the motion to dismiss. In response to the hypotheticals, counsel for the respondents argued that the Executive has the authority to detain the following individuals until the conclusion of the war on terrorism: "[a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities," . . . a person who teaches English to the son of an al Qaeda member, . . . and a journalist who knows the location of Osama Bin Laden but refuses to disclose it to protect her source.[65]

Because the United States cannot be at "war" with al Qaeda as such, it would even be improper to classify a member of al Qaeda who had never committed an act of violence and had never engaged in other conduct in direct participation of an actual war in Afghanistan or Iraq as any type of "combatant." Yet, such a person could be arrested and prosecuted for any domestic or international crime that he or she is reasonably accused of having committed.

H. CONCLUSION

Reason, various policies at stake, reciprocity, and established practice stand in opposition to claims to change the laws of war. Acceptance of such claims would result in changing the status of war, modifying thresholds for application of the laws of war, redefining "combatant" status, as well as refusing to grant prisoner of war status to members of the armed forces of a party to an international armed conflict. Changing the status of combatants and prisoners of war could have serious consequences for the United States, other countries, U.S. military personnel, military personnel of other countries, and the rest of humankind. In some ways, claimed changes in the laws

of war could even serve those who attacked the United States on September 11 and serve other nonstate actors who might seek to engage in various forms of transnational terrorism in the future.[66] Perpetuating a "war" paradigm is favored by elite members of al Qaeda, as they can have certain "victories" against a powerful "enemy" while engaging in a protracted "war" during which their status is enhanced from that of a member of a nonstate terrorist organization to that of an "enemy combatant." Such a paradigm might also serve al Qaeda's efforts at recruitment and attempted justification for its "war" and terrorist tactics as means of "warfare" and, thus, contribute to the continuation of social violence.

Mean-spirited denials of international legal protections are not merely unlawful, but also disserve a free people. Such denials have no legitimate claim to any role during our nation's responses to terrorism. International law should also guide interpretation of any congressional scheme relating to the status of persons who are detained without trial. In fact, Geneva law must have primacy where there is no clear and unequivocal expression of congressional intent to override the Geneva Conventions. Compliance with Geneva law will also serve short- and long-term interests of the United States and, especially, those of members of the armed forces of the United States.

CHAPTER FOUR

JUDICIAL POWER TO DETERMINE THE STATUS AND RIGHTS OF PERSONS DETAINED WITHOUT TRIAL

A. INTRODUCTION

When the United States was formed, Alexander Hamilton reiterated a trenchant warning that "the practice of arbitrary imprisonments, [has] been, in all ages, the favorite and most formidable instrument[] of tyranny."[1] His warning remains relevant today, and the consequences of arbitrary detention, whether or not tyrannical in purpose, still threaten liberty and democratic values.

After the September 11 attacks on the United States in which terrorists hijacked four airplanes, crashing two of them into the World Trade Center and one into the Pentagon, the United States detained thousands of persons.[2] The detentions raised several critical questions: Are there any legal limitations on Executive discretion to detain persons accused of participation in acts of terrorism or who are suspected of posing significant threats to national security? Is arbitrary detention proscribed and, if so, what is the proper role of the judiciary in response? Are Executive determinations of the status and rights of detainees reviewable in federal courts and, if so, what is the proper standard for judicial review?

Since September 11, the Bush administration has claimed a right to detain without trial any member of al Qaeda or the Taliban or other persons allegedly posing threats to national security as "enemy" or "unlawful" combatants, whether captured in or outside of a war in Afghanistan or Iraq and

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whether or not they are being detained in the United States, Afghanistan, Guantanamo Bay, or other countries.[3] Furthermore, the Bush administration has asserted that either there should be no judicial review of Executive determinations or, if judicial review obtains, there should be complete or nearly complete deference to Executive determinations.[4]

International law, the U.S. Constitution, federal case law, and other legal norms do not support the Bush administration's positions on detention and judicial review. Rather, these sources of law and trends in judicial decision demonstrate that there are legal limits to the power to detain persons without trial, that judicial review of the propriety of detention must be made available, and that no legal standard of review permits complete deference to Executive determinations of the legal status and rights of persons detained without trial.

As documented in Section B.1 of this chapter, human rights law applicable in all social contexts, including times of national emergency and war, prohibits arbitrary detention of persons and requires the availability of judicial review of the propriety of detention under a standard involving contextual inquiry whether detention is reasonably needed under the circumstances. Detention of a person actually posing a serious threat to national security would not be arbitrary, the detainee would have a right to judicial review of an Executive decision to detain such a person, but it would not be difficult for the government to meet the human rights standard for review. Section B.2 identifies relevant international law applicable during times of international armed conflict concerning prisoner of war status and the status and rights of all persons who do not have prisoner of war status. As demonstrated, prisoners of war can be detained for the duration of an international armed conflict, but there are legal limits on the power of the United States to detain other persons in time of war. Section B.2 also identifies international law relevant to review of determinations of prisoner of war status and judicial review of the propriety of detention of all non–prisoners of war. Human rights law permits detention if it is reasonably needed under the circumstances, whereas under the laws of war a more rigorous standard of necessity is required for detention of non–prisoners of war.

Section C addresses U.S. case law concerning judicial power and responsibility to determine the status and rights of persons detained as security threats or prisoners of war. The section also documents standards for

judicial review of Executive determinations that have been used throughout our history. These trends demonstrate without exception that, contrary to the Bush administration's claims, the Executive branch does not have complete and unreviewable power to classify persons as enemy or unlawful combatants and to detain such persons without trial. Overwhelming evidence of trends in judicial decision also demonstrates that the Executive assertion that there should be complete or nearly complete acceptance of Executive determinations of the legal status and rights of detainees whenever judicial review pertains is unacceptable. What permeates patterns of judicial decision concerning the status and rights of detainees under international law is the recognition of judicial authority to finally decide such status and rights.

B. PROPRIETY OF DETENTION AND NECESSITY OF JUDICIAL REVIEW UNDER INTERNATIONAL LAW

1. Human Rights Standards in Time of Peace, National Emergency, or War

a. Permissible Detention Under Human Rights Law

Under international law, human rights standards that are both treaty-based and part of customary international law, and that are applicable in all social contexts (i.e., during relative peace or war[5]), establish standards for the propriety of detention. These standards, recognized in nearly all major human rights instruments, include the prohibition of "arbitrary" arrest or detention.[6] For example, in a typically straightforward fashion, the International Covenant on Civil and Political Rights (ICCPR) mandates: "No one shall be subject to arbitrary arrest or detention."[7] Additionally, the human right to freedom from arbitrary arrest or detention is part of a more general right to liberty and security of person. As noted in the International Covenant, a concomitant human right prohibits deprivation of liberty "except on such grounds and in accordance with such procedure[s] as are established by law."[8] Thus, detention of terrorist suspects and others must not be "arbitrary," there must be legal grounds for such detention, and detention must be in accordance with procedures established by law.

Freedom from "arbitrary" detention is a relative right, however. Whether or not detention of an alleged terrorist or direct supporter of terrorism is

"arbitrary" has to be considered in context and with reference to various interests at stake, such as the detainee's rights to liberty and security, the rights of others to liberty and security,[9] and the interests of the government in maintaining law and democratic order.[10] Under human rights law, therefore, detention will not be "arbitrary" if it is reasonably needed under the circumstances.

b. Judicial Review of Detention Under Human Rights Law

When a person is detained by a state, human rights law requires the availability of judicial review of the detention. As affirmed in the International Covenant, "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."[11] Access to courts for judicial determination of rights and the right to an effective remedy are also guaranteed more generally under Article 14(1) of the International Covenant[12] and supplemented by General Comments of the Human Rights Committee created by the Covenant.[13] The human rights standard concerning judicial review should involve contextual inquiry into whether detention is reasonably needed under the circumstances and, thus, is not "arbitrary."

However, within the text of the ICCPR the right to judicial review of detention is impliedly a derogable right – that is, one that could be derogated from "[i]n time of public emergency which threatens the life of the nation," when the existence of such an emergency is officially proclaimed and a denial of judicial review is "strictly required by the exigencies of the situation."[14] Such a denial, however, must not be inconsistent with the state's other obligations under international law (e.g., its obligations under the laws of war and the customary prohibitions against any "denial of justice" to aliens[15]) and must "not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."[16] Thus, derogations are not permissible merely because they would be reasonable; they must be "strictly required" by the exigencies of the situation.

A strong argument exists that denial of judicial review of the propriety of detention will never be "strictly required," given that under the applicable standard concerning detention a state has such a low burden to justify detention. Because a state merely has to demonstrate that detention

is reasonably needed under the circumstances, the state should have to make this showing to a court. In fact, many authoritative international institutions have articulated this requirement. For example, the Human Rights Committee created under the ICCPR has recognized that freedom from arbitrary detention or arrest is a peremptory norm *jus cogens* (and is, thus, a right of fundamental and preemptive importance[17]), has expressly declared that a state "may not depart from the requirement of effective judicial review of detention,"[18] and has affirmed that "the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of the detention must not be diminished by a State party's decision to derogate from the Convention."[19] Similarly, the Inter-American Court of Human Rights has recognized that judicial guarantees essential for the protection of nonderogable or peremptory human rights are also nonderogable in times of emergency,[20] that the human right to be brought promptly before a judge must be subject to judicial control, and that judicial protection must include the right to habeas corpus or similar petitions and cannot be suspended during a time of national emergency.[21] Additionally, the European Court of Human Rights has recognized that detention by the Executive without judicial review of the propriety of detention is violative of fundamental human rights law.[22] Such widespread recognition and the *jus cogens* nature of the right to freedom from arbitrary detention affirm the nonderogability of judicial review and therefore require that the Executive branch may not exercise its discretion to detain persons without independent, fair, and effective judicial review. Indeed, it is difficult to imagine a more arbitrary system of detention than one involving an Executive branch unbounded by law and whose decisions are not subject to effective judicial review. Such a system exists in its most extreme form when detention is secret and the detainee is the victim of forced disappearance.

2. Detention Under the Laws of War During Times of International Armed Conflict

a. Detention of Prisoners of War

When an international armed conflict exists, certain persons, such as enemy combatants who are members of the armed forces of a party to the conflict, are entitled to prisoner of war (POW) status and protections under Article 4

of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW).[23] Prisoners of war can be detained during an armed conflict, but they must be "released and repatriated without delay after the cessation of active hostilities,"[24] unless they are being lawfully prosecuted or have been lawfully convicted of crimes and are serving sentence.[25]

During an armed conflict, all persons who are not prisoners of war, including so-called unprivileged fighters or "unlawful combatants," have at least various nonderogable rights to due process under the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Civilian Convention)[26] and Geneva Protocol I.[27] Thus, even if POW status is somehow lost, any detainee has due process protections under the Geneva Conventions and Protocol I, human rights law, and other international laws as noted herein. There is no gap in protection and in case of doubt as to the status of a detainee, GPW requires that all persons "having committed a belligerent act and having fallen into the hands of the enemy" shall enjoy POW protections "until such time as their status has been determined by a competent tribunal."[28]

b. Detention of Other Persons

During an international armed conflict or war-related occupation, "a Party to the conflict" or an occupying power can intern certain persons who are not prisoners of war either in its own territory or in occupied territory under certain circumstances. To detain someone within the state's territory, the person must be "definitely suspected of [engaging] or [having] engaged in activities hostile to the security of the State," and such detention must be "absolutely necessary," whereas to detain someone in occupied territory, the person must be "under definite suspicion of activity hostile to the security of the Occupying power" and the detention must be "necessary, for imperative reasons of security."[29] Internment without trial can last for the duration of the international armed conflict[30] or occupation, but detainees are to be released sooner if detention is no longer required for definite security reasons (e.g., release must occur upon termination of the armed conflict or occupation and in any event "at the earliest date consistent with the security of the State or Occupying Power"[31]). While such persons are being detained, they "shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by" the Geneva Civilian Convention.[32]

c. Judicial Review of Detention and Status Under the Laws of War

When doubt exists as to whether a person is a prisoner of war, such person has the right to have his status "determined by a competent tribunal."[33] If any person detained during an armed conflict is not a prisoner of war, such person nevertheless benefits from protections under common Article 3 of the Geneva Conventions, which applies today in all armed conflicts and which incorporates customary human rights to due process into the conventions.[34] Thus, whether non-POW detainees are to be prosecuted or merely detained as security threats, each such detainee has the right under customary and treaty-based human rights law to obtain judicial review of the propriety of his detention.[35]

C. JUDICIAL POWER AND RESPONSIBILITY TO DETERMINE THE STATUS AND RIGHTS OF DETAINEES

1. The Applicability of International Law as Law of the United States

International law applies as law of the United States primarily in two ways: First, treaties that the United States has entered into are binding on the United States and its nationals;[36] and, second, customary international law is part of the laws of the United States.[37]

Treaties that the United States has ratified can be binding law of the United States for various purposes regardless of whether they are self-executing or partly self-executing. Applicability of the Geneva Conventions illustrates this point. In *Hamdi v. Rumsfeld*, the Fourth Circuit panel concluded that the Geneva Civilian Convention is entirely non-self-executing,[38] but this conclusion is incorrect.[39] The panel assumed that a treaty must provide a private cause of action to be self-executing.[40] This is not the test, however.[41] Federal courts have repeatedly held that a treaty need only expressly or impliedly provide an individual right for it to be self-executing. Regardless, the Fourth Circuit panel's reasoning missed the point that a treaty can be partly non-self-executing for one purpose but still be directly operative for another, such as for use defensively or for habeas purposes.[42] Not only do the Geneva Conventions expressly recognize private rights,[43] but they also retain the possibility of private causes of action for their

breach – a practice that predates the conventions and exists more generally with respect to violations of the laws of war.[44] Furthermore, the conventions openly contemplate "liability" and reparations.[45] Several federal statutes also provide an executing function for various purposes, including for private lawsuits.[46] More important, habeas corpus legislation provides an executing function for any wholly or partly non-self-executing treaty of the United States by expressly implementing all treaties of the United States for habeas purposes.[47] An express purpose of the legislation is to allow a habeas petition for any person "in custody in violation of . . . treaties of the United States.[48]

International law also applies within the United States because customary international law, of which all of the rights, duties, and responsibilities reflected in the 1949 Geneva Conventions form a part,[49] is directly part of U.S. law.[50] In *Rodriguez-Fernandez v. Wilkinson*,[51] the court recognized that "arbitrary detention is [also] prohibited by customary international law" and "[t]herefore . . . [such detention] is judicially remedial as a violation of international law,"[52] as "[i]nternational law is a part of the laws of the United States which federal courts are bound to ascertain and administer in an appropriate case."[53] The district judge aptly added:

> Perpetuating a state of affairs which results in the violation of an alien's fundamental human rights is clearly an abuse of discretion. . . . This Court is bound to declare such an abuse and to order its cessation. When Congress and the Executive department . . . [decided to control certain aliens], it was their corollary responsibility to develop methods . . . without offending any of their fundamental human rights. . . . [T]he courts cannot deny them protection from arbitrary governmental action . . . [54]

The Supreme Court acknowledged in 1936 that "operations of the nation in . . . ["foreign"] territory must be governed by treaties . . . and the principles of international law,"[55] and in 1901 that Executive military powers during a war-related foreign occupation are "'regulated and limited . . . directly from the laws of war . . . the law of nations.'"[56]

In addition to international treaties and customary international law, domestic legal constraints also bind the United States. For example, the Supreme Court noted that "constitutional limits" also exist "on the President's powers as Commander-in-Chief or as the nation's spokesman in the

arena of foreign affairs."[57] The Supreme Court has also affirmed that "even the war power does not remove constitutional limitations safeguarding essential liberties."[58]

2. Judicial Power and Responsibility to Determine Status and Rights

United States courts clearly have judicial power to determine the legal status and rights of detainees under international law. This power derives from the uniform views of the Founders and from Article III, Section 2 of the Constitution, which empowers the federal judiciary to identify, clarify, and apply rights and duties arising under treaties and customary international law.[59] The Supreme Court has reaffirmed this power in numerous decisions. For example, in *The Paquete Habana*,[60] the Supreme Court recognized that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."[61] More specifically with respect to the matters in issue, in *Ex parte Quirin*,[62] the Supreme Court affirmed that "[f]rom the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes . . . the status, rights and duties of enemy . . . individuals."[63]

In *Owings v. Norwood's Lessee*,[64] the Supreme Court specifically addressed whether it and other federal courts had the power to hear claims based on rights expressly or impliedly afforded by treaties:

> The reason for inserting that clause in the constitution . . . [Art. III, Section 2] was, that all persons who have real claims under a treaty shall have their causes decided by the national tribunals. . . . Whenever a right grows out of, or is protected by, a treaty, it is sanctioned against all the laws and judicial decisions of the states; and whoever may have this right, it is to be protected.[65]

The Supreme Court further emphasized these general points when, in response to claims in *Ex parte Quirin* that Executive decisions denying access to courts to a class of persons are determinative and that, in any case, enemy aliens being detained should be denied access to courts,[66]

the Supreme Court was emphatic that "neither the [President's] Proclamation nor the fact that they are enemy aliens forecloses considerations by the courts of petitioners' contentions . . . [67]Indeed, as *Ex parte Quirin* recognizes, legal status and rights under international law are matters of law within the ultimate prerogative of the judiciary. Later, in *Youngstown Sheet and Tube Co. v. Sawyer*,[68] Justice Jackson affirmed that the Founders had omitted from the Constitution unreviewable presidential "powers *ex necessitate* to meet an emergency," noting that they knew how such powers would "afford a ready pretext for usurpation."[69] He proceeded to reassert the "control of Executive powers by law," and assured that "it is not a military prerogative, without support of law, to seize persons or property because they are important or even essential for the military . . . [70] In fact, issues concerning POW status, the propriety of detention, and provisional characterizations by the Executive during war have been reviewed by courts according to international legal standards.[71]

In other contexts, the judiciary has addressed the propriety of seizures of persons or property abroad in violation of international law[72] and has made final determinations concerning the seizure of enemy or neutral property in time of armed conflict, often in conflict with the determinations of the Executive branch.[73] In *Brown v. United States*,[74] Justice Story cautioned that the President during war "has a discretion vested in him, as to the manner and extent, but he cannot lawfully transcend the rules of warfare established among civilized nations. He cannot lawfully exercise powers, or authorize proceedings, which the civilized world repudiates and disclaims."[75] Later, in *Sterling v. Constantin*,[76] the Court affirmed that the line between permissible discretion and law is one that must be drawn by the judiciary:

> It does not follow from the fact that the Executive has this range of discretion, deemed to be a necessary incident of his power to suppress disorder, that every sort of action the . . . [Executive] may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, . . . is conclusively supported by mere Executive fiat. What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions. Thus, in the theatre of actual war, there are occasions in which private property may be taken . . . [but] the officer may show the necessity in defending an action . . . [before the judiciary].[77]

The Court then quoted *Mitchell v. Harmony*:[78] "'Every case must depend on its own circumstances.'"[79]

Judicial review of military actions taken under circumstances of claimed "necessity" during war has also occurred in other cases and has involved contextual inquiry into whether the military actions were required, "reasonable," or plainly justified.[80] Thus, exercise of war or national security powers must not only fall within the limits of law but also must not take exception in the name of "necessity" or under some theory that the end justifies the means. To this sort of claim, the Supreme Court gave an apt reply in *Ex parte Milligan*:[81]

> Time has proven the discernment of our ancestors. . . . Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. . . . The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence . . . [82]

The Court also emphasized that precisely at such times "the President . . . is controlled by law, and has his appropriate sphere of duty, which is to execute . . . [and not violate] the laws,"[83] adding: "[b]y the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers."[84]

During a heroic moment in judicial history, federal district judge Herbert J. Stern, sitting in a specially convened Court of the United States in Berlin during prosecution of aircraft hijackers, refused claims of U.S. prosecutors that rights of the accused would be determined by the Executive branch and that the proceedings and other governmental actions did not have to comply with the U.S. Constitution.[85] In reply to prosecutors' arguments when pressed to deny constitutional and other rights on the grounds that

important "foreign affairs" and "national interests" were at stake, Judge Stern noted that judges in that very city some forty years earlier had heard similar claims, but that such claims were clearly unacceptable:

> When was it that Judges were supposed to worry about that in deciding what the law is? . . . in construing the rights of human beings? And when did it become permissible for lawyers in a courtroom or a litigant to tell the Judge that the piece of litigation is so important to the litigant that the Judge is ordered to find a certain way? What system of justice are you referring to? . . . What Judge would do it for you?
>
> . . . That's a vile thing for a Judge to listen to. He can't be a judge if he listens to that.[86]

Instead, Judge Stern upheld predominant trends in decision and traditional expectations that judicial attention to law must not be lessened merely because of the Executive prerogative to conduct foreign relations as such and to prosecute alleged terrorist hijackings. Quite properly, the court noted that although laws might not directly regulate permissible Executive discretion concerning the conduct of otherwise permissible governmental operations, the Executive, in choosing among permissible options, must not violate the law. More specifically: "The talismanic incantation of the word 'occupation' cannot foreclose judicial inquiry into the nature and circumstances of the occupation, or the personal rights of two defendants which are at stake."[87]

3. Two Cases Before the Supreme Court's Decision in *Hamdi*

a. Affirming Judicial Responsibility

Before the Supreme Court's decision in *Hamdi*, the Fourth Circuit in *Hamdi v. Rumsfeld (Hamdi I)*[88] had rightly emphasized the importance of "meaningful judicial review" and denounced the "sweeping proposition . . . that with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel."[89] On remand, the district court noted that the Bush administration "conceded that their determination of Hamdi's status was subject to judicial review,"[90] and added:

> While it is clear that the Executive is entitled to deference regarding military designations of individuals, it is equally clear that the judiciary is

> entitled to a meaningful judicial review of those designations when they substantially infringe on . . . individual liberties. . . . The standard of judicial inquiry must . . . recognize that the "concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of [Executive] power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which sets this Nation apart . . . "[91]

Addressing significant policies at stake in a constitutional democracy with respect to a viable check and separation of powers, the district court added that judicial acceptance of an Executive determination as sufficient justification for detention "would in effect be abdicating any semblance of the most minimal level of judicial review," such that "this Court would be acting as little more than a rubber-stamp."[92] The district court added that under "a government of checks and balances," a court cannot allow detention with "few or no standards" or on "sparse facts" presented to support an Executive decision to detain.[93] Indeed, allowing the Executive to make a final determination with respect to the content and application of international law governing the status of persons, individual rights, and permissibility of detention would necessarily involve a violation of the separation of powers,[94] and would not be excusable under international law.[95]

b. Functionally Abdicating Responsibility to Provide a "Meaningful Judicial Review"

Less attentive to judicial responsibility was the district court decision in *Padilla v. Bush (Padilla I)*.[96] While the district court in *Padilla I* recognized that a U.S. national detained as an "enemy combatant" has the right by habeas corpus "to challenge the government's naked legal right to hold him as an unlawful combatant on any set of facts whatsoever,"[97] and has a right to counsel for the purpose of presenting facts to the court concerning the propriety of an Executive determination of his status and detention,[98] it stretched the notion of "deference" owed to Executive provisional characterizations so thin as to amount to a functional judicial abdication of responsibility to provide a "meaningful judicial review," as had been required in *Hamdi I*.[99] According to the court in *Padilla I*, the district court was to "examine only whether the President had some evidence to support his finding."[100] This is simply not sufficient for "meaningful," independent, fair, and "effective" judicial review, as required by human

rights law. There must be independent inquiry whether detention is reasonably needed under the circumstances. Furthermore, in time of war, there must be independent inquiry whether detention is absolutely necessary.[101]

On reconsideration, the district court in *Padilla II* clarified its "some evidence" standard to provide for greater review of Executive determinations than what the Fourth Circuit panel in *Hamdi II* finally required. The district court in *Padilla II* stated that it "would not be free simply to take" Executive "fears" as a test, "and on that basis alone deny Padilla access to a lawyer."[102] Instead, Padilla "has the right to present facts" and must have access to a lawyer for that purpose,[103] the court cannot focus "'exclusively on the evidence relied on by the Executive'" in determining whether "some evidence" supports the Executive determination,[104] and even under the "some evidence" standard the court "cannot confirm that Padilla has not been arbitrarily detained without giving him an opportunity to respond to the government's allegations."[105] Thus, Padilla "is entitled to present evidence that conflicts with what is set forth" by the Executive "and to have that evidence considered."[106]

In sharp contrast, when *Hamdi II* returned to the Fourth Circuit, the panel decided that Hamdi was "not entitled to challenge the facts presented" by the Executive,[107] even under its seemingly more meaningful "meaningful review" standard. *Padilla II* tried to distinguish *Hamdi II* by arguing that "if the petitioner does not dispute that he was captured in a zone of active combat operations abroad and the government adequately alleges that he was an unlawful combatant, the petitioner has no right to present facts" to dispute the government.[108] Additionally, *Padilla II* assumed that the "undisputed detention of a citizen during a combat operation undertaken in a foreign country and a determination by the Executive that the citizen was allied with enemy forces" should be determinative.[109] But this argument for complete abdication does not make sense. For example, a journalist detained in a zone of active combat should be allowed to challenge the government's determination that he or she poses a threat to security, especially since numerous cases noted in this chapter demonstrate the propriety of judicial power to second-guess decisions of the Executive branch that were made in time of war, even in a zone of active hostilities.[110]

When *Hamdi* returned to the Fourth Circuit, the panel in *Hamdi II* declared that in its earlier decision it had only "sanctioned a limited and deferential inquiry into Hamdi's status,"[111] had instructed that "the district

court must consider the most cautious procedures first" because they "may promptly resolve Hamdi's case,"[112] and had instructed "that the district court should proceed cautiously in reviewing military operations."[113] The circuit panel acknowledged that *Ex parte Milligan*[114] "does indicate" that detention "must be subject to judicial review,"[115] "including the military's determination that he is an 'enemy combatant' subject to detention during the ongoing hostilities,"[116] and recognized that petitioner has the right "to ask that the government provide the legal authority upon which it relies for that detention and the basic facts relied upon to support a legitimate exercise of that authority."[117] Nonetheless, instead of a proper check on Executive power in wartime based on law when liberty and other legal rights might be directly in peril, the circuit panel, in contrast to venerable Supreme Court precedent,[118] thought that a supposed "importance of limitations on judicial activities" should be "inferred"[119] and "any inquiry must be circumscribed to avoid encroachment into . . . military affairs."[120] Yet, it is precisely when law and legal rights are being trespassed that the judiciary must remain active, "play its distinctive role,"[121] and not abandon in whole or in part "the explicit enumeration of powers"[122] and its historic role in our democracy.[123] It is in such situations that the judiciary should ensure that it provides meaningful, independent, fair, and effective judicial review. Even with the judiciary playing its proper role, the government's burden under human rights law does not seem difficult with respect to persons who pose real threats to security, and is generally met if detention is reasonably needed under the circumstances. However, for a court to justify the detention of certain persons under Geneva law, it must deem the detention absolutely or imperatively "necessary" under the circumstances.[124]

What was ominous in connection with some of the government's claims made during *Padilla II* was that it stated openly that there are "numerous examples of situations where" interrogation of persons detained without trial and without access to an attorney as part of a "delicate subject-interrogator relationship" should proceed "'months, or even years, after the interrogation process began.' "[125] Similarly disturbing is the Executive's belief that persons should be denied access to an attorney if there is a need for ongoing intelligence, as new information is learned that may suggest new lines of inquiry, thus suggesting that the detainee has a new "intelligence value."[126] The problem with this approach is that international law requires access to courts for review of the propriety of detention, and detention in

times of armed conflict can continue only so long as the person detained is a real security threat, as determined by a necessity standard. The Executive claims that persons should be detained for intelligence value makes it all the more clear that judicial review of Executive determinations must be effective, fair, and meaningful.

Part of the government's argument for seemingly unending detention incommunicado raises other concerns. The "delicate relationship" alluded to is designed for its "psychological impacts," to create "an atmosphere of dependency,"[127] and to instill in the mind of the detainee the feeling "that help is not on the way" and thus to break down human will.[128] Yet, as documented in Chapter One, customary and treaty-based international law requires, without exception, that no person shall be subjected to torture or to cruel, inhuman, degrading, or humiliating treatment. Given these prohibitions, psychological interrogation techniques used for months, if not years, in order to break down human will and instill a sense of hopelessness is contrary to several international legal proscriptions. Courts should be vigilant in assuring that these types of violations do not take place and that, when they do, victims have access to courts and effective remedies.

D. THE SUPREME COURT'S DECISION IN *HAMDI*

The majority opinion of the Supreme Court in *Hamdi v. Rumsfeld*[129] held that although under the 2001 Authorization for Use of Military Force Congress impliedly "authorized the detention of combatants in the narrow circumstances alleged . . . , due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker."[130] The Court also noted that the government "has never provided any court with the full criteria that is uses in classifying individuals,"[131] and rejected government claims either "to eliminate entirely any individual process" for review of the propriety of detention or to review "under a very deferential 'some evidence' standard."[132] The Court reiterated that a citizen "must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker" and that "notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful

manner.'"[133] "An interrogation by one's captor, however effective an intelligence gathering tool," the Court noted, "hardly constitutes a constitutionally adequate factfinding before a neutral decisionmaker."[134] With respect to the length and purpose of detention, the Court stressed that "[i]t is a clearly established principle of the law of war that detention may last no longer than active hostilities"[135] and that "indefinite detention for the purpose of interrogation is not authorized."[136]

Addressing judicial authority and responsibility in our constitutional democracy, the Court declared that "it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here."[137] The Court then emphasized:

> we necessarily reject the Government's assertion . . . that the courts must forego any examination of the individual case. . . . [Such an assertion] cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.[138]

In context, *Hamdi* represented a significant reaffirmation that in our country no one is above the law, that the law of war places limits on the propriety of detention during war, and that Executive decisions concerning the detention of persons (at least U.S. nationals) without trial must be subject to meaningful judicial review.

E. HABEAS CORPUS REVIEW

1. Lower Federal Court Decisions Concerning Habeas Corpus*

Although the Bush administration attempted to deny habeas corpus to the detainees at Guantanamo, international law[139] and proper interpretation of the habeas corpus statute require that habeas corpus be available. In

* Reproduced with permission from the *Michigan Journal of International Law*. This subsection is revised from Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure*, 23 MICH. J. INT'L L. 677, 690–94 (2002).

2002, a federal district court in California had denied habeas corpus relief with respect to detainees at Guantanamo, in part because of a peculiar reading of the statute. Relevant portions of the habeas corpus legislation declare that "writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions" with respect to persons "in custody in violation of the Constitution or laws or treaties of the United States,"[140] and the phrase "laws . . . of the United States" will include customary international law.[141] The district court in California seemed to strain against the ordinary meaning the word "jurisdiction" and added a word that Congress had not chosen, that is, the word "territorial," as a limitation of "jurisdiction" or power.[142] The district court also focused on another word that Congress had not chosen to place in the statute, the word "sovereignty."[143] This appears to have been an attempt at judicial amendment of a federal statute in violation of the separation of powers.

The statutory language simply cannot support such a perverse reading. Indeed, the statute focuses on "jurisdiction" of courts, not territory or sovereignty of the United States, and the district court seemed to confuse the meaning of the statute with issues concerning the reach of the Constitution. As noted, the statute expressly reaches violations of laws other than the Constitution.[144]

The district court stated that detainees at Guantanamo were at all times outside the "sovereign territory" of the United States and that no federal court can address a habeas petition unless Guantanamo Bay "is under the sovereignty" of the United States, adding a conclusion that "there is a difference between territorial jurisdiction and sovereignty . . . "[145] Of course, all that the statute requires is "jurisdiction." What the court failed to address is that sovereignty is a form of lawful governmental power and that wherever the U.S. detains individuals, it is exercising a form of sovereign power.[146] Additionally, Guantanamo Bay is under the sovereign power and a form of territorial jurisdiction of the United States: (1) under a treaty with Cuba that confers "complete jurisdiction and control over and within such areas" – and, by implication, "sovereignty" (as Cuba merely has "ultimate sovereignty" under the treaty and, by implication, the United States also must have some form of sovereignty or sovereign power by treaty) – and (2) as an occupying power.[147] The district court was also misleading when stating that "'jurisdiction and control' is [not] equivalent to 'sovereignty'"

because the treaty recognizes "complete" jurisdiction and control in the United States, not merely "jurisdiction and control" (which, in any event, would also suffice because the United States fully exercises sovereign power, jurisdiction, and control at Guantanamo Bay over the detainees).

In any event, the statute's word "jurisdiction" is met by the treaty (i.e., the United States has "complete jurisdiction and control" and is fully exercising it) as well as by the United States status as occupying power with jurisdiction and control. Furthermore, there is a long history of allowing the use of habeas corpus with respect to U.S. or foreign accused situated outside U.S. sovereign territory and outside the territory where a particular district court sits.[148] Thus, the statute cannot rightly be so narrowly read as to limit habeas corpus to circumstances where a petitioner is physically located within a territory in which the district court sits or within "sovereign territory" of the United States. Indeed, "jurisdiction" can be extraterritorial and should be interpreted with respect to international law.[149] The statute's use of the word relates to the jurisdiction of a court.

Moreover, federal statutes must be interpreted consistently with international law[150] and, in case of an unavoidable clash between a federal statute and international law, international law will prevail unless there is a clear and unequivocal expression of congressional intent to override international law.[151] In this case, international law requires the availability of habeas corpus[152] and there has been no clear and unequivocal expression of congressional intent to override international law.[153] Even if there had been such an intent, international law concerning the right to habeas corpus would prevail under either the "rights under treaties" exception (guaranteeing the primacy of "rights under" a treaty)[154] or the "war powers" or law of war exception (guaranteeing the primacy of international law in the context of war)[155] to the "last in time" rule with respect to an unavoidable clash between a federal statute and a treaty.

By granting habeas review, one does not guarantee a particular decision on the merits of a claim. For example, if a person can be lawfully detained without trial,[156] the granting of habeas review merely assures judicial consideration of the lawfulness of an Executive decision to detain the petitioner. Yet, judicial consideration of the claim would save the United States from a violation of international law and allow courts to maintain a judicial independence that is vital to liberty and constitutional order. Furthermore, the Executive cannot suspend habeas corpus. There must be a constitutionally

permissible suspension by Congress.[157] Thus, following the President's 2001 Military Order and the 2002 DOD rules would not have served a proper balance and separation of powers and would have been unconstitutional.

2. The Supreme Court's Decision in *Rasul*

In *Rasul v. Bush*,[158] the Supreme Court held that the habeas statute "confers a right to judicial review of the legality of Executive detention of aliens in a territory of which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty.'"[159] The Court noted that denial of habeas as a constitutional entitlement in *Eisentrager* during World War II was based on several factors that distinguished the case before it, including the fact that petitioners in *Rasul* were detained "in territory over which the United States exercises exclusive jurisdiction and control."[160] Decisions of the Supreme Court after *Eisentrager* also have expanded the statutory entitlement to habeas review and will apply where the "'custodian can be reached by service of process.'"[161] The Court noted that no one questioned the district court's "jurisdiction over petitioners' custodians" in Washington, D.C., and ruled the habeas statute conferred the district court's jurisdiction to hear habeas challenges to the legality of detention at Guantanamo Bay, Cuba.[162] Concerning the survival of such jurisdiction after enactment of the Military Commissions Act of 2006, because Congress has no constitutional power to suspend the writ of habeas corpus except when actually required in time of rebellion or invasion, see Chapter Five, Section D.[163]

F. CONCLUSION

When responding to terrorism and threats to national security, judicial robes must not be used to smother liberty and due process. If this occurs, the judiciary will in some measure be complicit in terrorist attacks on human and constitutional rights. Destruction of American values, overreaction, the weakening of real bases of strength of our democratic institutions, and lawless law enforcement can fulfill terrorist ambitions and are ultimately more threatening than actual terrorist attacks. Judges in a democracy committed to law and human dignity cannot countenance such a result.

Our forebears knew that lawless overreaction by those with Executive power is a threat to human dignity, human rights, and our democracy that must be opposed by the judiciary and the American people.[164] This is clearly a time that tests the authority of the Supreme Court as much as it test the authority of law. Modern patriots of human rights and democratic freedoms must also take their stand.

"He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself."[165]

CHAPTER FIVE

EXECUTIVE CLAIMS TO UNCHECKED POWER

A. LEGAL CONSTRAINTS ON THE COMMANDER IN CHIEF POWER

On signing the 2005 Defense Appropriations Act, President Bush stated that "[t]he executive branch shall construe Title X in Division A, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power which will assist in . . . protecting the American people from further terrorist attacks."[1] Whatever implications lurk in the language of such a statement, President Bush has no delegated or inherent authority to suspend, change, or ignore the reach of duties set forth in the 2005 legislation.[2]

First, the President is expressly and unavoidably bound by the Constitution to faithfully execute the laws, including the 2005 Act and relevant international law, especially the laws of war.[3] Second, Supreme Court opinions have recognized since 1800 that Congress has constitutionally based power to place limits on certain commander in chief powers during actual war.[4] More generally, the Court also has recognized that the President's foreign relations power can "be regulated by treaty or by act of Congress . . . and [if regulated thusly, must] be executed by the executive" in accordance with the treaty or legislative limitations.[5]

Reproduced with permission from the *Utah Law Review*. This chapter is a revised version of a forthcoming article, Jordan J. Paust, *Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power*, 2007 Utah L. Rev. 345 (2007), forthcoming.

Although there are many relevant judicial opinions concerning the reach of congressional authority, those in two early Supreme Court decisions are especially enlightening. In the celebrated case of *Bas v. Tingy*,[6] Justice Washington affirmed the general recognition of the Court that Congress can authorize a war "confined in its . . . extent" and "limited as to places, persons, and things" and in such instances "those who are authorised to commit hostilities, act under special authority, and can go no farther."[7] As Justice Chase explained, "Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects and in time," adding that "[if] a general war is declared, its extent and operations are only restricted and regulated by the *jus belli* [or law of war], forming a part of the law of nations; but if a partial war is waged, its extent and operation depend upon" the grant of authority in congressional laws.[8] Justice Paterson agreed that congressional legislation created "a qualified state of hostility . . . or a war, as to certain objects, and to a certain extent" and "[a]s far as congress tolerated and authorized the war . . . , so far may we proceed in hostile operations," that war may be conducted "in the manner prescribed."[9] To reiterate, the Justices recognized that Congress can limit warfare in terms of its extent, objects, operations, persons and things affected, places, and time.

Points of agreement between the majority opinion of Chief Justice Marshall and the dissenting opinion of Justice Story in *Brown v. United States*[10] are also particularly informing concerning the reach of congressional power and are emblematic of the duty of the President to faithfully execute domestic legislation and the laws of war. In *Brown*, Chief Justice Marshall recognized that an 1812 Act containing a declaration of war had the "effect of placing" the United States and Great Britain "in a state of hostility, of producing a state of war, of giving [to the United States] those rights which war confers,"[11] which under the laws of war in that era included the right to confiscate enemy property. Marshall added that the Act also "authorizes the president . . . to use the whole land and naval force . . . to carry the war into effect,"[12] but, despite broad language in the Act, it did not thereby authorize the confiscation of enemy property as an incident of war since the choice whether or not to confiscate is a question of "policy . . . for the consideration of the legislature" and Congress had not authorized such a war measure expressly or by implication.[13]

Justice Story agreed that "the sovereignty of the nation as to the right of making war, and declaring its limits and effects" rests with Congress.[14] He added: "[t]he [congressional] power to declare war . . . *includes all the powers incident to war*, and necessary to carry it into effect"[15] and that the congressional power "'to provide and maintain a navy'" includes "the power to *regulate* and *govern* the navy."[16]

His main point in dissent was that although Congress has the power to set limits on the "objects and mode of warfare," it had not done so in the 1812 Act:

> There is no act of the legislature defining the powers, objects or mode of warfare: by what rule, then, must he be governed? I think the only rational answer is by the law of nations as applied to a state of war. Whatever act is legitimate, whatever act is approved by the law, or hostilities among civilized nations, such he may, in his discretion, adopt and exercise; for with him the sovereignty of the nation rests as to the execution of the laws. If any of such acts are disapproved by the legislature, it is in their power to narrow and limit the extent to which the rights of war shall be exercised; but until such limit is assigned, the executive must have all the right of modern warfare vested in him, to be exercised in his sound discretion . . . [17]

Justice Story assumed that broad language in the Act "authorizing the president to employ the public forces to carry it into effect" was a sufficient conferral of the power to confiscate "property, wherever, by the law of nations, it may be lawfully seized," "there being no limitation in the act"[18] and no violation of the law of nations. For Justice Story, "[i]f the legislature does not limit the nature of the war, all the regulations and rights of general war attach."[19] "He has a discretion vested in him, as to the manner and extent; but he cannot lawfully transcend the rules of warfare. . . . He cannot lawfully exercise powers or authorize proceedings which the civilized world repudiates and disclaims."[20] "[C]ertainly the rights of the 'commander in chief,'" Story affirmed, "must be restrained to such acts as are allowed by the laws."[21]

In view of the broad reach of congressional power evident in several judicial decisions and recognitions, as well as relevant patterns of legislation agreed to by Congress and the Executive[22] and the express constitutional power of Congress to "make all Laws which shall be necessary and proper

for carrying into Execution" its powers "and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof,"[23] there is a compelling basis for the presumptive validity of acts of Congress that set limits concerning the extent of war, its objects, its operations, its mode, persons and things to be affected, places, general effects, and time.

Third, numerous cases throughout our history clearly affirm that the judiciary has constitutionally based power to interpret international law and to review various decisions and actions taken by the Executive during war, including the status and treatment of detainees.[24] More particularly, there has been a consistent and unyielding judicial recognition that the laws of war are binding on all persons within the Executive branch, including the President;[25] and, more generally, it has been recognized that Executive views cannot be determinative of the content of law.[26] If the President disagrees and claims that the commander in chief power allows him to violate the 2005 Act and underlying laws of war and human rights law, he will be conducting war on the Constitution.[27]

One of the causes of our Revolution had involved a British governor's "defiance of the obligation of treaties."[28] Additional causes had involved the King's prosecution of hostilities "without regard to faith or reputation"[29] and use of Indians who acted outside the "known rule of warfare."[30] It is inconceivable that the Founders and Framers would have countenanced a commander in chief who claimed a right to violate treaties or, more particularly, the laws of war. Unanimous documented views of the era affirm that they did not.[31] Additionally, the Founders decried the King's efforts "to render the military independent of, and superior to the civil power."[32] Although the President would later be given power as commander in chief of the military partly to assure civil control of the military, it is inconceivable that the Founders would have countenanced a commander in chief of the military or "first general" who was himself superior to "civil power" and not "governed by it."[33]

B. THE COMMANDER-ABOVE-THE-LAW THEORY

These recognitions would not be remarkable if members of the Bush administration had not claimed that the President, as commander in chief, can

violate international and domestic laws. The commander-above-the-law theory was set forth in various DOJ and DOD memoranda and reports from 2001 to 2003 that the administration has not denounced. A primary proponent of the theory was John Yoo,[34] although several others in the administration endorsed the theory or proffered a related claim of necessity to violate international law.[35] For example, a 2003 DOD Working Group Report on Detainee Interrogations adopted John Yoo's commander-above-the-law theory[36] and the Yoo theory was set forth in the infamous 2002 Bybee torture memo.[37] A related claim that "courts may not second-guess" the Executive also has been reflected in administration briefs.[38] More recently, a DOJ memorandum on domestic spying claimed a commander in chief power to ignore congressional legislation,[39] a claim that was subsequently denounced by a federal district court.[40] Revelations of domestic electronic spying have been followed by revelations of warrantless mail inspections in violation of federal legislation with a claimed right to do so in a 2006 presidential signing statement attached to a postal statute.[41] It also has been reported that Vice President Cheney and others in the White House, and perhaps President Bush, had authorized the leaking of two types of highly classified national security information for political purposes despite federal laws prohibiting such conduct.[42] Even if the Vice President had a power like the President to declassify certain documents, the mere existence of such a power would not be a defense with respect to unlawful leaks that occurred while the documents and information remained classified.[43]

John Yoo's commander-above-the-law preference for the primacy of so-called self-defense interrogation tactics over nonderogable international law and his radical and nihilistic theory that the President can lawfully violate the laws of war[44] has its domestic counterpart – a fundamentally antidemocratic and unconstitutional preference for a congressionally unchecked and judicially unreviewable Executive commander in chief power to override any inhibiting domestic law.[45] Some of John Yoo's DOJ memos addressing presidential power appear to reflect a jurisprudence of a right-winged flock that is not "conservative" or originalist, but ahistorical and ideologic at base. It is also clearly not strict constructionist.[46] The blueprint for its adherents appears to reflect a willingness to ignore the most relevant views of the majority of the Founders and Framers (if

any are addressed), most of the text and structure of the Constitution, and overwhelming recognitions in judicial opinions for more than two hundred years and to pretend that if a few professors with an extremist agenda disagree, legal limits somehow disappear and the content of law can be recast merely through anticontextualist ideologic debate.[47] The administration has not abandoned the domestic counterpart to John Yoo's theory[48] despite its lack of any clear support in the text and structure of our Constitution, views of the Founders and Framers, relevant patterns of legislation, and predominant recognitions and trends in judicial opinions.[49]

C. MISINTERPRETATIONS OF THE 2001 AUTHORIZATION FOR USE OF MILITARY FORCE

A few might argue that the 2001 congressional Authorization for Use of Military Force (AUMF)[50] after 9/11 provided an authorization for Executive use of any lawful war measure here or abroad during a so-called war on "terrorism." However, such a claim would be in error. The AUMF is not a declaration of "war," but merely a very limited authorization to use necessary and "appropriate" "force" against certain persons, nations, or organizations directly involved in or that aided the 9/11 attacks or that had "harbored" such organizations or persons before or during the 9/11 attacks.[51] Congressional use of the past tense regarding nations, organizations, or persons that "aided" or "harbored" those who planned, authorized, or committed the 9/11 attacks means that the intentional aiding or harboring must have occurred prior to or during the 9/11 attacks and with reference to such attacks. The AUMF does not authorize use of force against those persons or organizations who were or are merely general supporters of those responsible for the 9/11 attacks; who were or are merely "affiliated," "associated," or have had "links" with al Qaeda; or who pose any threat of future terrorist attacks.[52]

It most certainly did not authorize a "war" against al Qaeda (a nonstate actor), as opposed to force,[53] or a "war" against a mere tactic of "terrorism." Congress actually refused to authorize use of force against "acts of terrorism" as such[54] and the Supreme Court has recognized that only Congress

has the constitutional power to determine whether a war exists.[55] Moreover, the United States cannot be at "war" with al Qaeda as such, since it is not a state, nation, belligerent, or insurgent.[56]

It follows that the AUMF provides no support for what rhetorically has been claimed to be a "war on terrorism"[57] and that if the AUMF authorized any "war" measures it did so only with respect to the war in Afghanistan against the Taliban (as the government of the nation of Afghanistan) "for the duration" of "active hostilities" during that war[58] if the Taliban had actually "harbored" al Qaeda before or during the 9/11 attacks.[59] Moreover, it is clear that in any event Congress only authorized the use of "appropriate" force and the word "appropriate" contains a statutory limitation that necessarily limits Executive discretion and requires Executive compliance with relevant constitutional, customary and treaty-based international, and other federal laws, especially because (1) the Executive has a constitutional duty to faithfully execute the laws and, thus, all are on notice that it would be clearly inappropriate to violate them;[60] and (2) Supreme Court opinions have long recognized that relevant international law is a necessary background for interpretation of federal statutes[61] and, thus in this instance, for interpretation of the statutory limitations incorporated through use of the word "appropriate." More particularly, given the fact that there has been an unswerving judicial recognition that all members of the Executive branch are bound by the laws of war,[62] Congress can be presumed to have required that Executive conduct comply with the laws of war, it being most inappropriate under the Constitution and in view of consistent judicial decisions and recognitions not to do so. The compelling nature of this presumption is enhanced by the fact that federal criminal statutes for prosecution of war crimes as offenses against the laws of the United States apply to "[w]hoever" might commit such crimes[63] and there was no intent to limit the reach of these or any other relevant criminal statutes or, indeed, any other federal legislation.[64]

D. THE MALIGNANT MILITARY COMMISSIONS ACT OF 2006

Just before Congress passed the Military Commissions Act of 2006,[65] Senator McCain was widely quoted when he stated that "[t]here's no doubt

that the integrity and letter and spirit of the Geneva Conventions have been preserved."[66] On the Senate floor, he also assured:

> The President and his subordinates are . . . bound to comply with Geneva. That is clear to me and to all who have negotiated this legislation in good faith. . . . [T]his bill makes clear that the United States will fulfill all of its obligations under those Conventions. We expect the CIA to conduct interrogations in a manner that is fully consistent with . . . all of our obligations under Common Article 3 . . . [and Congress is not] amending, modifying or redefining the Geneva Conventions.[67]

The statements were not fully accurate, but they reaffirm recognition that when passing the legislation there was no clear and unequivocal expression of a congressional intent to override the Geneva Conventions as treaty law of the United States. For this reason, the Geneva Conventions necessarily have primacy as law of the United States in case of a potential clash.[68]

This significant recognition is also evident in language of the legislation. For example, Section 6 is entitled "Implementation of Treaty Obligations," thereby evincing an intent of Congress to comply with U.S. treaty obligations. Section 6(a)(1) adds various acts enumerated in subsections (b) and (c) to 18 U.S.C. § 2441 and states that the added acts "constitute violations of common Article 3 of the Geneva Conventions prohibited by United States law" that are implemented in the new legislation, not that they constitute an exclusive set of violations of common Article 3 or that Congress intends to obviate the reach of other proscriptions. Section 6(a)(2) states that the provisions of § 2441, "as amended by" Section 6 of the new legislation, "fully satisfy the obligation under Article 129 of the Third Geneva Convention . . . to provide effective penal sanctions for grave breaches which are encompassed in common Article 3." The legislative statement is incorrect, but it demonstrates the clear intent of Congress to "fully satisfy" U.S. treaty obligations reflected in Article 129 and to not inhibit or obviate them in any way. Section 6(a)(3)(A) recognizes a presidential authority to interpret the Geneva Conventions – an authority that, in any event, the President already has in connection with the President's duty to faithfully execute the laws and, thus, to make an initial choice concerning the interpretation and application of a treaty, although numerous cases demonstrate that presidential choice of treaty content and application are subject to judicial

review.[69] Section 6(a)(3)(A) also states that the President has authority "to promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches," not to promulgate lower standards or violations of the Conventions. Section 6(c) addresses an "Additional Prohibition of Cruel, Inhuman, or Degrading Treatment or Punishment," not an exclusive prohibition of such forms of treatment or one that is intended to override other inconsistent federal statutes or the many treaties of the United States that set forth related rights and prohibitions. Finally, each recognition in Section 6 is overlaid by subsection (a)(3)(D), which assures that "[n]othing" in Section 6 "shall be construed to affect the constitutional functions and responsibilities of . . . the judicial branch." Necessarily then, the judicial functions and responsibilities that are not to be affected include the constitutionally based and time-honored authority and responsibility of the judiciary to identify, clarify, and apply treaties of the United States as law of the United States and to assure the primacy of international law when there is no clear and unequivocal expression of congressional intent to override international law.[70]

Nevertheless, there are provisions in the legislation that are inconsistent with rights and duties contained in common Article 3. Common Article 3 requires that all detainees "shall in all circumstances be treated humanely,"[71] not merely whenever domestic U.S. constitutional amendments or federal criminal laws against "torture" happen to coincide with some of the common Article 3 standards. Common Article 3 also prohibits "torture," "mutilation," "cruel treatment," "outrages upon personal dignity," "humiliating" treatment, and "degrading" treatment "at any time and in any place whatsoever."[72] A core of generally shared meaning and definitional factors operate in various judicial fora for imposition of criminal and civil responsibility with respect to each term or phrase despite the possibility of a lack of generally agreed meaning at the extreme outer edges of theoretically possible meanings[73] – a circumstance well known to lawyers and judges who interpret words such as "cruel," "due process," "free speech," "good faith," and the like in constitutions, statutes, private contracts, and other instruments.

Addressing Article 4 of the Statute of the International Criminal Tribunal for Rwanda (ICTR),[74] which incorporates all violations of common Article 3 and lists several of its proscriptions (including torture, mutilation, outrages on personal dignity, humiliating treatment, degrading treatment, rape, and

any form of indecent assault[75]), the Trial Chamber in *The Prosecutor v. Musema* (2000)[76] ruled that the list "is taken from Common Article 3 of the Geneva Conventions and of Additional Protocol II" and "comprises *serious* violations of the fundamental humanitarian guarantees which . . . are recognised as customary international law."[77] Thus, all of the proscriptions listed in common Article 3 are among "serious" violations of the laws of war.

More particularly, the Trial Chamber ruled that *humiliating* and *degrading* treatment includes "[s]ubjecting victims to treatment designed to subvert their self-regard,"[78] adding: "motives required for torture would not be required."[79] "Indecent assault," the tribunal affirmed, involved "the infliction of pain or injury by an act which was of a sexual nature and inflicted by means of coercion, force, threat or intimidation and was non-consensual."[80] As documented in another article, other international courts and tribunals have provided guidance concerning the meaning and definitional factors with respect to cruel, inhuman, and degrading treatment,[81] and so have several U.S. courts.[82] For example, while addressing five British interrogation tactics used in the 1970s (wall-standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink), the European Court of Human Rights affirmed that *inhuman* treatment occurred with respect to a combination of some of the tactics that "caused, if not bodily injury, at least intense physical and mental suffering."[83] The five "techniques were also *degrading*, since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance."[84] In 1999, other European decisions expressly reaffirmed the recognition that treatment is degrading if it is "such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them."[85]

A U.S. court also has recognized that "*cruel*, *inhuman*, or *degrading* treatment includes acts which inflict mental or physical suffering, anguish, humiliation, fear and debasement" and that being "forced to observe the suffering of friends and neighbors . . . [is] another form of inhumane and degrading treatment."[86] The Committee Against Torture affirmed that seven interrogation tactics are either torture or cruel, inhuman or degrading treatment criminally proscribed by the Convention: (1) restraining in very painful conditions; (2) hooding under special conditions; (3) sounding of loud music for prolonged periods; (4) sleep deprivation for prolonged

periods; (5) threats, including death threats; (6) violent shaking; and (7) using cold air to chill.[87]

Language in the 2006 legislation fails to reflect the international legal standards recognized by international and U.S. courts and tribunals. First, several definitions are limited to others that are found in prior U.S. legislation,[88] even though the Committee Against Torture noted that prior U.S. legislation is inadequate.[89] Second, in contrast to some of the standards noted earlier, some of the definitions in the 2006 legislation are too limiting and, thus, do not adequately warn U.S. interrogators regarding what the actual legal standards are under customary international and treaty law of the United States. Third, the legislation abets this problem by attempting to require that "[n]o foreign or international source of law shall supply a basis for a rule of decision in the courts . . . in interpreting the prohibitions enumerated."[90] However, the attempt to exclude time-honored judicial use of "international sources of law" to interpret a statute or treaty of the United States violates the separation of powers, as it is the judiciary that has the ultimate, traditional, and essential authority to interpret law in cases before the courts and to use international law to interpret a federal statute[91] as well as treaty law of the United States.[92]

Examples of incomplete coverage of international proscriptions are found in limiting words in the legislation such as "intended to inflict," "severe," and "serious" with respect to the Act's attempt to define "cruel or inhuman" treatment.[93] Moreover, "cruel" treatment is more egregious than "inhuman" treatment and it is improper to lump their definitions together. Instead of a prohibition of "mutilation," the legislation seeks to limit one form of mutilation to that which is "permanently disabling."[94] The legislation also limits coverage of "serious physical pain or suffering" by excluding "cuts, abrasions, or bruises" not amounting to "a burn or physical disfigurement"[95] and excluding serious pain or suffering not involving "significant loss or impairment of the function of a bodily member, organ, or mental faculty," or "extreme" physical pain, or "a substantial risk of death."[96] Thus, the legislation does not cover all forms of serious injury to body or health, mutilation, cruel treatment, and inhuman treatment.

There is no attention to Geneva prohibitions of "humiliating" treatment and there is only one portion that addresses "degrading" treatment[97] – and it does so in a manner that fails to provide adequate legal guidance to U.S. interrogators, since it attempts to limit additional coverage

of "cruel, inhuman, or degrading treatment" to merely the "cruel, unusual, and inhumane" treatment prohibited by three domestic U.S. constitutional amendments.[98] On their face, the terms "cruel, unusual, and inhumane" do not reflect "degrading" treatment. Moreover, as noted, the Committee Against Torture has rejected such an attempt to limit the reach of the CAT in a putative U.S. reservation.[99] Additionally, there is not and has never been such an attempted reservation to the Geneva Conventions and, if there had been, such a putative reservation would also have been void *ab initio* as a matter of law. Constitutional amendments simply do not cover all cruel, inhuman, degrading, and humiliating treatment proscribed under the laws of war and human rights law.[100] Moreover, constitutional amendments do not reach all private perpetrators, whereas U.S. cases have rightly recognized that the laws of war and human rights law can reach private perpetrators.[101]

Among the most egregious portions of the legislation are attempts to deny any person (i.e., any U.S. citizen or alien), here or abroad, in time of peace or war, now and in the future, the right to invoke his or her rights under the Geneva Conventions "in any habeas or civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States, is a party, as a source of rights in any court of the United States or its States or its territories";[102] and to deny any so-called enemy unlawful combatant[103] the right to "invoke the Geneva Conventions as a source of rights" at his or her trial by military commission.[104] These provisions necessarily violate the Geneva Conventions, which contemplate the invocation and enforcement of individual rights in domestic courts and tribunals.[105] They are also attempts to deny the ruling of the Supreme Court in *Hamdan* that common Article 3 of the Geneva Conventions is directly relevant treaty law that must be complied with.[106] Congress has no power to obviate original jurisdiction of the Supreme Court.[107] Thus, the attempt to deny treaty-based rights "in any court" is facially unconstitutional. Moreover, Congress has no power to violate the separation of powers by such a blatant denial of a constitutionally mandated, traditional, and essential judicial power to implement treaty law of the United States that, as the Constitution expressly requires, "shall extend to all cases . . . arising under . . . treaties."[108]

The violation of the separation of powers in this instance is especially evident where federal courts have continuing jurisdiction in all cases arising

under treaties and Congress attempts to substantially inhibit judicial independence and control the results in certain cases by prescribing rules for decision in a particular way or, in this instance, rights and rules of law contained in the Geneva Conventions that cannot be used for decision.[109] The attempt to deny use of particular law in judicial decision and to control judicial decision of cases in a particular way is all the more blatant when Congress has attempted to deny judicial use of common Article 3 as a rule for decision in detainee cases after the Supreme Court decided that common Article 3 applies and is a primary rule for decision.[110] Additionally, Congress has no power to deny to the States of the United States their shared constitutionally based duty and authority to implement treaty law of the United States as supreme law of the land.[111]

The attempt in another section of the Act to deny any habeas corpus relief at any time and under any circumstances to any alien in U.S. custody here or abroad[112] who has been properly determined to be an "enemy combatant" (either "lawful" or "unlawful") or who "is awaiting such determination"[113] is decidedly contrary to constitutional textual strictures and is therefore beyond the lawful power of Congress.[114] The draconian attempt to also deny such alien persons here or abroad, at any time, and under any circumstances, "any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement"[115] is a flagrant "denial of justice" under customary international law[116] and an outrageous denial of peremptory rights of access to courts, rights to a remedy, and/or equality of treatment under numerous multilateral and bilateral treaties of the United States and customary international law.[117] Such a sweeping denial of treaty-based requirements is also a violation of the separation of powers, as it attempts to control judicial decision and to deny the judiciary its time-honored and essential role of applying fundamental and peremptory rights and requirements contained in treaty law of the United States.[118] More generally, it is an attempt to deny the rule of law.

E. CONCLUSION

Finally, there are short- and long-term consequences of illegality. For example, war crimes policies and authorizations are not merely a threat to constitutional government and our democracy. They threaten law and order

more generally, violate our common dignity, degrade our military,[119] place our soldiers and CIA personnel in harm's way, thwart our mission, and deflate our authority and influence abroad. They can embolden an enemy, serve as a terrorist recruitment tool, lengthen social violence, and fulfill other terrorist ambitions.

The claim that the President has authority to violate international laws of war, human rights law, and domestic legislation is patently unconstitutional and unacceptable. Its nihilistic essence is remarkably close to the unlimited psychotic justifications of many terrorists and is far removed from the essential characteristics of modern human civilization. At least one sharply contrasting and venerable aspect of the meaning of America is worth conserving – the constitutionally based precept that no one is above the law.[120]

CHAPTER SIX

ANTITERRORISM MILITARY COMMISSIONS

A. THE 2001 EXECUTIVE MILITARY COMMISSIONS ORDER

On November 13, 2001, President Bush issued a sweeping and highly controversial Military Order for the purpose of creating military commissions with exclusive jurisdiction to try certain designated foreign nationals "for violations of the laws of war and other applicable laws" relevant to any prior or future "acts of international terrorism."[1] The Order reached far beyond the congressional authorization given to the President "to use all necessary and appropriate force," including "use of the United States Armed Forces," against those involved in the September 11 attack "in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."[2] The Order contained no time limit; it was potentially applicable to any acts of international terrorism that have "adverse effects on the U.S., its citizens, national security, foreign policy, or economy"; and prosecutions under it could have involved war crimes or violations of "other applicable laws."[3] In the Order, the President also declared that "it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."[4] This statement defied logic because its validity must be tested contextually,[5] yet it was made before the creation of any military commission for trial of any particular persons and before any particular rules of evidence had been

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devised by the Secretary of Defense. In addition, it purported to apply to every future military commission created under the Order regardless of its location or time of creation or other relevant circumstances.[6] The statement also demonstrated the new policy of the administration – avoid prosecution of alleged crimes by certain foreign nationals in federal district courts or military tribunals that function much like general courts-martial because of an alleged need to deny procedural protections that are operative in such fora in order to assure conviction.

Without appropriate congressional intervention, the Military Order would have created military commissions that would have involved unavoidable violations of international law and that would have raised serous constitutional challenges, perhaps undermining overall prosecutorial efforts. Furthermore, exclusive jurisdiction in military commissions was needlessly limiting of U.S. options in the long-term fight against international terrorism. New ad hoc rules of procedure, changeable by the Secretary of Defense, might have solved some of the problems created by the Military Order, but issues concerning the validity of certain rules of procedure existed since they were inconsistent with requirements under the Order.

When I was a Captain on the faculty of the U.S. Army JAG School during the Vietnam War, we took a different approach when we drafted a military commission to try ex-servicepersons for alleged war crimes. The Department of Defense also prepared a study on such a commission in 1970.[7] Government officials and/or President Nixon rejected the ideas, however, stating that it was politically "too hot" to prosecute, thus setting up a continual violation of U.S. obligations under international law to bring those reasonably accused into custody and then to initiate prosecution or to extradite them to another country.[8]

The military commission, as envisioned in the JAG School proposal and DOD study, generally would have followed the Federal Rules of Criminal Procedure and it was hoped to have former federal judges as judges in order to assure that convictions were less likely to be challenged in view of the expansion of due process guarantees since World War II. The 1970 DOD study noted that jury trials would not be required, but "specific protections of the Bill of Rights, unless made inapplicable to military trials by the Constitution itself, have been held applicable to courts-martial," and "[b]oth logic and precedent indicate that a lesser standard for military commissions would not be constitutionally permissible."[9] Furthermore, "Congress

directed the President to establish procedures for courts-martial or other military tribunals which follow, to the extent practicable, the principles of law and rules of evidence generally followed in United States district courts."[10] Thus, the DOD study recommended that "procedures adopted should provide every safeguard which an accused would be entitled to in a court-martial or a Federal district court."[11]

Previously, in 1951, the United Nations Command in Korea had set up other military commissions on paper. They were never activated but would have guaranteed the same procedural rights to due process that existed in general courts-martial in the U.S. military and that are required under the 1949 Geneva Convention Relative to the Treatment of Prisoners of War.[12] These included the rights to counsel, to a "reasonable opportunity to consult with his Counsel before and during trial," to at least three weeks' notice of charges before trial and at least two weeks to prepare a defense, to interpretation of charges and "the substance of the proceedings" as well as any documentary evidence, to remain silent, to cross-examine adverse witnesses, to a presumption of innocence "until his guilt is established by legal and competent evidence beyond a reasonable doubt," to trial in compliance with "the rules of evidence prescribed in the Manual for Courts-Martial, United States, 1951," and to an appeal.[13]

The President's commander in chief power to set up military commissions applies only during actual war within a war zone or relevant occupied territory and apparently ends when peace is finalized.[14] The United States was clearly at war (albeit undeclared) in Afghanistan after the armed conflict between the Taliban and the Northern Alliance was upgraded to an international armed conflict when the U.S. used military force in Afghanistan on October 7. The United States also was at war in the Gulf region with respect to Iraq (i.e., regarding the continuing international armed conflict in that region), and both international armed conflicts triggered application of the 1949 Geneva Conventions and other customary laws of war, including various due process guarantees for criminal accused.[15] While "war" remained in Afghanistan, the United States could have set up a military commission in Afghanistan (as a nonoccupying power, with the consent of the new Afghan regime) to try those reasonably accused of war crimes,[16] as it did with respect to the trial of General Yamashita for war crimes during World War II.

When the United States was an occupying power in Afghanistan, it could have created a military commission in the occupied territory to try

individuals for terrorism in violation of international law, genocide, other crimes against humanity, and aircraft sabotage in addition to war crimes.[17] However, outside the occupied territory, it is apparent that military commissions can only be constituted in an actual war zone and can only prosecute war crimes. In any event, pertinent commander in chief powers and jurisdictional competence of the antiterrorism military commissions appear to end when a relevant war (but not merely war "hostilities") ends. Given such limitations, it does not seem to be in the long-term interest of the United States to state that only military commissions can prosecute persons covered by the Military Order who are reasonably accused of participating in prior and future acts of international terrorism, as opposed to setting up a regional or more general international criminal court by Executive Agreement or using Article III federal courts.[18] Like Article III courts, a regional or more general international criminal court with jurisdiction over impermissible acts of terrorism and related international crimes would be able to prosecute accused long after peace is reinstated in Afghanistan.

Additionally, the United States has told the world that it is fighting terrorism for democratic values and freedom. Certain forms of military commissions could appear to be most inappropriate in view of what the United States stands for and what it has told the world it is fighting for and against. Military commissions are generally suspect under newer international criminal law–human rights treaties[19] and human rights law. In a landmark case in 1999, the Inter-American Court of Human Rights in *Castillo Petruzzi* denounced the use of military commissions in Peru, ruling that civilians should have been tried in civilian courts, that accused were detained too long before charges or trial, that the right to be brought promptly before a judge must be subject to judicial control, that the right to judicial protection must include the right to habeas corpus petitions (which cannot be suspended during an emergency), that defense attorneys lacked access to witnesses and evidence and did not have adequate time to prepare their cases, that the accused must be able to cross-examine all witnesses against them, that trials cannot be held in secret, and that there must exist a right of appeal to an independent and impartial tribunal.[20] Even earlier, in 1984, the Human Rights Committee created under the International Covenant declared that trial of civilians by military or special courts "should be very exceptional" and must "genuinely afford the full guarantees stipulated in article 14" of the treaty.[21] The 1999 U.S. Department of

State Country Report on Human Rights Practices for Peru noted particular human rights violations, including:

> Proceedings in these military courts – and those for terrorism in civilian courts – do not meet internationally accepted standards of openness, fairness and due process. Military courts hold treason trials in secret. . . . Defense attorneys in treason trials are not permitted adequate access to files containing the State's evidence against their clients.[22]

The 1999 Country Report on Egypt addressed denials of human rights to "fair public trial" in the military and State Security Emergency courts, noting particular infractions:

> the military courts do not ensure civilian defendants due process before an independent tribunal. . . . There is no appellate process for verdicts issued by military courts; instead, verdicts are subject to a review by other military judges and confirmation by the President, who in practice usually delegates the review function to a senior military officer. Defense attorneys have complained that they have not been given sufficient time to prepare defenses and that judges tend to rush cases involving a large number of defendants. . . . The State Security Emergency courts share jurisdiction with military courts over crimes affecting national security. . . . Sentences are subject to confirmation by the President but may not be appealed.[23]

The 1999 Country Report on Nigeria addressed denials of rights to fair trial in prior military tribunals that sometimes used a presumption of guilt: "In most cases . . . the accused had the right to legal counsel, bail, and appeal," but "decisions of the tribunals were exempt from judicial review."[24] The 1999 Country Report on Thailand also noted that "[t]here is no right to appeal military court decisions."[25]

During World War II, use of several of the types of procedural violations addressed in *Castillo Petruzzi* created war crime responsibility for German prosecutors, judges, members of the Ministry of Justice, and others. In *United States v. Altstoetter* (The Justice Case),[26] the following procedural improprieties were highlighted:

> The trials . . . did not approach even a semblance of fair trial or justice. The accused . . . were arrested and secretly transported to Germany and other countries for trial. They were held incommunicado. In many instances they were denied the right to introduce evidence, to be confronted by witnesses against them, or to present witnesses in their own behalf. They

> were tried secretly and denied the right of counsel of their own choice, and occasionally denied the aid of any counsel. . . . The entire proceedings from beginning to end were secret and no public record was allowed to be made of them.[27]

Today, at a minimum, U.S. military commissions must comply with Article 14 of the International Covenant on Civil and Political Rights,[28] which sets forth a minimum set of customary and treaty-based human rights to due process guaranteed to all persons in all circumstances by customary international law,[29] the International Covenant,[30] and thus also by and through Articles 55(c) and 56 of the United Nations Charter.[31] These rights include the general right of all persons "in full equality" to "a fair and public hearing by a competent, independent and impartial tribunal established by law," although the press and public can be excluded for reasons, for example, of "public order (*ordre public*) or national security in a democratic society";[32] the right to be presumed innocent until proved guilty;[33] the right to be informed "promptly and in detail in a language [the accused] understands of the nature and cause of the charge against him"; the right "[t]o have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing";[34] the right "[t]o be tried without undue delay"; the right "[t]o be tried in his presence, and to defend himself in person or through legal assistance of his choosing"; the right "[t]o examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf";[35] the right "[t]o have the free assistance of an interpreter"; the right "[n]ot to be compelled to testify against himself or to confess guilt"; and the right "[t]o have his conviction and sentence . . . reviewed by a higher tribunal according to law."[36] Section 4 (c)(8) of President Bush's November 13 Military Order requiring that orders and regulations issued by the Secretary of Defense "shall . . . provide for . . . submission of the record of the trial . . . for review and final decision" by the President or Secretary of Defense clearly violated the venerable human right to an appeal in a higher tribunal.[37] Also, under Article 7 of the International Covenant and customary human rights law, torture and cruel, inhumane, or degrading treatment of any detained person clearly would be illegal.[38] Politically at least, other common rules of evidence adopted by the International Criminal Tribunals for the Former Yugoslavia and for Rwanda should form part of the minimum set of due process guarantees under rules of procedure and evidence of any military

commission that the United States creates. Additionally, foreign states cannot lawfully extradite accused to the United States when there is a real risk that their human rights and/or protections under the Geneva Conventions will be violated.[39] Similarly, other states cannot lawfully tolerate violations of human rights and laws of war by U.S. military commissions operating within their territories.

An additional human rights violation was built into the Military Order. Section 2 (a) limited applicability of the order to "any individual who is not a United States citizen." Thus, the enforcement of U.S. and/or international laws through military commissions would have unavoidably involved national or social origin discrimination[40] and a denial of equal protection of the law[41] in violation of customary and treaty-based human rights law, as well as various provisions of the Geneva Conventions and Protocol I.[42] Furthermore, any new rules of procedure that allow hearsay and other evidence that would be inadmissible in federal district courts or courts-martial, allow conviction or sentencing by a percentage of a panel that is less than that required in federal district courts or courts-martial, create an appellate process that is not the same as that available to U.S. nationals, and/or deny habeas corpus to foreign nationals prosecuted abroad would violate equal protection guarantees. In addition, no rational and lawful reason exists why U.S. military tribunals must follow certain procedures during trials of U.S. nationals but cannot follow the same procedures during trials of foreign accused, especially when several foreign nationals have already been indicted, convicted, or are being prosecuted in federal district courts. Claims that some foreign accused should be relegated to military commissions with less due process protections because application of the same rules of procedure and evidence mirrored in the Federal Rules of Criminal Procedure might not facilitate conviction are facially unacceptable.

There are also important constitutional issues involving due process, especially in view of the rationale in *Reid v. Covert*[43] concerning the lawful power or authority of and structural limitations on the government of the United States (despite cases such as *Eisentrager*[44]).[45] The *Reid* rationale is consistent with the fundamental myth system adopted since the Founders that ours is a government of delegated powers and one that is entirely a creature of the Constitution and has no power or authority to act here or abroad inconsistently with the Constitution.[46] Under this approach, the major question is not whether aliens abroad in time of war have rights, but

whether our government has any power or delegated authority to act inconsistently with the Constitution.[47] Additionally, the rationale in *Verdugo-Urquidez*,[48] noting language in the Fourth Amendment that differs from words in the Fifth and Sixth Amendments (which can apply to aliens),[49] could form an additional basis for Supreme Court recognition consistent with that of many lower federal courts that Fifth and Sixth Amendment rights apply to aliens abroad.[50] Several courts also have recognized that international law can inform the meaning of "due process" protected by the Fifth Amendment here and abroad.[51] Yet, what process is constitutionally due abroad, viewed contextually and as informed by international law, might not be the same as that required in a federal district court.[52]

In view of *Milligan*,[53] it appears that removal of certain accused from the United States, where Article III district courts are clearly available, to a military commission in Afghanistan or some other foreign territory would be constitutionally impermissible. Mr. bin Laden and several of his entourage, including Mr. Moussaoui, have already been indicted in a federal district court, and some, including Moussaoui, have been convicted.[54] In addition to being unconstitutional under *Milligan* when Article III courts are available, Sections 2 (b) ("is tried only in accordance with Section 4"), 4 (a) ("shall . . . be tried by military commission"), and 7 (b)(1) ("military tribunals shall have exclusive jurisdiction") of the Military Order needlessly attempted to limit U.S. prosecutorial options.

Another specific question is whether the President, without approval by Congress, has the power to suspend habeas corpus, as he attempted to do so under Section 7 (b)(2)(i) of the November 13 Military Order.[55] Although President Lincoln did so during the Civil War, such action is constitutionally suspect, especially because suspension is addressed in Article I, Section 9, of the Constitution in connection with congressional powers and Congress actually ratified Lincoln's action in 1863.[56] Furthermore, habeas corpus or certiorari review was available to the accused in *Ex parte Quirin* and *In re Yamashita*, and such review has been expanded in cases such as *Calley v. Callaway*.[57] Additionally, the Court in *Ex parte Quirin* recognized that military commission decisions can be "set aside by the courts" when there is "clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted,"[58] and affirmed that "the duty . . . rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty."[59] Like the

Bush Military Order, President Roosevelt's 1942 Proclamation concerning persons subject to trial by military commission attempted to deny "all such persons . . . access to the courts."[60] The Executive argued that if the President's 1942 Proclamation "has force no court may afford the petitioners a hearing."[61] Importantly, the Supreme Court emphatically denied that such a power is held by the President:

> neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission.[62]

Similarly, in *In re Yamashita* the Court affirmed that the Executive "could not . . . withdraw from the courts the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus."[63] Justice Murphy also noted in dissent that all of the Justices had agreed that an Executive assertion that military trials of war criminals are "completely outside the arena of judicial review, has been rejected fully and unquestionably," that "the writ of habeas corpus is available," and that its "ultimate nature and scope . . . are within the discretion of the judiciary unless validly circumscribed by Congress."[64] Thus, the attempt in Section 7 (b)(2)(i) of the November 13 Military Order to preclude "any remedy or . . . proceeding . . . in any court of the United States" has been foreclosed by the Supreme Court in *Ex parte Quirin* and *In re Yamashita.*

The only limitation approved by the Court appears in a 6–3 decision in *Eisentrager*, in which the majority concluded that enemy alien belligerents "engaged in hostile service of a government at war with the United States" captured, charged, and prosecuted in China for war crimes committed in China have no right to seek relief by habeas corpus.[65] As noted by Justice Black in dissent, the majority "expressly disavows conflict with the *Quirin* and *Yamashita* decisions" and relied "solely" "on the fact that they were captured, tried and imprisoned outside our territory."[66] The majority had distinguished *Yamashita* because the capture and trial of General Yamashita in the Philippines had occurred in "insular possessions" subject to "our sovereignty" and the "offenses were committed on our territory,"[67] whereas in *Eisentrager* the offenses, capture, and trial had all occurred in China and there was "not . . . any intraterritorial contact."[68] These are interesting points of distinction, especially with respect to September 11 attacks

"on our territory" and persons captured or detained in the United States or in territory subject to U.S. "sovereign" power, which should include foreign occupied territory subject to our sovereign power and jurisdiction[69] and should cover persons who have been transferred to U.S. warships[70] and/or in U.S. military aircraft[71] to Guantanamo Bay, Cuba,[72] but the more significant issue is whether *Eisentrager* should survive after *Reid*'s fundamental recognition that our government, which is entirely a creature of the Constitution, simply has no lawful authority to act here or abroad inconsistently with the Constitution.[73] Moreover, there is nothing in the text or structure of the Constitution that requires adherence to an *Eisentrager* form of deviation. Additionally, newer customary and treaty-based international human rights law and laws of war, other treaties, and the customary prohibition of denials of justice provide independent bases for due process and equal protection guarantees,[74] access to courts,[75] and the right to review;[76] international law is part of the supreme law of the United States with its own constitutional and historic moorings and is law that must be applied by the judiciary;[77] and international law can inform the full meaning of due process and equal protection protected by and through the Constitution.[78]

Another constitutional issue is whether the President can set up a military commission outside of a war-related occupied territory or an actual war zone during an armed conflict. In 1865, Attorney General Speed advised the President:

> A military tribunal exists under and according to the Constitution in time of war. Congress may prescribe how all such tribunals are to be constituted, what shall be their jurisdiction, and mode of procedure. Should Congress fail to create such tribunals, then, under the Constitution, they must be constituted according to the laws and usages of civilized warfare. They may take cognizance of such offences as the laws of war permit. . . . In time of peace neither Congress nor the military can create any military tribunals, except such as are made in pursuance of that clause of the Constitution which gives to Congress the power "to make rules for the government of the land and naval forces."[79]

From Attorney General Speed's opinion, it appears that relevant presidential power is tied to a war circumstance and law of war competencies such as the competence of an occupying power to set up a military commission to try violations of the laws of war[80] in accordance with the laws of war.

Ex parte Quirin involved a military commission set up within the United States, but it was created during war for prosecution of enemy belligerents for violations of the laws of war that occurred within the United States and within the convening authority's field of command – in that case, in the Eastern Defense Command of the United States Army.[81]

Winthrop was emphatic that a military commission "can legally assume jurisdiction only of offences committed within the field of command of the convening commander. . . . [And] the place must be the theatre of war or a place where military government or martial law may be legally exercised; otherwise a military commission . . . will have no jurisdiction."[82] It is critically important that the President's power as commander in chief to set up a military commission and the jurisdictional competence of a military commission apply only during an actual war (to which the laws of war apply), and within a war zone or a war-related occupied territory.[83] What is unavoidably problematic with respect to military commission jurisdiction at Guantanamo, Cuba, is the fact that the U.S. military base at Guantanamo is neither in a theater of actual war nor in a war-related occupied territory.[84] Consequently, a military commission at Guantanamo is not properly constituted and is without lawful jurisdiction. Furthermore, alleged violations of the laws of war by detainees during war in Afghanistan or Iraq did not occur in Cuba.

Another problem posed was the serious violation of the separation of powers that existed with respect to the attempt by the President in his 2001 Military Order to preclude any judicial review of U.S. military commission decisions concerning offenses against the laws of war and other international crimes over which there is concurrent jurisdictional competence in federal district courts.[85] He cannot do so lawfully.[86] Additionally, under Article I, Section 8, clause 9 of the United States Constitution, Congress merely has power "[t]o constitute Tribunals inferior to the Supreme Court" and, thus, tribunals subject to ultimate control by the Supreme Court. For this reason, the congressional authorization for creation of military commissions in 10 U.S.C. § 821 is necessarily subject to the constitutional restraint contained in Article I, Section 8, clause 9, and the President's attempt to preclude any form of judicial review was constitutionally improper whether or not a military commission has support in a general congressional authorization.

To summarize, President Bush's November 13 Order, far from providing an "option," denied the United States needed flexibility to prosecute those

covered by the Order who are reasonably accused of terrorism and other crimes in a federal district court or regional or more general international fora (especially regarding those accused who are later found in various countries outside the region of Afghanistan and with respect to whom the United States seeks extradition); set up per se violations of human rights of the accused concerning freedom from national origin discrimination and the rights to equal protection and to an appeal to a higher tribunal; set up similar per se violations of the Geneva Conventions and Protocol I with respect to prisoners of war, unprivileged combatants, and civilians protected under the Conventions; set up similar violations of various other treaties;[87] created constitutional problems concerning due process and the right to habeas corpus; needlessly placed some prosecutions at risk; and brought dishonor to the United States. Some of the violations relate not merely to due process guarantees as such, but also to the permissibility of military commission jurisdiction. For example, because the military commissions cannot provide equal protection in general and equal appellate proceedings as required by treaty-based and customary international law, use of such fora would be impermissible.

At a minimum, the Military Order should have been amended to allow U.S. prosecution in alternative fora, to require use of appellate tribunals, to allow habeas corpus petitions, and to require compliance with other customary human rights of all persons to due process and equal protection reflected in Article 14 of the International Covenant on Civil and Political Rights and any similar or additional rights reflected in the Geneva Conventions and Protocol I concerning prisoners of war, unprivileged combatants, and civilians. Ad hoc rules of procedure created and changeable by the Secretary of Defense, especially those that were inconsistent with the Military Order, did not provide long-term guarantees of due process and equal protection. Indeed, today's rules of procedure still rest on national origin discrimination and deny equal protection in violation of various international laws. Congress should have amended Section 821 of Title 10 of the United States Code to reaffirm concurrent jurisdiction in federal district courts[88] and to assure that any military commission used in our long-term fight against terrorism will provide at least the due process and equal protection guarantees required by international law.[89]

An additional problem was posed for military personnel faced with implementation of the Military Order. U.S. military must disobey an order

calling for a patent illegality. Such an order would be *ultra vires* and a war crime if used during an armed conflict and if it called for a violation of the law of war.[90] At least for military lawyers, the Military Order, in part, was such an order and placed U.S. military personnel in harm's way. Rules of procedure created by the Secretary of Defense in 2002 pursuant to the order contained provisions that were inconsistent with the requirements of the order, thus creating an issue whether the Order or the ad hoc 2002 procedures were to be followed. Normally, a President's military order prevails over a Secretary's implementing rules and regulations, although any gaps or ambiguities in the Order must be filled and interpreted consistently with constitutional and international law. However, to the extent that an order is inconsistent with constitutional or international law and is thus *ultra vires*, the Secretary's rules of procedure that are consistent with constitutional and international law should have prevailed.

Finally, because it is apparent that military commissions outside of a war-related occupied territory can only prosecute war crimes and it is most likely that Mr. bin Laden and his entourage did not commit war crimes during the September 11 attacks on the United States, it is highly probable that a military commission outside of occupied territory in Afghanistan will not have jurisdiction to prosecute the initial prime targets of the November 13 Military Order and will have a very limited jurisdiction with respect to other international terrorists in the future. If alive, Mr. bin Laden and his entourage should be prosecuted for various other crimes in federal district courts or in a new international criminal court.

"He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself."[91]

B. RULES OF EVIDENCE AND PROCEDURE FOR THE 2001 COMMISSIONS*

In 2002, the Department of Defense formally issued its first set of Procedures for Trials by Military Commission of Certain Non-United States Citizens

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in the War Against Terrorism.[92] As documented in the previous section, the President's November 13 Military Order had set up several per se violations of international law.[93] Instead of attempting to avoid them, the DOD Order of March 21, 2002, continued the violations, set up additional violations of international law, and created various rules of evidence and procedure that, if not per se violative of international law, were highly problematic. What follows is a selective commentary on various ad hoc[94] rules of evidence and procedure set forth in the 2002 DOD Order.

1. Several Serious Violations Had Been Continued

The 2002 DOD rules continued intentional and per se discrimination on the basis of national or social origin,[95] intentional and per se denial of equal protection,[96] and "denial of justice" to aliens in *violation* of various international laws.[97] Nearly every impropriety concerning the Peruvian military commissions addressed by the Inter-American Court of Human Rights had been built into the Bush military commissions.[98] In particular, under the DOD Order, civilians were not to be tried in civilian courts, accused had been detained for months without charges, detainees did not enjoy the right to be brought promptly before a judge or to file habeas corpus petitions, defense attorneys would have lacked access to some witnesses, accused would not have been able to cross-examine all witnesses against them, portions of trials could be held in secret, and accused lacked the right of appeal to an independent and impartial tribunal. Furthermore, most of the customary minimum due process requirements reflected, for example, in Article 14 of the International Covenant on Civil and Political Rights[99] had been spurned.[100] In particular, and as explained partly later, there would have been a denial of a "fair and public hearing by a competent, independent and impartial tribunal established by law," detainees would not have been "informed promptly and in detail . . . of the nature and cause" of any charges against them, an accused would not have fully enjoyed the right to "counsel of his choosing," an accused would not have fully enjoyed the right "[t]o be tried in his presence" or to "defend himself . . . through legal assistance of his own choosing," an accused would not have fully enjoyed the right "[t]o examine, or have examined, the witnesses against him," and an accused would not have enjoyed "the right to his conviction and sentence being reviewed by a higher tribunal according to law." As noted later, various other due process guarantees under human rights law,

the laws of war, and other international laws would also have been violated if the 2002 DOD rules were followed.

2. Denial of the Right to Judicial Review of Detention

The DOD rules reflected an intentional denial of the customary and nonderogable human right to take proceedings before a court exercising judicial power in order to determine the lawfulness of one's detention and to order release of the person if detention is not lawful.[101] For example, no provision existed in the President's Military Order or the 2002 DOD rules for review of detention by a federal district court. The only "review" provided in the DOD rules involved perfunctory review of a military commission's decision by the Appointing Authority[102] of the record of trial to assure that the "proceedings of the Commission were administratively complete,"[103] possible limited "review" and "recommendations" to the Secretary of Defense by a Review Panel of military officers (only one of whom presumably must be a lawyer since only one of the members of the panel must "have experience as a judge"),[104] and "review" by the Secretary of Defense[105] with "final decision" by the Secretary of Defense or the President.[106] The Review Panel could not have overturned a conviction, reversed or amended a decision, or ordered dismissal or release of the person (or anything), since under the 2002 rules it "shall either (a) forward the case to the Secretary of Defense with a recommendation as to disposition, or (b) return the case to the Appointing Authority for further proceedings" if a majority of the Panel (which could be the nonlawyer officers) decides "that a material error of law occurred."[107] Section 7(B) of the DOD rules also attempted to assure that there would have been no other form of review, including habeas corpus review, as it provided that "[i]n the event of any inconsistency between the President's Military Order and this Order . . . , the provisions of the President's Military Order shall govern,"[108] and the President's Military Order openly attempted to preclude all judicial review, including all access to Article III courts and any use of habeas corpus.[109]

As noted previously, denial of the right to habeas corpus is impermissible under customary human rights law[110] and also violates rights under human rights and other international laws to equality of treatment and equal protection.[111] These denials are particularly serious with respect to possible use of military commissions at Guantanamo Bay, Cuba, because

U.S. military commissions have lawful jurisdiction only during war either in a war zone or in war-related occupied territory[112] and Guantanamo is clearly outside any war zone and war-related occupied territory.[113]

It may be shocking to some, but during an international armed conflict or war-related occupation "a Party to the conflict" or an occupying power, in its territory or in occupied territory, can intern certain persons without trial if such persons are "definitely suspected of or engaged in activities hostile to the security of the State"[114] and if internment is necessary.[115] Internment without trial can last for the duration of the international armed conflict[116] or occupation, but detainees are to be released sooner if detention is no longer required for definite security reasons, for example, release must occur upon termination of the armed conflict or occupation and in any event "at the earliest date consistent with the security of the State or Occupying Power . . . "[117] While such persons are being detained, "[i]n each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by" the Geneva Convention Relative to the Protection of Civilians in Time of War.[118] Common Article 3 is part of the Convention and now applies in all armed conflicts, and thus customary human rights to due process that are incorporated therein by reference[119] supplement other due process provisions contained in the Convention. Whether they are to be prosecuted or merely detained as security threats, each detainee has a right under customary human rights law to obtain judicial review of the propriety of their detention. Moreover, persons detained by the U.S. at Guantanamo or in Afghanistan who are suspected or accused of crime have not enjoyed the right to be informed promptly and in detail of the nature and cause of any charges against them and, then, to communicate with counsel of their choosing.[120]

DOD statements concerning the detainees and efforts at interrogation had shifted between attempts to prosecute those accused of crimes, attempts to detain certain persons as security threats, and attempts at information gathering for the purposes of prosecuting others or for more general intelligence purposes.[121] There were even suggestions that, given the lack of sufficient evidence for prosecution of many of the detainees for crimes, they should be interned without trial or judicial review for as long as they are "dangerous."[122] One problem with such a strategy is that detention of non–prisoners of war authorized under the Geneva Civilian Convention

and detention of prisoners of war must end when the international armed conflicts in Afghanistan and Iraq end.[123] The United States cannot be at "war" with al Qaeda as such,[124] there or in other countries. The threshold of "armed conflict" under common Article 2 of the Geneva Conventions, which triggers application of the detaining power's competence under Article 5 of the Geneva Civilian Convention to intern certain persons, cannot be met if the United States is merely fighting members of al Qaeda. Other problems for those seeking prosecution include the fact that (1) mere membership in an organization (such as al Qaeda) is not a crime;[125] (2) acts of warfare engaged in by members of the armed forces of a party to an international armed conflict (begun on October 7 in Afghanistan) are entitled to immunity from prosecution if their acts are not otherwise violative of international law[126] and, thus, lawful combat training and actions of members of the armed forces of the Taliban (and perhaps members of al Qaeda units attached to the armed forces of the Taliban) during the armed conflict in Afghanistan are privileged belligerent acts entitled to combat immunity and cannot properly be criminal, elements of a domestic crime, or acts of an alleged conspiracy; and (3) al Qaeda attacks on the United States on September 11 (before the international armed conflict in Afghanistan between the Taliban and the United States began) cannot be privileged belligerent acts but also cannot be prosecuted as war crimes because the United States and al Qaeda cannot be at war under international law.[127]

3. Denial of the Right to Review by a Competent, Independent, and Impartial Court

The preceding violations are also relevant to the more general and blatant denial of the customary and nonderogable right to appeal to a competent, independent, and impartial court.[128] No such right of appeal existed under either the President's Military Order or the 2002 DOD Order. Indeed, a "Review Panel" under the 2002 DOD rules consisted of three military officers who generally remained under orders from the President, the DOD Order, and various others within the military. As noted earlier, presumably only one member of the Review Panel must be a lawyer, as only one member must "have experience as a judge." The Review Panel, a majority of whom

might be nonlawyer officers, also was under specific orders to "disregard any variance from procedures specified in this [DOD] Order or elsewhere that would not materially have affected the outcome of the trial before the Commission."[129] The Panel did not have the power to order, reverse, or amend anything and its "recommendations" were subject to "review" merely by the Secretary of Defense or the President. What had been set up was hardly a system for fair, competent, meaningful, impartial, viable appellate review by a competent, independent, and impartial court of law or tribunal exercising judicial functions. The DOD system did not even pretend to match the normal appellate process available in the U.S. military justice system that can involve review by a Court of Criminal Appeals, further review by a Court of Appeals of the Armed Forces, and possible review by habeas corpus or elsewise in Article III courts. Moreover, Section 7(B) of the DOD Order might actually have precluded use of the Review Panel, as use of even such a Panel would have been inconsistent with the President's Military Order, which required review only by the Secretary or the President.[130]

4. Denial of the Right to Trial Before a Regularly Constituted, Competent, Independent, and Impartial Tribunal Established by Law

Prosecution before the military commissions also would have constituted denial of the customary and nonderogable right to prosecution before a regularly constituted, competent, independent, and impartial tribunal established according to law.[131] Under the 2002 DOD rules, military commissions "shall consist of at least three but no more than seven members,"[132] all of whom must have been military officers,[133] and only one of whom, the "Presiding Officer," must have been a lawyer.[134] Under the 2002 rules, there was no procedure for challenging a member of the commission for cause, although the "Appointing Authority may remove members or alternative members for good cause."[135] The Presiding Officer had to admit evidence that he or she considered to "have probative value to a reasonable person," but a majority of the commission (all of whom could have been nonlawyers) could have overruled the Presiding Officer on such questions.[136] The majority of the members of the commission could have

been under chains of command outside the chain of command that exists for lawyers within the Judge Advocate General's Corps; and, in any event, all members of the commission would have been subject to lawful military orders, lawful portions of the DOD Order and the President's Military Order, and lawful portions of other orders of the President.[137] The deliberate plan was that military commissions would not have been constituted or have operated in the same manner as general courts-martial and conviction and sentencing could have been approved by a percentage of members of a commission that is less than that required in federal district courts or courts-martial,[138] thus constituting a denial of equal protection as required by international law. The lack of minimum procedural guarantees strictly required by international law also assured that the military commissions were not designed to be fair, competent, independent, and impartial tribunals.

5. Denial of the Rights to Fair Procedure and Fair Rules of Evidence

With respect to procedural guarantees, the 2002 DOD rules had been designed to permit hearsay, unsworn written statements, and other evidence that would be inadmissible in U.S. federal courts or courts-martial and to deny the right to confrontation or examination of all witnesses against an accused. The chair of the A.B.A. Criminal Justice Section expressed his criticism and that by other A.B.A. representatives of "the decision to relax the rules of evidence so as to admit anything 'that a reasonable person would find probative.'"[139] Cross-examination of witnesses against the accused was only authorized with respect to witnesses "who appear before the Commission."[140] Witnesses also could provide testimony "by telephone, audiovisual means, or other means,"[141] thus placing in jeopardy the rights of confrontation and cross-examination of witnesses. Confrontation and cross-examination also were jeopardized by allowance of witness testimony by "introduction of prepared declassified summaries of evidence,"[142] "testimony from prior trials and proceedings,"[143] "sworn and [even] unsworn written statements,"[144] and "reports."[145] Such rules of evidence and procedure are clearly contrary to customary human rights law and other international laws concerning confrontation and examination of witnesses which require, at a minimum, that every accused have the right

"[t]o examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."[146]

6. Denial of the Right to Counsel and to Effective Representation

The right of an accused to legal counsel of choice might have been in jeopardy by the DOD rules, as they provided that civilian attorneys of the accused's own choosing must be a U.S. citizen; "must be admitted to the practice of law in a State, district, territory, or possession of the United States, or before a Federal court"; and must have been "determined to be eligible for access to information classified at the level of secret or higher."[147] A JAG officer was to be assigned as a Detailed Defense Counsel for each accused,[148] but civilian defense counsel could have been precluded from "closed Commission proceedings" and denied "access to any information protected under Section 6(D)(5),"[149] thus raising serious issues concerning full enjoyment of the right to free choice of counsel and the right to be tried in one's presence and to adequately defend oneself through legal assistance of one's own choosing.[150]

7. Conclusion

From this section, it is evident that implementation of the President's Military Order and the ad hoc 2002 DOD rules of evidence and procedure would have necessarily involved serious and patent violations of human rights, the laws of war, and various other international laws. Various 2002 rules of evidence and procedure, if not patently illegal, were problematic. The military commission and "review" processes that were designed were not in the best interests of the United States and their use could have led to state responsibility of the United States under international law and to individual criminal[151] and civil[152] responsibility for those who designed or implemented the system or who were otherwise complicit in violations of human rights, laws of war, and other international laws. What resonates more than details of deprivation, intended or foreseen, is the grating, mean-spirited, and ultimately anti-American tone of the entire Executive effort.

C. A REGULARLY CONSTITUTED COURT WITH FAIR PROCEDURES: THE SUPREME COURT'S DECISION IN *HAMDAN*

1. Problems Concerning Establishment of the Commissions

In June 2006, the Supreme Court issued its landmark opinion in *Hamdan v. Rumsfeld*.[153] "[T]he military commission convened [under the President's Order and DOD Rules of Procedure] to try Hamdan lacks power to proceed," the Court ruled, "because its structure and procedures violate both the UCMJ and the Geneva Conventions."[154] While addressing issues concerning the establishment and structure of the military commissions, the Court stated that "[e]xigency alone . . . will not justify the establishment and use of penal tribunals not contemplated by Article I, § 8 and Article III, § 1 of the Constitution unless some other part of that document authorizes a response to the felt need," adding: "that [constitutional] authority, if it exists, can derive only from the powers granted jointly to the President and Congress in time of war."[155]

The Court noted that historically there have been three types of military commissions: (1) those created during martial law; (2) those created to try civilians as part of a temporary military government over occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function; and (3) those convened "as an 'incident to the conduct of war' when there is a need 'to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.'"[156] With respect to the third type, the type of military commission at issue in the case:

> [n]ot only is its jurisdiction limited to offenses cognizable during time of war, but its role is primarily a factfinding one – to determine, typically on the battlefield itself, whether the defendant has violated the law of war. . . . Since Guantanamo Bay is neither enemy-occupied territory nor under martial law, the law-of-war commission is the only model available. At the same time, no more robust model of executive power exists; *Quirin* represents the high-water mark of military power to try enemy combatants for war crimes.[157]

The Court then recognized "four preconditions for exercise of jurisdiction" by a so-called law-of-war military commission:

> First, "[a] military commission, (except where otherwise authorized by statute), can legally assume jurisdiction only of offenses committed within the field of the command of the convening commander." The "field of command" in these circumstances means the "theatre of war." Second, the offense charged "must have been committed within the period of the war." No jurisdiction exists to try offenses "committed either before or after the war." Third, a military commission not established pursuant to martial law or an occupation may try only "[i]ndividuals of the enemy's army who have been guilty of illegitimate warfare or other offences in violation of the laws of war" and members of one's own army "who, in time of war, become chargeable with crimes or offences not cognizable, or triable, by the criminal courts or under the Articles of war." Finally, a law-of-war commission has jurisdiction to try only two kinds of offense: "Violations of the laws and usages of war cognizable by military tribunals only," and "[b]reaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war."[158]

The Court also noted that all parties agreed that such "jurisdictional limitations . . . were incorporated in [the 1916] Article of War [art.] 15 and, later, Article 21 of the UCMJ [10 U.S.C. § 821]."[159] It follows that the military commission was not lawfully constituted because it operates outside any theater of war and was created to prosecute offenses that were not committed within the field of command of the convening authority. As the Court stressed, there exists "a broader inability on the Executive's part here to satisfy the most basic precondition – at least in the absence of specific congressional authorization – for establishment of military commissions: military necessity [and] Hamdan's tribunal was appointed not by a military commander in the field of battle, but by a retired major general stationed away from any active hostilities."[160] Additionally, in this instance, "[n]one of the overt acts alleged to have been committed [by Hamdan] . . . is itself a war crime, or even necessarily occurred during time of, or in a theater of, war."[161] Thus, the military commission had several structural defects that were violative of the UCMJ and the requirement under Geneva law that persons be tried in a "regularly constituted court."[162]

2. Procedural Violations

The Supreme Court also recognized that the Bush military commission "lacks power to proceed" because of significant procedural improprieties

and that these are interrelated with the question whether a "regularly constituted court" has been created. "The UCMJ conditions the President's use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the 'rules and precepts of the law of nations,'" and, the Court ruled, "[t]he procedures that the Government has decreed will govern Hamdan's trial by commission violate these laws."[163] More particularly, the rights of the accused:

> are subject . . . to one glaring condition: The accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding that either the Appointing Authority or the presiding officer decides to "close." Grounds for such closure "include the protection of information classified or classifiable . . . ; information protected by law or rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests." § 6(B)(3). Appointed military defense counsel must be privy to these closed sessions, but may, at the presiding officer's discretion, be forbidden to reveal to his or her client what took place therein.[164]

Additional procedural improprieties were identified by the Supreme Court in language echoing several of the concerns noted earlier in this chapter:

> Another striking feature of the rules governing Hamdan's commission is that they permit the admission of any evidence that, in the opinion of the presiding officer, "would have probative value to a reasonable person." § 6(D)(1). Under this test, not only is testimonial hearsay and evidence obtained through coercion fully admissible, but neither live testimony nor witnesses' written statements need be sworn. See §§ 6(D)(2)(b), (3). Moreover, the accused and his civilian counsel may be denied access to evidence in the form of "protected information" (which includes classified information as well as "information protected by law or rule from unauthorized disclosure" and "information concerning other national security interests," §§ 6(B)(3), 6(D)(5)(a)(v)), so long as the presiding officer concludes that the evidence is "probative" under § 6(D)(1) and that its admission without the accused's knowledge would not "result in the denial of a full and fair trial." § 6(D)(5)(b). Finally, a presiding officer's determination that evidence "would not have probative value to a reasonable

person" may be overridden by a majority of the other commission members. § 6(D)(1).

. . . Any appeal is taken to a three-member review panel composed of military officers and designated by the Secretary of Defense, only one member of which need have experience as a judge. § 6(H)(4). The review panel is directed to "disregard any variance from procedures specified in this Order or elsewhere that would not materially have affected the outcome of the trial before the Commission." *Ibid.* Once the panel makes its recommendation to the Secretary of Defense, the Secretary can either remand for further proceedings or forward the record to the President with his recommendation as to final disposition. § 6(H)(5). The President then, unless he has delegated the task to the Secretary, makes the "final decision." § 6(H)(6). He may change the commission's findings or sentence only in a manner favorable to the accused.[165]

Of additional concern was the general need for "uniformity" of courts-martial and military commission procedures and the evident inconsistency between procedures for courts-martial and those adopted by the President and DOD for military commissions. As the Court explained:

In part because the difference between military commissions and courts-martial originally was a difference of jurisdiction alone, and in part to protect against abuse and ensure evenhandedness under the pressures of war, the procedures governing trials by military commission historically have been the same as those governing courts-martial. *See, e.g.*, 1 The War of the Rebellion 248 (2d series 1894) (General Order 1 issued during the Civil War required military commissions to "be constituted in a similar manner and their proceedings be conducted according to the same general rules as courts-martial in order to prevent abuses which might otherwise arise"). Accounts of commentators from Winthrop through General Crowder – who drafted [the 1916] Article of War [art.] 15 and whose views have been deemed "authoritative" by this Court, Madsen, 343 U.S., at 353 – confirm as much. As recently as the Korean and Vietnam wars, during which use of military commissions was contemplated but never made, the principle of procedural parity was espoused as a background assumption. See Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 Mich. J. Int'l L. 1, 3-5 (2001-2002).

The uniformity principle is not an inflexible one; it does not preclude all departures from the procedures dictated for use by courts-martial. But any departure must be tailored to the exigency that necessitates it. . . . That

> understanding is reflected in Article 36 of the UCMJ. . . . Article 36 places two restrictions on the President's power to promulgate rules of procedure for courts-martial and military commissions alike. First, no procedural rule he adopts may be "contrary to or inconsistent with" the UCMJ – however practical it may seem. Second, the rules adopted must be "uniform insofar as practicable." That is, the rules applied to military commissions must be the same as those applied to courts-martial unless such uniformity proves impracticable.[166]

Hamdan argued that the President's Order violated both of these restrictions. Having considered his claims and those of the Executive, the Court decided that the variances in procedure were unjustified:

> [w]ithout reaching the question whether any provision of Commission Order No. 1 is strictly "contrary to or inconsistent with" other provisions of the UCMJ, we conclude that the "practicability" determination the President has made is insufficient to justify variances from the procedures governing courts-martial. . . . Nothing in the record before us demonstrates that it would be impracticable to apply court-martial rules in this case. There is no suggestion, for example, of any logistical difficulty in securing properly sworn and authenticated evidence or in applying the usual principles of relevance and admissibility. . . .
>
> The absence of any showing of impracticability is particularly disturbing when considered in light of the clear and admitted failure to apply one of the most fundamental protections afforded not just by the Manual for Courts-Martial but also by the UCMJ itself: the right to be present. See 10 U.S.C.A. § 839(c) (Supp. 2006). Whether or not that departure technically is "contrary to or inconsistent with" the terms of the UCMJ, 10 U.S.C. § 836(a), the jettisoning of so basic a right cannot lightly be excused as "practicable."
>
> Under the circumstances, then, the rules applicable in courts-martial must apply. Since it is undisputed that Commission Order No. 1 deviates in many significant respects from those rules, it necessarily violates Article 36(b).[167]

Importantly, the Supreme Court also ruled that "[t]he procedures adopted to try Hamdan . . . violate the Geneva Conventions";[168] that "regardless of the nature of the rights conferred on Hamdan, . . . they are, as the Government does not dispute, part of the law of war";[169] "[a]nd [that] compliance with the law of war is the condition upon which the

authority set forth in Article 21 is granted."[170] Instead of addressing all possible violations of the Geneva Conventions with respect to detainees who are either prisoners of war or persons protected under provisions of the Geneva Civilian Convention during particular types of armed conflicts, the Court found it sufficient to focus on violations of common Article 3 of the Geneva Conventions,[171] which requires that there be a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[172] In his concurring opinion, Justice Kennedy emphasized that:

> [t]he Court is correct to concentrate on one provision of the law of war that is applicable to our Nation's armed conflict with al Qaeda in Afghanistan and, as a result, to the use of a military commission to try Hamdan. . . . That provision is Common Article 3 of the four Geneva Conventions of 1949. The provision [in Article 3(1)(d)] is part of a treaty the United States has ratified and thus accepted as binding law. . . . By Act of Congress, moreover, violations of Common Article 3 are considered "war crimes," punishable as federal offenses, when committed by or against United States nationals and military personnel. See 18 U.S.C. § 2441.[173]

As the Court's opinion stressed, as common Article 3 applies in this case, it:

> requires that Hamdan be tried by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." While the term "regularly constituted court" is not specifically defined in either Common Article 3 or its accompanying commentary, other sources disclose its core meaning. The commentary accompanying a provision of the Fourth Geneva Convention, for example, defines "'regularly constituted'" tribunals to include "ordinary military courts" and "definitely exclud[e] all special tribunals." GC IV Commentary 340 (defining the term "properly constituted" in Article 66, which the commentary treats as identical to "regularly constituted"); *see also Yamashita*, 327 U.S., at 44 (Rutledge, J., dissenting) (describing [a] military commission as a court "specially constituted for a particular trial"). And one of the Red Cross' own treatises defines "regularly constituted court" as used in Common Article 3 to mean "established and organized in accordance with the laws and procedures already in force in a country." Int'l Comm. of Red Cross, 1 Customary International Humanitarian Law 355 (2005); *see also* GC IV Commentary 340 (observing that "ordinary military courts"

> will "be set up in accordance with the recognized principles governing the administration of justice").[174]

In view of the definitional factors recognized by the Court, it would not seem possible to conclude that a special military commission created ad hoc (and post hoc) by the President or Congress merely to try a particular set of aliens in a manner that does not comply with the principle of uniformity can constitute a "regularly constituted court." The Supreme Court noted that the Executive offered "only a cursory defense of Hamdan's military commission in light of Common Article 3 . . . [and a]s Justice Kennedy explains, that defense fails because '[t]he regular military courts in our system are the courts-martial established by congressional statutes.'"[175] Another reason why the military commission is "irregular," the Court noted, "is the fact that its rules and procedures are subject to change midtrial, at the whim of the Executive."[176]

"Inextricably intertwined with the question of regular constitution," the Supreme Court stressed, "is the evaluation of the procedures governing the tribunal and whether they afford 'all the judicial guarantees which are recognized as indispensable by civilized peoples.'"[177] Relevant "judicial guarantees," the Court held, "must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law [and m]any of these are described in Article 75 of Protocol I to the Geneva Conventions of 1949, adopted in 1977 (Protocol I)."[178] "Among the rights set forth in Article 75," the Court added, "is the 'right to be tried in [one's] presence.'"[179] In this instance:

> various provisions of Commission Order No. 1 dispense with the principles, articulated in Article 75 and indisputably part of the customary international law, that an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him. See §§ 6(B)(3), (D). That the Government has a compelling interest in denying Hamdan access to certain sensitive information is not doubted. . . . But, at least absent express statutory provision to the contrary, information used to convict a person of a crime must be disclosed to him . . .[180]

Of course, there are other due process requirements under customary international law that are incorporated by reference in common Article 3, as noted in previous sections of this chapter. It is of great significance that

the Supreme Court has rightly affirmed in *Hamdan* that such minimum and customary rights to due process under common Article 3 include those reflected in Article 75 of Geneva Protocol I and Article 14 of the International Covenant on Civil and Political Rights. Importantly also, customary human rights to due process are applicable whether or not common Article 3 applies.

D. THE 2006 MILITARY COMMISSIONS

Most of the procedural improprieties identified in Sections A and B of this chapter and by the Supreme Court in *Hamdan* were set forth in the Military Commissions Act of 2006.[181] First, there is continued per se discrimination on the basis of national origin, denial of equality of treatment, and denial of justice to aliens. Under Section 3(a)(1) of the Act, only an "alien unlawful enemy combatant is subject to trial by military commission."[182] Second, as noted in Chapter Three, the definitions of "unlawful" and "lawful" "enemy combatant" in the Act are problematic. Under some interpretations (which are not preferable), aliens entitled to prisoner of war status under Geneva law might be mislabeled as "unlawful" enemy combatants and subject to trial in a military commission in violation of Article 102 of GPW, which requires trial in the same tribunals using the same procedures as trials of U.S. service members (i.e., trials in a courts-martial or federal district court). Third, under the Act there are no area, time of war, or other contextual limits with respect to creation of a military commission. Prior sections of this chapter and the Supreme Court's decision in *Hamdan* demonstrate that military commissions prosecuting violations of the laws of war can be lawfully created only during time of actual armed conflict and then only within a theater of war or war-related occupied territory. As explained in Chapter Five, under some interpretations of the Act there were attempts to deny persons who are subject to trial by military commission their rights under the Geneva Conventions[183] as well as their more specific rights to habeas corpus relief under the Geneva Conventions and other international law.[184] However, such interpretations must not be allowed to prevail in view of the fact that there was no clear and unequivocal expression of congressional intent to override rights and prohibitions reflected in the Geneva Conventions[185] and, under venerable Supreme Court

rulings, when no such intent has been expressed relevant treaty law has primacy.

With respect to the right to review by a competent, independent, and impartial court,[186] the Act sets up a system of initial review by a convening authority, automatic review of a final decision of guilt approved by the convening authority by a Court of Military Commission Review,[187] limited review by the United States Court of Appeals for the District of Columbia Circuit,[188] and possible review by writ of certiorari by the Supreme Court.[189] Review by the D.C. Circuit is limited to: "(1) whether the final decision was consistent with the standards and procedures specified in [the Act]; and (2) to the extent applicable, the Constitution and the laws of the United States."[190] Because some of the standards and procedures set forth in the Act are either violative of international law or highly problematic, limitation of review to whether a final decision was consistent with some of the standards and procedures expressed in the Act would hardly be sufficient to comply with international legal standards concerning the creation of a regularly constituted tribunal, the status and equality of treatment of persons subject to trial, procedural fairness, effective representation by counsel of one's choice, and meaningful review by a court of law. In view of the fact that review is also possible in accordance with applicable laws of the United States, it is important to note that treaties of the United States and customary international law are relevant to each of these issues and are part of "the laws of the United States."[191] They are also a necessary background for interpretation of federal statutes.[192] For these reasons, the phrase "laws of the United States" should be interpreted as it has normally been interpreted to include international legal standards. Furthermore, it will only be possible to provide meaningful appellate review in the D.C. Circuit if all relevant international legal standards are followed.

With respect to the need for fair procedure and fair rules of evidence, essentially the same problems explored in each of the sections above and by the Supreme Court in *Hamdan* pertain under the Military Commissions Act. Hearsay,[193] unsworn statements, and other evidence that would be inadmissible in U.S. federal courts and courts-martial might be used and there also could be a denial of the right of an accused person to confrontation or examination of all witnesses against him. In general, "[e]vidence shall be admissible if the military judge determines that the evidence would have probative value to a reasonable person."[194] Classified information can

be admitted without an opportunity to confront persons who prepared such information and the information can be admitted by "substitution of a portion or summary of the information" or through "substitution of a statement admitting relevant facts that the classified information would tend to prove."[195]

Language in the Act allowing the use of some coerced statements is especially problematic. Although under the Act a "statement obtained by use of torture shall not be admissible,"[196] statements obtained by use of cruel, inhuman or degrading treatment or any other form of "coercion" before creation of the 2005 Detainee Treatment Act (DTA)[197] can be admitted if the military judge finds that they are "reliable and possess . . . sufficient probative value" and that the "interests of justice would best be served by admission of the statement into evidence."[198] Statements obtained by "coercion" after enactment of the DTA that does not amount to "cruel, inhuman, or degrading treatment" prohibited by the DTA can also be admitted.[199] Thus, if the prohibition of other forms of coercion, intimidation, and improper treatment under the Geneva Conventions (such as the prohibitions of "humiliating" treatment, "mutilation," "outrages upon personal dignity," "physical suffering," and "intimidation"[200]) did not have primacy over the Military Commissions Act, violations of the laws of war and human rights law would occur with respect to use of such coerced information – especially (as the Subsequent Proceedings at Nuremberg precedent warns) if a military judge knowingly allows use of coerced statements obtained in violation of the laws of war.[201] The primacy of rights and prohibitions under the Geneva Conventions and other treaties and customary international law is assured, however, because there was no clear and unequivocal expression of a congressional intent to override the Geneva Conventions[202] and, in any event, because the "rights under treaties" and law of war exceptions to the last in time rule would also assure the primacy of Geneva law.[203] Of additional relevance is the recognition in *In re Guantanamo Detainee Cases*[204] that "[t]he Supreme Court has long held that due process prohibits the government's use of involuntary statements obtained through torture or other mistreatment."[205] Thus, under international law and constitutionally based due process standards, such statements must be excluded. Although appeal before a Court of Military Commission Review and the D.C. Circuit is limited in each instance to "matters of law,"[206] the legal problems concerning creation of a regularly constituted tribunal, the

status and equality of treatment of accused, fair procedures and fair rules of evidence, and coerced statements noted earlier are matters of law and should be fully addressed.

The right to counsel of one's choice and to adequate representation is potentially jeopardized under the Military Commissions Act in ways similar to those identified in the previous sections of this chapter. Under the Act, civilian defense counsel are limited to U.S. citizens with access to classified information at the level of secret or higher.[207] Civilian defense counsel cannot divulge any classified information to their client or to any other person not entitled to receive such information.[208] Also of significant concern are accusations by JAG defense counsel of denials of adequate access to clients at Guantanamo and adequate opportunities to represent clients. For example, Lieutenant Colonel Colby Vokey, Marine Corps Defense Coordinator for the Western United States and lead defense counsel for Omar Khadr, stated in February 2007 that he had to schedule eight days for a trip to Guantanamo just to see his client for a few hours or less, that at Guantanamo he had limited access to transportation, that rules concerning the day and hours that he could see his client changed frequently and without adequate notice, that he cannot show his client evidence against him so that he can discuss such with his client, that he is barred from discussing newspaper articles about his client with his client, and that the confidentiality of communication with his client and his notes are compromised when guards search his notes.[209]

An additional problem is that the military commissions are not limited to prosecutions of violations of the laws of war. For example, "spying"[210] and "conspiracy"[211] are chargeable under the Act, but neither spying[212] nor conspiracy as such[213] is a violation of the laws of war. Given the Supreme Court's recognition in *Hamdan* that a relevant military commission can be used only to prosecute violations of the laws of war,[214] neither spying nor conspiracy as such should be chargeable. Although certain forms of terrorism violate the laws of war,[215] the definition of "terrorism" in the Military Commissions Act is ridiculously overly broad. For example, instead of using a commonsense and objective definitional factor involving the need for a "terror" outcome, "terrorism" is defined in the Act to merely require conduct calculated to "influence or affect . . . by intimidation or coercion" of any sort and with any type of outcome.[216] One portion of the definition merely requires that listed conduct be engaged in "to retaliate against

government conduct,"[217] thereby requiring no outcome of intimidation or coercion, much less a "terror" outcome. In contrast, an objective and common sense definition of "terrorism" must contain the element of "terror" outcome.[218] Other crimes chargeable under the Act that are not war crimes include (1) the crime of "providing material support for terrorism"[219] unless the perpetrator is actually abetting a war crime of terrorism, and (2) the crime of "wrongfully aiding the enemy,"[220] which is a type of crime against the state or pure political offense.

E. CONCLUSION

What resonates from the efforts over the last five years to tailor special military tribunals and their procedures for prosecution of certain aliens is the overall goal of supporting convictions. None of the specially constituted tribunals envisioned by the Executive or Congress or the changes in their rules of evidence and procedure from those of courts-martial were designed to enhance fairness. It is possible to avoid some of the violations of international law that would occur and possible criminal and civil liability if language in the Military Commissions Act was followed (1) by interpreting the Act consistently with international law wherever possible and (2) by recognizing the primacy of relevant treaty law in any event because there was no clear and unequivocal expression of congressional intent to override relevant treaties. Nevertheless, serious constitutional problems would remain with respect to the creation of military commissions outside an actual theater of war or war-related occupied territory and outside the time of an actual war. To ultimately guarantee convictions of those who have committed violations of the laws of war, Congress should revise the Military Commissions Act to comply with constitutional and international legal requirements or the Executive branch should prosecute those reasonably accused of violations of the laws of war in the federal district courts, where some prosecutions of "terrorists" have already been successful.

NOTES

ONE. Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees

1. *See* Letter from the Permanent Representative of the United States of America to the U.N. President of the Security Council, U.N. Doc. 5/2001/946 (Oct. 7, 2001).
2. *See, e.g.*, U.S. Dep't of Army, Field Manual 27-10, The Law of Land Warfare 178, para. 499 (1956) ("The term 'war crime' is the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime.") [hereinafter FM 27-10]; U.K. War Office, The Law of War on Land being Part III of the Manual of Military Law 174, para. 624 & n.1 (W.O. Code No. 12333 1958) ("The term 'war crime' is the technical expression for violations of the laws of warfare, whether committed by members of the armed forces or by civilians" and "may be committed by nationals both of belligerent and of neutral States") [hereinafter 1958 UK Manual]; Principles of the Nuremberg Charter and Judgment, Principle VI b ("War crimes: Violation of the laws of and customs of war"), 5 U.N. GAOR, Supp. No. 12, at 11–14, para. 99, U.N. Doc. A/1316 (1950) [hereinafter Nuremberg Principles]; The Prosecutor v. Tadic, IT-94-1, Decision on the Defense Motion on Jurisdiction (Trial Chamber, International Criminal Tribunal for Former Yugoslavia, 10 Aug. 1995), paras. 61–62 [hereinafter The Prosecutor v. Tadic, Trial Chamber]. *See also* Hague Convention No. IV Respecting the Laws and Customs of War on Land, Annex, art. 23(h) ("it is especially forbidden – (h) To declare abolished, suspended, or inadmissible in a court of law the rights . . . of the nationals of the hostile party."), Oct. 18, 1907, 36 Stat. 2277; T.S. No. 539 [hereinafter HC IV].
3. *See, e.g.*, Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 Cornell Int'l L.J. 533, 539 n.19, 543–44 (2002); *see also infra* note 58. The states were Pakistan, Saudi Arabia, and the United Arab Emirates.
4. *See, e.g.*, Paust, *supra* note 3, at 539 n.19.
5. *See, e.g.*, *id.* at 543 n.36.
6. *See, e.g.*, Jordan J. Paust, M. Cherif Bassiouni, *et al.*, International Criminal Law 803–04, 807–09, 816 (2d ed. 2000); FM 27-10, *supra* note 2, at 7–8, para. 8(b).

7. *See, e.g.*, Paust, Bassiouni, *et al.*, *supra* note 6, at 809, 812–13, 815–16; FM 27-10, *supra* note 2, at 9, para. 11(a); The Prize Cases, 67 U.S. (2 Black) 635, 666–67, 669 (1862).
8. *See, e.g.*, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. SCOR, 48th Sess., para. 35, U.N. Doc. S/25704 (May 3, 1993) (the 1949 Geneva Conventions are "part of conventional international humanitarian law which has beyond doubt become part of international customary law"). The Report was unanimously approved by U.N. S.C. Res. 827 (1993). *See also* Paust, Bassiouni, *et al.*, *supra* note 6, at 658, 807; UK Ministry of Defence, The Manual of the Law of Armed Conflict 14 (2004) ("In practice, the Geneva Conventions are of virtually universal application and are generally considered to embody customary international law.") [hereinafter 2004 UK Manual]; Annotated Supplement to Commander's Handbook on the Law of Naval Operations 490 n.47 (U.S. Naval War College, Int'l Studies vol. 73, A.R. Thomas and James C. Duncan eds., 1999) ("GPW is the universally accepted standard for treatment of Pws; virtually all nations are party to it and it is now regarded as reflecting customary law."); Adam Roberts & Richard Guelff, Documents on the Laws of War 8, 196 (3d ed. 2000); *infra* notes 17, 19, 27. *See also* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 258, paras. 81–82, *reprinted in* 35 I.L.M. 809, 828 (1996).
9. *See, e.g.*, U.S. Dep't of State, Treaties in Force 452–53 (2002); Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 160–61 (D.D.C. 2004). As Secretary of State Colin Powell had warned the White House in 2002, "[t]he United States and the international community have consistently held Afghanistan to its treaty obligations and identified it as a party to the Geneva Conventions." Colin L. Powell, Memorandum, Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan 5 (Jan. 26, 2002), available at: http://www.msnbc.msn.com/id/4999363/site/newsweek. *See also* Roberts & Guelff, *supra* note 8, at 355 (listing Afghanistan as a party). Treaties with a state continue to exist even if a particular government is not formally recognized. *See, e.g.*, New York Chinese TV Programs v. U.E. Enterprises, 954 F.2d 847 (2d Cir. 1992), *cert. denied*, 506 U.S. 827 (1992); Restatement of the Foreign Relations Law of the United States §§ 202, cmt. b, 203(1), 208, cmt. a & RN 2 (3d ed. 1987) [hereinafter Restatement]. Moreover, "applicability of the rules of international humanitarian law is not dependent upon whether the parties to a conflict recognize one another." Christopher Greenwood, *Scope of Application of Humanitarian Law*, in The Handbook of Humanitarian Law in Armed Conflict 45 (Dieter Fleck ed., 1999).
10. *See, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, done 12 Aug. 1949, art. 1, 75 U.N.T.S. 287, 6 U.S.T. 3516 [hereinafter GC or Geneva Civilian Convention]. A few have argued that the Geneva Conventions do not provide protections because they are not self-executing. Such a claim is in error for several reasons. First, most of the articles of the Conventions contain mandatory language, expressly address individual rights, and are self-executing under the language of the treaty considered in context test. *See, e.g.*, GC, *supra* arts. 3, 5, 7, 8, 27, 38, 43, 48, 72, 73, 75, 76, 78, 80, 101, 147; *In re* Guantanamo Detainee

Cases, 355 F. Supp. 2d 443, 478–79 (D.D.C. 2005); Hamdan v. Rumsfeld, 344 F. Supp. 2d at 164–65; Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 Harv. Int'l L.J. 503, 515–16 (2003) [hereinafter Paust, *Judicial Power*] [revised in Chapter Four, Sections A–C]; David L. Sloss, *International Decisions: Availability of U.S. courts to detainees at Guantanamo Bay Naval Base – reach of habeas corpus – executive power in war on terror*, 98 Am. J. Int'l L. 788, 794 n.66 (2004). *See also infra* note 154. Second, if they were not the President has an unavoidable constitutional duty to faithfully execute the laws, treaties ratified by the United States are such laws, and the President must execute such treaties and is bound by treaty law. *See, e.g.*, U.S. Const., art. II, § 3; Francis v. Francis, 203 U.S. 233, 240, 242 (1906); The Lessee of Pollard's Heirs v. Kibbe, 39 U.S. (14 Pet.) 353, 415 (1840); 1 Op. Att'y Gen. 566, 569–71 (1822); Alexander Hamilton, Pacificus No. 1 (June 29, 1793); Jordan J. Paust, International Law as Law of the United States 67–70, 169–73 (2d ed. 2003). Third, several statutes execute treaties for civil sanction, habeas, and criminal sanction purposes. *See, e.g.*, Paust, *Judicial Power*, *supra* at 516–17; *infra* note 47. Fourth, even non-self-executing treaties can be used defensively. *See, e.g.*, Paust, *Judicial Power*, *supra* at 515 & n.42. Fifth, the Geneva Conventions are also customary international law of universal application. *Supra* note 8. As such, they are also directly binding on the Executive and rights and duties under customary international law are also directly incorporable. *See, e.g.*, Paust, *supra* at 7–11, 169–73, 175, 488–89, 493–94, and numerous cases and opinions cited; Section E, *infra*.

11. *See, e.g.*, IV Commentary, Geneva Convention Relative to the Protection of Civilian Persons in Time of War 9, at 15, 37 ("obligation is absolute," "compulsory"), 39 ("prohibited absolutely . . . , no exception or excuse"), 204–05 ("absolute character"), 219–20 (apply in "all cases," "forbidden for any purpose or motive whatever," "for any purpose or reason"), 228 (no "military necessity" exception exists to the prohibition of reprisals) (ICRC, Jean S. Pictet ed., 1958) [hereinafter IV Commentary]; Paust, Bassiouni, *et al.*, *supra* note 6, at 847; 2004 UK Manual, *supra* note 8, at 23.
12. These are rare. *See, e.g.*, GC, *supra* note 10, art. 27; IV Commentary, *supra* note 11, at 200.
13. *See, e.g.*, IV Commentary, *supra* note 11, at 15 ("It is not an engagement concluded on the basis of reciprocity, binding each party . . . only in so far as the other party observes its obligations. . . . Each state contracts obligations *vis-á-vis* itself and at the same time *vis-á-vis* the others."), 34 ("without any condition in regard to reciprocity"), 37; G.I.A.D. Draper, The Red Cross Conventions 8 (1958). More generally, the 1958 UK Manual recognizes: "A belligerent is not justified in declaring himself freed altogether from the obligation to observe the laws of war or any of them on account of their suspected or ascertained violation by his adversary." UK Manual, *supra* note 2, at 44, para. 121; *see also* HC IV, *supra* note 2, art. 23(h). With similar effect, Article 60(5) of the Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, prohibits suspension of performance of "provisions relating to the protection of the human person contained in treaties of a humanitarian character," like the Geneva Conventions, in response to a material breach by another party. The Vienna Convention is customary international law. *See, e.g.*, Ehrlich

v. American Airlines, 360 F.3d 366, 373 n.5 (2d Cir. 2004); Fujitsu Ltd. v. Federal Express Corp., 247 F.3d 423, 433 (2d Cir.), *cert. denied*, 534 U.S. 891 (2001); Restatement, *supra* note 9, at 145–47; Jordan J. Paust, *et al.*, International Law and Litigation in the U.S. 66, 68, 257 (2000); Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 Va. J. Int'l L. 281, 295–301 (1988). Additionally, the Geneva Conventions prohibit attempts to terminate adherence while a signatory is engaged in an armed conflict. *See, e.g.*, GC, *supra* note 10, art. 158 ("denunciation . . . shall not take effect until peace has been concluded, and until after operations connected with the release, repatriation and re-establishment of the persons protected by the present Convention have been terminated."). As customary international law, they are binding in any event. John Yoo does not understand this fundamental point about the lack of authority to suspend the Geneva Conventions during armed conflict. *See* John Yoo, War by Other Means 26 (2006).

14. *See, e.g.*, Paust, *et al.*, *supra* note 13, at 48. *See also* Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), 1986 I.C.J. 4, para. 220 (the obligation in Article 1 "does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression.") [hereinafter 1986 I.C.J.].
15. *See supra* note 13.
16. *See, e.g.*, IV Commentary, *supra* note 11, at 39, 228; FM 27-10, *supra* note 2, at 177, para. 497(c) ("Reprisals against the persons or property of prisoners of war, including wounded and sick, and protected civilians are forbidden. . . . Collective penalties and punishment . . . are likewise prohibited"); 2004 UK Manual, *supra* note 8, at 420; *see also* GC, *supra* note 10, arts. 3, 33.
17. *See, e.g.*, Theodor Meron, Human Rights and Humanitarian Norms as Customary International Law 34–35 (1989); Paust, Bassiouni, *et al.*, *supra* note 6, at 689, 692–93, 695, 823, 833; 2004 UK Manual, *supra* note 8, at 5 ("Common Article 3 . . . [is] accepted as customary law and thus binding on all states."); The Prosecutor v. Dusko Tadic, IT-94-1-AR72 (Appeals Chamber, International Criminal Tribunal for Former Yugoslavia, Oct. 2, 1995), at paras. 98 ("some treaty rules have gradually become part of customary law. This holds true for common Article 3 of the 1949 Geneva Conventions, as was authoritatively held by the International Court of Justice"), 102 [hereinafter The Prosecutor v. Tadic, Appeals Chamber], *reprinted in* 35 I.L.M. 32, 63–64 (1996); The Prosecutor v. Tadic, Trial Chamber, *supra* note 2, at paras. 51, 65, 67, 72, 74; The Prosecutor v. Naletilic and Martinovic, IT-98-34 (Trial Chamber, International Criminal Tribunal for Former Yugoslavia, Mar. 31, 2003), at para. 228 ("It is . . . well established that common Article 3 has acquired the status of customary international law"); The Prosecutor v. Kunarac, IT-96-23 and IT-96-23/1 (Trial Chamber, International Criminal Tribunal for Former Yugoslavia, Judgment, June 12, 2002), at para. 68 (common Article 3 "is indeed regarded as being part of customary international law"); The Prosecutor v. Blaskic, IT-95-14 (Trial Chamber, International Criminal Tribunal for Former Yugoslavia, Judgment, Mar. 3, 2000), at paras. 166 ("Common Article 3 must be considered a rule of customary international law"), 176 ("customary international law imposes criminal responsibility for serious violations of Common Article 3"); The Prosecutor v. Musema, ICTR-96-13-T (Trial Chamber, International Criminal Tribunal

for Rwanda, 27 Jan. 2000), at para. 287; The Prosecutor v. Akayesu, ICTR-96-4-T, Judgment (Trial Chamber, International Criminal Tribunal for Rwanda, 2 Sept. 1998), at para. 49, *reprinted in* 37 I.L.M. 1399 (1998). *See also* text *infra* note 27 (common Article 3 rights and duties are also mirrored in an article in another treaty that is also customary international law applicable during any international armed conflict); *infra* note 19.

18. *See, e.g.*, Paust, Bassiouni, *et al.*, *supra* note 6, at 816. It must be emphasized that a Common Article 3 insurgency need not occur completely within the territory of a single state and be devoid of transnational aspects of consequences. The phrase "in the territory" set forth in Article 3's language recognizing application to an "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties" is illustrative and not a limitation. However, once the conflict shifts to one of an international character, all of the customary laws of war apply. *See, e.g.*, *id.* (3d ed. 2007) at 645, 648–49, 657, 661.

19. *See, e.g.*, IV Commentary, *supra* note 11, at 14 ("This minimum requirement in the case of a non-international armed conflict, is *a fortiori* applicable in international conflicts."), 58; ICRC, International Humanitarian Law and the Challenges of Contemporary Armed Conflict 9 (2003); Jean-Marie Henckaerts & Louis Doswald-Beck, 1 Customary International Humanitarian Law: Rules 299, 306–19 (ICRC 2005) (the prohibitions reflected in common article 3 are "fundamental guarantees" that apply as "customary international law applicable in both international and non-international armed conflicts"); Paust, Bassiouni, *et al.*, *supra* note 6, at 693, 695, 813–14, 816; U.S. Dep't of Army, TJAG School, Operational Law Handbook 8–9 (2003); Derek Jinks, *Protective Parity and the Law of War*, 79 Notre Dame L. Rev. 1493, 1508–11 (2004); Paust, *Judicial Power*, *supra* note 10, at 512 n.27; 1986 I.C.J., *supra* note 14, at paras. 218 ("There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which . . . reflect . . . 'elementary considerations of humanity'"), 255 (is included in "general principles of humanitarian law . . . in the context of armed conflicts, whether international in character or not"); The Prosecutor v. Delalic, IT-96-21-A, Judgment (Appeals Chamber, International Criminal Tribunal for Former Yugoslavia, 20 Feb. 2001), at paras. 143, 150, *reprinted in* 40 I.L.M. 630 (2001); The Prosecutor v. Tadic, Appeals Chamber, *supra* note 17, at para. 102 ("The International Court of Justice has confirmed that these rules reflect 'elementary considerations of humanity' applicable under customary international law to any armed conflict, whether it is of an internal or international character. (Nicaragua Case, at para. 218). Therefore, at least with respect to the minimum rules in common Article 3, the character of the conflict is irrelevant."); The Prosecutor v. Tadic, Trial Chamber, *supra* note 2, at paras. 65, 67, 74; Abella v. Argentina, Case 11,137, Inter-Am. C.H.R., paras. 155–56, OEA/ser.L/V.97, doc. 38 (1997); Hamdan v. Rumsfeld, 344 F. Supp. 2d at 162–63; *see also* 2004 UK Manual, *supra* note 8, at 5 n.13 (recognizing that among "important judgments" the I.C.J. "referred to the rules in Common Art. 3 as constituting 'a minimum yardstick' in international armed conflicts"); text *infra* note 27 (the same rights and duties are mirrored in an article in another treaty that is also customary international law applicable during any international armed conflict); William H. Taft, IV, letter to

John C. Yoo (Jan. 23, 2002) (copy to Judge Gonzales), at 2 ("Even those terrorists captured in Afghanistan, however, are entitled to the fundamental humane treatment standards of common Article 3 of the Geneva Conventions – the text, negotiating record, subsequent practice and legal opinion confirm that common Article 3 provides the minimal standards applicable in any armed conflict."), available at: http://www.newyorker.com/online/content/?050214on_onlineonly02; John C. Yoo, letter to William H. Taft, IV (Mar. 28, 2002), at 3–4 (noting that at page 89 of a March 22, 2002 memorandum prepared by Legal Adviser Taft it is stated "that all combatants are entitled, 'as a minimum, [to] the guarantees of article 3 . . . '" and that at page 5 the March 22 memo states "that '[i]t is widely recognized internationally . . . that common Article 3 reflects minimum customary international law standards for both internal and international armed conflicts'"), available at: http://www.newyorker.com/online/content/?050214on_onlineonly02.

20. *See, e.g.*, IV Commentary, *supra* note 11, at 51, 595; III Commentary, Geneva Convention Relative to the Treatment of Prisoners of War 51 n.1, 76, 423 (ICRC, Jean S. Pictet ed., 1960); FM 27-10, *supra* note 2, at 31, para. 73; 2004 UK Manual, *supra* note 8, at 145, 148, 150, 216, 225; UK Manual, *supra* note 2, at 96; The Prosecutor v. Delalic, Case No. IT-96-21-T (Trial Chamber, ICTY, Nov. 16, 1998), at para. 271 ("there is no gap between the Third and the Fourth Geneva Contentions"); Michael Bothe, *et al.*, New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949, at 261–63 (1982); Henckaerts & Doswald-Beck, *supra* note 19, at 389; Hillare McCoubrey, International Humanitarian Law: Modern Developments in the Limitation of Warfare 137 (2d ed. 1998); Knut Dormann, *The Legal Situation of "Unlawful/Unprivileged Combatants,"* 85 Int'l Rev. Red Cross 849 (2003); Jinks, *supra* note 19, at 1504, 1510–11; Paust, *Judicial Power*, *supra* note 10, at 511–12 & n.27; Sloss, *supra* note 10, at 796; Johannes van Aggelen, *A Response to John C. Yoo, "The Status of Soldiers and Terrorists Under the Geneva Convention,"* 3 Chinese J. Int'l L. 1, 5, 8–9 (2004); *see also* Hamdan v. Rumsfeld, 344 F. Supp. 2d at 161 (if a detainee is not a POW, rights and protections exist under common Article 3); U.S. Dep't of Army, Subject Schedule 27–1, The Geneva Conventions of 1949 and Hague Convention No. IV of 1907, at 7–8 ("these rules are embodied in one general principle: treat all prisoners of war, civilians, or other detained personnel *humanely*. . . . To repeat, we must insure that all persons are treated humanely. These persons may not be subjected to murder, torture, corporal punishment, mutilation, or any form of physical or mental coercion.") (Oct. 8, 1970) (emphasis in original); *infra* note 111 (regarding Army doctrine).
21. *See* GC, *supra* note 10, art. 3; Jinks, *supra* note 19, at 1500, 1511; *supra* note 20.
22. *See* GC, *supra* note 10, art. 3(1)(a).
23. *See id.*
24. *See id.* art. 3(1)(c).
25. *See id.* art. 3(1)(d), which incorporates customary human rights to due process by reference and, thus, all of the provisions in Article 14 of the International Covenant on Civil and Political Rights [ICCPR]. *See, e.g.*, Paust, *Judicial Power*, *supra* note 10, at 511–12 & n.27; Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 Mich. J. Int'l L. 1, 10–18 (2001) [hereinafter Paust, *Courting*

Illegality] [revised in Chapter Six, Section A]; Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure*, 23 Mich. J. Int'l L. 677, 678 & n.9, 685–90 (2002) [revised in Chapter Six, Section B].

26. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 75, 1125 U.N.T.S. 3 [hereinafter Geneva Protocol I].
27. William H. Taft IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 Yale J. Int'l L. 319, 321–22 (2003). *See also* Christopher J. Greenwood, *Customary Law Status of the 1977 Additional Protocols*, in Humanitarian Law of Armed Conflict: Challenges Ahead 103 (Delissen & Tanja eds., 1991); Jinks, *supra* note 19, at 1510–11; Nigel Rodley, *The Prohibition of Torture: Absolute Means Absolute*, 34 Denv. J. Int'l L. & Pol'y 145, 146 (2006) (rights and prohibitions reflected in Article 75 are customary international law that close a "'gap'"); U.S. Dep't of Army TJAG School, Operational Law Handbook 11 (2002) (Articles 73–89 are among several articles in Protocol I that the United States views "as either binding as customary international law or acceptable practice though not legally binding"), available at: http://www.jagcnet.army.mil/TJAGSA.
28. *See* GC, *supra* note 10, art. 4, stating that "[p]ersons protected by the Conventions [in Part III] are those who, at a given moment and in any manner whatsoever, find themselves . . . in the hands of a Party to the conflict or Occupying Power of which they are not nationals"; that a narrow exclusion for "[n]ationals of a neutral State" applies only when such nationals are "in the territory of a belligerent State" and their state of nationality "has normal diplomatic representation in the State in whose hands they are"; and that "[t]he provisions of Part II are, however, wider in application, as defined in Article 13." Thus, nationals of a neutral state who are in the territory of the United States could fit within the exclusion in Article 4, but they might be covered under Part II of the Convention (*see infra* note 29) and they have the customary rights and protections mirrored in common Article 3 (which pertains if they are detained). However, nationals of a neutral state detained by the United States outside "the territory of" the United States are covered and have protections listed in Part III of the Convention as well as in common Article 3. *See also infra* note 149 (concerning nationals of a neutral state in occupied territory). In any event, limitations in Article 4 are obviated once the general rights, duties, and protections in the Convention become customary international law of universal application. In a related manner, the International Military Tribunal at Nuremberg ruled that the fact that (1) Germany refused to ratify the 1907 Hague Convention, and (2) the treaty contained a general participation clause in Article 2 that limited the treaty's reach to armed conflicts between contracting parties became irrelevant once the rules mirrored in the treaty became customary international law. *See* Opinion & Judgment, International Military Tribunal at Nuremberg (1946), *reprinted in* 41 Am. J. Int'l L. 172, 248–49 (1947).
29. GC, *supra* note 10, art. 13. This language can reach nationals of a neutral state and any other persons who are part of the "population" of a country in conflict (*e.g.*, a resident alien of Saudi nationality who is part of the population of the United States).
30. GC, *supra* note 10, art. 16.

31. *Id.* art. 27. *See also id.* art. 147 ("torture or inhuman treatment" are "grave breaches").
32. *Id.* art. 31.
33. *Id.* art. 32. *See also id.* art. 147 ("torture or inhuman treatment, . . . wilfully causing great suffering or serious injury to body or health" are "grave breaches").
34. *Id.* art. 33.
35. *See, e.g.*, Advisory Opinion, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. paras. 104–05; Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 95, para. 25, 226, 239 (July 8); Thomas Buergenthal, Dinah Shelton, & David Stewart, International Human Rights 331–32 (3d ed. 2002); Henckaerts & Doswald-Beck, *supra* note 19, at 299–306; Richard B. Lillich, *et al.*, International Human Rights 216, 218–19, 223, 225–26, 242 (4th ed. 2006); Paust, *Judicial Power*, *supra* note 10, at 505–06 n.5 [Chapter Four, note 5, citing other cases, treaties, international instruments, international decisions, and textwriters]; Alfred de Zayas, *The Status of Guantanamo Bay and the Status of Detainees*, 37 U.B.C. L. Rev. 277, 281–82, 309–10 (2004); *see also Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 119 (1866) ("human rights" in the context of war); The Julia, 12 U.S. (8 Cranch) 181, 193 (1814) ("rights of humanity" pertain in war); Kadic v. Karadzic, 70 F.3d 232, 242–44 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996); 11 Op. Att'y Gen. 19, 21 (1864) ("human rights"); U.N. G.A. Res. 59/182, Torture and other cruel, inhuman or degrading treatment or punishment, preamble and paras. 1–2, U.N. Doc. A/RES/59/182 (20 Dec. 2004); U.N. Human Rights Comm., General Comment No. 31, para. 11, U.N. Doc. CCPR/C/Rev.1/Add.13 (2004); U.N. Human Rights Comm., General Comment No. 29, paras. 3, 9, 11 & n.6, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001); Council of Europe, Parliamentary Assembly, Res. 1433, para. 4 (2005), available at: http://assembly.coe.int/Documents/AdoptedText/ta05/RES1433.htm. *See also* U.N. S.C. Res. 1378, para. 9 (2006) ("violations of international humanitarian and human rights law in situations of armed conflict"); U.N. S.C. Res. 1265, para. 4, U.N. Doc. S/RES/1265 (Sept. 17, 1999); U.N. S.C. Res. 1100, pmbl., U.N. Doc. S/RES/1194 (1998) ("violations of human rights and of international humanitarian law"); U.N. G.A. Res. 60/148, preamble (2005) ("freedom from torture and other cruel, inhuman or degrading treatment or punishment is a non-derogable right that must be protected under all circumstances, including in times of international or internal armed conflict or disturbance"); Coard v. United States, Case No. 10.951, Inter-Am. Comm. H.R., Report No. 109/99, para. 39 (1999) ("core guarantees apply in all circumstances, including situations of conflict"). More generally, the duty of states under the United Nations Charter to respect and observe human rights applies universally and without a war-context limitation. *See* U.N. Charter, arts. 55(c), 56.
36. *See, e.g.*, International Covenant on Civil and Political Rights, preamble, arts. 10(1) ("All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."), 16 ("Everyone shall have recognition everywhere as a person before the law."), 26 ("All persons shall be equal before the law and are entitled without any discrimination to the equal protection of the law . . . "), 999 U.N.T.S. 171 [hereinafter ICCPR]; Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content*, 27 How. L.J. 145 (1983). Our courts have recognized more generally that cruel or inhumane treatment "cannot comport with human dignity." *See, e.g.*,

Furman v. Georgia, 408 U.S. 238, 279–81, 286 (1972); *see also* Bell v. Wolfish, 441 U.S. 520, 583 (1979); Estelle v. Gamble, 429 U.S. 97, 102 (1976); Gregg v. Georgia, 428 U.S. 153, 173 (1976); United States *ex rel.* Caminito v. Murphy, 222 F.2d 698, 701 (2d Cir. 1955) (psychological torture, cruelty).

37. *See, e.g.*, ICCPR, *supra* note 36, arts. 4(1), 18(3), 19(3), 22(2). Since 9/11, the United States has not made any formal declaration or notification of derogation in accordance with Article 4(3).
38. *See, e.g.*, *id.* art. 4(2); U.N. Human Rights Committee General Comment No. 29, *supra* note 35, para. 13 (some rights and prohibitions that are not listed in Article 4(2) have become nonderogable, *e.g.*, Article 10's requirement that all persons deprived of their liberty be treated with humanity and respect for their dignity; the requirement that no "unacknowledged detention" occur; the prohibition of forcible transfer of civilians in violation of international law; and required "fair trial" guarantees); Human Rights Committee, General Comment No. 24, at para. 8, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994), *reprinted in* Paust, *supra* note 10, at 376–77; U.N. G.A. Res. 60/148, preamble (quoted *supra* note 35) and paras. 1, 3 ("Condemns any action or attempt by States or public officials to legalize, authorize or acquiesce in torture and other cruel, inhuman or degrading treatment or punishment under any circumstances, including on grounds of national security or through judicial decisions") (2005); General Assembly Torture Resolution, *supra* note 35, paras. 1 ("Condemns all forms of torture and other cruel, inhuman or degrading treatment . . . , including through intimidation, which are and shall remain prohibited at any time and in any place whatsoever and can thus never be justified"), 2 ("Condemns in particular any action or attempt by State or public officials to legalize or authorize . . . [such conduct] under any circumstances, including on grounds of national security").
39. *See, e.g.*, General Comment No. 24, *supra* note 38, at para. 8; Restatement, *supra* note 9, § 702 and cmts. a, n, RN 11; Paust, *et al.*, *supra* note 13, at 49–53; U.N. G.A. Res. 60/148, preamble ("the prohibition of torture is a peremptory norm of international law") (2005). Among *jus cogens* prohibitions listed in the Restatement are: murder or causing the disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; systematic racial discrimination; and a consistent pattern of gross violations of human rights. Restatement, *supra* note 9, § 702 (c)–(g).
40. *See, e.g.* ICCPR, *supra* note 36, art. 7; General Comment No. 24, *supra* note 38, at para. 8 ("Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant. . . . Accordingly, provisions in the Covenant that represent customary international law (and *a fortiori* when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a state may not reserve the right . . . to torture, to subject persons to cruel, inhuman or degrading treatment or punishment"); Restatement, *supra* note 9, § 702(d) & cmt. n; The Prosecutor v. Furundzija, IT-95-17/1-T (Trial Chamber, International Criminal Tribunal for Former Yugoslavia, 10 Dec. 1998), paras. 153, 155 (the prohibition of torture "has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules. The most conspicuous consequence of this higher rank is that . . . [the proscription of torture] cannot be derogated

from by States through international treaties. . . . [T]reaties or customary rules providing for torture would be null and void *ab initio* . . . [and states cannot take] national measures authorising or condoning torture or absolving its perpetrators"), *reprinted in* 38 I.L.M. 317, 349 (1999); Kadic v. Karadzic, 70 F.3d 232, 243–44 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996); Filartiga v. Pena-Irala, 630 F.2d 876, 878, 882 (2d Cir. 1980); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 305–06, 326 (S.D.N.Y. 2003); Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1347–48 (N.D. Ga. 2002) (adding: "cruel, inhuman, or degrading treatment includes acts which inflict mental or physical suffering, anguish, humiliation, fear and debasement, which do not rise to the level of 'torture'" and that being "forced to observe the suffering of their friends and neighbors . . . [is] another form of inhumane and degrading treatment"); Estate of Cabello v. Fernandez-Larios, 157 F. Supp. 2d 1345, 1360–61 (S.D. Fla. 2001); Daliberti v. Republic of Iraq, 97 F. Supp. 2d 38, 45 (D.D.C. 2000); Cicippio v. Islamic Republic of Iran, 18 F. Supp. 2d 62, 65–69 (D.D.C. 1998); Xuncax v. Gramajo, 886 F. Supp. 162, 184–89 (D. Mass. 1995); *see also* ICCPR, *supra* note 36, art. 10(1) ("All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."); Universal Declaration of Human Rights, art. 5 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment . . . "), U.N. G.A. Res. 217A, 3 U.N. GAOR, U.N. Doc. A/810, at 71 (1948); U.S. Memorial before the International Court of Justice in Case Concerning United States Diplomatic Staff in Tehran (United States v. Iran), 1980 I.C.J. Pleadings (the Executive recognizes that Article 5 of the Universal Declaration is customary human rights law); 22 U.S.C. § 262 d(a) (Congress has recognized that gross violations of human rights include "torture or cruel, inhumane, or degrading treatment"); U.N. G.A. Res. 59/182, *supra* note 35, paras. 1–2 (quoted *supra* note 38); *supra* notes 38–39.

The ICCPR also happens to apply to all persons subject to the jurisdiction of a signatory. *See, e.g.*, ICCPR, *supra* note 36, art. 2(1); Advisory Opinion, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. paras. 108–11 (The ICCPR "is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory"), *reprinted in* 43 I.L.M. 1009, 1039–40 (2004); Human Rights Committee, General Comment No. 31, at para. 10 (applies "to all persons subject to their jurisdiction. This means . . . anyone within the power or effective control of that State party, even if not situated within the territory of the State. . . . [The ICCPR applies] to all individuals . . . who may find themselves in the territory or subject to the jurisdiction of a State Party. . . . [It] also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained"), para. 11 ("the Covenant applies also in the situation of armed conflict to which the rules of international humanitarian law are applicable."), U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004); General Comment No. 24, *supra* note 38, at paras. 4, 12 ("all those under a State party's jurisdiction"); Henckaerts & Doswald-Beck, *supra* note 19, at 305 ("wherever they have jurisdiction . . . [or] effective control. . . . State practice has interpreted this widely."); Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, in The International Bill of Rights: The Covenant on Civil

and Political Rights 72, 74 (Louis Henkin ed., 1981); Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 Am. J. Int'l L. 78, 78–80 (1995); Zayas, *supra* note 35, at 281–82, 310–12.

Clearly, persons detained and being interrogated by the United States are subject to jurisdiction of the United States. Moreover, Guantanamo and U.S. naval vessels are under the complete jurisdiction and control of the United States. *See, e.g.*, Rasul v. Bush, 542 U.S. 466, 471, 480, 484 (2004); Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 Notre Dame L. Rev. 1335, 1347–49 (2004) [hereinafter Paust, *Overreaction*]; Zayas, *supra* note 35, at 282, 311–12. Where the United States is an occupying power, it also has jurisdiction and control of detainees. Paust, *supra* at 1347. More generally, U.S. obligations under the U.N. Charter to respect and ensure respect for human rights are applicable universally. *See* U.N. Charter, arts. 55(c), 56.

41. *See, e.g.*, The Prosecutor v. Furundzija, *supra* note 40; Vienna Convention on the Law of Treaties, *supra* note 13, arts. 53, 64 (recognizing that *jus cogens* norms prevail over any inconsistent treaties or portions thereof); General Comment No. 24, *supra* note 38, at para. 8, quoted *supra* note 40. U.S. obligations under the U.N. Charter to respect and ensure respect for human rights are absolute and without limitation. Moreover, they assure that customary human rights that are incorporated by reference apply universally and without limitations attempted in other treaties. *See* U.N. Charter, arts. 55(c), 56, 103 ("In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter prevail."). As the I.M.T. at Nuremberg recognized, specific limitations in a treaty are obviated once the rights, duties, and protections become customary international law. *See supra* note 28.
42. A U.S. reservation to the ICCPR attempted to limit the reach of the ICCPR with respect to proscribed cruel, inhuman, and degrading treatment. *See* Reservation No. 3, 138 Cong. Rec. S4781–01 (daily ed., April 2, 1992) ("the United States considers itself bound by Article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States."). Clearly, the attempted reservation would deny full protection under the ICCPR with respect to all forms of cruel, inhuman, and degrading treatment. As such, it is incompatible with the object and purpose of the treaty and void *ab initio* as a matter of law. *See, e.g.*, Vienna Convention on the Law of Treaties, *supra* note 13, art. 19(c) (reservations are void if they are "incompatible with the object and purpose of the treaty"); General Comment No. 24, *supra* note 38, at para. 8, quoted *supra* note 40. In any event, the customary prohibition of such treatment applies universally and without such an attempted limitation.
43. Done Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987). A putative U.S. reservation to the Convention attempted to preclude its reach to all forms of cruel and inhuman treatment. *See* Reservation No. 1, available at Cong. Rec. S17486–01 (daily ed., Oct. 27, 1990) ("the United States considers itself bound by the obligation under Article 16 to prevent 'cruel, inhuman or degrading treatment

or punishment,' only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."). Clearly, the attempted reservation would be incompatible with the object and purpose of the Convention, as application of the reservation would preclude coverage of all forms of cruel, inhuman, and degrading treatment as required under the Convention. As such, it is void *ab initio* as a matter of law. *See* Vienna Convention on the Law of Treaties, *supra* note 13, art. 19(c). It was claimed by Alberto Gonzales that the putative reservation not only sought to limit the type of treatment proscribed (*i.e.*, that the phrase "cruel, inhuman, or degrading" set forth in a multilateral treaty "means" merely that which is recognized under U.S. constitutional amendments), but also sought to limit the treaty's reach overseas (*i.e.*, "means" treatment or punishment prohibited by the amendments and, if they do not apply overseas, such treatment or punishment overseas is permissible). *See* Sonni Efron, *Torture Becomes a Matter of Definition: Bush Nominees Refuse to Say What's Prohibited*, N.Y. Times, Jan. 23, 2005, at A1. Such an attempted reservation would be doubly incompatible with the object and purpose of the treaty and void as a matter of law. In any event, the customary prohibitions have no such limitations.

In 2004, Congress declared that "the Constitution, laws, and treaties of the United States and the applicable guidance and regulations of the United States Government prohibit the torture or cruel, inhuman, or degrading treatment of foreign prisoners held in custody of the United States" here or abroad. Sense of Congress and Policy Concerning Persons Detained by the United States, Pub. L. No. 108–375, 118 Stat. 1811, § 1091 (a)(1)(6) (Oct. 28, 2004). Congress also reiterated the requirement that "no detainee shall be subject to torture or cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States" (*Id.* § 1091 (a)(8)) and reiterated "the policy of the United States to . . . investigate and prosecute, as appropriate, all alleged instances of unlawful treatment of detainees in a manner consistent with the international obligations, laws, or policies of the United States." *Id.* § 1091 (b)(2).

44. *See* Alberto R. Gonzales, Memorandum for the President, Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban 2 (Jan. 25, 2002), available at: http://www.msnbc.msn.com/id/4999148/site/newsweek. *See also* Yoo, *supra* note 13, at ix (detention, denial of Geneva protections, and coercive interrogation "policies were part of a common, unifying approach to the war on terrorism"), 35 (instead of "following the Geneva Conventions" the inner circle decided whether such "would yield any benefits or act as a hindrance"), 39–40 (following Geneva law would "interfere with our ability to . . . interrogate," "[t]his became a central issue," and following "'Geneva's strict limitations on questioning'" "made no sense"), 43 ("treating the detainees as unlawful combatants would increase flexibility in detention and interrogation"), 171–72 (the question became "what interrogation methods fell short of the torture ban and could be used"), 177–78, 190–91 ("coercive interrogation" was used); *infra* notes 46, 89, 97; Chapter Two, Section B. Concerning the administration's use of the phrases "unlawful combatant" and "enemy combatant," *see also* Chapter Three.

45. *See id.* at 4; *see also id.* at 2 ("needs and circumstances"). President Bush authorized this alleged excuse for denial of required treatment under the Geneva Conventions in his February 7, 2002, Memorandum. *See infra* note 60.
46. Gonzales, *supra* note 44, at 2. Subsequently, John Yoo indicated the reason for the plan to deny "Geneva's strict limitations on questioning." *See* John Yoo, *Behind the "Torture Memo,"* San Jose Mercury News, Jan. 2, 2005 ("Why? Because the United States needed to be able 'to quickly obtain information . . . '"). *See also supra* note 44.
47. *See* Gonzales, *supra* note 44, at 2, addressing the War Crimes Act, 18 U.S.C. § 2441. The other federal statute that incorporates laws of war as offenses against the laws of the United States is 10 U.S.C. § 818. Unlike the War Crimes Act, it incorporates all of the laws of war and can reach any war crime committed by any person. Federal district court jurisdiction pertains under 18 U.S.C. § 3231, which reaches "all offenses against the laws of the United States." *See, e.g.*, Paust, Bassiouni, *et al.*, *supra* note 6, at 253–59; Jordan J. Paust, *After My Lai: The Case for War Crime Jurisdiction Over Civilians in Federal District Courts*, 50 Tex. L. Rev. 6 (1971), *reprinted in* 4 The Vietnam War and International Law 447 (ASIL, Richard Falk ed., 1976).
48. *See* Gonzales, *supra* note 44, at 2. This advice was correct. *See, e.g.*, *supra* notes 2, 17.
49. Geneva Convention Relative to the Treatment of Prisoners of War, done 12 August 1949, 75 U.N.T.S. 135, 6 U.S.T. 3316 [hereinafter GPW].
50. Gonzales, *supra* note 44, at 2. *See also supra* notes 20–21, 27, and accompanying text. The letter from Taft to Yoo (copy to Gonzales) was dated Jan. 23, 2002. *Supra* note 19.
51. Gonzales, *supra* note 44, at 2. *See also supra* note 44.
52. *Id.* By this language, Gonzales probably meant if GPW did not apply to the armed conflict, since he recognized that if Geneva law applies to the armed conflict those who are not prisoners of war are still protected under various Geneva protections, including common Article 3. *Supra* notes 48–50 and accompanying text. Nonetheless, it was strange to focus on GPW, as those who are not prisoners of war under GPW are still protected under common Article 3 and the Geneva Civilian Convention. *See supra* notes 20–21.
53. *See, e.g.*, Paust, *Judicial Power*, *supra* note 10, at 518–24, and numerous cases cited [revised in Chapter Four].
54. *See, e.g.*, *id.*; The Prize Cases, 67 U.S. (2 Black) 635, 666–67 (1862). Moreover, the President is bound by and must faithfully execute international law, especially the laws of war. *See, e.g.*, Section E, *infra.*
55. Gonzales, *supra* note 44, at 2. Former White House Counsel John Dean has stated that "[t]he Gonzales memo shows the president was up to his eyeballs in the decision about how to extract information from those captured in Afghanistan" and there is "indisputable evidence that President Bush issued orders" to deny protections under the laws of war. John W. Dean, *Crime and No Punishment: Who Is Accountable for the Legal Measures That Justify Torture?*, Playboy, vol. 51, no. 10, Oct. 2004, at 51. *See also* Chapter Two, Section B.
56. Gonzales, *supra* note 44, at 1–2.

57. Powell, *supra* note 9, at 5.
58. William H. Taft IV, Memorandum to Counsel to the President, Comments on Your Paper on the Geneva Convention (Feb. 2, 2002), *quoting* U.N. S.C. Res. 1193, para. 12, U.N. Doc. S/RES/1193 (Aug. 28, 1998), available at: http://pegc.no-ip.info/archive/State_Department/20020202_taft_memo_to_gonzales.pdf. *See also infra* note 85. Earlier, Legal Adviser Taft had written to the Office of Legal Counsel of the Department of Justice that a January 9, 2002, DOJ memo relied on by Gonzales (the Yoo & Delahunty OLC, DOJ memo) was "seriously flawed," its reasoning was "incorrect as well as incomplete" and "contrary to the official position of the United States, the United Nations and all other states that have considered the issue," and the claim that the President could suspend the Geneva Conventions was "legally flawed and procedurally impossible." *See* John Barry, *et al.*, *The Roots of Torture*, Newsweek, May 24, 2004, at 26, 30; R. Jeffrey Smith, *Lawyer for State Dept. Disputed Detainee Memo; Military Legal Advisers Also Questioned Tactics*, Wash. Post, June 24, 2004, at A7; 1); William H. Taft, IV, Draft Memorandum to John C. Yoo (Jan. 11, 2002) (copies to Secretary of State; Judge Gonzales), at 1, 4–5 (Afghanistan continues to be a state and "[a] failed State does not thereby cease to be a State, nor does it cease to be a party to relevant Conventions"), 7–8 (Geneva law continues to apply), 29 (U.S. "is bound to respect all of the provisions of the Convention"), available at: http://pegc.no-ip.info/archive/State_Department/taft_memo_20020111.pdf.
59. Letter from Attorney General John Ashcroft to President George W. Bush (Feb. 1, 2002), available at: http://news.findlaw.com/wp/docs/torture/jash20102ltr.html.
60. *See, e.g.*, Memorandum of President George W. Bush (Feb. 7, 2002), available in Final Report of the Independent Panel to Review DOD Detention Operations (Aug. 2004), Appendix C [hereinafter Final Report 2004], available at: http://wid.ap.org/documents/iraq/040824finalreport.pdf; Final Report 2004, *supra* at 33–34; Barry, *et al.*, *supra* note 58, at 30–31; Katharine Q. Seelye, *In Shift, Bush Says Geneva Rules Fit Taliban Captives*, N.Y. Times, Feb. 8, 2002, at A1. Secretary Rumsfeld issued similar orders limiting treatment required by Geneva law on January 19, 2002 (*see infra* note 110) and April 16, 2003 (*see infra* note 120). President Bush's memo stated that he accepted "the legal conclusion of the Department of Justice" "dated January 22, 2002," and determined "that none of the provisions of Geneva apply to our conflict with al Qaeda . . . because, among other reasons, al Qaeda is not a High Contracting Party." Bush memo, *supra*, para. 2(a); *but see infra* notes 62–63. The January 22 memo was most likely a thirty-seven-page Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense, Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002), prepared by Jay S. Bybee, Ass't Att'y Gen., available at: http://www.washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf. *See, e.g.*, *Timeline of Memos on Treatment of Prisoners*, Miami Herald, June 23, 2004, at 15. The Bybee memo was basically a reiteration of the Yoo-Delahunty memo, *infra* note 66.

    The President's memo also stated that the President accepted "the legal conclusions" of DOJ and determined "that common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees because . . . the relevant conflicts are international in scope and common Article 3 applies only to 'armed conflict not of an

international character.'" Bush Memo, *supra*, para. 2(c); *but see supra* note 19; text *supra* notes 26–27. Moreover, the President's memo attempted to deny treatment required under the Geneva Conventions on the basis of alleged necessity (will be treated "humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva." Bush Memo, *supra*, paras. 3, 5). However, necessity is no defense with respect to violations of Geneva law (which are war crimes) and nonderogable human rights. *See supra* notes 2, 10–11, 42; *infra* note 94. Necessarily, the message in the President's memo that alleged necessity could justify denial of treatment required under Geneva law was an authorization with criminal implications. The "to the extent appropriate" limitation is an even broader order with criminal implications. It had its intended effect. For example, Colonel Manuel Supervielle admitted that he implemented a similar order concerning treatment at Guantanamo, that he categorized Geneva articles as "green, yellow, and red," and that various "yellow" and "red" duties and protections were denied. Col. Manuel Supervielle, remarks, during a panel session at the American University, Washington College of Law, March 24, 2005, during a conference on The Geneva Convention and the Rules of War in the Post 9–11 and Iraq World, shown on C-Span. *See also* Council of Europe Resolution, *supra* note 35, para. 7(i). It had been reported that a draft DOD Joint Publication 3–63, Joint Doctrine for Detainee Operations (23 Mar. 2005) would perpetuate criminal denials of protections under the Geneva Conventions with a "subject to military necessity, consistent with the principles of GC" limitation of protections. *See* Human Rights Watch, Letter to Secretary Rumsfeld on the "Joint Doctrine for Detainee Operations," available at: http://hrw.org/english/docs/2005/04/07/usdom10439.htm, citing the draft JP 3–63, chapter 1, at 11, available at http://hrw,org/campaigns/torture/jointdoctrine/jointdoctrine040705.pdf.

61. *See* Seelye, *supra* note 60; *see also supra* note 60; Bybee, *supra* note 60, at 1 ("We conclude that these treaties do not protect the members of the al Qaeda organization, which as a non-State actor cannot be a party to the international agreements governing war."), 9.

62. Paust, *Courting Illegality*, *supra* note 25, at 7–8 n.15. With respect to treaties, it was affirmed long ago that "every citizen is a party to them." Henfield's Case, 11 F. Cas. 1099, 1101 (C.C.D. Pa. 1793) (Jay, C.J.) (No. 6,360). This fundamental aspect of treaty law assures that individuals and groups (such as members of al Qaeda) are bound by treaties that have been adhered to by the state of which they are nationals. It is why an array of treaties addressing international crimes such as aircraft hijacking, aircraft sabotage, hostage-taking, genocide, and war crimes are binding on various individuals and groups that could not and have never "ratified" such treaties. It is also why insurgents are bound by and can be prosecuted for violations of common Article 3 of the Geneva Conventions. The Executive's false claim was necessarily laid to rest by the Supreme Court in Hamdan v. Rumsfeld, _ U.S. _, _ (2006) (although "al Qaeda, unlike Afghanistan, is not a 'High Contracting Party' . . . , there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not between signatories. Article 3 . . . affords some minimal protection . . . to individuals associated with neither a signatory nor even a nonsignatory 'Power' who are involved in a conflict."); *see also id.*, _ U.S. at _

(Kennedy, J., concurring) ("The Court is correct to concentrate on one provision of the law of war that is applicable. . . . That provision is Common Article 3"). With respect to customary international law, because such law is universally applicable to all human beings, it covers nationals of a Party, nationals of a non-Party (such as Taiwan), and stateless persons.

63. Taft, *supra* note 58, at 2. *See also supra* notes 20–21 and accompanying text.
64. Gonzales, *supra* note 44, at 3. It had been reported that a memorandum from Patrick F. Philbin in Office of Legal Counsel, Department of Justice to Gonzales on November 6, 2001, had argued that trying detainees for violations of the laws of war "'does not mean that terrorists will receive protections of the Geneva Conventions.'" Tim Golden, *After Terror, a Secret Rewriting of Military Law*, N.Y. Times, Oct. 24, 2004, at A1.
65. *See supra* notes 8, 14, 17, 19–20, 28.
66. John Yoo, Robert J. Delahunty, Memorandum for William J. Haynes II, General Counsel, Department of Defense, Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002), available at: http://www.msnbc.msn.com/id/5025040/site/newsweek. Concerning the inner-circle plan, *see, e.g.*, *supra* note 44.
67. Neil A. Lewis, *Justice Memos Explained How to Skip Prisoner Rights*, N.Y. Times, May 21, 2004, at A1; Michael Isikoff, *Double Standards?*, Newsweek Web exclusive, at 5 (May 21, 2004), available at http:www.msnbc.msn.com/id/5032094/site/newsweek; *see also* Final Report 2004, *supra* note 60, at 33; *infra* note 97. The Gonzales memo stated that Attorney General John Ashcroft "delegated this role to OLC." Gonzales, *supra* note 44, at 1.
68. Yoo & Delahunty, *supra* note 66, at 1, 11; *but see id.* at 6 (recognizing that common Article 3 would apply "even if other parties to the conflict are not parties to the Conventions."). An express purpose of the memorandum was to address "the effect of international treaties and federal laws on the treatment of individuals detained by the U.S. Armed Forces during the conflict in Afghanistan. In particular, . . . whether the laws of war apply to the conditions of detention . . . " *Id.* at 1; *see also id.* at 2 ("Department . . . plans regarding the treatment of members of al Qaeda and the Taliban . . . detained during the Afghanistan conflict."), 3 (a focus on the War Crimes Act and "application of the Geneva Conventions to the treatment of detainees"), 11 ("As a result, the U.S. military's treatment of al Qaeda members is not governed by the bulk of the Geneva Conventions"), 12 ("the military's treatment of al Qaeda members"); text *infra* notes 77–78; *infra* note 78.
69. *See* text *supra* notes 20–21, 62–63; *see also* Hamdan v. Rumsfeld, 344 F. Supp. 2d at 161 (Geneva Conventions "are triggered by the place of the conflict, and not by what particular faction a fighter is associated with"). John Yoo still does not understand this fundamental point concerning the reach of rights as well as duties to nationals of a party to a treaty. *See* Yoo, *supra* note 13, at 23, 237.
70. *See* Yoo & Delahunty, *supra* note 66, at 4, 6.
71. *See id.* at 6–7, 10, 12.
72. *See supra* note 19. Moreover, the 1958 ICRC Commentary had already recognized this general point just eleven years after formation of the Geneva Conventions. *See* IV Commentary, *supra* note 19, at 14, 58.
73. *See* text *supra* note 27.
74. *See* Yoo & Delahunty, *supra* note 66, at 9 & n.19; *see also supra* note 19.

75. *See* Yoo & Delahunty, *supra* note 66, at 10.
76. *See, e.g.*, Vienna Convention on the Law of Treaties, *supra* note 13, art. 31(1), (3)(b)–(c); RESTATEMENT, *supra* note 9, § 324 & cmt. c; PAUST, *ET AL.*, *supra* note 13, at 57–58, 131, 171. Another well-recognized rule of construction in the United States is that treaties are to be construed in a broad manner to protect express and implied rights. *See, e.g.*, Factor v. Laubenheimer, 290 U.S. 276, 293–94 (1933); Nielsen v. Johnson, 279 U.S. 47, 51 (1929); Jordan v. Tashiro, 278 U.S. 123, 127 (1928); Asakura v. City of Seattle, 265 U.S. 332, 342 (1924) ("Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred."); United States v. Payne, 264 U.S. 446, 448 (1924) ("Construing the treaty liberally in favor of the rights claimed under it, as we are bound to do . . . "); Geofroy v. Riggs, 133 U.S. 258, 271 (1890) ("where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred."); Hauenstein v. Lynham, 100 U.S. 483, 487 (1879) (Where a treaty admits of two constructions, one restrictive as to the rights, that may be claimed under it, and the other liberal, the latter is to be preferred."), *citing* Shanks v. Dupont, 28 U.S. (3 Pet.) 242, 249 (1830) ("If the treaty admits of two interpretations, and one is limited, and the other liberal; one which will further, and the other exclude private rights; why should not the most liberal exposition be adopted?"); Owings v. Norwood's Lessee, 9 U.S. (5 Cranch) 344, 348–49 (1809) ("Whenever a right grows out of, or is protected by, a treaty, . . . whoever may have this right, it is to be protected."). This approach is especially apt with respect to human rights treaties, as recognized by the European Court of Human Rights. *See* Soering v. United Kingdom, Eur. Ct. H.R. (ser. A), No. 161, para. 87 ("special character" of human rights convention requires "that its provisions be interpreted and applied so as to make its safeguards practical and effective."), 11 E.H.R.R. 439 (1989).
77. Yoo & Delahunty, *supra* note 66, at 14; *see also id.* at 2.
78. *Id.* at 14; *see also id.* at 16 (stating erroneously: "If the Executive made such a determination, the Geneva Conventions would be inoperative as to Afghanistan"), 19, 22–23, 42 (stating erroneously: "In narrowing the scope of the substantive provisions that apply in a particular conflict, the President . . . could thus preclude the trials of United States military personnel on specific charges of violations of the . . . laws of war.").
79. *See id.* at 2, 19, 22.
80. *See id.* at 22, 25.
81. *Id.* at 17, quoting a State Department note; *see also id.* at 22 ("Afghanistan, when largely controlled by the Taliban").
82. *See id.* at 26, 29 (also addressing "[n]on-performance of such duties" by the Taliban, thereby recognizing that the Geneva Conventions applied and the Taliban had duties under the Geneva Conventions); *see also id.* at 31 ("Assuming Afghanistan could . . . be in material breach" of the Geneva Conventions), 33 & n.101 (addressing Taliban breaches of Geneva law, but providing completely erroneous advice concerning reprisals and refusing to cite FM 27-10, *supra* note 2, at 177, para. 497(c) (quoted *supra* note 16) while citing other portions of paragraph 497).
83. *See supra* notes 9, 58.

84. *See* text *supra* notes 3–5.
85. *See* U.N. S.C. Res. 1378, para. 2 (Nov. 14, 2001), U.N. Doc. S/RES/1378 (2001). *See also supra* note 58 and accompanying text.
86. *See supra* note 60.
87. *See, e.g.*, Paul Groves, *When the Rules of War Don't Apply*, Birmingham Post, Jan. 21, 2002, at 9; Neil A. Lewis, *Red Cross Criticizes Indefinite Detention in Guantanamo Bay*, N.Y. Times, Oct. 10, 2003, at A1; Robert Russo, *Under Fire from Allied Critics, Rumsfeld Shoots Back Over Prisoner Treatment*, Canadian Press Newswire, CBCA-ACC-No. 5294538 (Jan. 22, 2002); David R. Sands, *Britain Backs U.S. on Cuba Detainees*, Wash. Times, Jan. 22, 2002, at A1; Katharine Q. Seelye, *Rumsfeld Defends Treatment by U.S. of Cuba Detainees*, N.Y. Times, Jan. 23, 2002, at A1; Editorial, *The Prisoners of Guantanamo Bay*, Irish Times, Jan. 21, 2002, at 15; *Photos Breach Prisoner Rules Says Red Cross*, New Zealand Herald, Jan. 23, 2002; Paust, *supra* note 62, at 7 n.15.
88. *See, e.g.*, Diane Marie Amann, *Guantanamo*, 42 Colum. J. Trans'l L. 263, 270–73 (2004); Paust, *Courting Illegality*, *supra* note 25, at 7 n.15, 16 n.35; Zayas, *supra* note 35, at 285–87, 317–18; Lynn Cockburn, *"Unlawful Combatants" Are Prisoners of War*, Edmonton Sun, Jan. 23, 2002, at 11; Groves, *supra* note 87; Sands, *supra* note 87, at A1; Seelye, *supra* note 87, at A1; Richard A. Serrano & John Hendren, *Rumsfeld Strongly Denies Mistreatment of Prisoners*, L.A. Times, Jan. 23, 2002, at A1; Thom Shanker & Katharine Seelye, *Behind-the-Scenes Clash Led Bush to Reverse Himself on Applying Geneva Conventions*, N.Y. Times, Feb. 22, 2002, at A12; *Most POWs "Will Be Sent Home,"* The Australian, Jan. 21, 2002, at 6; *Blair Wants Britons' Legal Status Resolved*, Hous. Chron., Oct. 23, 2003, at A23; *supra* note 85. *See also* Hamdan v. Rumsfeld, 344 F. Supp. 2d at 160–61, 163.
89. *See* Jay S. Bybee, Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002), available at: http://news.findlaw.com/wp/docs/doj/bybee80102mem.pdf; Jeffrey Smith, *Memo Offered Justification for Use of Torture*, Wash. Post, June 8, 2002, at A1. *See also* Final Report 2004, *supra* note 60, at 34. The memo expressly noted that its drafters considered "this question . . . in the context of the conduct of interrogations outside of the United States" and "possible defenses that would negate any claim that certain interrogation methods violate" a U.S. criminal statute. Bybee, *supra* at 1. It also has been reported that Vice President Cheney's "top lawyer," David Addington, "was a principal author of the White House memo justifying torture." Dana Milbank, *In Cheney's Shadow, Counsel Pushes the Conservative Cause*, Wash. Post, Oct. 11, 2004, at A21. The memo used the word "we," thereby indicating that others were involved in its planning and drafting. *See, e.g.*, Bybee, *supra* at 1–3, 11–12, 14, 22, 31, 36, 39, 46. John Yoo has stated that he "helped draft the main memo defining torture" so that the administration could adopt "aggressive measures." *See* Yoo, *supra* note 46. It was reported that the August 2002 memo was drafted "after White House meetings convened by . . . Gonzales, along with Defense Department general counsel William Haynes and David Addington, . . . who discussed specific interrogation techniques. . . . Among the methods they found acceptable: 'waterboarding,' or dripping water into a wet cloth over a suspect's face, which can feel like drowning; and threatening to bring in more-brutal interrogators from other

nations." Michael Hirsh, *et al.*, *A Tortured Debate*, Newsweek, June 21, 2004, at 50, available at: http://www.msnbc.msn.com/id/5197853/site/newsweek.

Others reported that because of opposition within the Executive branch to the decision to deny Geneva protections to detainees "that Yoo, Attorney General John D. Ashcroft and senior civilians at the Pentagon no longer sought to include the State Department or the Joint Staff in deliberations" and that the Bybee torture memo was an example. Smith, *supra* note 58; *see also* Golden, *supra* note 64, at 12–13. Thus, advice that was forthcoming was that which was wanted, manipulated, and in error; and an ideologic corruption of the Executive decisional processes was part of the common plan. After all of the revelations through January 2005, John Yoo stated in an interview regarding "torture as an interrogation technique" that "[i]t's the core of the Commander-in-Chief function. They [Congress] can't prevent the President from ordering torture." *See* Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, The New Yorker, Feb. 14, 2005. The media also report that there is a "March 14, 2003, memo by . . . John Yoo to Haynes titled 'Military Interrogations of Alien Unlawful Combatants,' which tracks the analysis in the" Bybee torture memo and addresses tactics. *See* Michael Isikoff, *Torture: Bush's Nominee May Be "DOA,"* Newsweek, Mar. 21, 2005, at 7.

90. *See* Bybee, *supra* note 89, at 1–3, 5–6, 13 (attempting to redefine torture as "intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so sever that death, organ failure, or permanent damage resulting in a loss of a significant body function will likely result"), 22, 29–30, 46; Smith, *supra* note 89; Final Report 2004, *supra* note 60, at 7, 34 (also stating that the Bybee memo had argued that the President could authorize torture and that mere "cruel, inhumane, or degrading" treatment would not violate the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 42, which would be patently ludicrous in view of the title, preamble, and Article 16 of the treaty).
91. *See, e.g.*, *supra* notes 22–24, 27, 40; GC, *supra* note 10, arts. 3, 5, 27, 31 ("No physical or moral coercion . . . , in particular, to obtain information"), 32 ("any measure of such a character as to cause their physical suffering . . . also any other measures of brutality"), 33 ("all measures of intimidation"), 147. With respect to treatment of prisoners of war, *see, e.g.*, GPW, *supra* note 49, arts. 3, 13–14, 16–17, 130.
92. *See* Bybee, *supra* note 89, at 2, 39, 46; Smith, *supra* note 89, at A1, quoting the Bybee memo, *supra* note 89, at 46.
93. *See also supra* notes 2, 10–11, 47 (also recognizing that two federal statutes provide a basis for prosecution of war crimes).
94. *Supra* note 42. The Convention expressly prohibits any such exceptions: "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." *Id.* art. 2(2). The Bybee memo stated that the Convention leaves cruel, inhuman, or degrading treatment "without the stigma of criminal penalties." Bybee, *supra* note 89, at 15. However, the memo generally ignored the fact that the laws of war do create criminal responsibility for such conduct (*cf id.* at 15 n.7) and that, in any event, such conduct would also violate the express and unavoidable duty in Article 16 of the Convention "to prevent" such conduct. Thus, orders

or authorizations to engage in cruel, inhuman, or degrading treatment would be in violation of the Convention. Moreover, with respect to the same prohibitions under Article 7 of the ICCPR, the Human Rights Committee's General Comment No. 31 declares that states "must ensure that those responsible are brought to justice. . . . These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment . . . and enforced disappearance." General Comment No. 31, *supra* note 40, at para. 18. With respect to criminal sanctions, "inhumane acts" committed against civilians are also expressly recognized as crimes against humanity in famous international instruments reflecting customary international law. *See, e.g.*, Charter of the International Military Tribunal at Nuremberg, art. 6(c) (1945), Annex to the London Agreement (Aug. 8, 1945), 82 U.N.T.S. 279; Charter of the International Military Tribunal for the Far East, art. 5(c), as amended by General Orders No. 20 (26 Apr. 1946), T.I.A.S. No. 1589; Allied Control Council Law No. 10, art. II(1)(c) (1945).

95. *See supra* notes 40–43 and accompanying text; *supra* note 40; Mayer, *supra* note 89.

96. Barry, *et al.*, *supra* note 58, at 31. *See also* Douglas Jehl, *Questions Left by C.I.A. Chief on Torture Use*, N.Y. Times, Mar. 18, 2005, at A1 (C.I.A. Director Goss "could not assure Congress" that CIA methods "had been permissible under federal laws prohibiting torture" and considers "waterboarding, in which a prisoner is made to believe that he will drown," falls "into 'an area of which I will call professional interrogation techniques.'"); Inigo Gilmore & Robin Gedye, *Jordan Ghost Jail "Holds al-Qa'eda Men" Israeli Intelligence Expert Claims*, Daily Telegraph, Oct. 14, 2004, at 16; Tim Golden, *Administration Officials Split Over Stalled Military Tribunals*, N.Y. Times, Oct. 25, 2004, at A1, 9 (the Bush administration is transferring persons to other countries for detention and intends to shift more from Guantanamo to other countries); Mayer, *supra* note 89; *CIA Outsourcing Interrogation to Jordan, Says Israeli Paper*, Irish Times, Oct. 14, 2004, at 12; Toby Harnden, *Gloves Off as Bush Scraps Ban on "Dirty War" by CIA Intelligence*, The Daily Telegraph, Oct. 22, 2001, at 8 ("'The gloves are off,' a senior official told the paper. 'The president has given the agency the green light to do whatever is necessary,'" including "'pressure,'" which can include "physical beating."); Eric Lichtblau, *Gonzales Says '02 Policy on Detainees Doesn't Bind C.I.A.*, N.Y. Times, Jan. 19, 2005, at A17 (also stating that CIA tactics "include 'water boarding,' in which interrogators make it appear that the suspect will be drowned."); Anthony Mitchell, *U.S. Seeks Terror Suspects in Secret African Prisons*, The Va.-Pilot, Apr. 4, 2007, at A4 (secret prisons in Ethiopia); Dana Priest & Barbara Gellman, *U.S. Decries Abuse but Defends Interrogations; "Stress and Duress" Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, Wash. Post, Dec. 26, 2002, at A1 (Cofer Black, head of the CIA Counterterrorist Center, testified before a joint hearing of the House and Senate Intelligence Committees that "the gloves come off"; secret CIA interrogation centers exist at Bagram air base in Afghanistan, Diego Garcia island in the Indian Ocean, and elsewhere; the CIA also engages in "'extraordinary renditions'" of detainees to Jordan, Egypt, and Morocco for interrogation; U.S. tactics include "'stress and duress'" techniques such as standing or kneeling for hours and in painful positions, use of black hoods or spray-painted goggles, deprivation of sleep, and bombardment of lights); Dana Priest &

Joseph Stephens, *Secret World of U.S. Interrogation*, Wash. Post, May 11, 2004, at A1; James Risen, *et al.*, *CIA Worried About Al-Qaida Questioning*, Pitts. Post-Gazette, May 13, 2004, at A1; Association of the Bar of the City of New York & Center for Human Rights and Global Justice, NYU Law, *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions"* (Oct. 29, 2004), available at: http://www.abcny.org/pdf/report/Torture%20by%20Proxy%20-%20Final%20(PDF).pdf; Human Rights First, *Ending Secret Detentions* (June 2004), available at: http://www.humanrightsfirst.org/us_law/PDF/EndingSecretDetentions_ web.pdf; Human Rights Watch, *The United States "Disappeared": The CIA's Long-Term "Ghost Detainees"* (Oct. 2004), available at: http://www.hrw.org/backgrounder/usa/us1004; Chapter Two, Section D.

The Taft memo to Gonzales had indicated that "lawyers involved all agree that the CIA is bound by the same legal restrictions as the U.S. military." *See* Taft, *supra* note 58, at 4. The disappearance of individuals and secret detentions trigger other serious violations of international law. *See, e.g.*, Council of Europe Resolution, *supra* note 35, paras. 7(vi)–(vii), 8(vii)–(x); Henckaerts & Doswald-Beck, *supra* note 19, at 340–43; Paust, *Overreaction*, *supra* note 40, at 1352–56, 1358; Chapter Two, Section D. Moreover, transfer of non-POWs out of occupied territory is a war crime. *See* Paust, *Overreaction*, *supra* note 40, at 1363–64; *infra* notes 149–51. During a press conference in 2005, President Bush was asked about "written responses that Judge Gonzales gave to his Senate testimony . . . specifically, his allusion to the fact that cruel, inhumane and degrading treatment of some prisoners is not specifically forbidden as long as it's conducted by the CIA and conducted overseas" and "[i]s that a loophole that you approve?" *See President Holds Press Conference,* US Fed News, Jan. 26, 2005. The President's response was: "Listen, Al Gonzales reflects our policy, and that is we don't sanction torture . . . " *See id.* By not fully responding to such a specific question and not condemning a "loophole" for "cruel, inhumane and degrading treatment," the President sends an apparent message of approval and, in terms of dereliction of duty (*see* text *infra* notes 158–59), fails to take reasonable corrective action.

97. *See* Vice President Dick Cheney, NBC News' Meet the Press (Sept. 16, 2001), available at: http://stacks.msnbc.com/news/629714.asp. It has also been reported that Cheney stated "'we think . . . that we'll have the kind of treatment of these individuals that we believe they deserve.'" Golden, *supra* note 64, at 1.

At the annual meeting of the American Society of International Law on April 1, 2005, during a panel session on Legal Ethics and the War on Terror, Scott Horton offered the following hypothetical while smiling to convey the impression of the hypo's accuracy and stating that it "does not rest on conjecture": Soon after 9/11, Vice President Cheney was told that current interrogation tactics went to the limits of the law, but Cheney was unhappy with that advice and organized meetings to press the need for memos to justify new aggressive interrogation tactics. Cheney, in Horton's words, wanted to "'take the gloves off' and 'use the dark arts' . . . [and] aggressively advocated a change in the [intelligence] service's authorized interrogation techniques to include 'extreme' measures. He was told that in the opinion of the service, their current set of approved techniques went fully to the limit of what the law permitted. Not satisfied with this response, the high official involved his counsel and other White House lawyers, including one now at the helm of DOJ, in

a discussion over what steps could be taken to persuade the service to adopt these new techniques." *Id.* (copy on file with the author).

98. Cheney, *supra* note 97.
99. Michael B. Dunlavey, Memorandum for Commander, United States Southern Command, Counter-Resistance Strategies (Oct. 11, 2002), available at: http://www.npr.org/documents/2004/dod_prisoners/20040622doc3.pdf. Also available at: http://www.defenselink.mil/news/Jun2004/d20040622doc3.pdf.
100. Jerald Phifer, Memorandum for Commander, Joint Task Force 170, Request for Approval of Conter-Resistance Strategies (Oct. 11, 2002), available at: http://www.yirmeyahureview.com/archive/documents/prisoner_abuse/dod_sc_021011.pdf.
101. Diane E. Beaver, Memorandum for Commander, Joint Task Force 170, Legal Review of Aggressive Interrogation Techniques (Oct. 11, 2002), available at: http://www.yirmeyahureview.com/archive/documents/prisoner_abuse/dod_sc_021011.pdf.
102. *Id.*
103. *See* Phifer, *supra* note 100, at 1; Beaver, *supra* note 101, at 5.
104. *See* Phifer, *supra* note 100, at 1–2; Beaver, *supra* note 101, at 6.
105. *See* Phifer, *supra* note 100, at 2–3; Beaver, *supra* note 101, at 6. LTC Phifer also stated that Category III tactics "and other aversive techniques, such as those used in U.S. military interrogation resistance training or by other U.S. government agencies may be utilized in a carefully coordinated manner to help interrogate exceptionally resistant detainees." Phifer, *supra* note 100, at 2. *Compare* text *infra* note 132. Nonetheless, in addition to relevant international law 18 U.S.C. § 2340(2)(c) expressly prohibits "the threat of imminent death" and § 2340(2)(d) covers "prolonged mental harm caused by or resulting from the threat that another person will be subjected to death, or severe mental pain or suffering."
106. *See* Beaver, *supra* note 101, at 1, 5; *but see supra* notes 19–21, 27, 62–63. For those in the military, the Army Field Manual was right on point. *See* FM 27-10, *supra* note 2, at 31, para. 173. *See also supra* note 20; *infra* note 111 (regarding Army doctrine). Whether or not particular detainees at Guantanamo are prisoners of war is more complex, but this complexity should have alerted military lawyers at various levels that a sweeping denial of POW status for all members of the armed forces of the Taliban was highly problematic if not patently in error. *See, e.g.*, Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 Yale J. Int'l L. 325, 328, 332–33 (2003) [revised in Chapter Three]; Paust, *Courting Illegality*, *supra* note 25, at 5–7 n.15; *see also* Hamdan v. Rumsfeld, 344 F. Supp. 2d at 161–62; W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 Chi. J. Int'l L. 493 (2003); Evan J. Wallach, *The Logical Nexus Between the Decision to Deny Application of the Third Geneva Convention to the Taliban and al Qaeda, and the Mistreatment of Prisoners at Abu Ghraib*, 36 Case W. Res. J. Int'l L. 541 (2005).
107. James T. Hill, Memorandum for Chairman of the Joint Chiefs of Staff (Oct. 25, 2002), available at: http://www.npr.org/documents/2004/dod_prisoners/20040622doc4.pdf.
108. William J. Haynes II, Action Memo, Counter-Resistance Techniques (Nov. 27, 2002), available at: http://www.npr.org/documents/2004/dod_prisoners/20040622doc5.pdf. The request was actually for approval of the use of such tactics by the USSOUTHCOM Commander. *Id.*
109. *Id.*

110. *See id.*, signed "Approved" by Secretary Rumsfeld on Dec. 2, 2002, available at: http://www.npr.org/documents/2004/dod_prisoners/20040622doc5. Already, Secretary Rumsfeld had required the Chairman of the Joint Chiefs of Staff to notify combat commanders that members of al Qaeda and the Taliban "are not entitled to prisoner of war status for purposes of the Geneva Conventions" and that the military should only apply Geneva standards "to the extent appropriate and consistent with military necessity." *See* Memorandum for Chairman of the Joint Chiefs of Staff, Status of Taliban and Al Qaida (19 Jan. 2002), available at: http://www.defenselink.mil/news/Jun2004/d20040622doc1.pdf. The order was carried out by a Memorandum of the Joint Chiefs of Staff, Subj/Status of Taliban and Al Qaida (19 Jan. 2002), available at http://www.defenselink.mil/news/Jun2004/d20040622doc2.pdf. Of course, military necessity does not permit violations of Geneva law, unless such an exception expressly exists in a particular article. *See supra* notes 11–12, 60.
111. *See, e.g.*, U.S. Dep't of Army, Field Manual 34–52, Intelligence Interrogations (1987) (the manual also expressly prohibits "acts of violence or intimidation, including physical or mental torture, threats, insults or exposure to inhumane treatment as a means of or aid to interrogation"), available at: http://www.globalsecurity.org/intell/library/policy/army/fm/fm34-52/toc.htm; U.S. Dep't of Defense Working Group, Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations 53 (4 Apr. 2003) (regarding tactics approved in FM 34–52 and the fact that "Army interrogation doctrine . . . places particular emphasis on the humane handling of captured personnel" regardless of their status and that prohibitions such as "mental torture, threats, and exposure to inhumane treatment of any kind" "apply to all types of interrogations") [hereinafter DOD Working Group Report], available at: http://www.defenselink.mil/news/Jun2004/d20040622doc8.pdf; Final Report 2004, *supra* note 60, at 7, 14, 35, 38 (noting that the 1992 Field Manual had specifically left out manipulation of "'lighting and heating, as well as food, clothing, and shelter,'" and quoting a 1987 version of FM 34–52), Appendices D, E; Barry, *et al.*, *supra* note 58, at 32; Smith, *supra* note 89. FM 34–52 also warned its readers: "The use of force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment of any kind is prohibited by law and is neither authorized nor condoned by the US Government." FM 34–52, *supra* at 1–10 to 1–12.
112. *See also* Final Report 2004, *supra* note 60, at 38, 68 ("[t]echniques employed at Guantanamo included the use of stress positions, isolation for up to 30 days and removal of clothing."), Appendices D, E; Human Rights Watch, Interrogation Techniques for Guantanamo Detainees, Table of Interrogation Techniques Recommended/Approved by U.S. Officials (Aug. 19, 2004) (listing yelling, significantly increased fear, stress, isolation, sensory deprivation, hooding, removal of clothing, use of dogs, among others) [hereinafter Human Rights Watch Table], available at: http://hrw.org/backgrounder/usa/0819interrogation.htm. Concerning reports of other tactics used at Guantanamo, *see, e.g.*, *infra* notes 122, 138, 144–45.
113. *See* Smith, *supra* note 89, at A1; Final Report 2004, *supra* note 60, at 7–8, 35; Human Rights Watch Table, *supra* note 112, at 2; Secretary of Defense Donald Rumsfeld Memorandum for the General Counsel of the Department of Defense

(Jan. 15, 2003), available at: http://www.npr.org/documents/2004/dod_prisoners/20040622doc6.pdf; *see also* DOD Working Group Report, *supra* note 111, at 17 ("Crimes that Could Relate to Interrogation Techniques"), 20 ("Legal doctrines under the Federal Criminal Law that could render specific conduct otherwise criminal, *not* unlawful" (emphasis in original)), 33 ("the defense of superior orders will generally be available for U.S. Armed Forces personnel engaged in exceptional interrogations except where the conduct . . . [is] patently unlawful").

114. *See* DOD Working Group Report, *supra* note 111, at 4 (also using the wrong title for the GC); *see also* Jess Bravin, *Pentagon Report Set Framework for Use of Torture*, Wall. St. J., June 7, 2004, at A1. Names of all members of the group are not yet available, and a rumor that several members who are or were military personnel refused to sign the report cannot be confirmed at this time. In the Memorandum from William J. Haynes II to the General Counsel of the Department of the Air Force, Jan. 17, 2003, available at: http://www.washingtonpost.com/wp-srv/nation/documents/011703haynes.pdf, Haynes suggested that "you should call upon the resources of the offices of those indicated as recipients of copies of this memorandum, including requesting their participation, or that of members of their staffs, in this working group." Those listed were: Under Secretary of Defense (Policy); Acting Assistant Secretary of Defense (SO/LIC); General Counsel of the Department of the Army; General Counsel of the Department of the Navy [Alberto Mora]; Director of the Joint Staff; Director, Defense Intelligence Agency; Counsel for the Commandant of the Marine Corps; The Judge Advocate General of the Army [Major General Romig]; The Judge Advocate General of the Navy; The Judge Advocate General of the Air Force [Major General Rives]; Staff Judge Advocate for the Commandant of the Marine Corps [Brigadier General Sandkuhler]. *See also* Working Group Report, *supra* note 111, at 2, para. 2 (listing unnamed members of the group as "representatives" of such "entities," including "Joint Staff Legal Counsel and J5"). Several of the JAGs protested the results of the Working Group effort. *See infra* note 119.

Concerning the manifestly false conclusions, *see supra* notes 8, 19–21, 27, 62–63. During a "discussion of international law that . . . could be cited by other countries," the Report addressed Article 75 of Protocol I and the ICRC Commentary to the Geneva Civilian Convention, but only with respect to "policy considerations" relevant to widespread expectations of other states that Geneva law provides certain minimum protections for all persons and not to recognize and set legal limits to U.S. interrogation tactics. *See* DOD Working Group Report, *supra* note 111, at 58. Concerning torture, the Report argued incorrectly that the President is above the law when exercising commander in chief powers such as those relating to interrogation of enemy detainees. *See id.* at 20–21; *but see* Paust, *supra* note 10, at 7–9, 169–73, 175, 488–89, 493–94; Paust, *Judicial Power*, *supra* note 10, at 517–22; text *infra* notes 181–82, 188–95. Concerning congressional power to set limits to presidential war powers, *see, e.g.*, Herrera v. United States, 222 U.S. 558, 572 (1912), *quoting* Planters' Bank v. Union Bank, 83 U.S. (16 Wall.) 483, 495 (1873) ("It was there decided that the military commander at New Orleans 'had power to do all that the laws of war permitted, except so far as he was restrained by . . . the effect of congressional action.'"); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407

(1819); Gelston v. Hoyt, 16 U.S. (3 Wheat.) 246, 330–38 (1818); Brown v. United States, 12 U.S. (8 Cranch) 110 (1814); Little v. Barreme (The Flying Fish), 6 U.S. (2 Cranch) 170, 177–78 (1804); Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 28, 41 (1801); Bas v. Tingy, 4 U.S. (4 Dall.) 37, 40–42 (1800); Hamdan v. Rumsfeld, 344 F. Supp. 2d at 158–59; 9 Op. Att'y Gen. 517, 518–19 (1860); Paust, *supra* note 10, at 461–62, 474–75 n.54, 478 n.58; *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 541 (2004) (Souter, J., dissenting in part and concurring in judgment); *id.*, 542 U.S. at 573–75 (Scalia, J., dissenting); *Ex parte* Milligan, 71 U.S. 2, 139 (1866) (Chase, C.J., dissenting) ("Congress . . . has . . . the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns."); Chapter Five, Section A.

With respect to cruel, inhuman, and degrading treatment proscribed under the ICCPR and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Report stressed that in reservations to each treaty the United States stated that it "considers itself bound" only to the extent these forms of impermissible treatment are also prohibited under the Fifth, Eighth, or Fourteenth Amendments to the U.S. Constitution. *See* DOD Working Group Report, *supra* note 111, at 6; *see also supra* notes 42–43. Such a reservation is void *ab initio* under international law because it is incompatible with the object and purpose of the treaty to reach all forms of proscribed treatment. Concerning the ICCPR, *see, e.g.*, *supra* note 42. Concerning the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *see, e.g.*, *supra* note 43. In any event, the prohibition of cruel, inhuman, and degrading treatment is now a customary and peremptory prohibition *jus cogens* that applies universally and without any limitations in allegedly valid reservations or understandings. *See* text *supra* note 41.

115. *See* Esther Schrader & Greg Miller, *U.S. Officials Defend Interrogation Tactics*, L.A. Times, May 13, 2004, at A11 (regarding Rumsfeld's views); Editorial, *Mr. Kerry on Prisoners*, Wash. Post, Oct. 20, 2004, at A26 (President "Bush continues to take the position that the Geneva Conventions should not be applied to many detainees, including anyone captured in Afghanistan, and that harsh interrogation techniques foresworn by the U.S. military for decades should be used").

116. *See* John Yoo, *Terrorists Have No Geneva Rights*, Wall St. J., May 26, 2004, at A16 ("Taliban fighters . . . lost POW status. . . . As a result, interrogations of detainees captured in the war on terrorism are not regulated under Geneva."). The sweeping denial of POW status for every member of the armed forces of the Taliban, and before any hearing for particular detainees, is problematic enough and rests on a mistaken view of the tests for POW status under Article 4(A)(1) and (3) of the GPW. *See, e.g.*, GPW, *supra* note 49, art. 4(A)(1), (3); Paust, *Courting Illegality*, *supra* note 25, at 5–7 n.15; Paust, *Judicial Power*, *supra* note 106, at 328, 332–33; Wallach, *supra* note 106. The statement that persons who are not prisoners of war have no rights under the Geneva Conventions is patently false and outrageous. *See, e.g.*, *supra* notes 8, 19–28, 62–63.

117. *See* Schrader & Miller, *supra* note 115 (addressing remarks by Rumsfeld, General Richard B. Myers, and others). *But see supra* notes 22–24, 31–34, 40, 91.

118. *Id.*
119. *See, e.g.*, Barry, *et al.*, *supra* note 58, at 32; Bravin, *supra* note 114; Ken Silverstein, *U.S. Military Lawyers Felt "Shut Out" of Prison Policy*, L.A. Times, May 14, 2004, at A10; Smith, *supra* note 58 (mentioning classified memos in the spring of 2003 from top military lawyers (Air Force Major General Rives, Marine Brigadier General Sandkuhler, and Army Major General Romig) and Air Force General Counsel Alberto J. Mora, and various protestations from the Chairman of the Joint Chiefs of Staff (General Myers) and "Lawyers for the Joint Chiefs of Staff"); Smith, *supra* note 89; *see also* Final Report 2004, *supra* note 60, at 7 (the General Counsel of the Navy, Alberto J. Mora, had also raised "concerns"). Certain military lawyers apparently did little more than protest and apparently none resigned. *Cf* Silverstein, *supra.* Other military lawyers furthered the common plan. *See, e.g.*, *supra* note 60; text *supra* notes 101–06; text *infra* note 141.
120. *See, e.g.*, Secretary of Defense Donald Rumsfeld, Memorandum for the Commander, US Southern Command (Apr. 16, 2003), available at: http://www.npr.org/documents/2004/dod_prisoners/20040622doc9.pdf; Robert Burns, *Lawyers Opposed Questioning at Guantanamo*, The Tribune, SanLuisObispo.com, May 21, 2004; Barry, *et al.*, *supra* note 58, at 32; Smith, *supra* note 89; Final Report 2004, *supra* note 60, at 8, 35; Human Rights Watch, *supra* note 112, at 3. The thirty-five tactics recommended by the DOD Working Group are listed in its Report, *supra* note 111, at 63–65, and in charts at the end of the Report. The Report noted that "[e]ach of the techniques requested or suggested for possible use for detainees by USSOUTHCOM and USCENTCOM is included." *Id.* at 62. Among the thirty-five tactics were: "5. Fear Up Harsh: Significantly increasing the fear level in a detainee . . . 20. Hooding . . . 26. Threat of Transfer: Threatening to transfer the subject to a 3rd country that subject is likely to fear would subject him to torture or death . . . 27. Isolation . . . 28. Use of Prolonged Interrogations: . . . (e.g., 20 hours per day per interrogation) . . . 31. Sleep Deprivation: . . . Not to exceed 4 days in succession . . . 33. Face slap/Stomach slap: A quick glancing slap to the fleshy part of the cheek or stomach. These techniques are used strictly as shock measures . . . 34. Removal of Clothing . . . 35. Increasing Anxiety by Use of Aversions . . . (e.g., simple presence of dog . . . " *Id.* at 63–65.
121. *See supra* note 111.
122. *See, e.g.*, Barry, *et al.*, *supra* note 58, at 32–33; Julian Borger, *Harsh Methods Approved at Top*, The Guardian (London), May 12, 2004, at 13 (Rumsfeld approved tactics for Guantanamo such as "stripping detainees naked, making them hold 'stress' positions and prolonged sleep deprivation"); Bravin, *supra* note 114 (General Hill said four tactics required special approval by Rumsfeld and they have been used at Guantanamo on two detainees; tactics used more generally at Guantanamo included threatening to immediately kill family members, denial of clothing, shackling in stress positions, sleep deprivation for up to ninety-six hours, placing women's underwear on prisoners' heads); Neil A. Lewis & Eric Schmitt, *Inquiry Finds Abuses at Guantanamo Bay*, N.Y. Times, Apr. 30, 2005, at 35; Neil A. Lewis, *Broad Use of Harsh Tactics Is Described at Cuba Base*, N.Y. Times, Oct. 17, 2004, at 1; Dana Priest & Joe Stephens, *Harsh Actions Okayed by U.S. Officials*, Toronto Star, May 9, 2004, at 7 (harsh tactics included exposure "to heat, cold and 'sensory assault,' including

loud music and bright lights"); Tim Reid, *Files Implicate Bush in Iraqi Jail Abuses*, The Times (London), Dec. 22, 2004, at 26 (FBI memos show use at Guantanamo and in Iraq of "snarling dogs and forcing detainees to defecate on themselves, was still an interrogation tactic months after the Abu Ghraib abuse scandal"); R. Jeffrey Smith & Dan Eggen, *New Papers Suggest Detainee Abuse Was Widespread*, Wash. Post, Dec. 22, 2004, at A1; *see also supra* notes 103–05, 112, 118; *infra* notes 144–45; *cf* Final Report 2004, *supra* note 60, at 68 (tactics used at Guantanamo included: "stress positions, isolation for up to 30 days and removal of clothing"), Appendix E (not listing some tactics); *but see* Rumsfeld, *supra* note 120, Tab A (listing as tactics approved in advance fear up harsh and isolation, among other tactics, but not listing use of dogs, stripping persons naked, hooding, stress to inflict pain, among others); Human Rights Watch Table, *supra* note 112, at 2–4 (similarly listing yelling, "significantly . . . increasing fear," and "isolating prisoner for up to 30 days," but not others such as use of dogs, stripping persons naked, or hooding).

123. *See also supra* notes 22–24, 27, 31–34, 40, 91, 111.

124. *See, e.g.*, Paust, Bassiouni, *et al.*, *supra* note 6, at 693, 695, 803, 807 n.5, 821–22, 831; *supra* note 2.

125. 25 Eur. Ct. H.R. (ser. A) at 5 (1978).

126. *Id.* at 41, para. 96, 66, para. 167. The Court noted that the "techniques were applied in combination, with premeditation and for hours at a stretch; they caused, if not bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation," and, "accordingly," were forms of inhuman treatment. *Id.* at 66, para. 167. The Court concluded that the "techniques were also degrading, since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance." *Id.*

127. Aksoy v. Turkey, 6 Eur. Ct. H.R. 2260, 23 EHRR 553, at paras. 60, 64 (18 Dec. 1996). The Court stated that "torture attaches only to deliberate inhuman treatment causing very serious and cruel suffering." *Id.* at paras. 63–64. The victim was detained for some two weeks and had claimed to have been subjected to beatings and had been stripped naked, hooded, and subjected to electric shocks. *Id.* at paras. 60, 64.

128. T & V v. United Kingdom, Judgment of 16 Dec. 1999, at para. 71, 30 EHRR 121 (2000).

129. *See, e.g.*, The Prosecutor v. Kunarac, IT-96-23-T & IT-96-23/1-T (Trial Chamber, International Criminal Tribunal for Former Yugoslavia), para. 497 (22 Feb. 2001) (intentional "infliction, by act or omission, of severe pain or suffering, whether physical or mental"); Johan D. van der Vyver, *Torture as a Crime Under International Law*, 67 Albany L. Rev. 427 (2003).

130. With respect to "cruel" treatment, a trial chamber of the ICTY declared that "cruel treatment is treatment which causes serious mental or physical suffering and constitutes a serious attack on human dignity." The Prosecutor v. Delalic, IT-96-21-T (Trial Chamber, International Criminal Tribunal for Former Yugoslavia), para. 551 (Nov. 16, 1998). The same decision recognized that "inhuman treatment is an intentional act or omission, that is an act which, when judged objectively, is

deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity." *Id.* at para. 543. Other ICTY cases confirm the *Delalic* recognitions. *See, e.g.*, Knut Dormann, Elements of War Crimes Under the Rome Statute of the International Criminal Court 65 n.72 (regarding inhuman treatment), 398–99 nn.7–8 (regarding cruel treatment) (2003). Concerning U.S. decisions whether certain conduct constitutes cruel, inhuman, and/or degrading treatment, *see also supra* note 40. With respect to torture, *see also* Zubeda v. Ashcroft, 333 F.3d 463, 472 (3d Cir. 2003) ("[r]ape can constitute torture"); Al-Saher v. I.N.S., 268 F.3d 1143, 1147 (9th Cir. 2001); *supra* note 40.

131. Concluding Observations of the Committee Against Torture: Israel, 18th Sess., U.N. Doc. A/52/44 (1997) at paras. 256–257.

132. U.S. Dep't of Army Subject Schedule 27–1, *The Geneva Conventions of 1949 and Hague Convention No. IV of 1907*, at 7 (8 Oct. 1970). *Compare* text *supra* note 105; Lichtblau, *supra* note 106.

133. *See* Jeffrey Smith, *Memo Gave Intelligence Bigger Role, Increased Pressure Sought on Prisoners*, Wash. Post, May 21, 2004, at A17. *See also* Scott Horton, Expert Report (Jan. 28, 2005), at para. 16 (stating that "Rumsfeld gave an oral order to dispatch MG Miller to Iraq to 'Gitmoize' the intelligence gathering operations there" as part of a "consciously crafted . . . evasion of the requirements of the Geneva Conventions – and to introduce them to Iraq . . . [that] rested on the express and unlawful order of Rumsfeld," offering no citations for the revelation but stating that the oral order is "well known to many senior officers involved in the process"), available at: http://www.ccr-ny.org/v2/legal/september_11th/docs/ScottHortonGermany013105.pdf; Chapter Two, Section B. It was reported that Judge Advocate Generals of the Armed Services went to Horton for advice and told him that there was "'a calculated effort'" to ignore the demands of the Geneva Conventions and that "prime movers in this effort . . . were DOD Under Secretary for Policy Douglas Feith and DOD general counsel William Haynes." Barry, *et al.*, *supra* note 58.

134. *See* Final Report 2004, *supra* note 60, at 9 ("He brought the Secretary of Defense's April 16, 2003 policy guidelines for Guantanamo with him and gave this policy to CJTF-7 as a possible model for the command-wide policy that he recommended be established."), 37 ("as a potential model"); Report by Major General Antonio M. Taguba, Article 15–6 Investigation of the 800th Military Police Brigade 7–8 (Feb. 2004) ("MG Miller's team used JTF-GTMO procedures and interrogation authorities as baselines. . . . MG Miller's team recognized that they were using JTF-GTMO operational procedures and interrogation authorities as baselines for its observations and recommendations."), available at: http://www.npr.org/iraq/2004/prison_abuse_report.pdf. *See also* Chapter Two, Section B.

135. *See, e.g.*, Final Report 2004, *supra* note 60, at 9–10; Borger, *supra* note 122 (Under-Secretary of Defense Stephen Cambone testified before a Senate Committee that severe and "stress matrix" tactics, including use of dogs to intimidate, had been approved by U.S. commanders in Iraq; and Senator Carl Levin stated that "sleep management, sensory deprivation, isolation longer than 30 days and dogs" were

considered to be permissible tactics if approved in particular cases by the commanding general); Schrader & Miller, *supra* note 115 (tactics included fear up harsh, use of dogs, use of hoods, isolation for longer than thirty days, sleep management up to seventy-two hours); Smith, *supra* note 133 (tactics included use of dogs, long-term isolation, forced stress positions, sleep deprivation); Editorial, *Protecting the System*, Wash. Post, May 12, 2004, at A22; *Iraqi Prison Scandal: Most "Arrested by Mistake,"* L.A. Times, May 11, 2004, at A11. Seymour Hersh has written that Cambone decided that harsh interrogation tactics should be used in Iraq and that "Rumsfeld and Myers approved the program." Seymour M. Hersh, Chain of Command 60 (2004). *See also supra* note 133.

136. *See* Smith, *supra* note 133.

137. Final Report 2004, *supra* note 60, at 11. The Report did not address those secretly detained elsewhere and who might have numbered in the thousands. *See, e.g.*, Paust, *supra* note 96, at 1353 n.74; *supra* note 96.

138. Final Report 2004, *supra* note 60, at 14. *See also* Taguba Report, *supra* note 134, at 16–17 ("intentional abuse of detainees by military police personnel included the following acts. . . . Forcing detainees to remove their clothing and keeping them naked for several days at a time; . . . Forcing naked male detainees to wear women's underwear; . . . Using military working dogs (without muzzles) to intimidate and frighten detainees; . . . Pouring cold water on naked detainees," and even more egregious conduct); Editorial, *supra* note 115; Amann, *supra* note 88, at 323–25; Carlotta Gall, *U.S. Military Investigating Death of Afghan In Custody*, N.Y. Times, Mar. 4, 2003, at A14; John Hendren, *Pentagon Files Reveal More Allegations of Abuse in Iraq; Documents Contain Descriptions of Severe Detainee Mistreatment Beyond Abu Ghraib*, L.A. Times, Jan. 25, 2005, at A1; John Hendren & Mark Mazzetti, *Army Implicates 28 U.S. Troops in Deaths of 2 Afghan Detainees*, L.A. Times, Oct. 15, 2004, at A13; Carlotta Gall, *Captives; Released Afghans Tell of Beatings*, N.Y. Times, Feb. 11, 2002, at A1; Barton Gellman & R. Jeffrey Smith, *Report to Defense Alleged Abuse by Prison Interrogation Teams; Intelligence Official Informed Defense Dept. in June*, Wash. Post, Dec. 8, 2004, at A1; Stephen Grey, *Britons Sounded Alert on Abu Ghraib*, Sun. Times (London), Dec. 5, 2004, at 22; Seymour M. Hersh, *Torture at Abu Ghraib*, The New Yorker, May 10, 2004, at 42; Deborah Horan, *Ex-UN Envoy: U.S. Feared Discovery of Prison Abuse*, Chicago Trib., Apr. 29, 2005, at C6; *Mr. Kerry on Prisoners*, *supra* note 115; Todd Richissin & Gail Gibson, *Memo Purportedly Foresaw Iraq Abuses; "Gloves Are Coming Off" at Abu Ghraib Prison*, Balt. Sun, Aug. 24, 2004, at A1; Eric Schmitt, *Pentagon Failed to Set Policy on Detainees*, N.Y. Times, Dec. 6, 2004, at 6 (Naval Inspector General Vice Admiral Albert Church investigation reveals that Rumsfeld's approved techniques for Guantanamo were being used in Afghanistan; and Navy Seals in Iraq are accused of abuse, photos demonstrate abuse); Josh White, *U.S. Generals in Iraq Were Told of Abuse Early, Inquiry Finds*, Wash. Post, Dec. 1, 2004, at A1; Josh White, *"Wish Lists" of Detainee Tactics Cited*, Wash. Post, Apr. 19, 2005, at A16; Editorial, Wash. Post, Apr. 26, 2005, at A14 (stating that "simulated drowning and the withholding of pain medication, were authorized for the CIA at White House meetings presided over by President Bush's counsel"; "Lt. Gen. Ricardo S. Sanchez . . . signed an order on Sept. 14, 2003, authorizing a number of interrogation methods that violated the Geneva Conventions,"

including "use of guard dogs to 'exploit Arab fear of dogs'"; regarding "Maj. Gen. Geoffrey D. Miller," "[a]ccording to one official investigation . . . , dogs were introduced" at Guantanamo "at his suggestion"; "Maj. Gen. Barbara Fast, as the senior intelligence officer on Gen. Sanchez's staff . . . failed to act on, reports of abuses in the fall of 2003"; and "Maj. Gen. Walter Wojdakowski, Gen. Sanchez's deputy, was responsible for detention operations" and "reportedly approved interrogation plans involving the use of dogs"); *US Military in New Scandal – Abuse Photos on Internet*, Sun. Telegraph (Sydney, Australia), Dec. 5, 2004, at 53; *Memo Appealed for Ways to Break Iraqi Detainees*, Wash. Post, Aug. 23, 2004, at A12 ("'The gloves are coming off gentlemen regarding these detainees,' said the memo, which carried the signature of Capt. William Ponce Jr. . . . sent by the intelligence staff of Lt. Gen. Ricardo Sanchez . . . to all concerned military intelligence personnel in Iraq. In an apparent reference to Sanchez's head of intelligence, Col. Steven Boltz, the memo asserted that 'Col. Boltz has made it clear that we want these individuals broken.'"); Josh White, *Soldiers' "Wish Lists" of Detainee Tactics Cited*, Wash. Post, April 19, 2005, at A16; William Ponce Jr., ALCON memo, available at *Purported Army Memo on Intelligence*, Balt. Sun, Aug. 24, 2004, at A9.

139. Final Report 2004, *supra* note 60, at 30, 36–37; *see also id.* at 43, 68, 82–83; Grey, *supra* note 138; Schmitt, *supra* note 138; White, *supra* note 138.
140. Final Report 2004, *supra* note 60, at 30; *see also id.* at 43 ("the Independent Panel finds that commanding officers and their staffs at various levels failed in their duties and that such failures contributed directly or indirectly to detainee abuse.").
141. *Id.* at 47.
142. *See id.* at 10, 83.
143. *See, e.g.*, ICRC, *Iraq: ICRC Explains Position Over Detention Report and Treatment of Prisoners*, available at: http://www.icrc.org/Web/eng/siteengo.nsf/html/5YRMYC?OpenDocument; *Alarm Raised by ICRC*, Sunday Times (Perth, Australia), May 9, 2004; Neil Lewis & Eric Lichtblau, *The Struggle for Iraq: Outcry; Red Cross Says That for Months It Complained of Iraq Prison Abuse to the U.S.*, N.Y. Times, May 7, 2004, at A12; Mark Matthews, *Prison Abuse Revealed in 2003, Agency Says; Red Cross, British Official Say U.S. Authorities Were Slow to Respond*, Balt. Sun, May 8, 2004, at 14A (adding: "ICRC director of operations Pierre Kraehenbuehl . . . said, 'The elements we found were tantamount to torture. There were clearly incidents of degrading and inhuman treatment.'"); *Excerpts from Red Cross Report*, Wall St. J., May 7, 2004; Robin Wright & Bradley Graham, *Bush Privately Chides Rumsfeld*, Wash. Post, May 6, 2004, at A1 ("U.S. officials blamed the Pentagon for failing to act on repeated recommendations to improve conditions for thousands of Iraqi detainees. . . . Rumsfeld and the Pentagon resisted appeals in recent months from the State Department and the Coalition Provisional Authority to deal with problems relating to detainees. . . . 'It's something Powell has raised repeatedly.' . . . State Department officials . . . have been particularly concerned about . . . the Pentagon's reluctance to heed urgings earlier from the International Committee of the Red Cross."); *see also* ICRC, Report on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation (Feb. 2004), available at: http://www.derechos.org/nizkor/us/doc/icrc-prisoner-report-feb-2004.pdf. Amnesty International also stated that it gave

the Coalition Provisional Authority a memorandum detailing alleged abuse in June 2003. *See, e.g.*, Farah Stockman, *Right Groups Say Mistreatment Was Reported Last Year*, Boston Globe, May 8, 2004, at A1.

144. *See, e.g.*, Robert Reid, *U.S. Soldier Faces Court Martial*, Toronto Star, May 10, 2004, at A1.

145. *See, e.g.*, Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantanamo*, N.Y. Times, Nov. 29, 2004, at A1 (tactics included "'humiliating acts, solitary confinement, temperature extremes, use of forced positions, . . . exposure to loud and persistent noise and music and to prolonged cold, . . . some beatings'" and raised questions regarding "'psychological torture'"); *see also supra* notes 112, 122.

146. *See, e.g.*, Josh White, *Abu Ghraib Guards Kept a Log of Prison Conditions*, Wash. Post, Oct. 25, 2004, at A14; *Sergeant Gets 8 Years, Trials Start for 2 Over Iraq Prison Abuse*, Int'l Herald Trib., Oct. 23, 2004, at 5.

147. *See, e.g.*, Douglas Jehl, *U.S. Action Bars Right of Some Captured in Iraq*, N.Y. Times, Oct. 26, 2004, at A1; Dana Priest, *Detainees Secretly Taken Out of Iraq, Practice Is Called Breach of Protections*, Wash. Post, Oct. 24, 2004, at A1. Concerning such transfers, *see also supra* note 96; Chapter Two, Section D. Additionally, transfer of any "person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture" is prohibited by the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 43, art. 3(1). The outsourcing of interrogation when there is a real risk of human rights violations creates state responsibility and can form the basis for an individual's responsibility. *See, e.g.*, Paust, *Overreaction*, *supra* note 40, at 1358 n.97.

148. *See, e.g.*, Jack Goldsmith, Memorandum to William H. Taft, IV, *et al.*, regarding Draft Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Permissibility of Relocating Certain "Protected Persons" from Occupied Iraq 2–5, 14 (Mar. 19, 2004), available at: http:www.washingtonpost.com/wp-srv/nation/documents/doj_memo031904.pdf; Jehl, *supra* note 147; Priest, *supra* note 147. The Goldsmith memo fit perfectly within the administration's common plan outlined by John Yoo and others to engage in secret and coercive interrogation. *See supra* note 44. The Goldsmith memo offered a specious claim that to "remove" or "relocate" is not to "transfer" or "deport." *See* Goldsmith, *supra* at 2–5. However, treaties are to be interpreted with respect to their object and purpose as well as the ordinary meaning of their terms (*see supra* note 76), which clearly encompasses transfer of any sort, for any purpose, and for however long. *See also* 2004 UK Manual, *supra* note 8, at 293 ("forbidden to *transfer* forcibly . . . not *moved* outside occupied territory") (emphasis added). An earlier military pamphlet recognized that the prohibition involves "forced individual or mass *relocation*." U.S. Dep't of Army Pam. No. 20–151, *Lectures of the Geneva Conventions of 1949*, at 19 (28 Apr. 1958) (emphasis added). The only exceptions are specifically addressed in the Geneva Civilian Convention. *See* GC, *supra* note 10, art. 49, paragraph 2 (certain types of "evacuation"); IV Commentary, *supra* note 11, at 279 ("The prohibition is absolute and allows of no exceptions, apart from those stipulated in paragraph 2.").

149. *See* GC, *supra* note 10, art. 49 ("Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory . . . are prohibited,

regardless of their motive."); Paust, *Overreaction*, *supra* note 40, at 1363. *See also* GC, *supra* note 10, art. 76 ("persons accused of offences shall be detained in the occupied territory"); Protocol I, *supra* note 26, art. 85(4)(a); IV Commentary, *supra* note 11, at 278–80, 363, 599. Afghan and Iraqi nationals are "protected persons" within the meaning of Article 4 of the Geneva Civilian Convention at least while the state of which they are nationals is not "neutral" and their government does not have "normal diplomatic representation in the State in whose hands they are." *See* GC, *supra* note 10, art. 4. Even if persons are nationals of a "neutral" state and their state of nationality has normal diplomatic relations with the detaining state, they are protected persons if they are in occupied or other territory that is not the territory of the detaining state, since the narrow exclusion in paragraph 2 in Article 4 only applies to persons detained "in the territory of" a detaining state. *See, e.g.*, *id.*; IV Commentary, *supra* note 11, at 48 ("in occupied territory they are protected persons and the Convention is applicable to them"); U.S. Dep't of Army, Pam. 27–161–2, II International Law 132 (1962) ("If they are in occupied territory, they remain entitled to protection."); 2004 UK Manual, *supra* note 8, at 274 ("Neutral nationals in occupied territory are entitled to treatment as protected persons under Geneva Convention IV whether or not there are normal diplomatic relations between the neutral states concerned and the occupying power."). Moreover, all detainees remain protected under the customary law reflected in common Article 3.

150. *See* GC, *supra* note 10, art. 147 ("unlawful deportation or transfer . . . of a protected person"); Paust, *Overreaction*, *supra* note 40, at 1363–64; Protocol I, *supra* note 26, art. 85(4)(a); IV Commentary, *supra* note 11, at 280, 599; Rome Statute of the ICC, art. 8(2)(a)(vii), (b)(viii), 2189 U.N.T.S. 90. Concerning other relevant violations of international law with respect to transfer to other countries, *see supra* note 96.

151. Charter of the IMT at Nuremberg, *supra* note 94, art. 6(b). The Charter's use of "of or in" does not distinguish between persons who are nationals or aliens in occupied territory or who are lawfully or unlawfully under domestic law "in" occupied territory.

152. *Id.* art. 6(c). *See also* General Comment No. 29, *supra* note 35, at para. 13(d) ("As confirmed by the Rome Statute of the International Criminal Court, deportation or forcible transfer of population without grounds permitted under international law . . . constitutes a crime against humanity. . . . ").

153. With respect to war crimes, *see, e.g.*, *supra* notes 2, 47, 93, 146; Council of Europe Resolution, *supra* note 35, para. 8(ii); Brenda S. Jeffreys, *Abu Ghraib Prisoner Abuse Case Set of January Trial in Texas*, 20 Tex. Lawyer no. 38, at 8 (Nov. 22, 2004); David Johnson, *Rights Group Cites Rumsfeld and Tenet in Report on Abuse*, N.Y. Times, Apr. 24, 2005, at 14; Brian Knowlton, *Will Abu Ghraib Prosecution Go Higher? Many Doubt It*, Int'l Herald Trib., Jan. 20, 2005, at 4 (discussing the conviction of Charles Graner, Jr.). Although tactics utilized against civilians amounting to inhumane acts can constitute crimes against humanity, the United States presently has no legislation permitting prosecution of crimes against humanity as such. A new crimes against humanity statute could be enacted and apply retrospectively without violating ex post facto prohibitions if the statute reaches what were crimes against humanity at the time they were committed. *See generally* Demjanjuk v.

Petrovsky, 776 F.2d 571, 582–83 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); Paust, Bassiouni, *et al.*, *supra* note 6, at 244–48.

154. *See, e.g.*, 28 U.S.C. § 1350; Ali, *et al.* v. Rumsfeld, Complaint for Declaratory Relief and Damages, filed in the U.S. District Court for the Northern District of Illinois, Mar. 1, 2005, available at: http://www.humanrightsfirst.org/us_law/etn/lawsuit/PDF/rums-complaint-022805.pdf; Jordan J. Paust, *The History, Nature, and Reach of the Alien Tort Claims Act*, 16 Fla. J. Int'l L. 249 (2004). War crimes and human rights were of particular concern to the Founders and Framers and early judiciary. *See, e.g.*, Paust, *supra* note 10, at 12, 60 nn.82, 67–70, 89, 169–73, 193, 195–203, 208–10, 226–27, 291–92, 488–89, 493–94, *passim*; Jordan J. Paust, *My Lai and Vietnam: Norms, Myths, and Leader Responsibility*, 57 Mil. L. Rev. 99, 112–15, 129–30 (1972). In a given case, claims may be possible also under the Torture Victim Protection Act, Public Law 102–256; 106 Stat. 73 (1992). A claim can proceed under Section 2(a)(1), for example, where a U.S. national "under . . . color of law, of any foreign nation" "subjects an individual to torture." Tests for "color" of foreign law recognize that conduct "together with," "in concert with," or "in close cooperation with" a foreign state fits. *See, e.g.*, Kadic v. Karadzic, 70 F.3d at 244–45; Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 445–46 & n.27 (D.N.J. 1999). Such a circumstance might arise when a U.S. national transfers a detainee to a foreign country for jointly planned and beneficial interrogation if foreign conduct would foreseeably involve torture. With respect to civil liability for war crimes and complicity in war crimes, *see, e.g.*, *Kadic* and *Iwanowa* above, and Sosa v. Alvarez-Machain, 542 U.S. 692, 672 (2004) (Breyer, J., concurring in part and concurring in judgment); The Paquete Habana, 189 U.S. 453, 464 *ff* (1903); *id.*, 175 U.S. 677, 700, 711, 714 (1900); Hilao v. Estate of Marcos, 103 F.3d 767, 777 (9th Cir. 1996); Linder v. Portocarrero, 963 F.2d 332, 336–37 (11th Cir. 1992); Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257, 279–80 (E.D.N.Y. 2007); Estate of Rodriquez v. Drummond Co., 256 F. Supp. 2d 1250, 1259–61 (N.D. Ala. 2003); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 310–11, 320–25 (S.D.N.Y. 2003); Barrueto v. Larios, 205 F. Supp. 2d 1325, 1333 (S.D. Fla. 2002); Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1350–54, 1358 (N.D. Ga. 2002); Doe v. Islamic Salvation Front, 993 F. Supp. 3, 5, 8 (D.D.C. 1998); Xuncax v. Gramajo, 886 F. Supp. 162, 171–72 (D. Mass. 1995); Paust, *supra* note 10, at 64 n.130, 226–27, 291–92; William Winthrop, Military Law and Precedents 889 (2d ed. 1920); GC, *supra* note 10, arts. 29 (state and individual liability), 148 ("liability"); IV Commentary, *supra* note 11, at 209–11, 602–03 ("liable to pay compensation"); 1958 UK Manual, *supra* note 2, at 174, para. 620 ("compensation"); Jordan J. Paust, *Suing Saddam: Private Remedies for War Crimes and Hostage-Taking*, 31 Va. J. Int'l L. 351, 360–63 (1991), and the many cases cited; *see also* Henfield's Case, 11 F. Cas. 1099, 1107 (C.C.D. Pa. 1793) (with respect to international crime, "[w]hen the offending citizen escapes to his own country, his nation should oblige him to repair the damage, if reparation can be made"); Resolution of the Continental Congress of 1781, 21 J. Cont. Cong. 1136–37 (regarding "infractions of the laws of nations" and "infractions of treaties" or "offenses against the law of nations" and "any transgression of that law by a citizen of the united States," "the author of those injuries should compensate the damage out of his private fortune."); *infra* note 193. *See also* Freeland v. Williams, 131 U.S. 405,

416–17 (1889) ("no civil liability attached" when no war crime occurred); Ford v. Surget, 97 U.S. 595, 605–06 (1878) (individuals "relieved from civil liability" where no war crime occurred); Mitchell v. Harmony, 54 U.S. (13 How.) 115, 137 (1851) (suit could be brought in "any district in which the defendant might be found"); Bas v. Tingy, 4 U.S. (4 Dall.) 37, 43 (1800) (Chase, J.); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 279 (1796) (Iredell, J.) "rights . . . derived from the laws of war . . . and in that case the individual might have been entitled to compensation").

With respect to claims to immunity by the United States or public actors, the ICCPR as treaty law of the United States expressly mandates that victims of relevant human rights "shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity." ICCPR, *supra* note 36, art. 2(3)(a); *see also id.* art. 50 (all of "*[t]he provisions* of the present Covenant *shall extend* to all parts of federal States *without any limitations or exceptions.*") (emphasis added); Human Rights Committee, General Comment No. 20, at paras. 2 ("whether inflicted by people acting in their official capacity, outside their capacity or . . . "), 13 ("whether committed by public officials or other persons acting on behalf of the State, . . . those who violate . . . must be held responsible") (forty-fourth session, 1992), U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994), available at: http://www1.umn.edu/humanrts/gencomm/hrcomms.htm. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment expressly covers torture committed "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." *Supra* note 42, art. 1(1). The Convention also expressly mandates that each signatory "shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible." *Id.* art. 14(1). Additionally, with respect to war crimes there is no immunity under international law. *See also infra* note 158.

The 1988 Federal Employees Liability Reform and Tort Compensation Act, 28 U.S.C. § 2679, which in subsection (b)(1) generally provides that the United States is to be substituted as a defendant and that claims are to proceed under the Federal Tort Claims Act [FTCA] (28 U.S.C. § 1346) if claims arise out of the wrongful act of a federal employee "acting within the scope of his official duties," should not apply to violations of international law, because such violations are *ultra vires* and beyond the lawful authority of any government. *See also* Opinion and Judgment of the International Military Tribunal at Nuremberg (1946) (principles of immunity "cannot be applied to acts which are condemned as criminal under international law. The authors of these acts cannot shelter themselves behind their official position," and "one cannot claim immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law."), *reprinted in* 41 Am. J. Int'l L. 172, 221 (1947). Concerning nonimmunity more generally and the *ultra vires* rationale, *see, e.g.*, Paust, *supra* note 10, at 422, 435–39, and cases cited. Moreover, the 1988 Act and the FTCA are prior in time to ratification of the two treaties mentioned above that deny any form of immunity. Under the last in time rule, the treaties must prevail; and they would prevail even if the legislation was enacted subsequent to ratification of the treaties

under the "rights under a treaty" exception to the last in time rule. *See, e.g.*, PAUST, *supra* note 10, at 101–02, 104–05, 120.

155. *See, e.g.*, Jeffrey Fleishman, *German Suit Accuses U.S. of Condoning Iraq Torture*, L.A. TIMES, Dec. 1, 2004, at A10 (the Center for Constitutional Rights filed a criminal complaint with federal prosecutor in Karlsruhe, Germany, alleging criminal responsibility of Donald Rumsfeld, George Tenet, Stephen Cambone, Lt. Gen. Sanchez, and others concerning war crimes, torture, and other human rights violations); *but see German Prosecutor Rejects Investigation of Rumsfeld*, L.A. TIMES, Feb. 11, 2005, at A9. More generally, violations of international law are a legal concern of the entire community, with universal jurisdiction attaching for both civil and criminal sanctions even though there are no contacts with the forum. *See, e.g.*, Talbot v. Janson, 3 U.S. (3 Dall.) 133, 159–61 (1795) ("all . . . trespasses committed against the general law of nations, are enquirable, and may be proceeded against, in any nation where no special exemption can be maintained, either by the general law of nations, or by some treaty which forbids or restrains it"); United States v. Yousef, 327 F.3d 56, 79 (2d Cir. 2003); Kadic v. Karadzic, 70 F.3d at 236, 240; *In re* Estate of Marcos Litigation, 978 F.2d 493, 499–500 (9th Cir. 1992); United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991); Filartiga v. Pena-Irala, 630 F.2d at 878, 885; Daliberti v. Republic of Iraq, 97 F. Supp. 2d 38, 52–54 (D.D.C. 2000); RESTATEMENT, *supra* note 10, § 404, and cmts. a, b; PAUST, *supra* note 10, at 420–23, and the many cases cited.

156. *See, e.g.*, PAUST, BASSIOUNI, *ET AL.*, *supra* note 6, at 32, 86.

157. *See, e.g.*, *id.* at 28, 30, 32, 39–43; Principles of the Nuremberg Charter and Judgment, *supra* note 2, Principle VII; U.S. Dep't of Army Pam. No. 27–161–2, *supra* note 149, at 240 ("aided, abetted or encouraged"). An example would be aiding and abetting the denial of protections under the Geneva Conventions. *See also* Richard B. Bilder, Detlev F. Vagts, *Speaking Law to Power: Lawyers and Torture*, 98 AM. J. INT'L L. 689, 694 (2004).

158. *See, e.g.*, PAUST, BASSIOUNI, *ET AL.*, *supra* note 6, at 28–29, 46–69, 73–75; FM 27-10, *supra* note 2, at 178–79, para. 501. Under international law, there is no immunity from prosecution of international crimes. *See, e.g.*, *id.* at 27–34, 38, 42, 46–53, 55–70, 73–74, 88–99, 132, 134, 136, 171–76, 621–22, 660, 677, 699–708, 717, 741–47, 821; Principles of the Nuremberg Charter and Judgment, *supra* note 2, Principles I, III; The Prosecutor v. Milosevic, ICTY-99–37-PT, at paras. 26–34 (Nov. 8, 2001) (nonimmunity of heads of state reflected in Article 7 of the Statute of the ICTY "reflects a rule of customary international law"); FM 27-10, *supra* note 2, at 178, para. 498 ("Any person, whether a member of the armed forces or a civilian who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment."); Johnson v. Eisentrager, 339 U.S. 763, 765, 789 (1950) (no public official immunity exists for war crimes).

159. *See, e.g.*, *supra* note 158.

160. *See, e.g.*, U.S. Govt. Motion to Dismiss or for Judgment as a Matter of Law at 70 n.80, addressed in *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 478–79 (D.D.C. 2005).

161. *See* text *supra* note 68.

162. *See supra* note 60; text *supra* notes 61–62.

163. *See* text *supra* note 63. *See also* text *supra* notes 20–21, 62.
164. *See In re* Guantanamo Detainee Cases, 355 F. Supp. 2d at 479.
165. *See supra* note 2.
166. *See* United States v. Altstoetter (The Justice Case), 3 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, at 3, 1010–27, 1031–81, *passim* (1951).
167. *See, e.g.*, *id.* at 17–22, 1034, 1082–87, 1093–95, 1107, 1118, 1128, 1132, *passim.*
168. U.S. Const., art. II, § 3.
169. *See, e.g.*, Paust, *supra* note 10, at 7–11, 67–70, 169–73, 175, 488–90, 493–94, and numerous cases and opinions cited; David Golove, *Military Tribunals, International Law, and the Constitution: A Franckian-Madisonian Approach*, 35 N.Y.U. J. Int'l L. & Pol. 363 (2003); Paust, *Judicial Power*, *supra* note 10, at 514, 517–24; *infra* notes 182, 188–95.
170. *See, e.g.*, *supra* note 169. It was also well known that the people are bound by international law and subject to sanctions for violations of international law. *See, e.g.*, Paust, *supra* note 10, at 7–8, 11–12, 23–25 n.14, 169, 171–72, 180 n.2, 181 nn.7, 14, 421–22, 446. Thus, they could hardly delegate to the federal Executive a supposed power to violate such law that they did not posses.
171. *See, e.g.*, *supra* note 169.
172. In view of the fact that there are so many cases affirming that the President and others are bound and that their claims concerning the extremely few cases they cite are so obviously erroneous, it is evident that their statement that customary international law does not bind the President or the military was either purposely dishonest or professionally inept. At best, in the context of providing important legal advice within the Executive branch on the treatment of human beings, it was unavoidably unprofessional. *See also infra* note 199.
173. *See* Yoo & Delahunty, *supra* note 66, at 2. The same patent nonsense appears in the Bybee memo (*supra* note 60, at 32) and the DOD Working Group Report, *supra* note 111, at 6.
174. *Compare supra* note 169; *infra* notes 181–82, 188–95, regarding various cases and opinions cited.
175. 504 U.S. 655 (1992), *cited in* Yoo & Delahunty, *supra* note 66, at 34 n.105.
176. *See* 504 U.S. at 668–69.
177. *See* Yoo & Delahunty, *supra* note 66, at 35.
178. *See, e.g.*, Paust, *supra* note 10, at 7–11, 38 n.36, 44 n.54, 50 n.60; *see also* Finzer v. Barry, 798 F.2d 1450, 1456–57 (D.C. Cir. 1986); text *supra* note 170.
179. *See* U.S. Const., art. II, § 3; Paust, *supra* note 10, at 7–11, 67–70, 169–73, 175, 488–90, 493–94, and cases cited therein; Golove, *supra* note 169; Paust, *Judicial Power*, *supra* note 10, at 514, 517–24; *infra* notes 182, 188–95. The President's constitutional duty is to faithfully execute laws, not to violate them or authorize their violation. We have not consented to a presidential dictatorship and the text, structure, and history of the Constitution do not allow the exercise of presidential powers unbounded by law.
180. 11 U.S. (7 Cranch) 116, 145–46 (1812), addressed in Yoo & Delahunty, *supra* note 66, at 36. Customary international law allowed a discretion, as a matter of comity, in the United States to grant or refuse immunity for a foreign ship of war entering our waters and although such ships had an implied waiver of our jurisdictional

reach, the waiver of U.S. jurisdiction could be taken back. *See* 11 U.S. (7 Cranch) at 136–45; Republic of Austria v. Altmann, 541 U.S. 677, 688–89 (2004); Verlinden B. V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983); Berg v. British and African Steam Navigation Co. (The Prize Ship "Appam"), 243 U.S. 124, 153–56 (1917); The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 350–55 (1822). *The Schooner Exchange* clearly did not hold or even suggest that either the United States or the President could violate customary international law.

181. 12 U.S. (8 Cranch) 110 (1814), addressed in Yoo & Delahunty, *supra* note 66, at 36. The memorandum quoted a statement in *Brown* that had addressed merely "usage" or long-term practice, not customary international law. Moreover, the majority never disagreed with Justice Story, who was otherwise in dissent, that the President is bound by the customary international laws of war. The point of the majority was that the power to confiscate enemy property during war is that of Congress, that Congress can set limits regarding Executive wartime seizures (which Story agreed with, 12 U.S. (8 Cranch) at 145), and that Congress passed no law permitting confiscation in that case and, thus, the President could not unilaterally seize property that the laws of war would otherwise permit the United States to seize at its discretion (*i.e.*, that Congress must exercise such a competence allowed the United States by the laws of war, not the President alone, and that although the laws of war allowed confiscation, such property, "according to modern usage, ought not to be confiscated," but mere "usage is a guide," implicating a "question rather of policy than of law," which "may be disregarded" by Congress). *See, e.g.*, 12 U.S. (8 Cranch) at 123, 128; *id.* at 145, 149, 153 (Story, J., dissenting); Paust, *supra* note 10, at 170–71, 182 nn.19, 21. Congress is also bound by the laws of war. *See, e.g.*, Paust, *supra* note 10, at 48–49 n.57, 106–09, and cases cited.

182. 12 U.S. (8 Cranch) at 149, 153. Concerning law's limit on commander in chief or military discretion, *see, e.g.*, Paust, *supra* note 10, at 487–89, 493–94; Paust, *Judicial Power*, *supra* note 10, at 520–24, and cases cited; *see also* Hamdan v. Rumsfeld, 344 F. Supp. 2d at 158–59 (Congress set limits for presidential use of military commissions); Chapter Five.

183. 175 U.S. 677 (1900).

184. *See* Yoo & Delahunty, *supra* note 66, at 37.

185. *Id.* This nonsense was repeated in the Bybee memo (*supra* note 60, at 35) and the DOD Working Group Report (*supra* note 111, at 6). The clear and unprofessional falsehood was repeated in a later writing. *See* Robert J. Delahunty, John Yoo, *Executive Power v. International Law*, 30 Harv. J.L. & Pub. Pol'y 73, 74 (2006) ("clearly held that the President could override customary international law"); *see also id.* (misinterpreting dictum and using the "only where" error: "will be given effect only if" – concerning the "only where" error, *see, e.g.*, Paust, *supra* note 10, at 176, 188–90).

186. Yoo & Delahunty, *supra* note 66, at 37.

187. *See, e.g.*, Paust, *supra* note 10, at 9, 39–43 n.50; Jordan J. Paust, *Customary International Law and Human Rights Treaties* Are *Law of the United States*, 20 Mich. J. Int'l L. 301, 301–13 (1999).

188. *See, e.g.*, The Paquete Habana, 175 U.S. at 698 ("law of war"), 700, 708, 711, 714; Paust, *supra* note 10, at 172, 175–76, 183–84 n.24, 189–90 n.67; Jordan J. Paust,

Paquete *and the President: Rediscovering the Brief for the United States*, 34 Va. J. Int'l L. 981 (1994). *See also* The Paquete Habana, 189 U.S. 453, 464 (1903).

189. *See* Trans World Airlines v. Franklin Mint Corp., 466 U.S. 243, 261 (1984) (O'Connor, J.); *supra* note 161.
190. Bas v. Tingy, 4 U.S. (4 Dall.) 37, 43 (1800).
191. Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 28 (1801).
192. 11 Op. Att'y Gen. 297, 299–300 (1865). During the Civil War, the Supreme Court also affirmed that the President has no powers *ex necessitate*, "is controlled by law, and has his appropriate sphere of duty, which is to execute [and not violate] the laws," and "[b]y the protection of the law *human rights* are secured; withdraw that protection, and they are at the mercy of wicked rulers." *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 119–21 (1866) (emphasis added). Also concerning events during that war, the Supreme Court made a significant recognition with respect to Executive authority and the reach of law. *See* United States v. Lee, 106 U.S. 196, 220 (1882):

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.
>
> It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

193. Miller v. United States, 78 U.S. (11 Wall.) 268, 314–16 (1870) (Filed, J., dissenting). *See also* Herrera v. United States, 222 U.S. at 572–73, *quoting* Planters' Bank v. Union Bank, 83 U.S. (16 Wall.) at 495 (quoted *supra* note 114, *Herrera* adding: "if it was done in violation of the laws of war . . . , it was done in wrong." *Id.* at 573.); New Orleans v. The Steamship Co., 87 U.S. (20 Wall.) 387, 394 (1874) (limits exist "in the laws and usages of war"); United States v. Adams, 74 U.S. 463 (1869) (argument of counsel: "The war powers of Congress, and of the President, as commander-in-chief . . . , and (as a necessary consequence) of his subordinate commanding generals . . . , are unlimited in time of war, except by the law of war itself."); The Prize Cases, 67 U.S. (2 Black) 635, 667–68, 671 (1862) (the President "is bound to take care that the laws be faithfully executed," including in context the "laws of war," "*jure belli*"); Mitchell v. Harmony, 54 U.S. (13 How.) 115, 137 (1852) (illegal orders provide no defense); *Ex parte* Duncan, 153 F.2d 943, 956 (9th Cir. 1946) (Stephens, J., dissenting) (regarding U.S. occupation commander, "[h]is will is law subject only to the application of the laws of war"); United States v. American Gold Coin, 24 F. Cas. 780, 782 (C.C.D. Mo. 1868) (No. 14,439) (it became necessary for the national government to take every possible measure against an enemy "and at the same time [use measures] consistent with the laws of war"); Elgee's Adm'r v. Lovell, 8 F. Cas. 449, 454 (C.C.D. Mo. 1865) (No. 4,344) (Miller, J., on circuit) (concerning the "law of nations, . . . no proclamation of the president can change or modify this law"); United States *ex rel.* Henderson v. Wright, 28 F. Cas. 796, 798 (C.C.W.D. Pa. 1863) (No. 16, 777) (war cartel is like a treaty and "[u]nder the law of nations the president could not [do a particular act], and what the president of the United States cannot do, will not be assumed by the judiciary"); Johnson v.

Twenty-One Bales, 13 F. Cas. 855, 863 (C.C.D.N.Y. 1814) (No. 7,417) (courts cannot construe Executive orders so as to abrogate a right under the law of war); Dias v. The Revenge, 7 F. Cas. 637, 639 (C.C.D. Pa. 1814) (No. 3,877) (Washington, J., on circuit) (concerning improper conduct under the laws of war, the owner of a privateer cannot "shield himself, by saying that the privateer . . . acts under the president's instructions"); Vietnam Ass'n for Victims of Agent Orange/Dioxin v. Dow Chemical Co., 373 F. Supp. 2d 7, 255–56 (E.D.N.Y. 2005); 8 Op. Att'y Gen. 365 (1857) (re: *jus belli*, "[t]he commander of the invading, occupying, or conquering army, rules . . . with supreme power, limited only by international law, and the orders of the sovereign or government"); State *ex rel.* Tod v. Court of Common Pleas, 15 Ohio St. 377, 389–91 (1864) ("There is no limitation placed upon this grant of the power to carry on war, except those contained in the laws of war. . . . If a party bring a suit against the president, or any one of his subordinates, . . . do not questions at once arise, of the extent and lawfulness of the power exercised, and of the right to shield the subaltern acting under orders, and hold his superior alone responsible? And are not these constitutional questions? If so, then, the case is one 'arising under the constitution' [for federal courts]. . . . The controversy is merely as to the occasions and manner of its exercise, and as to the parties who should be held responsible for its abuse. In time of war, . . . he possesses and exercises such powers, not in spite of the constitution and laws of the United States, or in derogation from their authority, but in virtue thereof and in strict subordination thereto. . . . And in time of war, without any special legislation, not the commander-in-chief only, but every commander . . . is lawfully empowered by the constitution and laws of the United States to do whatever is necessary, and is sanctioned by the laws of war. . . . The president is responsible for the abuse of this power. He is responsible civilly and criminally . . . "); *In re* Kemp, 16 Wis. 359, 392 ("His duty is still only to execute the laws, by the modes which the laws themselves prescribe; to wage the war by employing the military power according to the laws of war."), 395 ("Within those limits let the war power rage, controlled by nothing but the laws of war.") (1863); Ward v. Broadwell, 1 N. M. 75, 79 (1854) (quoting President Polk: "'The power to declare war against a foreign country, and to prosecute it according to the laws of war, . . . exists under our constitution. When congress has declared that war exists with a foreign nation, the laws of war apply . . . and it becomes the duty of the president . . . to prosecute it'"; citing Message of the President of July 24, 1848, Exec. Doc. No. 70); Alexander Hamilton, *Pacificus No. 1*, in 15 The Papers of Alexander Hamilton 33, 35, 38, 40, 42–43 (H. Syrett ed., 1969) (the Executive "is charged with the execution of all laws"; has a "duty to enforce the laws," including treaties and the law of nations, "the laws of Nations, as well. . . . It is consequently bound"; and since "[o]ur Treaties and the laws of Nations form a part of the law of the land," the executive has both "a right, and . . . duty, as Executor of the laws"; and, during war, "it belongs to the 'Executive Power' to do whatever . . . the laws of Nations cooperating with the Treaties of the Country enjoin"); Chief Justice John Jay, draft Charge to the Grand Jury of the Circuit Court for the District of Virginia (1793), in 2 The Documentary History of the Supreme Court of the United States, 1789–1800 at 359, 361 (Maeva Marcus ed., 1988). With respect to breaches of neutrality, presidential orders or authorizations are of no excuse. *See, e.g.*, Little v. Barreme (The Flying Fish), 6 U.S. (2 Cranch) 170, 179 (1804); United

States v. Smith, 27 F. Cas. 1192, 1229–30 (C.C.D.N.Y. 1806) (No. 16,342) (Paterson, J., on circuit); *see also* United States v. The Adriadne, 24 F. Cas. 851, 856 (D.C.D. Pa. 1812) (No. 14,465) (private citizen is "bound to observe" the law of nations with or without instructions from the Executive).

194. Dooley v. United States, 182 U.S. 222, 231 (1901).
195. United States v. Curtiss-Wright Export Co., 299 U.S. 304, 318 (1936).
196. Rumsfeld v. Padilla, 542 U.S. 426, 465 (2004) (Stevens, J., dissenting).
197. *Id.*
198. *See, e.g.*, United States v. Altstoetter (The Justice Case), 3 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, at 3, 1010–27, 1031–81, *passim* (1951); United States v. Uchiyama, Case No. 35–46 (trial at Yokohama, Japan, 18 July 1947), addressed in Robert W. Miller, *War Crimes Trials at Yokohama*, 15 Brok. L. Rev. 191, 207 (1949); *supra* notes 2, 47, 93, 153.
199. Concerning relevant "ethical and moral" responsibility and the evident lack of professional integrity, *see* Stephen Gillers, *Tortured Reasoning*, 25 Am. Lawyer No. 7, at 65 (July 2004). *See* John W. Dean, Worse Than Watergate: The Secret Presidency of George W. Bush 213–17 (2005) ("It would be difficult to imagine a better example of the evil that emanates from secrecy than these memoranda . . . the cloistered work was little more than a well-motivated criminal conspiracy."); Bilder & Vagts, *supra* note 157; Lawyers' Statement on Bush Administration Torture Memos (2004) (also stressing that the claim that the President can ignore various laws "directly contradicts several major Supreme Court decisions, numerous statutes passed by Congress and signed by Presidents, and specific provisions of the Constitution itself. One of the surprising features of these legal memoranda is their failure to acknowledge the numerous sources of law that contradict their own positions."), available at: http://www.afj.org/spotlight/0804statement.pdf; Horton, *supra* note 133, at paras. 34–35 & n.4 (also quoting the Lawyers' Statement and noting that among its many signatories were "eight living former presidents of the ABA, numerous retired judges, retired attorneys general, deans of law schools, law professors, attorneys and prosecutors.").
200. Letter of General David M. Brahms (Ret. USMC), *et al.*, to President George W. Bush (Sept. 7, 2004), at 1, available at: http://www.humanrightsfirst.org/us_law/PDF/detainees/Military_Leaders_Letter_President_Bush_FINAL.pdf. *See also* Bob Herbert, *We Can't Remain Silent*, N.Y. Times, Apr. 1, 2005, at A23 (former Rear Admiral John Hutson and former Brigadier General James Cullen, who were among those who signed the letter, also support the lawsuit in the United States against Secretary Rumsfeld noted *supra* note 154).
201. Instructions for the Government of Armies of the United States in the Field, General Orders No. 100 (1863) (the 1863 Lieber Code), art. 15, *reprinted in* Paust, Bassiouni, *et al.*, International Criminal Law Documents Supplement 94 (2000).

two. Additional Revelations Concerning Treatment, Secret Detentions, and Secret Renditions

1. *See* Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 Columbia J. Transnat'l

L. 811, 814–22, 835, 838–41, 843–46 (2005) [revised in Chapter One]. *See also* U.N. Committee Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee Against Torture, United States of America*, 36th sess., U.N. Doc. CAT/C/USA/CO/2 (18 May 2006), paras. 14 (the U.S. "should recognize and ensure that the Convention applies at all times, whether in peace, war or armed conflict, in any territory under its jurisdiction . . . "), 15 ("provisions of the Convention . . . apply to, and are fully enjoyed by, all persons under the effective control of its authorities, of whichever type, wherever located in the world"), 19 (there exists an "absolute prohibition of torture . . . without any possible derogation"), 24 (the U.S. "should rescind any interrogation technique – including methods involving sexual humiliation, 'water boarding,' 'short shackling,' and using dogs to induce fear, that constitute torture or cruel, inhuman or degrading treatment or punishment, in all places of detention under its *de facto* effective control, in order to comply with the Convention.") [hereinafter U.N. CAT Report], available at: http://www.ohchr.org/english/bodies/cat/docs/AdvanceVersions/CAT.C.USA.CO.2.pdf; Leila Zerrougui, *et al.*, Report, *Situation of Detainees at Guantanamo Bay*, Commission on Human Rights, 62nd sess., items 10 and 11 of the provisional agenda, U.N. Doc. E/CN.4/2006/120 (Feb. 15, 2006), at 9–10, paras. 12–14, 21–22, paras. 41–45, 24–25, paras. 51–52, 37, para. 87 [hereinafter U.N. Experts' Report], available at: http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/16_02_06_un_guantanamo.pdf; Council of Europe, Parliamentary Assembly, Res. 1433, Lawfulness of Detentions by the United States in Guantanamo Bay, paras. 7(i)–(vi), 8(i)–(iii), (vii) (Apr. 26, 2005), available at: http://assembly.coe.int/Documents/AdoptedText/ta05/RES1433.htm; Jose E. Alvarez, *Torturing the Law*, 37 Case W. Res. J. Int'l L. 175 (2006); M. Cherif Bassiouni, *The Institutionalization of Torture Under the Bush Administration*, 37 Case W. Res. J. Int'l L. 389 (2006); Jennifer Moore, *Practicing What We Preach: Humane Treatment for Detainees in the War on Terror*, 34 Denv. J. Int'l L. & Pol'y 33, 55–56 (2006); Mary Ellen O'Connell, *Affirming the Ban on Harsh Interrogation*, 66 Ohio St. L.J. 1231 (2005); Mark Brzezinski, *Torture Reports Tarnish US Image*, Boston Globe, Nov. 22, 2005, at A11; Douglas Jehl, *Report Warned C.I.A. on Tactics in Interrogation*, N.Y. Times, Nov. 9, 2005, at 1; Josh White, *Military Lawyers Say Tactics Broke Rules*, Wash. Post, Mar. 16, 2006, at A13 ("top lawyers for the Army, Navy and Marine Corps have told Congress that a number of aggressive techniques used by military interrogators . . . were not consistent with the guidelines in the Army field manual on interrogation, which 'provides that the Geneva Convention provisions . . . be strictly adhered to in the quest to identify legitimate threats and gain needed intelligence. . . . Among those provisions are the prohibition on physical or moral coercion and the prohibition on subjecting individuals to humiliating or degrading treatment.'"); text *infra* notes 5, 7 (use of dogs, etc.); *infra* note 7 (use of dogs, etc.).

2. *See, e.g.*, Paust, *supra* note 1, at 824–26, 830, 834 n.89, 848 n.138; *infra* note 9; text *infra* notes 18, 28–37; *see also* Diane Marie Amann, *Abu Ghraib*, 153 U. Pa. L. Rev. 2085, 2086 ("self-conscious creation of the Executive" and "deliberate executive construction" more generally of a process of interrogation violative of law), 2094 (Gonzales advice to Bush that "'Geneva's strict limitations'" should not be observed) (2005); *infra* note 134. As Attorney General, it is evident that he is less than interested in

investigating and prosecuting all persons within or who had previously served in the Executive branch who are reasonably accused of authorizing or directly perpetrating war crimes, abetting war crimes, being derelict in duty with respect to war crimes, or directly participating in a common plan to deny protections under the laws of war. *See also* text *infra* notes 51–57. Nonetheless, as Attorney General, it is his duty to do so, and in a normal criminal justice system all apparent criminal activity would be investigated. Concerning such forms of criminal liability, nonimmunity (civil and criminal), and two sets of federal legislation that allow prosecution of civilian or military persons for war crimes in federal district courts, *see, e.g.*, Paust, *supra* note 1, at 824 n.47, 836 n.94, 852–55. Under the circumstances, the need for an independent Special Prosecutor has rarely been so apparent.

3. *See* Council on Foreign Relations Meeting with U.S. Attorney General Alberto R. Gonzales, Fed. News Service, Dec. 2, 2005, available through Lexis.
4. Paust, *supra* note 1, at 840–41.
5. *Id.* at 843–44 & nn.120, 122. *See also* O'Connell, *supra* note 1, at 1245; Jane Mayer, *The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees Was Thwarted*, The New Yorker, Feb. 27, 2006, addressing a memo from General Counsel of the Navy Alberto J. Mora to Inspector General, Dep't of Navy, Vice Admiral Albert Church, Statement for the Record: Office of General Counsel Involvement in Interrogation Issues, July 7, 2004 [hereinafter Mora Memo], available at: http://www.newyorker.com/images/pdfs/moramemo.pdf, and the memos of Rumsfeld, the role of others in approving and abetting unlawful interrogation tactics, abuse at Guantanamo, and the failure to foster checks and balances and the flow of the best available information within Executive decisional processes that might provide ultimate decision makers with sound information required for rational, policy-serving choice.
6. Paust, *supra* note 1, at 843–44.
7. Interview of General Janis Karpinski by Professor Marjorie Cohn, Aug. 3, 2005, available at: http://www.truthout.org/docs_2005/082405z.shtml. *See also Rumsfeld Exposed*, The Australian, Nov. 28, 2006, at 12 (she reiterated these points in an interview in Spain); O'Connell, *supra* note 1, at 1245 (regarding the role of Lt. Gen. Sanchez); Paust, *supra* note 1, at 843 (regarding testimony of DOD officials in 2004 that use of dogs, "fear up harsh," and humiliating treatment, among other tactics, were approved for use in Iraq), 847–48 & nn.135, 138 (regarding well-publicized authorizations by Lt. Gen. Sanchez and others for use of "Fear Up Harsh: Significantly increasing the fear level in a detainee," "Presence of Military Working Dog: Exploits fear of dogs," "Yelling . . . : Used to create fear," and similar tactics in Iraq); Bryan Bender, *Prison Rules "Not Humane": Iraq Interrogation Guidelines Possibly Illegal, Officials Concede*, Boston Globe, May 14, 2004, at A1 (tactics of stripping naked, hooding, use of dogs were approved); Michael Hirsh, *"Gaps and Discrepancies,"* Newsweek, Web Exclusive, May 24, 2004 (Major General Miller brought tactics from GITMO to Iraq, including use of dogs); Esther Schrader & Greg Miller, *U.S. Officials Defend Interrogation Tactics*, L.A. Times, May 13, 2004, at A11 ("Top U.S. defense officials," including General Richard B. Myers, Chairman of the Joint Chiefs of Staff, testified that use of dogs, fear up harsh, and humiliating treatment were authorized for use in Iraq). During a court-martial of Sgt. Michael J. Smith, Colonel Thomas M. Pappas (who controlled military

intelligence at Abu Ghraib) testified that General Miller had authorized use of dogs to exploit "Arab fear of dogs." *See, e.g.*, Eric Schmitt, *Judge Orders a Top Officer to Attend Abuse Trial*, N.Y. Times, Apr. 19, 2006, at A16; Josh White, *Memo Shows Officer's Shift on Use of Dogs*, Wash. Post, Apr. 15, 2006, at A11; *but see* Neil A. Lewis, *Court in Iraq Prisoner Abuse Case Hears Testimony of General*, N.Y. Times, May 25, 2006, at A19 (General Miller testified during a court-martial of dog-handler Sgt. Santos A. Cardona that he did not recommend to Lt. Gen. Sanchez that dogs be used for intimidation during interrogation, but for "custody and control" of detainees).

8. The Torture Question: Interview with Janis Karpinski, Frontline, Aug. 5, 2005, available at: http://www.pbs.org/wgbh/pages/frontline/torture/interviews/karpinski.html. *Compare* Paust, *supra* note 1, at 847. *See also* Evan Thomas & Michael Hirsh, *The Debate Over Torture*, Newsweek, Nov. 21, 2005, at 26 ("Rumsfeld sent . . . Lt. Gen. Geoffrey Miller – to 'Gitmoize' the interrogation techniques in Iraq."); Josh White, *General Asserts Right on Self-Incrimination in Iraq Abuse Cases*, Wash. Post, Jan. 12, 2006, at 1.
9. *See, e.g.*, Tim Golden & Eric Schmitt, *Detainee Policy Sharply Divides Bush Officials*, N.Y. Times, Nov. 2, 2005, at 1, adding: "Another official said Mr. Addington and others also argued that Mr. Bush had specifically rejected the Article 3 standard in 2002 . . . when he ordered that military detainees 'be treated humanely and [merely], to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.'" *Id. See also* Thomas & Hirsh, *supra* note 8 (Addington "has strongly attacked a draft directive from DOD's [Deputy Secretary of Defense Gordon] England that would require detainees to be treated in accordance with language drawn from Article Three of the Geneva Conventions."); David Ignatius, *Cheney's Cheney*, Wash. Post, Jan. 5, 2006, at A19; *infra* notes 11–12. Concerning the role played by Addington, *see also* Paust, *supra* note 1, at 816–18, 834 n.89; David Klaidman, *et al.*, *Palace Revolt*, Newsweek, Feb. 6, 2006, at 34; Jane Mayer, *The Hidden Power*, The New Yorker, July 3, 2006, at 44 (Addington "played a central role in shaping the Administration's legal strategy . . . that the President, as Commander-in-Chief, has the authority to disregard virtually all previously known legal boundaries. . . . Under this framework, statutes prohibiting torture, secret detention, and warrantless surveillance have been set aside." Addington either drafted or provided advice for the Bybee torture memo and another memo that claimed the right to violate "legal prohibitions against the inhumane treatment of foreign prisoners held by the C.I.A." And, Addington reportedly berated Matthew Waxman (*see infra* note 11) for seeking compliance with humane treatment requirements under the Geneva Conventions "rather than the President's way."); Mayer, *supra* note 5; Chitra Ragavan, *Cheney's Guy*, U.S. News & World Rpt., May 29, 2006, at 32 (Addington helped draft the 2002 Gonzales memo abetting denials of Geneva law protections to detainees; with John Yoo, he helped draft the infamous Bybee torture memo; he participated in the Bush decision to engage in domestic surveillance in violation of FISA [Federal Intelligence Surveillance Act], with a claim that the commander in chief power allows the President to violate domestic law [*see also* Chapter Five, Section B]; and he was in active opposition to the McCain Amendment that reiterated the legal ban on cruel, inhuman, and degrading treatment).

10. Larry Wilkerson discusses Cheney's role in Iraq War, Morning Edition of NPR, Nov. 3, 2005. *See also* James Gordon, *Torture's No Good, Army Cadets Told*, Daily News (New York), Nov. 13, 2005, at 24 (reporting Wilkerson's remarks regarding the administration's so-called prohibition of torture: "That is not what I saw in the paperwork coming out of the vice president's office and the office of the secretary of defense."); "Powell Aide: Torture 'Guidance' From VP," CNN, Nov. 20, 2005 (Wilkerson has no doubt that Cheney provided the philosophical guidance and flexibility for torture of detainees); Mayer, *supra* note 5 ("small group of lawyers closely aligned with Vice-President Cheney"); *supra* note 9.
11. *See, e.g.*, Golden & Schmitt, *supra* note 9. Regarding Cambone, *see also* Paust, *supra* note 1, at 846, 847 n.135; Mayer, *supra* note 5 ("Just a few months ago, Mora attended a meeting in Rumsfeld's private conference room at the Pentagon, called by Gordon England, the Deputy Defense Secretary, to discuss a proposed new directive defining the military's detention policy. The civilian Secretaries of the Army, the Air Force, and the Navy were present, along with the highest ranking officers of each service and some half-dozen military lawyers. Matthew Waxman, the deputy assistant secretary of defense for detainee affairs, had proposed making it official Pentagon policy to treat detainees in accordance with Common Article Three of the Geneva conventions. . . . England asked for a consensus on whether the Pentagon should support Waxman's proposal. . . . One by one, the military officers argued for returning the U.S. to what they called the high ground. But two people opposed it. One was Stephen Cambone, the under-secretary of defense for intelligence; the other was Haynes. . . . Their opposition was enough to scuttle the proposal. . . . Since then, efforts to clarify U.S. detention policy have languished."); *infra* notes 130, 132. Regarding Haynes, *see also* Paust, *supra* note 1, at 834–35 n.89, 840–41, 847 n.133; Mayer, *supra* note 5 (quoted earlier); Mayer, *supra* note 9 (Addington reportedly "exerted influence" over Haynes and "'runs the whole operation'" at the Pentagon's Office of the General Counsel); Ragavan, *supra* note 9.
12. *See, e.g.*, Paust, *supra* note 1, at 827–28, 854–55 (including related claims of government lawyers in 2005); *see also id.* at 842–43 (2004 views of Bush, Rumsfeld, and DOD officials); Mayer, *supra* note 5 ("in April, 2004, Mora warned his superiors at the Pentagon [including Haynes] about the consequences of President Bush's decision, in February, 2002, to circumvent the Geneva conventions . . . [and] described as 'unlawful,' 'dangerous,' and 'erroneous' novel legal theories" underlying the decision to violate humanitarian law. Three months later, he wrote a memo to the Inspector General of the Navy [*see supra* note 5]); Editorial, N.Y. Times, Aug. 14, 2006, at A20 (Bush's plan to violate the Geneva Conventions continues); *supra* note 9 (regarding interpretations in 2005 and earlier by "Addington and others" of the Bush authorization to deny Geneva protections and Addington's role with respect to the 2002 Gonzales memo, which abetted denials of Geneva law protections). Mora has affirmed that the Bush administration "authorizations rested on three beliefs: that no law prohibited the application of cruelty; that no law should be adopted that would do so; and that our government could choose to apply the cruelty – or not – as a matter of policy depending on the dictates of perceived military necessity." Alberto J. Mora, *An Affront to American Values*, Wash. Post, May 27, 2006, at A25. *See also infra* notes 35–36.

13. *See, e.g.*, Eric Schmitt, *New Army Rules May Snarl Talks with McCain on Detainee Issue*, N.Y. Times, Dec. 14, 2005, at 1; Charles Savage, *McCain Fights Exception to Torture Ban*, Boston Globe, Oct. 26, 2005, at A2; *Vice President for Torture*, Wash. Post, Oct. 26, 2005, at A18. *See also* Walter Pincus, *McCain Will Not Bend on Detainee Treatment; He Pushes White House to Ban Torture*, Wash. Post, Dec. 5, 2005, at A18; *infra* note 14. On December 14, 2005, the House voted 308–122 to endorse the McCain Amendment. *See, e.g.*, Eric Schmitt, *House Defies Bush and Backs McCain on Detainee Torture*, N.Y. Times, Dec. 15, 2005, at 14. A year earlier, the full Congress had declared that "the Constitution, laws, and treaties of the United States . . . prohibit the torture or cruel, inhuman, or degrading treatment of prisoners held in custody of the United States." *Sense of Congress and Policy Concerning Persons Detained by the United States*, Pub. L. No. 108–375, 118 Stat. 1811, § 1091(a)(1)(6) (Oct. 28, 2004). *See also* Paust, *supra* note 1, at 823 n.43; 22 U.S.C. § 262 d(a) (gross violations of human rights include "torture or cruel, inhumane, or degrading treatment"); 22 U.S.C. § 2304 (d)(1) (same). In the final legislation, the McCain Amendment was restricted. *See* Chapter Five, Section A.

    Before the House voted to approve the McCain Amendment, former CIA Director Stansfield Turner and thirty-two other retired CIA and other professional intelligence and interrogation experts wrote a letter on December 9, 2005, to Senator McCain expressing their "strong support" for the amendment "reinforcing the ban on cruel, inhuman and degrading treatment by all US personnel around the world." Available at: http://www.humanrightsfirst.info/pdf/051209-etn-cia-mcain.pdf. The letter also declared that "use of torture and other cruelty against those in US custody undermines" U.S. efforts to combat terrorist violence and that "[s]uch tactics fail to produce reliable information, risk corrupting the institutions that employ them, and forfeit the ideals that attract others to our nation's cause." *Id.*

14. Concerning the unlawful plan, authorizations, and orders, *see, e.g.*, Paust, *supra* note 1, at 827–29, 836, 848 n.138, 854. *See also* John Yoo, War by Other Means ix (denial of Geneva protections and coercive interrogation "policies were part of a common, unifying approach to the war on terrorism"), 35, 39–40, 43, 171–72, 177, 187, 190–91, 200, 231 (2006); Thomas & Hirsh, *supra* note 8 ("Cheney, with CIA Director Porter Goss in tow, has been lobbying against McCain. . . . Cheney remains adamantly opposed to any check on executive power"); *supra* notes 9–13; *infra* note 15; text *infra* notes 18–19, 131–32.
15. *See, e.g.*, Goss Says CIA "Does Not Do Torture," But Reiterates Need for Interrogation Flexibility, The Frontrunner, Nov. 21, 2005. *See also* Yoo, *supra* note 14, at 171 (under the Bush policy, "methods . . . short of the torture ban . . . could be used"), 178 (the Bush policy had been that "[m]ethods that . . . do not cause severe pain or suffering are permitted"), 187 ("using 'excruciating pain'" related to "coercive interrogation" that is not prohibited), 190–91 ("coercive interrogation" was used), 200 ("If the text of the McCain Amendment were to be enforced as is, we could not coercively interrogate"); R. Jeffrey Smith, *Fired Officer Believed CIA Lied to Congress*, Wash. Post, May 14, 2006, at A1 (there is a "secret Justice Department opinion in 2004 authorizing the agency's creation of 'ghost detainees' – prisoners removed from Iraq for secret interrogations" in violation of Geneva law and

CIA officer and former director of intelligence programs of the National Security Agency, Mary O. McCarthy, has stated that CIA policies authorized treatment she "considered cruel, inhumane or degrading."); Toni Locy & John Diamond, *Memo Lists Acceptable "Aggressive" Interrogation Methods*, USA Today, June 27, 2004, at 5A (stating that a secret DOJ August 2002 memo apparently exists that is more detailed than the 2002 Bybee torture memo and it "spelled out specific interrogation methods that the CIA" can use, including "waterboarding"); Mayer, *supra* note 9 (memo allows inhumane treatment of persons held by the CIA); Eric Schmitt & Carolyn Marshall, *In Secret Unit's "Black Room," a Grim Portrait of U.S. Abuse*, N.Y. Times, Mar. 19, 2006, at A1 (secret sites in Camp Nama near Baghdad and elsewhere in Iraq were used for harsh interrogation by CIA, military, and others and tactics included use of the cold cell). Concerning the Bush administration's approval of the secret rendition of persons from Afghanistan, Iraq, and elsewhere to other countries in violation of the 1949 Geneva Conventions, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, customary prohibitions of forced disappearance, and other customary and treaty-based international law, *see also* Alvarez, *supra* note 1, at 199, 210–11, 213; Bassiouni, *supra* note 1, at 411–13; Paust, *supra* note 1, at 836–37 & n.96, 850–51 & nn.147–51; Jordan J. Paust, *Post 9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 Notre Dame L. Rev. 1335, 1352–56 (2004); Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, 57 Case W. Res. J. Int'l L. 309 (2006); U.N. Experts' Report, *supra* note 1, at 26–27, para. 55, 37, para. 89 ("The practice of rendition of persons to countries where there is a substantial risk of torture . . . amounts to a violation of the principle of non-refoulement and is contrary to article 3 of the Convention against Torture and Article 7 of the ICCPR"); Council of Europe Res., *supra* note 1, at paras. 7(vi) ("the unlawful practice of secret detention"), (vii) ("the United States has, by practicing 'rendition' (removal of persons to other countries, without judicial supervision, for purposes such as interrogation or detention), allowed detainees to be subjected to torture and cruel, inhuman or degrading treatment, in violation of the prohibition of *non-refoulement*"), 8 (vii), (ix); Diane Marie Amann, *The Committee Against Torture Urges an End to Guantanamo Detention*, ASIL Insight (June 8, 2006), available at: http://www.asil.org/insights/2006/06/insights060608.html; Christine Spolar, *Ex-spy: CIA , Italians Worked on Abduction; Arrest Warrant Targets 4 Accused Americans*, Chicago Trib., July 9, 2006, at 10; Craig Whitlock, *Germans Charge 13 CIA Operatives*, Wash. Post, Jan. 31, 2007, at A1; *infra* notes 19, 42; Section D *infra*.

16. *See, e.g.*, Editorial, *Director for Torture*, Wash. Post, Nov. 23, 2005, at A18. *See also* Paust, *supra* note 1, at 836–37 n.96, 848 n.138; Douglas Jehl & David Johnston, *C.I.A. Expands Its Inquiry into Interrogation Tactics*, N.Y. Times, Aug. 29, 2004, at A10 (there were "some extreme tactics used at those secret [CIA] centers, including 'waterboarding'"); Jonathan S. Landay, *Cheney: Water Torture Is OK , Confirms Method Used on al-Qaeda*, The News & Observer (Raleigh, NC), Oct. 26, 2006, at A4; Scott Hennen, WDAY at Radio Day at the White House, Interview of Vice President, available at: http://www.whitehouse.gov/news/releases/2006/10/20061024-7.html; *supra* note 15.

17. *See, e.g.*, Paust, *supra* note 1, at 836 n.96, 846 ("using cold air to chill"), 852–54; *In re* Estate of Ferdinand E. Marcos Human Rights Litigation, 910 F. Supp. 1460, 1463 (D. Haw. 1995) ("forms of torture" include "[t]he 'water cure,' where a cloth was placed over the detainee's mouth and nose, and water poured over it producing a drowning sensation" and "[f]orcing a detainee while wet and naked to sit before an air conditioner often while sitting on a block of ice," among other interrogation tactics).
18. *See* Thomas & Hirsh, *supra* note 8; *see also* W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 Cornell L. Rev. 67, 75–76 & n.18 (2005); Eric Lichtblau, *Gonzales Says Humane-Policy Order Doesn't Bind C.I.A.*, N.Y. Times, Jan. 19, 2005, at A17 (Gonzales still claimed in 2005 that CIA and nonmilitary personnel are outside the reach of any remaining limitations on treatment contained in the Bush Feb. 7, 2002, directive and that a congressional ban on cruel and inhumane treatment does not apply to "'aliens overseas'"); Editorial, Wash. Post, Apr. 26, 2005, at A14 (the Gonzales meeting approved simulated drowning). Concerning the evident role of Cheney, *see also* Paust, *supra* note 1, at 837–38 & n.97; *supra* note 10; *see also* Landay, *supra* note 16; Mayer, *supra* note 9 (regarding Addington's involvement in creation of the CIA interrogation memo and effective control of the White House Counsel's office – one administration lawyer claiming that Gonzales would call the meetings but was weak, "'an empty suit.'"). Concerning other relevant conduct by Gonzales, *see, e.g.*, *supra* note 2; *infra* note 28. Concerning the infamous Bybee torture memo, *see, e.g.*, Paust, *supra* note 1, at 834–35.
19. *History of an Interrogation Technique: Water Boarding*, ABC News, Nov. 29, 2005, available at: http://abcnews.go.com/WNT/print?id=1356870. *See also* Landay, *supra* note 16; Paust, *supra* note 1, at 836–37 & n.96 (secret authorization for CIA), 848 n.138; Wendel, *supra* note 18, at 84 & n.60 (secret presidential directive exists for CIA transfer of detainees for interrogation); *supra* note 15.
20. *See* David Johnson & Douglas Jehl, *At a Secret Interrogation, Dispute Flared Over Tactics*, N.Y. Times, Sept. 10, 2006, at 1.
21. *See, e.g.*, Dan Eggen, *CIA Acknowledges 2 Interrogation Memos*, Wash. Post, Nov. 14, 2006, at A29; David Johnston, *CIA Tells of Bush Directive on Handling of Detainees*, N.Y. Times, Nov. 15, 2006, at A14.

    As noted in the subsequent Nuremberg proceedings, Hitler's directives "had the force and effect of law," but "to recognize as a defence to" international crimes "that a defendant acted pursuant to the order of his government or of a superior . . . would be to recognize an absurdity"; international law "must . . . take precedence over National Law or directives issued by any national governmental authority"; and "[a] directive to violate International Criminal . . . Law is therefore void and can afford no protection to one who violates such law in reliance on such a directive . . . " United States v. Von Leeb and Others (The High Command Case), 15 Int'l L. Reps. 376 (1949).
22. *See, e.g.*, Julian E. Barnes, *CIA Can Still Get Tough on Detainees*, L.A. Times, Sept. 8, 2006, at A1; John Donnelly & Rick Klein, *Bush Admits to CIA Jails; Top Suspects Are Relocated*, Boston Globe, Sept. 7, 2006, at A1; Ken Herman, *Bush Confirms Secret Prisons, Denies Torture*, Atlanta J.-Const., Sept. 7, 2006, at 1A (adding that the CIA secret detention program "had held about 100 detainees"); Anthony Mitchell, *U.S. Seeks Terror Suspects in Secret African Prisons*, The Va.-Pilot, Apr. 4, 2007, at

A4; Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*,Wash. Post, Nov. 2, 2005, at A1; Mark Silva, *et al.*, *Bush Confirms Use of CIA Secret Prisons*, Chicago Trib., Sept. 7, 2006, at 1. *See also* Eggen, *supra* note 21; Johnston, *supra* note 21; Paust, *supra* note 1, at 836–37 & n.96; text *infra* note 26.

23. *Quoted in* Priti Patel, *A Wider Torture Loophole?*, L.A. Times, Aug. 18, 2006, at B11. The numbers in brackets have been added to more easily identify the three exceptions set forth in the CIA memo, the final one being prior specific approval by CIA headquarters of apparently any interrogation tactic or form of treatment.
24. The Torture Question: Interview with John Yoo, Frontline, Jul. 19, 2005, available at http://www.pbs.org/wgbh/pages/frontline/torture/interviews/yoo.html. *See also* Teddy O'Reilly, *Who Is Watching the Watchmen?*, The Daily Cardinal, Dec. 14, 2005 (reporting John Yoo's outrageous if no longer surprising remarks during a debate: Professor Doug Cassel: "If the President deems that he's got to torture somebody, including by crushing the testicles of the person's child, there is no law that can stop him? Yoo: No treaty. Cassel: Also, no law by Congress – that is what you wrote in the August 2002 memo. . . . Yoo: I think it depends on why the President thinks he needs to do that." [Yoo also stated during the debate in Chicago: "I don't think a treaty can constrain the President as commander in chief"]), available at: http://www.dailycardinal.com/article.php?storyid=1028126; Anne-Marie O'Connor, *In Wartime, This Lawyer Has Got Bush's Back*, L.A. Times, Dec. 12, 2005, at E1 (reporting that Yoo was opposed to the McCain Amendment and quoting him: "The real effect of the McCain amendment would be to shut down coercive interrogation."); *infra* note 27; *see also* John C. Yoo, Robert J. Delahunty, Memorandum for William J. Haynes II, General Counsel, Department of Defense, Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002), at 28 (opining in error that "the President has a variety of constitutional powers with respect to treaties, including powers to . . . contravene them. . . . [P]ower[s] over treaty matters . . . are within the President's plenary authority."), available at: http:www/msnbc.msn.com/id/5025040/site/newsweek. *But see* John Yoo, *Terrorists Are Not POWs*, USA Today, Nov. 2, 2005, at 12A ("Physical and mental abuse is clearly illegal. . . . The Geneva Conventions – which already prohibit the torture or cruel, inhumane or degrading treatment of prisoners – clearly apply in Iraq."). John Yoo also indicated that among the members of the 2003 DOD Working Group that approved use of various illegal interrogation tactics were JAGS and "general counsels." The Torture Question: Interview with John Yoo, *supra. See also* Yoo, *supra* note 14, at 195 ("OLC advised the group, composed of both military officers and Defense Department civilians"). Nonetheless, several JAG officers did not approve. *See, e.g.*, Paust, *supra* note 1, at 843 & n.119; *see also* Mayer, *supra* note 5 (Alberto Mora had been a member of the DOD Working Group, but openly disapproved. He had not seen the final version of the Report and, thus, was one of those who allegedly did not sign the Report (some reportedly in protest, *see* Paust, *supra* note 1, at 841 n.114)); Mora Memo, *supra* note 5, at 15–19 & n.12.
25. *See, e.g.*, Bassiouni, *supra* note 1, at 392–93, 395, 406; Richard Goldstone, *Combating Terrorism: Zero Tolerance for Torture*, 37 Case W. Res. J. Int'l L. 343 (2006); Paust, *supra* note 1, at 815–16, 820–21; U.N. G.A. Res. 60/148, preamble ("freedom from torture and other cruel, inhuman or degrading treatment or punishment is a

non-derogable right that must be protected under all circumstances, including in times of international or internal armed conflict or disturbance," "absolute prohibition"), paras. 1 ("Condemns all forms of torture and other cruel, inhuman or degrading treatment or punishment, including through intimidation, which are and shall remain prohibited at any time and in any place whatsoever and can thus never be justified"), 3 ("Condemns any action or attempt by States or public officials to legalize, authorize or acquiesce in . . . [such treatment] under any circumstances, including on grounds of national security or through judicial decisions") (2005), U.N. Doc. A/RES/60/148 (21 Feb. 2006); U.N. Experts' Report, *supra* note 1, at 21, paras. 42–43; *supra* note 1. *See also* United States v. List, 11 T.W.C. 757, 1255 (1948) ("military necessity or expediency does not justify a violation of positive rules"); U.S. Dep't of Army Field Manual 27-10, The Laws of Land Warfare 4, para. 3(a) (1956) (same) [hereinafter FM 27-10]; *infra* note 44. John Yoo still does not understand that "necessity" is not a defense under binding treaty law of the United States of several varieties. *See* Yoo, *supra* note 14, at 172 ("do what is reasonably necessary"), 175 ("'good reasons'"), 200 ("necessity or self-defense"). In response to such claims, Professor Michael Reisman has reminded that such a "practice sits precariously on a slippery – and nasty – slope: torture, by its nature, once sanctioned and however contingent and restrictive . . . metastasizes quickly, infecting the whole process of interrogation." W. Michael Reisman, *Holding the Center of the Law of Armed Conflict*, 100 Am. J. Int'l L. 852, 855–56 (2006). Moreover, use of cruel and inhuman tactics with impunity encourages contempt for the rule of law.

26. John Yoo, remarks, on National Public Radio, Dec. 15, 2005. *See also* Yoo, *supra* note 14, at 190–91; *supra* note 22 (Bush admits that "tough" tactics were used against "high-value" detainees held in secret detention by the CIA).
27. John Yoo, *President's Power in Times of War*, Tribune-Review (Greensburg, PA), Dec. 25, 2005. Concerning the role that Yoo played, *see also* Paust, *supra* note 1, at 830–33, 834–35 n.89, 842–43, 856 & n.172, 858, 861–62 & n.198; Klaidman, *et al.*, *supra* note 9 (the infamous 2002 Bybee torture memo was "drafted by Yoo" and a "Yoo memo in March 2003 was even more expansive, authorizing military interrogators . . . to ignore many criminal statutes"); Mayer, *supra* note 5 (on Feb. 6, 2003, Alberto Mora asked John Yoo "'Are you saying the President has the authority to order torture?' 'Yes,' Yoo replied."); Mora Memo, *supra* note 5, at 19; Ragavan, *supra* note 9 (Yoo was a drafter, with Addington and Bybee, of the Bybee torture memo). *But see* Yoo, *supra* note 14, at 196 (Yoo thinks he "would not have said" "torture" as such to Mora).
28. Yoo, *supra* note 14, at ix. *See also id.* at 30 (in December 2001 and for months thereafter Gonzales chaired the meetings "to develop [such] policy"). Concerning the chairing of meetings by Gonzales, *see also* Paust, *supra* note 1, at 834 n.89, 848 n.138; text *supra* note 18.
29. Yoo, *supra* note 14, at 35.
30. *Id.* at 39.
31. *Id.*
32. *Id. See also* Chapter One, note 46.
33. *Id.* at 39–40.

34. *Id.* at 43.
35. *Id.* at 171. *See also id.* at ix (by focusing "on what constituted 'torture' under the law . . . our agents [supposedly, and erroneously] would know exactly what was prohibited, and what was not."), 172 ("OLC addressed this question: what is the meaning of 'torture'"). This is an example of manifestly and seriously unprofessional advice that remains silent, for example, concerning the ban on cruel, inhuman, and degrading treatment in several treaties of the United States and customary international law.
36. *See id.* at 172 ("harsh interrogation short of torture"), 177 ("Congress banned torture, but not interrogation techniques short of it . . . coercive interrogation" is permissible), 178 ("[m]ethods that . . . do not cause severe pain or suffering are permitted"), 187 ("American law prohibits torture but not coercive interrogation," such as "using 'excruciating pain'"), 190–91 (coercive interrogation was used), 192 ("coercive interrogation . . . should not be ruled out"), 202 (same).
37. *Id.* at 200. *See also supra* note 24 (Yoo recognizing that the McCain Amendment would "shut down coercive interrogation"). That such tactics were approved for use in Iraq, *see, e.g.*, Paust, *supra* note 1, at 843, 847 & n.135.
38. *See, e.g.*, Seth F. Kreimer, *"Torture Lite," "Full Bodied" Torture, and the Insulation of Legal Conscience*, 1 J. Nat'l Security L. & Pol'y 187, 197–98 (2005); Brian Knowlton, *U.S. Holds Firm as Rice Faces CIA Storm*, Int'l Herald Trib., Dec. 5, 2005, at 1; *supra* notes 14–15, 18. *But see* Tom Ridge, former Secretary for Homeland Security, interview with BBC, Jan. 14, 2005 ("*By and large, as a matter of policy* . . . we do not condone the use of torture to extract information" (emphasis added)), *quoted in* Kim Lane Scheppele, *Hypothetical Torture in the "War on Terrorism,"* 1 J. Nat'l Security L. & Pol'y 285, 285 n.1 (2005). President Bush had used this tactic earlier. *See, e.g.*, Paust, *supra* note 1, at 837 n.96. *See also* Moore, *supra* note 1, at 47, 49–50 (Bush administration narrowed its definition of "torture" in order to claim interrogation tactics were not "torture").
39. *See, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, 75 U.N.T.S. 287 (Aug. 12, 1949) [hereinafter GC]; *see also id.* arts. 5, 27, 31–33, 49 (transfer of non–prisoners of war from occupied territory is a war crime), 147; Paust, *supra* note 1, at 816–20, 850–51; Sadat, *supra* note 15, at 325–31 (transfers from occupied territory violate GC art. 49). Among the absolute rights and duties reflected in common Article 3 are the right to be "treated humanely," freedom from "violence to life and person," freedom from "cruel treatment and torture," and freedom from "outrages upon personal dignity, in particular, humiliating and degrading treatment." GC, *supra* art. 3. Common Article 3 now reflects minimum and absolute rights and duties under customary laws of war that are directly applicable in any armed conflict whether or not portions of the Conventions as such are self-executing. *See, e.g.*, Paust, *supra* note 1, at 813 n.8, 814 n.10, 816–18 & nn.17, 19; *see also* Hamdan v. Rumsfeld, _ U.S. _, _ nn. 57 (rights guaranteed by the Geneva Conventions are rights "written 'first and foremost to protect individuals'"), 63 (2006). Moreover, the relevant articles in the treaty contain mandatory, self-executing language. *See, e.g.*, Paust, *supra* note 1, at 814 n.10. The rights and duties reflected in common Article 3 apply "in all circumstances" to any person who is not taking an active part in hostilities, thus including any person detained and regardless of

the person's status (*e.g.*, as a civilian, prisoner of war, unprivileged belligerent, terrorist, state or nonstate actor). *See, e.g.*, *id.* at 816–18.

Because common Article 3 applies with respect to any detainee during an armed conflict, there is no gap in the reach of some forms of protection even if the detainee is not a prisoner of war. *Id.* at 817–18 n.20; Hamdan v. Rumsfeld, _ U.S. at _ n.63. Nationals of a "neutral State" who are not prisoners of war have additional rights and protections under Part II of the Geneva Civilian Convention. A narrow exception for such persons concerning additional protections under Part III of the treaty (containing, *e.g.*, Articles 27, 31–33, and 49) applies only when they are "in the territory of" the detaining state. *Id.* at 819 & n.28, 851 n.149. Thus, when the U.S. detains non–prisoners of war outside the United States, they have additional rights and protections under Part III of the treaty.

40. International Covenant on Civil and Political Rights, art. 7 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment . . . "), 999 U.N.T.S. 171 (Dec. 9, 1966) [hereinafter ICCPR]. *See also* Paust, *supra* note 1, at 820–23. Article 50 of the treaty assures that orders, authorizations, conspiracies, complicitous conduct (including memos that abet violations), and other acts within the United States in violation of the provisions of the treaty are proscribed "without any limitations or exceptions." *See* ICCPR, *supra* art. 50 ("The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions."). Concerning the unavoidable and direct domestic effects of Article 50's mandate even in the face of a declaration of partial non-self-execution with respect to other articles, *see, e.g.*, Jordan J. Paust, International Law as Law of the United States362 (2d ed. 2003). With respect to any relevant potentially non-self-executing article, the President has a constitutional duty to faithfully execute the laws, including treaties of the United States, and is unavoidably bound by U.S. treaties. *See, e.g.*, Paust, *supra* at 109, 147–48 n.77, 169–73; Paust, *supra* note 1, at 814 n.10.

Contrary to the administration's view, the ICCPR also applies wherever a person is subject to the jurisdiction or effective control of a party to the treaty. *See, e.g.*, ICCPR, *supra* art. 2(1); Advisory Opinion, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. paras. 108–11 (The ICCPR "is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory"), *reprinted in* 43 I.L.M. 1009, 1039–40 (2004); Human Rights Committee, General Comment No. 31, para. 10 (applies "to all persons subject to their jurisdiction. This means . . . anyone within the power or effective control of that State party, even if not situated within the territory of the State. . . . [The ICCPR applies] to all individuals . . . who may find themselves in the territory or subject to the jurisdiction of a State Party. . . . [It] also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained"), para. 11 ("the Covenant applies also in the situation of armed conflict to which the rules of international humanitarian law are applicable."), U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004); General Comment No. 24, at paras. 4, 12 ("all those under a State party's jurisdiction"), U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994); Coard, *et al.* v. United States, Case No. 10.951,

Report No. 109/99, Annual Report of the Inter-Am. Comm. H.R. (Sept. 29, 1999); Alejandre, *et al.* v. Cuba, Case No. 11.589, Annual Report of the Inter-Am. Comm. H.R. (Sept. 29, 1999); Human Rights Comm., Concluding Observations on Croatia, 28/12/92, U.N. Doc. CCPR/C/79/Add.15 (1992), § 9; U.N. Experts' Report, *supra* note 1, at 8–9, para. 11; Paust, *supra* note 1, at 822 n.40. More specifically, there is no territorial limitation set forth with respect to the absolute rights and duties contained in Article 7 of the ICCPR. The authoritative decisions and patterns of *opinio juris* noted earlier are part of subsequent practice and expectation relevant to proper interpretation of the treaty. *See* Vienna Convention on the Law of Treaties, art. 31(3)(b), 1155 U.N.T.S. 331 (1969) [hereinafter Vienna Convention]. Treaties also must be interpreted in light of their object and purpose (*see, e.g.*, *id.* art. 31(1)), which in this instance is to assure universal respect for and observance of the human rights set forth in the treaty. *See* ICCPR, *supra* preamble (recognizing "equal and inalienable rights of all," recognizing that "everyone . . . [should] enjoy" human rights, and "[c]onsidering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights"). The preamble to the treaty also must be used for interpretive purposes (*see, e.g.*, Vienna Convention, *supra* art. 31(2)), which in this instance reflects the object and purpose of the ICCPR to achieve universal respect for and observance of the human rights set forth in the treaty. More generally, human rights treaties are presumptively universal in reach in view of the general and preemptive duty of States under the United Nations Charter to achieve universal respect for and observance of human rights. *See, e.g.*, U.N. Charter, arts. 55(c), 56, 103, T.S. 993, 59 Stat. 1031 (June 26, 1945); ICCPR, *supra* preamble; Vienna Convention, *supra* art. 31(3)(c) ("any relevant rules of international law" (such as the preemptive human rights duties under the U.N. Charter) are to be taken into account when interpreting a treaty (such as the ICCPR); *infra* note 42. Furthermore, the Supreme Court has recognized that treaties are to be interpreted in a broad manner in order to protect express and implied rights. *See, e.g.*, Paust, *supra* note 1, at 832 n.76.

Concerning the invalidity of an attempted reservation to Article 7's reach to *all* forms of torture, cruel, inhuman, and degrading treatment, *see, e.g.*, Paust, *supra* note 1, at 821 n.40, 823 n.42; Concluding Observations of the Human Rights Committee: United States of America, U.N. Doc. CCPR/C/79/Add.50, para. 14 (1995); *infra* note 59. Article 7 is also expressly among the nonderogable articles in the treaty. *See* ICCPR, *supra* art. 4(2). Moreover, the rights and duties reflected in Article 7 are part of customary and *jus cogens* international law of a nonderogable and universal reach regardless of attempted treaty reservations or understandings. *See, e.g.*, General Comment No. 24, supra at para. 8; Paust, *supra* note 1, at 821–23; U.N. Experts' Report, *supra* note 1, at 8, para. 8, 21, paras. 42–43. Acceptance of an attempted reservation to a treaty that conflicts with *jus cogens* rights or duties is not possible since, in case of such a conflict, the relevant portion of the treaty would be void. *See, e.g.*, Vienna Convention, *supra* arts. 53, 64. More generally, the United States has not "declared a 'state of emergency' within the meaning of Article 4" and has not attempted a formal "derogation from [any of] its commitments under the Covenant." Second and Third Periodic Report of the United States of America to the U.N. Committee on Human Rights Concerning the International Covenant

on Civil and Political Rights 31–32, paras. 89, 91 (Oct. 21, 2005) (copy on file with the author).

41. O.A.S. Res. XXX (1948), arts. I ("Every human being has the right to life, liberty and the security of person."), XXV ("... Every individual who has been deprived of his liberty ... has the right to humane treatment"), O.A.S. Off. Rec. OEA/Ser. L/V/I.4, Rev. (1965). As a party to the Charter of the Organization of American States, the U.S. is bound by the American Declaration, which is a legally authoritative indicium of human rights protected through Article 3(k) of the O.A.S. Charter [*see also id.* arts. 44, 111]. *See, e.g.*, Advisory Opinion OC-10/89, I-A, Inter-Am. Court H.R., Ser. A: Judgments and Opinions, No. 10, paras. 45, 47 (1989); Inter-Am. Comm. H.R., Report on the Situation of the Inhabitants of the Interior of Ecuador Affected by Development Activities, Chapter VIII (1996), OEA/Ser.L/V/II.96, doc. 10 rev. 1 (Apr. 24, 1977) ("The American Declaration ... continues to serve as a source of international obligation for all member states"); The "Baby Boy" Opinion, Case 2141, Inter-Am. Comm. H.R. 25, OEA/Ser.L/V/II.54, doc. 9 rev. 1 (1981), at para. 15 ("As a consequence of Article 3j, 16, 51e, 112 and 150 of [the Charter], the provisions of other instruments and resolutions of the OAS on human rights acquired binding force. Those instruments and resolutions of the OAS on human rights approved with the vote of the U.S. Government" include the American Declaration of the Rights and Duties of Man. That Declaration affirms several human rights, now protected through the O.A.S. Charter, including the right to "resort to the courts to ensure respect for ... [one's] legal rights" documented in Article XVIII); Roach Case, No. 9647, Inter-Am. Comm. H.R. 147, OEA/Ser.L/V/II.71, doc. 9 rev. 1 (1987), at para. 48; *see also* Richard B. Lillich & Hurst Hannum, International Human Rights 802–04 (3d ed. 1995); David Weissbrodt, Joan Fitzpatrick, & Frank Newman, International Human Rights 598–600 (3d ed. 1996); Myres S. McDougal, Harold D. Lasswell, & Lung-chu Chen, Human Rights and World Public Order 198, 316 (1980).

Within the Americas, the United States is also bound to take no action inconsistent with the object and purpose of the American Convention on Human Rights, 1144 U.N.T.S. 123 (1969), which would necessarily include orders, authorizations, complicity, and more direct acts in violation of the human rights protected in the Convention. This obligation arises because the United States has signed the treaty while awaiting ratification. *See, e.g.*, Vienna Convention, *supra* note 40, art. 18. Article 5 of the American Convention requires:

> (1) Every person has the right to have his physical, mental, and moral integrity respected.
>
> (2) No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person ...

Moreover, the United States is bound by Article 15(1) of the Inter-American Convention Against Terrorism to respond to terrorism "with full respect for the rule of law, human rights, and fundamental freedoms." Inter-American Convention Against Terrorism, June 3, 2002, OAS/AG/Res. 1840 (XXXII-0/02), art. 15(1). *See also* David P. Stewart, *Human Rights, Terrorism, and Efforts to Combat Terrorism, Commentary*, in Human Rights & Conflict 267, 268–70 (Julie A. Mertus &

Jeffrey W. Helsing eds., 2006) ("A government cannot justify . . . torturing its captives, on the grounds of combating terrorism . . . terrorists themselves have human rights and it is not justifiable to commit human rights violations in pursuit of counterterrorism.").

42. *Supra* note 40, arts. 55(c), 56. The universally applicable duty of states under Articles 55(c) and 56 is to take joint and separate action to achieve "*universal* respect for, and observance of, human rights" and, thus, not to authorize their violation or to violate them in any location, in any social context (including actual war), and with respect to any person. *See id.* arts. 55(c) (emphasis added), 56. *See also* U.N. S.C. Res. 1566, prmbl. (8 Oct. 2004) (quoted *infra* note 49); U.N. G.A. Res. 59/195, Human Rights and Terrorism, prmbl. (20 Dec. 2004) ("all States have an obligation to promote and protect all human rights . . . , Reaffirming that all measures to counter terrorism must be in strict conformity with international law, including international human rights"); U.N. G.A. Res. 59/191, Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, prmbl. ("States are under the obligation to protect all human rights and freedoms of all persons . . . in the context of the fight against terrorism"), para. 1 ("States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular human rights . . . and humanitarian law") (20 Dec. 2004); Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance With the Charter of the United Nations, U.N. G.A. Res. 2625 (Oct. 24, 1970), 25 U.N. GAOR, Supp. No. 28, at 121, U.N. Doc. A/8028 (1971) ("Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter."); Paust, *supra* note 1, at 822–23 n.41. One uses evidences of the content of customary human rights to identify those rights "guaranteed to all by the Charter." *See* Filartiga v. Pena-Irala, 630 F.2d 876, 882 (2d Cir. 1980), adding: "the guarantees include, at a bare minimum, the right to be free from torture. This prohibition has become part of customary international law as evidenced and defined by the Universal Declaration of Human Rights. . . . Charter precepts embodied in this Universal Declaration 'constitute basic principles of international law.' G.A. Res. 2625 (XXV) (Oct. 24, 1970)." *Id.* In addition to the prohibition of torture, Article 5 of the Universal Declaration prohibits "cruel, inhuman or degrading treatment or punishment." U.N. G.A. Res. 217A, art. 5, 3 U.N. GAOR, U.N. Doc. A/810, at 71 (1948). The more general right to human dignity is mirrored in Article 1. *Id.* art. 1. Concerning the status of the Universal Declaration and its use as an authoritative interpretive aid, *see, e.g.*, McDougal, Lasswell, & Chen, *supra* note 41, at 274, 302, 325–27; *see also* U.N. G.A. Res. 59/191, *supra* prmbl. ("Stressing that everyone is entitled to all the rights and freedoms recognized in the Universal Declaration"); Paust, *supra* note 1, at 822 n.40 (U.S. Executive recognition before the I.C.J. in United States v. Iran (1980) that rights and duties reflected in Article 5, among others, are customary international law). The same absolute prohibitions "at any time and in any place whatsoever" are found in the Resolution on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 59/182, U.N. Doc. A/RES/59/182 (2004) (quoted in Paust, *supra* note 1, at 821 n.38), and the 1975 Declaration on the Protection of All Persons from Being Subjected to Torture

and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. G.A. Res. 3452, 30 U.N. GAOR, Supp. No. 34, at 91, U.N. Doc. A/1034 (1976). Article 2 of the 1975 Declaration affirms that each form of prohibited conduct violates human rights under the U.N. Charter. *See id.* art. 2. The 1975 Declaration was also used in *Filartiga* to identify U.N. Charter-based and customary human rights prohibitions. 630 F.2d at 882–83. *See also* Kadic v. Karadzic, 70 F.3d 232, 240 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996); *In re* Estate of Marcos Human Rights Litig., 978 F.2d 493, 499 (9th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993).

The 1988 Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment also affirms that "[a]ll persons under any form of detention . . . shall be treated in a humane manner and with respect for the inherent dignity of the human person." U.N. G.A. Res. 43/173, 43 U.N. GAOR, Supp. No. 49, at 297, U.N. Doc. A/43/49 (1988). *See also* Kane v. Winn, 319 F. Supp. 2d 162, 197–99 (D. Mass. 2004) (use of the Body of Principles as evidence of customary law).

43. 1465 U.N.T.S. 85. *See also id.*, preamble ("Having regard to Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant . . . , both of which provide that no one may be subjected to cruel, inhuman or degrading treatment" and "Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment . . . throughout the world"); Paust, *supra* note 1, at 823 n.43; U.N. CAT Report, *supra* note 1, at paras. 17 ("The State party should ensure that no one is detained in any secret detention facility under its *de facto* effective control. Detaining persons in such circumstances constitutes, *per se*, a violation of the Convention"), 18 ("The State party should adopt all necessary measures to prohibit and prevent enforced disappearance in any territory under its jurisdiction, and prosecute and punish perpetrators, as this practice constitutes, *per se*, a violation of the Convention"), 22 ("detaining persons indefinitely without charge, constitutes *per se* a violation of the Convention"), 24 (quoted *supra* note 1), 25 ("The State party should promptly, thoroughly and impartially investigate all allegations of torture or cruel, inhuman or degrading treatment and punishment by law enforcement personnel and bring perpetrators to justice, in order to fulfill its obligations under article 12 of the Convention"), 26 ("eradicate all forms of torture and ill-treatment of detainees by its military and civilian personnel, in any territory under its jurisdiction"); U.N. Experts' Report, *supra* note 1, at 21, paras. 42 (CAT also encompasses the prohibition of cruel, inhuman or degrading treatment), 44 (CAT "also encompasses the principle of non-refoulement (art. 3) . . . [and] the prohibition of incommunicado detention"), 24–25, para. 51, 37, paras. 87 ("degrading treatment" and "inhuman treatment"), 89 (quoted *supra* note 15). CAT obligations apply in time of war or times of relative peace. *See, e.g.*, CAT, *supra*, art. 2 ("[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability, or any other public emergency, may be invoked as a justification"); U.N. CAT Report, *supra* note 1, at para. 14.

44. *See, e.g.*, O'Connell, *supra* note 1, at 1233, 1235, 1241, 1243–48; Paust, *supra* note 1, at 816–23, 826; U.N. Experts' Report, *supra* note 1, at 8, para. 8, 21, paras. 42–43. *See also* Resolution of the American Society of International Law, para. 3 (Mar. 30, 2006) ("Torture and cruel, inhuman, or degrading treatment of any person . . . are

prohibited by international law from which no derogations are permitted"), available at: http://www.asil.org/events/am06/resolutions.html.

45. General Comment No. 7, para. 1, Report of the H.R. Comm., 37 U.N. GAOR, Supp. No. 40, Annex V, U.N. Doc. E/CN.4/Sub.2/Add.1/963 (1982). The same types of obligation were reiterated by the U.N. Committee Against Torture in connection with the CAT. *See, e.g.*, U.N. CAT Report, *supra* note 1, at paras. 18 (must "prosecute and punish perpetrators" of "enforced disappearance"), 19 ("ensure that perpetrators of acts of torture are prosecuted and punished"; "ensure that . . . no doctrine under domestic law impedes the full criminal responsibility of perpetrators"; and "promptly, thoroughly, and impartially investigate any responsibility of senior military and civilian officials authorizing, acquiescing or consenting, in any way, to acts of torture committed by their subordinates"), 25 ("promptly, thoroughly and impartially investigate all allegations of torture or cruel, inhuman or degrading treatment or punishment . . . and bring perpetrators to justice"), 26 ("promptly and thoroughly investigate such acts and prosecute all those responsible"), 27 ("The Committee is concerned that the Detainee Treatment Act of 2005 aims to withdraw the jurisdiction of the State party's federal courts with respect to *habeas corpus* petitions, or other claims by or on behalf of Guantanamo Bay detainees, except under limited circumstances. The Committee is also concerned that detainees in Afghanistan and Iraq, under the control of the Department of Defence, have their status determined and reviewed by an administrative process of that Department. . . . The State party should ensure that independent, prompt and thorough procedures to review the circumstances of detention and the status of detainees are available to all detainees as required by article 13 of the Convention."), 28 ("The State party should ensure, in accordance with the Convention, that mechanisms to obtain full redress, compensation and rehabilitation are accessible to all victims of acts of torture or abuse, including sexual violence, perpetrated by its officials."), 32 ("ensure that all allegations of violence in detention centres are investigated promptly and independently, perpetrators are prosecuted and appropriately sentenced and victims can seek redress, including appropriate compensation").
46. General Comment No. 20, para, 8 (1992), in International Human Rights Instruments, U.N. Doc. HRI/GEN/1 (4 Sept. 1992), at 29–32.
47. *Id.* paras. 2, 13, 15. The same obligations were reflected in a recent U.N. General Assembly resolution. *See* U.N. G.A. Res. 60/148, *supra* note 25, at paras. 4 ("all allegations . . . must be promptly and impartially examined . . . [and] those who encourage, order, tolerate or perpetrate acts of torture must be held responsible and severely punished"), 5 ("all acts of torture must be made offences under domestic criminal law . . . [and] perpetrators . . . must be prosecuted and punished"). *See also infra* notes 102–04.
48. U.N. S.C. Res. 1674, para. 5, U.N. Doc. S/RES/1674 (28 Apr. 2006).
49. *Id.* para. 6. *See also* U.N. S.C. Res. 1566, prmbl. (8 Oct. 2004) (States must "ensure that any measures taken to combat terrorism comply with all their obligations under international law . . . , in particular international human rights, refugee, and humanitarian law"). Decisions of the Security Council are binding on the United States and other members of the U.N. under Articles 25 and 48 of the U.N. Charter.
50. *Id.* para. 8. Concerning the customary international legal responsibility *aut dedere aut judicare* to either initiate prosecution of or to extradite all persons reasonably

accused of such crimes and other violations of customary international criminal law, *see, e.g.*, Jordan J. Paust, M. Cherif Bassiouni, *et al.*, International Criminal Law 10, 12, 131–44, 155, 169 (3d ed. 2007). Article 7 of the CAT mirrors this customary legal duty. *Supra* note 43, art. 7(1). The same duty is reflected in the Geneva Conventions, *see, e.g.*, GC, *supra* note 39, art. 146.

51. *See* War Crimes Act, 18 U.S.C. § 2441. Alternative legislation allowing prosecution of any war crime in federal district courts is based on 10 U.S.C. § 818 used in conjunction with 18 U.S.C. § 3231. *See* Paust, *supra* note 1, at 824 n.47. *See also* Bassiouni, *supra* note 1, at 407, 412.
52. 18 U.S.C. §§ 2340–2340A.
53. 18 U.S.C. §§ 1091–1093.
54. The Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3261. *See also* Bassiouni, *supra* note 1, at 415–16; Heather Carney, Note, *Prosecuting the Lawless: Human Rights Abuses and Private Military Firms*, 74 Geo. Wash. L. Rev. 317, 328 (2006) ("The Coalition Provisional Authority in Iraq declared that 'disciplining contractor personnel is the contractor's responsibility.' This lack of accountability is disturbing," using a quotation of remarks from Att'y Scott Horton); Robin M. Donnelly, Note, *Civilian Control of the Military: Accountability for Military Contractors Supporting the U.S. Armed Forces Overseas*, 4 Geo. J.L. & Pub. Pol'y237 (2006); David Johnston, *U.S. Inquiry Falters on Civilians Accused of Abusing Detainees*, N.Y. Times, Dec. 19, 2006, at A1. *Cf* Andrea Weigl, *Jury Finds Passaro Guilty of Assault*, [Raleigh] News & Observer, Aug. 17, 2006 (conviction of a CIA civilian contractor, David Passaro, of assault resulting in bodily injury of a detainee on a U.S. military base in Afghanistan under the Patriot Act [Pub. L. No. 107–56, § 804, 115 Stat. 272, 377 (2001), codified at 18 U.S.C. § 7(9)(A)], which was found to be applicable to conduct of U.S. nationals on U.S. facilities abroad); *CIA Contractor Guilty in Beating of Detainee*, L.A. Times, Aug. 18, 2006, at A18 (also noting that the Afghan detainee later died in custody and that human rights organizations have been critical of the lack of other indictments of CIA personnel or "contractors"); Patel, *supra* note 23. By definition, civilian contractors are not members of the armed forces and are not combatants entitled to combatant immunity for lawful acts of warfare or prisoner of war status upon capture. *See* Chapter Three.
55. Concerning the illegal Bush policy and practice of transferring persons from occupied territory and relevant Geneva law, *see, e.g.*, Alvarez, *supra* note 1, at 199–208; Paust, *supra* note 1, at 850–51 & nn.147–51; Sadat, *supra* note 15, at 325–31.
56. *See, e.g.*, *supra* notes 15, 43, 45.
57. *See, e.g.*, *supra* note 22. Concerning the illegality of forced disappearance of persons, *see* Section D *infra*.
58. *See, e.g.*, Guy Dinmore & Demetri Sevastopulo, *Rice Shifts Stance on Interrogation to Shake Off Claims of Torture Abroad*, Fin. Times(London), Dec. 8, 2005, at 1; David Holley & Paul Richter, *Rice Fails to Clarify U.S. View on Torture*, L.A. Times, Dec. 8, 2005, at A1.
59. *See, e.g.*, Paust, *supra* note 1, at 823 n.43; U.N. Experts' Report, *supra* note 1, at 22 (regarding the U.S. "obligation to fully respect the prohibitions of torture and ill-treatment" and attempted U.S. reservations to the CAT and the ICCPR, the Experts "recall the concerns of the relevant treaty bodies, which deplored the failure of the United States to include a crime of torture consistent with the Convention

definition in its domestic legislation and the broadness of the reservations made by the United States"), 45 n.48, quoting Conclusions and Recommendations of the Committee Against Torture: United States of America, 15/05/2000, U.N. Doc. A/55/44, paras. 179–180 (2000) ("The Committee expresses its concern about (a) The failure of the State Party to enact a federal crime of torture in terms consistent with article 1 of the Convention; (b) The reservation lodged to article 16, in violation of the Convention, the effect of which is to limit the application of the Convention . . . ") and Concluding Observations of the Human Rights Committee: United States of America, 03/10/95, CCPR/C/79/Add.50; A/50/40, paras. 266–304 (para. "279. The Committee regrets the extent of the State party's reservations, declarations and understandings to the Covenant. It believes that, taken together, they intended to ensure that the United States has accepted only what is already the law of the United States. The Committee is also particularly concerned at reservations to article 6, paragraph 5, and article 7 of the Covenant, which it believes to be incompatible with the object and purpose of the Covenant . . . "); Vienna Convention, *supra* note 40, art. 19(c); *see also* Objections of Finland, the Netherlands, and Sweden to the U.S. reservation, available at: http://www.ohchr.org/english/law/catreserve.htm. An additional U.S. "understanding" that the treaty does not preclude all forms of cruel, inhuman, and degrading treatment is simply erroneous and, therefore, of no legal effect. *See* Paust, *supra* note 1, at 823 n.43. *See also* O'Connell, *supra* note 1, at 1251 ("cannot alter . . . legal obligations under the CAT"). Moreover, as customary and peremptory rights and prohibitions *jus cogens*, they apply universally and without any limitations attempted in treaty reservations and understandings. *See, e.g.*, Paust, *supra* note 1, at 821–22 & nn.40–41; *supra* note 40. In The Prosecutor v. Furundzija, IT-95-17/1-T, Judgment (Dec. 10, 1998), at paras. 153–55, it was recognized that the prohibition of torture "has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules. The most conspicuous consequence of this higher rank is that the principle at issue could not be derogated from by States . . . [para. 154] an absolute value from which nobody must deviate. 155. The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorizing torture. It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principles and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international legal recognition . . . "

The putative reservation had attempted to limit the treaty's reach to types of treatment, not the place of treatment. Given the universal reach of the treaty proscriptions, if the putative reservation had attempted to require application merely within U.S. territory there would have been an additional reason why it would be incompatible with the object and purpose of the treaty and void *ab initio* as

a matter of law. *See, e.g.*, Paust, *supra* note 1, at 823 n.43; *see also supra* note 43. In any event, the U.S. Constitution applies abroad to restrain Executive authority. *See, e.g.*, Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 Mich. J. Int'l L. 1, 18–20 (2001) [hereinafter *Courting Illegality*] [revised in Chapter Six, Section A]. As Justice Black affirmed in Reid v. Covert, 354 U.S. 1 (1957), our government is one of delegated powers, one that is entirely a creature of the Constitution, and one that has no power or authority to act here or abroad inconsistently with the Constitution. *See* 354 U.S. at 5–6, 12, 35 n.62; *see also Ex parte* Quirin, 317 U.S. 1, 25 (1942) ("Congress and the President . . . possess no power not derived from the Constitution"); Asakura v. City of Seattle, 265 U.S. 332, 341 (1924); Balzac v. Porto Rico, 258 U.S. 298, 312–13 (1922) ("The Constitution of the United States is in force . . . wherever and whenever the sovereign power of that government is exerted"); Downes v. Bidwell, 182 U.S. 244, 381 ("the limits of which instrument may not be passed by the government . . . [the people] created, or by any branch of it"), 382 (Congress . . . has no existence except by virtue of the Constitution. It is the creature of the Constitution. It has no powers which that instrument has not granted, expressly or by necessary implication.") (1901) (Harlan, J., dissenting); United States v. Worrall, 2 U.S. (2 Dall.) 384, 393–94 (C.C. Pa. 1798) (Chase, J., on circuit) ("government can never assume any power that is not expressly granted by that instrument, nor exercise a power in any other manner that is there prescribed"); United States v. Tiede, Crim. Case No. 78-001A (U.S. Ct. for Berlin, Mar. 14, 1979), *reprinted in* 19 I.L.M. 179 (1979); Paust, *supra* at 19–20 & nn.43, 47.

60. *See, e.g.*, *supra* note 22. He also might be relying on the void putative U.S. reservation to the CAT, as if U.S. obligations under the CAT are limited and, mistakenly, that only the CAT applies. Even then, various "tough" tactics noted earlier would violate amendments to the Constitution. *See also* Chapter Five, Section D.
61. *See, e.g.*, *supra* notes 12, 15–19, 26, 35–37, and accompanying text.
62. Secretary of State Condoleezza Rice to Chairman John Warner, Sept. 14, 2006, available at: http://www.uniontribune.net/news/nation/terror/20060914–1513-powell-riceletters.html.
63. Not only is the content different (*see also supra* note 59), but the U.S. Constitution does not reach all private actors even under a domestic notion of "color of law" whereas treaties and the laws of war can be violated by private actors. *See, e.g.*, Weisshaus v. Swiss Bankers Ass'n, 225 F.3d 191 (2d Cir. 2000); Kadic v. Karadzic, 70 F.3d 232, 239, 242–43 (1995), *cert. denied*, 518 U.S. 1005 (1996) (private actor violations of common Article 3 of the Geneva Conventions, laws of war); *In re* Agent Orange Product Liability Litig., 373 F. Supp. 2d 7, 58–59 (E.D.N.Y. 2005); Estate of Rodriquez v. Drummond Co., Inc., 256 F. Supp. 2d 1250, 1260–62 (N.D. Ala. 2003) (including common Article 3); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 310–11 (S.D.N.Y. 2003) (private actor violations of common Article 3, laws of war); Doe v. Islamic Salvation Front, 993 F. Supp. 3, 7–8 (D.D.C. 1998) (including common Article 3); 11 Op. Att'y Gen. 297, 299–300 (1865) (laws of war can be violated by citizens, every citizen is bound); 1 Op. Att'y Gen. 68, 69 (1797) (private individual violation of the law of nations); 1 Op. Att'y Gen. 57, 58 (1795) (same); FM 27-10, *supra* note 25, at 178, paras. 498–99; The War

Crimes Act, 18 U.S.C. § 2441(a) ("Whoever"); Jordan J. Paust, *The Reality of Private Rights, Duties, and Participation in the International Legal Process*, 25 MICH. J. INT'L L. 1229 (2004); Jordan J. Paust, *After My Lai: The Case for War Crime Jurisdiction Over Civilians in Federal District Courts*, 50 TEX. L. REV. 6, 12–15 (1971).

64. Rice, Letter, *supra* note 61. *But see supra* note 59.
65. There is also a major difference between good faith use of domestic legal standards as minimum rights or duties protected under a treaty or to further effectuate a treaty and attempting to use them as maximum obligations and limitations. The latter is unacceptable. *See also supra* note 59. With respect to customary international law, *see also* Ross v. Rittenhouse, 2 U.S. (2 Dall.) 160, 162 (Pa. 1792) ("municipal law of the country . . . may . . . facilitate or improve the execution of . . . ["the law of nations"], by any means they shall think best, provided the great universal law remains unaltered"). Furthermore, it is well known with respect to the reach of international criminal law that domestic law is no excuse. *See infra* note 147. *See also supra* note 45.
66. United States v. Stuart, 489 U.S. 353, 372–74 (1989) (Scalia, J., concurring).
67. Ware v. Hylton, 3 U.S. (3 Dall.) 199, 261 (1796).
68. Henfield's Case, 11 F. Cas. 1099, 1101 (C.C.D. Pa. 1793 (No. 6,360) (Jay, C.J., on circuit).
69. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 65 (Max Farrand ed., 1937).
70. *See, e.g.*, Human Rights Watch, *Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees*, vol. 14, no. 4 (G), at 22–24 (Aug. 2002) [hereinafter *Presumption of Guilt*]; Steven W. Becker, *"Mirror, Mirror on the Wall . . . ": Assessing the Aftermath of September 11*th, 37 VALPARAISO U. L. REV. 563, 610 (2003); Michael J. Kelly, *Executive Excess v. Judicial Process: American Judicial Responses to the Government's War on Terror*, 13 IND. INT'L & COMP. L. REV. 787, 788, 799, 803 (2003); Lawyers Committee for Human Rights, *Assessing the New Normal: Liberty and Security for the Post-September-11 United States* 31, 34, 39 (2003) [hereinafter Lawyers Comm.], available at: http://www.humanrightsfirst.org.
71. *See, e.g.*, U.N. CHARTER, arts. 1(3), 55(c), 56; ICCPR, *supra* note 40, arts. 2(1), 14(1).
72. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944); Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984).
73. *See, e.g.*, *Ex parte* Quirin, 317 U.S. 1 (1942).
74. *See, e.g.*, *Presumption of Guilt*, *supra* note 70, at 7, 17; Lawyers Committee for Human Rights, *A Year of Loss: Reexamining Civil Liberties since September 11*, at 19–21 (2002), available at: http://www.lchr.org/US_law/loss/loss_report.pdf; Human Rights Watch, U.S. Supreme Court Should Review and Reject Secret Detentions, available at: http://www.hrw.org/press/2003/09/us093003.htm.
75. *See, e.g.*, *Presumption of Guilt*, *supra* note 70, at 17; Kelly, *supra* note 70, at 808–11; Edward Walsh, *Court Upholds a Post-9/11 Detention Tactic*, WASH. POST, Nov. 8, 2003, at A11.
76. *See, e.g.*, Chapter Four; Amnesty International, Memorandum to the US Government on the Rights of People in US Custody in Afghanistan and Guantanamo Bay 23–27 (Apr. 15, 2002), available at: http://web.amnesty.org/ai.nsf/Index/AMR510532002?OpenDocument&of=COUNTRIES\US; Dan Chapman,

Al-Qaida Cases Blur Rules on Interrogations, Atlanta Journal-Const., Mar. 4, 2003, at 1A ("U.S. officials say more than 3,000 al-Qaida members and supporters have been detained worldwide since Sept. 11," some in Afghanistan, some on Diego Garcia in the Indian Ocean, some 650 at Guantanamo Bay, some "in Jordan, Egypt and Saudi Arabia, whose governments are known to allow torture," and others in places unknown); Daphne Eviatar, *Foreigners' Rights in the Post-9/11 Era: A Matter of Justice*, N.Y. Times, Oct. 4, 2003, at B7 ("More than 5,000 citizens of foreign countries have been detained"); Lawyers Comm., *supra* note 70, at 52–53; Katharine Q. Seelye, *Moscow, Seeking Extradition, Says 3 Detainees Are Russian*, N.Y. Times, Apr. 3, 2002, at A11. In addition to requirements under human rights law and the laws of war to not engage in torture, cruel, or inhuman treatment of persons being interrogated, the United States has related obligations under international law to not become a complicitor in foreign violations. On the prohibition of complicitous behavior, *see, e.g.*, Paust, Bassiouni, *et al.*, *supra* note 50, at 44–49; Paust, *supra* note 40, at 210, 286–87, 291. Further, the United States must not send persons to a foreign country, for example, for interrogation, if one can foresee that there will be a "real risk" of violations of human rights or rights or duties under the laws of war. *See, e.g.*, Paust, Bassiouni, *et al.*, *supra* note 50, at 344–45, 348 (addressing the Soering Case, 161 Eur. Ct. H.R., Ser. A, paras. 88, 91–92, 111 (1989)), 349, 352–53, 396 (Jefferson quoted in *Ex parte* Kaine, 14 F. Cas. 78, 81 (C.C.S.D.N.Y. 1853) (No. 7,597), 401; Restatement of the Foreign Relations Law of the United States §§ 475, cmnt. g, 476, cmnt. h, 711, RN 7 (3d ed. 1987); *supra* notes 43, 45; *infra* note 145.

77. Joan Fitzpatrick, *Terrorism and Migration* at 9 (Oct. 2002), available at: http://www.asil.org/taskforce.
78. *Id.* at 10.
79. *Id.*, *citing* Memorandum from Michael Creppy, Sept. 21, 2001, *reprinted in* 78 Interpreter Releases 1836 (Dec. 3, 2001); *see also Presumption of Guilt*, *supra* note 70, at 24–27; Becker, *supra* note 70, at 610; Kelly, *supra* note 70, at 803–08.
80. *Supra* note 22. *See also supra* notes 15, 19, 43.
81. *See, e.g.*, Rome Statute of the International Criminal Court, art. 7(2)(i) (forced disappearance is a serious customary crime against humanity) 2187 U.N.T.S. 90; Inter-American Convention on the Forced Disappearance of Persons, art. II, done in Belen, Brazil, June 9, 1994, *reprinted in* 33 I.L.M. 1529 (1994); Council of Europe Parliamentary Assembly, Res. 1433, *supra* note 1, at paras. 7(vi), 8(vii)–(viii); Restatement, *supra* note 76, § 702(c) and cmnt. n & RN 1; Jean-Marie Henckaerts & Louise Doswald-Beck, Customary International Humanitarian Law: Rules 340–43, 421, 439 (ICRC 2005); Alvarez, *supra* note 1, at 199, 210–11, 213; Bassiouni, *supra* note 1, at 411–13; Maureen R. Berman, & Roger C. Clark, *State Terrorism: Disappearances*, 13 Rutgers L.J. 531 (1982); Paust, *supra* note 15, at 1352–56; Sadat, *supra* note 15, at 322–23; The Prosecutor v. Kupreskic, IT-95-16-T (ICTY Trial Chamber, Judgment, 14 Jan. 2000); *In re* Marcos, Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994); Tachiona v. Mugabe, 234 F. Supp. 2d 401, 416, 426 (S.D.N.Y. 2002); Xuncax v. Gramajo, 886 F. Supp. 162, 184–85 (D. Mass. 1995); Forti v. Suarez-Mason, 694 F. Supp. 707, 710–12 (N.D. Cal. 1988); *see also* U.N. CAT Report, *supra* note 1, at paras. 17–18; 22 U.S.C. § 2151n(a) (2000); 22 U.S.C. § 2304(d) ("causing the disappearance of persons" is among "flagrant" and "gross violations of internationally

recognized human rights"); S. Rep. No.102–249, at 9 (1991), *quoted in Xuncax*, 886 F. Supp. at 172; *supra* notes 15, 43, 55; text *infra* notes 86–111. In the context of wars in Afghanistan and Iraq, the policy also creates violations of the Geneva Conventions and the violations can be prosecuted as war crimes. *See* GC, *supra* note 39, arts. 5, 25, 71, 106–07, 143; IV Commentary, Geneva Convention Relative to the Treatment of Civilian Persons in Time of War 56–58 (ICRC, Jean S. Pictet ed., 1958) [hereinafter IV Commentary]; Paust, *supra* note 1, at 836–37 n.96; Paust, *supra* note 15, at 1355 n.84. Text *infra* notes 114–122.

82. Eur. T.S. No. 126 (1987).
83. 213 U.N.T.S. 221, Eur. T.S. No. 5 (1950).
84. *See* Mahmut Kaya v. Turkey, 28 EHRR 1 (28 Mar. 2000); Gongadze v. Ukraine, judgment of (8 Nov. 2005); *see also supra* notes 43, 45, 76; *infra* note 145.
85. *See* Cyprus v. Turkey, 35 EHRR 30 (10 May 2001); Kurt v. Turkey, 27 EHRR 373 (25 May 1998), adding that Article 5 requires the authorities to take effective measures to safeguard against a risk of disappearance and to conduct prompt and effective investigations.
86. *Supra* note 81, art. II. A similar definition of "enforced disappearance" as a customary crime against humanity appears in Article 7(2)(i) of the Rome Statute of the International Criminal Court. *Supra* note 81.
87. U.N. G.A. Res. 47/133 (18 Dec. 1992), U.N. Doc. A/RES/47/133, 92nd plenary mtg., *reprinted in* 32 I.L.M. 903 (1993).
88. *Id.* preamble.
89. 694 F. Supp. 707 (N.D. Cal. 1988).
90. *Id.* at 710–12.
91. Restatement, *supra* note 76, § 702(c). *See also* Thomas Buergenthal, Dinah Shelton, & David Stewart, International Human Rights 277–79 (3d ed. 2002) (addressing several cases before the Inter-American Court of Human Rights); Richard J. Wilson & Jan Perlin, *The Inter-American Human Rights System: Activities from Late 2000 Through October 2002*, 18 Am. U. Int'l L. Rev. 651 (2003); Berman & Clark, *supra* note 81; Sadat, *supra* note 81; *supra* notes 15, 43, 45, 81.
92. Restatement, *supra* note 76, § 702, cmnts. a, c, n & RN s 1, 11. Article 7(1)(i) of the Statute of the International Criminal Court (ICC), *supra* note 81, lists enforced disappearance of persons among crimes against humanity under customary international law. The Statute of the ICC was created in Rome in 1998 by some 160 states to assure "that the most serious crimes . . . must not go unpunished" and that there is "an end to impunity for perpetrators of these crimes." *See id.* pmbl. and art. 5.
93. Restatement, *supra* note 76, cmnt. n & RN 11.
94. *Id.* RN 11; Jordan J. Paust, Jon M. Van Dyke, & Linda A. Malone, International Law and Litigation in the U.S. 61–64 (2d ed. 2005).
95. H.R. Comm., General Comment No. 29, States of Emergency (article 4), para. 13 (b), U.N. Doc. CCPR/C21/Rev.1/Add.11 (2001). *See also supra* note 45.
96. *See, e.g.*, *In re* Estate of Ferdinand Marcos, Human Rights Litigation Hilao v. Estate of Ferdinand Marcos, 25 F.3d 1467, 1475 (9th Cir. 1994); Tachiona v. Mugabe, 234 F. Supp. 2d 401, 416, 426 (S.D.N.Y. 2002); Xuncax v. Gramajo, 886 F. Supp. 162, 184–85 (D. Mass. 1995); Forti v. Suarez-Mason, 694 F. Supp. at 710–12; *see also* Abebe-Jira v. Negewo, 72 F.3d 844, 845–46 (11th Cir. 1996) (campaign of arbitrary imprisonments, etc.); Rodriguez-Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan.

1980) (arbitrary detention violates customary international law), *aff'd on other gds.*, 654 F.2d 1382 (10th Cir. 1981) (arbitrary detention violates a federal statute, international law was used as an aid to interpret the statue); Alfonso Chardy, *Fernandez Larios Found Liable for Chilean Official's Death*, Miami Herald, Oct. 16, 2003 (addressing $4 million jury verdict re: crimes against humanity and various human rights violations as well as the disappearance of some 3,200 persons during the Pinochet regime in Chile).

97. *See, e.g.*, Foreign Assistance Act, 22 U.S.C. § 2151n (a); 22 U.S.C. § 2304(d); Senate Report No. 249, 102d Cong., 1st Sess. 9 (1991), *quoted in* Xuncax v. Gramajo, 886 F. Supp. at 172.
98. *See, e.g.*, U.S. Dep't of State, Country Reports on Human Rights Practices for 1999, Argentina (Feb. 25, 2000), at 3–5; *id.* Burundi (Feb. 25, 2000), at 4; *id.* Columbia (Feb. 25, 2000), at 15–17; *id.* Guatemala (Feb. 25, 2000), at 15; *id.* Peru (Feb. 25, 2000), at 6; *id.* Sudan (Feb. 25, 2000), at 5. The 1999 Country Reports are available at: http://www.state.gov/www/global/human_rights/1999_hrp_report/[name of country].html. Country Reports for 2002 are available at: http://www.state.gov/g/drl/rls/hrrpt/2002/. For example, disappearances in Iraq during Saddam Hussein's regime are addressed in Country Reports on Human Rights Practices–2002, Iraq (Mar. 31, 2003), available at: http://www.state.gov/g/drl/rls/hrrpt/2002/18277.htm. The U.S. Army also recognizes that "causing the disappearance of individuals" is a violation of customary international law. *See, e.g.*, U.S. Dep't of Army, Operational Law Handbook 39–40 (2003).
99. *Supra* note 81, preamble. Technically, the Convention does "not apply to the international armed conflicts governed by the 1949 Geneva Convention[s], *id.* art. XV; but this certainly does not eliminate applicability of relevant customary international and treaty-based human rights and other proscriptions, especially those identified in the Convention. Moreover, in case of an international armed conflict, the rights and duties under the Geneva Conventions apply.
100. *Id.*
101. *Id. See also* statute of the ICC, *supra* note 81, art. 7(1)(i); Forti v. Suarez-Mason, 694 F. Supp. 707, 711 (N.D. Cal. 1988), *citing* O.A.S. General Assembly Res. 666 (Nov. 18, 1983), which stated that disappearance is a crime against humanity. Concerning the nature of crimes against humanity more generally, *see, e.g.*, Paust, Bassiouni, *et al.*, *supra* note 50, at 701–70. Such crimes also implicate universal jurisdiction for criminal or civil sanctions in any state that has an offender within its territory, occupied territory, or the equivalent of its territory under international law. On the nature, history, and reach of universal jurisdiction, *see, e.g.*, *id.* at 157–76; Paust, *supra* note 40, at 420–23, 432–41, and numerous references cited; *see also* M. Cherif Bassiouni & Edward M. Wise, *Aut Dedere Aut Judicare*: The Duty to Prosecute or Extradite (1995) (concerning the responsibility to engaged in sanction efforts).
102. *See also* Chumbipuma Aguirre, *et al.* v. Peru (Barrios Altos Case), Inter-American Court of Human Rights (March 14, 2001), para. 41 (amnesty laws cannot eliminate responsibility "for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance"); IACHR *Report No. 61/01, Case No. 11.771* (Catalán Lincoleo v. Chile), Inter-American Commission on Human Rights, April 16, 2001 (ruling that Chile's amnesty law preventing

criminal investigation and prosecution of those involved in disappearance, torture, and extrajudicial killing impermissibly interfered with right of claimants to obtain reparations through civil courts); Rodriguez v. Uruguay, U.N. Doc. CCPR/C/51/D/322/1988 (1994); International Criminal Law 108 (diplomat can be prosecuted), 622 (public officials) (Gerhard O.W. Mueller & Ed Wise eds., 1965); Paust, *supra* note 40, at 422 (no head of state, diplomatic, or public official immunity exists under customary international law or in any international criminal law treaty or instrument), 435–39, 443–45, 449–52; Paust, Bassiouni, *et al.*, *supra* note 50, at 29, 33–43, 131–34, 138–40, 142, 168–70, 207, 355, 427, *passim*; Paust, Van Dyke, & Malone, *supra* note 94, at 452, 753–59, 763, 766, 773–75, 981–82, 986–88. Of particular interest with respect to violations of customary international law is the express recognition of nonimmunity by the International Military Tribunal at Nuremberg: "The principle of international law, which under certain circumstances protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position . . . [and one] cannot claim immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law." Opinion and Judgment, I.M.T. at Nuremberg (1946).

103. *Supra* note 81, art. VIII.
104. *Id.* art. IX.
105. *Id.* art. X.
106. *Id.* Customary and treaty-based human rights law also requires access to a court of law to address the propriety of detention. *See* Chapter Four, Section B.1.
107. *Supra* note 81, art. XI.
108. U.N. Declaration, *supra* note 87, preamble. *See also* U.N. G.A. Res. 60/148, para. 11 (2005) (noting "that prolonged incommunicado detention or detention in secret places may facilitate the perpetration of torture and other cruel, inhuman or degrading treatment . . . and can in itself constitute a form of such treatment").
109. *Id.*, art. 1. *See also* U.N. G.A. Res. 33/173 (20 Dec. 1978), addressed in Forti v. Suarez-Mason, 694 F. Supp. at 710.
110. Adopted by the First U.N. Congress on the Prevention of Crime and Treatment of Offenders in 1955, approved by ECOSOC res. 663 C (XXIV) C, 24 U.N. ESCOR, Supp. No. 1, at 11, U.N. Doc. E/3048 (31 Jul. 1957) and res. 2076 (LXII) (13 May 1977).
111. *Id.* para. 92.
112. GC, *supra* note 39, art. 25; *see also id.* arts. 106–07. Prisoners of war have similar rights. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, arts. 70–71, 75 U.N.T.S. 135 [hereinafter GPW]. Furthermore, any person arrested or detained who is not a prisoner of war is protected under common Article 3 of the Geneva Conventions and under at least some other portions of the Geneva Civilian Convention; and, thus, there are no complete gaps in the reach of Geneva law based on the status of a person. *See, e.g.*, Chapter One, Section B; Chapter Four, Section B.2.
113. GC, *supra* note 39, art. 5. Concerning the standard of necessity regarding detention or internment, *see also id.* arts. 42, 78.
114. IV Commentary, *supra* note 81, at 57–58; *see also id.* at 56 ("the Detaining Power . . . remains fully bound by the obligation, imposed on it by Article 136,

to transmit to the official Information Bureau particulars of any protected person who is kept in custody for more than two weeks.").

115. GC, *supra* note 39, art. 106. Concerning use of similar cards on the West Bank and Gaza and efforts to ensure accurate identification of persons detained during the late 1980s, *see, e.g.*, Jordan J. Paust, Gerhard von Glahn, & Günter Woratsch, *Report of the ICJ Mission of Inquiry into the Israeli Military Court System in the Occupied West Bank and Gaza*, 14 Hast. Int'l & Comp. L. Rev. 1, 21–24, 26–27, 64 (1990). Similar rights exist for prisoners of war. *See* GPW, *supra* note 112, art. 70.
116. GC, *supra* note 39, art. 107; *see also* GPW, *supra* note 112, art. 71.
117. IV Commentary, *supra* note 81, at 449.
118. GC, *supra* note 39, art. 143.
119. 3 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1951).
120. *Id.* at 1058. Our Supreme Court has also condemned the totalitarian practice of using "unrestrained power to seize persons . . . [and] hold them in secret custody, and wring from them confessions by physical and mental torture." Ashcraft v. Tennessee, 322 U.S. 143, 155 (1944).
121. *See, e.g.*, Vienna Convention on Consular Relations, art. 36(1)(a), 596 U.N.T.S. 261 (1963). *See also* The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99 (Oct. 1, 1999), Inter-Am. Ct. H.R., Ser. A, No. 16, paras. 77–84 (1999), available at: http://www1.umn.edu/humanrts/iachr/A/OC-16ingles-sinfirmas.html.
122. *Id.* art. 36(1)(c).
123. *Supra* note 87, art. 6(1).
124. *Id.* art. 7.
125. *Id.* art. 9(1).
126. *Id.* art. 10(1). The International Covenant on Civil and Political Rights also requires judicial review of the propriety of detention, a right that is now widely expected to be nonderogable and customary as well as treaty-based. *Supra* note 40, art. 9(4); *also see* Chapter Four.
127. *Supra* note 87, art. 10(2)–(3).
128. *See, e.g.*, Eric Schmitt, *Clash Foreseen Between C.I.A. and Pentagon*, N.Y. Times, May 10, 2006, at A1 (adding, the "Pentagon proposal [is] to have one set of interrogation techniques for enemy prisoners of war and another . . . for the suspected terrorists imprisoned at Guantanamo").
129. *See, e.g.*, *supra* note 11. Cambone's opposition to the legal requirements clearly mirrors Addington's. *See supra* note 9.
130. Julian E. Barnes, *Army Rules Put on Hold*, L.A. Times, May 11, 2006, at A1; *see also* Julian E. Barnes, *Army Manual to Skip Geneva Detainee Rule*, L.A. Times, June 5, 2006, at A1 (Addington and Cambone oppose use of common Article 3 standards regarding interrogation of non-POWs and the draft manual would omit the ban on humiliating and degrading treatment required under international law for all detainees). This would constitute a major change from standards in previous manuals. *See, e.g.*, David E. Graham, *Treatment and Interrogation of Detained Persons*, in International Law Challenges: Homeland Security and Combating Terrorism, 81 U.S. Naval War College Int'l L. Studies 215 (2006); White, *supra* note 1 (addressing uniform minimum standards required by Geneva law contained

in the previous manual); *see also* Paust, *supra* note 1, at 840–41 n.111 (addressing prohibitions in prior manuals). Later reports indicated that congressional and military pressure might lead to the preclusion of two different sets of standards for detainee interrogation. *See, e.g.*, Eric Schmitt, *Pentagon Rethinking Manual with Interrogation Methods*, N.Y. Times, June 14, 2006, at A21.

131. *See, e.g.*, *supra* notes 1, 39.

132. *See* Hamdan v. Rumsfeld, _ U.S. at _ ("there is at least one provision of the Geneva Conventions that applies here. . . . Common Article 3. . . . Common Article 3, then, is applicable here"), _ (and the phrase "'regularly constituted court'" in common Article 3 "must be understood to incorporate at least the barest of those trial procedures that have been recognized by customary international law"); *id.* at _ (Kennedy, J., concurring in part) ("the requirement of the Geneva Conventions . . . a requirement that controls here. . . . The Court is correct to concentrate on one provision of the law of war that is applicable to our Nation's armed conflict with al Qaeda in Afghanistan. . . . That provision is Common Article 3. . . . The provision is part of a treaty the United States has ratified and thus accepted as binding law. . . . . By Act of Congress, moreover, violations of Common Article 3 are considered 'war crimes,' punishable as federal offenses"). Common Article 3 applies as a minimum set of customary rights and prohibitions concerning any detainee during the wars in Afghanistan and Iraq. *See supra* note 39. The Court should have adopted this recognition instead of considering common Article 3 to apply during a fight with al Qaeda as such (and, thus, also outside of and unconnected with the armed conflicts in Afghanistan and Iraq).

133. *See, e.g.*, Stephen J. Hedges, *U.S. Relents on Gitmo Detainees; Geneva Conventions Will Apply to Inmates*, Chicago Trib., July 12, 2006, at 1; Scott Shane, *Terror and Presidential Power: Bush Takes a Step Back*, N.Y. Times, July 12, 2006, at A20. Thus, armed with a Supreme Court ruling that common Article 3 applies in the fight against al Qaeda, England and military lawyers finally prevailed over Addington, Cambone, and Haynes with respect to compliance with the laws of war by military personnel and others subject to DOD control. *See also supra* note 11.

134. *See, e.g.*, Rosa Brooks, *Orwell Had Nothing on This White House*, L.A. Times, July 14, 2006, at B13 (Acting Chief of the OLC, DOJ, Steven Bradbury testified before the Senate Armed Service Committee on July 11, 2006, in serious manifest error, that "[u]nder the law of war . . . the president is always right" – *but see* Chapter Five, note 3); R. Jeffrey Smith & Jonathan Weisman, *Policy Rewrite Rift in Administration; Top Officials Split on Treatment of Detainees*, Wash. Post, July 14, 2006, at A4 ("the Justice Department and the Pentagon have offered starkly different accounts of the administration's" stance after the *Hamdan* ruling); Andrew Zajac, *Gonzales Takes Issue with Justices' Detainee Ruling*, Chicago Trib., July 14, 2006, at C28 (Gonzales "took issue . . . that al Qaeda combatants were covered by . . . Common Article 3"). *See also supra* note 22 (President Bush stated that the CIA program will continue).

135. U.S. Dep't Defense, Directive No. 2310.01E (Sept. 5, 2006), para. 2.2, available at: http://www.defenselink.mil/pubs/pdfs/Detainee_Prgm_Dir_2310_9–5-06.pdf.

136. *Id.* para. 4.1.

137. *Id.* para. 4.2.

138. *Id.* para. 4.4. "Applicable law," of course, requires that there be no disappearance of detainees. *See supra* notes 15, 43, 45.
139. U.S. Dep't of Army, Field Manual No. 2-22.3, Human Intelligence Collector Operations (6 September 2006), available at: http://www.army.mil/references/FM2-22.3.pdf.
140. *Id.* at vii.
141. Concerning previous authorizations, *see, e.g.*, *supra* notes 1, 4–5, 7, 15–22, 26–27, 35–37.
142. *See, e.g.*, Stephen J. Hedges, *U.S. Revises Rules for Detainees; Treatment Will Follow Geneva Conventions*, Chicago Trib., Sept. 7, 2006, at C13; Josh White, *New Army Manual Recalls Abuse*, Wash. Post, Sept. 9, 2006, at A8. The manual retained sixteen tactics previously set forth in a 1992 manual and added three: good-cop/bad-cop, interrogator portraying self as someone from another country, and "separation" unless the detainee is a prisoner of war.
143. Title X of the Department of Defense Appropriations Act, "Detainee Treatment Act of 2005," § 1003(d), Public Law 109–48, 119 Stat. 2680 (Dec. 30, 2005).
144. *Id.* § 1003(a) ("In general.– No individual in the custody or under the control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.").
145. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 43, preamble (recognizing "the obligation of States under the [U.N.] Charter, in particular, Article 55, to promote *universal* respect for, and *observance* of, human rights"; "[h]aving regard to Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one may be subjected to torture or to cruel, inhuman or degrading treatment or punishment"; and "[d]esiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment . . . *throughout the world*" (emphasis added)), arts. 1 (torture under the treaty is proscribed whenever it is "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity," *e.g.*, whether or not victims are actually in U.S. custody or control), 2(1) (state duty exists without limitations to "prevent acts of torture in any territory under its jurisdiction" and, thus, whether or not victims are in U.S. territory and whether or not victims within territory subject to U.S. jurisdiction are in U.S. custody or control), 4(1) ("an act by any person which constitutes complicity or participation in torture" is covered and, thus, whether or not victims are within territory subject to U.S. jurisdiction or are in U.S. custody or control), 5(1)(a) (whenever "the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that state"), 5(2) (duty to exercise criminal jurisdiction when any "alleged offender is present in any territory under its jurisdiction" and, thus, regardless of the nationality of the perpetrator or place of the crime), 16 (duty to "prevent in any territory under its jurisdiction"); U.N. CAT Report, *supra* note 1, at paras. 14 ("in any territory under its jurisdiction"), 15 ("'territory under [the State party's] jurisdiction' (articles 2, 5, 13, 16) . . . includes all areas under the *de facto* effective control of the State party, by whichever military or civil authorities such control is exercised" and "the provisions of the Convention

expressed as applicable to 'territory under the State party's jurisdiction' apply to, and are fully enjoyed by, all persons under the effective control of its authorities, of whichever type, wherever located in the world"), 17 ("any secret detention facility under its *de facto* effective control"), 18 ("prohibit and prevent enforced disappearance in any territory under its jurisdiction, and prosecute and punish perpetrators, as this practice constitutes, *per se*, a violation of the Convention"), 20 (contrary to the claim of the Bush administration that Article 3 of the Convention does not extend to persons detained outside the United States, the United States "should apply the *nonrefoulement* guarantee to all detainees in its custody, cease rendition of suspects, in particular by its intelligence agencies, to States where they face a real risk of torture, in order to comply with its obligations under article 3 of the Convention" and the United States "should always ensure that suspects have the possibility to challenge decisions of *refoulement*"), 24 ("in all places of detention under its *de facto* effective control"), 26 ("in any territory under its jurisdiction").

With respect to the prohibition of transfer or extradition of any person to another country where there is a real risk that the person will be subject to torture, cruel, inhuman or degrading treatment, or violations of human rights more generally, *see, e.g.*, Council of Europe, Parliamentary Assembly, Res. 1433, *supra* note 1, at para. 7(vii) ("the United States has, by practising 'rendition' (removal of persons to other countries, without judicial supervision, for purposes such as interrogation or detention), allowed detainees to be subjected to torture and to cruel, inhuman or degrading treatment, in violation of the prohibition on *non-refoulement.*"); U.N. Experts' Report, *supra* note 1, at para. 55 ("the United States practice of 'extraordinary rendition' constitutes a violation of article 3 of the Convention against Torture and article 7 of ICCPR"); Bader and others v. Sweden, ECHR 2005-II, No. 13284/04, para. 29 ("an alien must not be sent to a country where there are reasonable grounds for believing that he or she would be in danger of suffering capital or corporal punishment or of being subjected to torture or other inhuman or degrading treatment or punishment."); Chahal v. United Kingdom, 1996-V Eur. Ct. H.R. 1831, 1832 (15 Nov. 1996); The Soering Case, 161 Eur. Ct. H.R. (ser. A), at 34–36, 44 (1989); *supra* notes 15, 43, 45, 74, 84.

146. *See supra* note 59.

147. S*ee, e.g.*, Weinberger v. Rossi, 456 U.S. 25, 35 (1982) ("congressional expression [to override is] necessary"); Cook v. United States, 288 U.S. 102, 120 (1933) (purpose to override or modify must be "clearly expressed"); Cheung Sum Shee v. Nagle, 268 U.S. 336, 345–46 (1925) (the "Act must be construed with the view to preserve treaty rights unless clearly annulled, and we cannot conclude . . . a congressional intent absolutely to exclude"); United States v. Lee Yen Tai, 185 U.S. 213, 221 (1902) ("purpose . . . must appear clearly and distinctly from the words used" by Congress); Paust, *supra* note 40, at 99, 107, 120, 124–25 nn.2–3, and other cases cited; *see also* Spector v. Norwegian Cruise Line, Ltd., 545 U.S. 119, 142 (2005) (Ginsburg, J., concurring). In any event, the rights and duties remain at the international level, as inconsistent domestic law is not an excuse. *See, e.g.*, Vienna Convention, *supra* note 40, art. 27 (a party to a treaty "may not invoke the provisions of its internal law as justification for its failure to perform a treaty"); Paust, *supra* note 40, at 126–27 n.4, 306–08 n.547, 422, 435–38, 445; O'Connell, *supra* note 1, at 1235 n.13;

Principles of the Nuremberg Charter and Judgment, principle II ("internal law . . . does not relieve the person . . . from responsibility"), formulated by the International Law Commission and adopted by U.N. G.A. Res. 177 (II)(a), 5 U.N. GAOR, Supp. No. 12, at 11–14, para. 99, U.N. Doc. A/1316 (1950); 9 Op. Att'y Gen. 356, 357 (1859). Moreover, the 2006 Security Council resolution noted above (*supra* notes 48–50) is subsequent in time to the 2005 Appropriations Act and as part of U.S. treaty law would prevail in case of an unavoidable clash. *See generally* Paust, *supra* note 40, at 460, 480–81 n.62.

148. *See, e.g.*, Paust, *supra* note 40, at 104–05, 137–39 nn.40–49, and Supreme Court cases cited.

149. *See, e.g.*, *id.* at 106–07, 141–42 nn.53–57 (concerning recognitions of Justices Chase, Field, and Sutherland that the laws of war must prevail over inconsistent congressional legislation); 11 Op. Att'y Gen. 297, 299–300 (1865) ("Congress may define those laws, but cannot abrogate them . . . the laws of war . . . are of binding force upon the departments and citizens of the Government. . . . [War] must be carried on according to the known laws and usages of war. . . . Congress cannot abrogate them or authorize their infraction. The Constitution does not permit this Government to prosecute a war" in violation of the laws of war and "the citizen and the soldier are bound"); *see also* 9 Op. Att'y Gen. 356, 362–63 (1850) (the law of nations "must be paramount to local law in every question where local laws are in conflict [and] what you [the President] will do must of course depend upon the law of our own country, as controlled and modified by the law of nations."); Paust, *supra* note 40, at 7–9, 67–70, 169–73, 175, 488–89, 493–94 (the Executive is bound by international law, especially the laws of war); Jordan J. Paust, *International Law Before the Supreme Court: A Mixed Record of Recognition*, 45 Santa Clara L. Rev. 829, 839–40 n.53 (2005) [hereinafter Paust, *Before the Supreme Court*] (unanimous views of the Founders and uniform case law and judicial recognitions assure that all within the Executive branch are bound by the laws of war); Chapter One, Section E. In view of the singular importance of compliance with the laws of war during an armed conflict (as opposed, for example, to a trade agreement), such a recognized primacy of the laws of war is also logical and policy-serving. Another reason for interpreting the legislation consistently with the laws of war is that it is a war crime for any person (including congresspersons and judges) "[t]o declare abolished, suspended, or inadmissible in a Court of law the rights . . . of the nationals of the hostile party." Hague Convention No. IV Respecting the Laws and Customs of War on Land, Annex, art. 23(h), 36 Stat. 2277, T.S. No. 539 (18 Oct. 1907).

Because rights and duties under the customary laws of war prevail, all persons within the Executive branch are bound to comply with the laws of war as opposed to subsequent legislation that is even unavoidably inconsistent and based in a clear and unequivocal expression of congressional intent to override. By not violating the laws of war, the Executive duty faithfully to execute the laws is complied with, but one set of laws has primacy over another.

150. *See, e.g.*, The War Crimes Act, 18 U.S.C. § 2441 (regarding prosecution of certain war crimes committed by any person, civilian or military); 10 U.S.C. § 818 (incorporating all war crimes by reference as offenses against the laws of the U.S.), as supplemented to provide federal district court jurisdiction by 18 U.S.C. § 3231

(*see* Paust, *supra* note 1, at 824 n.47); the Antiterrorism Act, 18 U.S.C. §§ 2331–2333 (regarding criminal and civil sanctions for certain acts against U.S. national victims); 18 U.S.C. §§ 2340–2340A (regarding torture); the Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3261 (regarding certain civilians employed by or accompanying U.S. military forces abroad); 10 U.S.C. §§ 881, 892–893, 920, 925, 928, 934 (regarding courts-martial jurisdiction over offenses such as assault, dereliction of duty, cruelty and maltreatment, rape, sodomy, indecent acts with another, etc.); the Torture Victim Protection Act, Public Law 102–256, 106 Stat. 73 (1992) (regarding civil sanctions against certain persons for torture or extrajudicial killing); the Alien Tort Claims Act (or Alien Tort Statute), 28 U.S.C. § 1350 (regarding a tort in violation of customary international law or a treaty of the United States); Paust, *supra* note 1, at 852–55.

It is also of interest that the President's pardon power is expressly limited to the pardoning of "Offenses against the United States" as such (U.S. Const., art. II, § 2, cl. 1) as opposed to all offenses against the laws of the United States. Thus, it does not appear to reach violations of the customary law of nations or multilateral treaties as such (which are offenses against the international community) or offenses under the laws of the United States that incorporate international law by reference. *See, e.g.*, Jordan J. Paust, *Contragate and the Invalidity of Pardons for Violations of International Law*, 10 Hous. J. Int'l L. 51 (1987). Moreover, an attempt to provide immunity for international crimes in new legislation would have no binding legal effect outside the United States. *See, e.g.*, Paust, Bassiouni, *et al.*, *supra* note 50, at 30, 34, 127–28, 133–34; Principles of the Nuremberg Charter and Judgment, principle II, U.N. GAOR, Supp. No. 12, at 11–14, para. 99, U.N. Doc. A/1316 (1950).

151. Exec. Order No. 13107, 63 Fed. Reg. 68,991 (Dec. 10, 1998).

three. War and Enemy Status

1. *See, e.g.*, Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 Mich. J. Int'l L. 1, 5–7 & n.15 (2001) [hereinafter Paust, *Antiterrorism* No. 1] [revised in Chapter Six, Section A].
2. *See, e.g.*, Military Order of Nov. 13, 2001, 66 Fed. Reg. 57,833 §§ 1(a) (Nov. 16, 2001). This also involved adoption of the so-called war paradigm as opposed to an international criminal law enforcement paradigm.
3. *See, e.g.*, Hamdi v. Rumsfeld, 296 F.3d 278, 280, 282–83 (4th Cir. 2002); U.S. Dep't of Defense, "DOD News Briefing – Secretary Rumsfeld and Gen. Myers," January 11, 2002, available at: DefenseLINK, http://www.defenselink.mil/news/Jan2002/t01112002_t0111sd.html; Lawyers Committee for Human Rights, *A Year of Loss – Reexamining Civil Liberties since September 11* 25–28, 35 (2002), available at: http://www.lchr.org/US_law/loss/loss_report.pdf.
4. *See, e.g.*, Paust, *Antiterrorism* No. 1, *supra* note 1, at 7–8 n.15.
5. *See, e.g.*, Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 Cornell Int'l L. J. 533 (2002).
6. Concerning criteria regarding an insurgency or belligerency, *see, e.g.*, Jordan J. Paust, M. Cherif Bassiouni, Michael Scharf, *et al.*, International Criminal Law 809, 812–13, 815–16, 819, 831–32 (2d ed. 2000); The Prize Cases, 67 U.S. (2 Black)

635, 666 ("When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have committed hostilities against their former sovereign, the world acknowledges them as belligerents"), 669 ("Foreign nations acknowledge it as a war by a declaration of neutrality . . . recognizing hostilities as existing. . . . ") (1862); *see also* U.S. Dep't of Army, Pamphlet 27-161-2, 2 International Law 27 (1962) ("If the rebellious side conducts its war by guerrilla tactics it seldom achieves the status of a belligerent because it does not hold territory and it has no semblence of a government."); U.S. Dep't of Army Field Manual 27-10, The Law of Land Warfare 9, para. 11(a) (1956) ("The customary law of war becomes applicable to civil war upon recognition of the rebels as belligerents.").

7. *See also* Pan American Airways, Inc. v. Aetna Casualty & Surety Co., 505 F.2d 989, 1013–15 (2d Cir. 1974) (U.S. could not have been at war with the Popular Front for the Liberation of Palestine (PFLP), which had engaged in terrorist acts as a nonstate, nonbelligerent, noninsurgent actor). *But see* Derek Jinks, *September 11 and the Laws of War*, 28 Yale J. Int'l L. 1 (2003).
8. *See, e.g.*, Paust, *Antiterrorism* No. 1, *supra* note 1, at 7 n.15.
9. *Quoted in* Sean D. Murphy, *Contemporary Practice of the United States*, 96 Am. J. Int'l L. 461, 479 (2002) (quoting ICRC Press Release, Feb. 9, 2002).
10. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 520–21 (2004); Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 Harv. Int'l L. J. 503, 510–11 (2003) [revised in Chapter Four, Sections A–C]. The article also identifies relevant human rights law concerning arbitrary detention, the human right and Geneva law requirements of judicial review of the propriety of detention, and trends in U.S. judicial decisions.
11. *See, e.g.*, Robert K. Goldman & Brian D. Tittemore, *Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian Law and Human Rights Law* 6 (Dec. 2002), available at: http://www.asil/taskforce/goldman.pdf.
12. *See also* The Handbook of Humanitarian Law in Armed Conflict 68 (Dieter Fleck ed., 1995); Goldman & Tittemore, *supra* note 11, at 4, 6; *infra* note 17; *cf* Nathaniel Berman, *Privileging Combat: Contemporary Conflict and the Legal Construction of War*, 43 Columbia J. Transnat'l L. 1, 14 (2004) ("Engagement in combat by those not covered by the combatants' privilege . . . is not illegal *per se* under *international* law . . . [but] the contending parties are free to punish individuals engaged in such activities under their own law").

    Language in *Ex parte* Quirin, 317 U.S. 1 (1942), can create confusion. In that case, German "enemy belligerents," "who though combatants," were prosecuted for the war crime of engaging in combat activity out of uniform or perfidy (before creation of the 1949 Geneva Conventions). *See* 317 U.S. at 35–37, 44; Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 Chi. J. Int'l L. 493, 547 n.31 (2003). They were prisoners of war and enemy combatants. *Cf id.* at 30–31 ("an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war" is among those "generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the laws of war"). Yet, the Court stated that it was appropriate "to charge all the petitioners with *the offense of unlawful belligerency*." 317 U.S. at 23 (emphasis added). The Court also stated that participation in combat "without uniform" subjects the individual "to the punishment prescribed by the

law of war for unlawful belligerents." 317 U.S. at 37 ("those who participate in it without uniform"). *See also* IV Commentary, Geneva Convention Relative to the Protection of Civilian Persons in Time of War 53 (ICRC, Jean S. Pictet ed., 1958) ("irregular combatants" are "[t]hose who take part in the struggle while not belonging to the armed forces [and] are acting deliberately outside the laws of warfare." Yet, the acts are not labeled as war crimes.). Two U.S. Army JAG officers wrote recently that "the decision in *Quirin* was partly incorrect because the Court confused status with culpability. The Nazi sabatuers were rightly prosecuted for their unlawful belligerent acts, *i.e.*, their culpability, but should not have been prosecuted for merely being unlawful combatants, *i.e.*, their status." LTC Mark David Maxwell & MAJ Sean M. Watts, *"Unlawful Enemy Combatant": Status, Theory or Culpability, or Neither?*, J. Int'l Crim. Justice 1, 4 (2007), adopting the view of Professor Yoram Dinstein in Yoram Dinstein, The Law of War 96–97 (1983). In my opinion, one should state today that such persons would retain combatant and POW status, but would be subject to prosecution for perfidy in violation of the laws of war.

Like bin Laden, members of al Qaeda who engaged in armed violence during an armed conflict could be prosecuted in a federal district court for any war crime they committed in Afghanistan or Iraq or for violations of relevant extraterritorial federal statutes, assuming that the United States would have jurisdiction under customary international law principles (*e.g.*, protective and universal jurisdiction). Because it is not a war crime merely to engage in unprivileged acts of violence as an unprivileged fighter, they could not be prosecuted for such acts as "war crimes." They would not be "combatants" and would not have combatant immunity.

13. U.S. Army Judge Advocate General's School, Operational Law Handbook 12 (2002), available at: http://www.jagcnet.army.mil/JAGNETInternet/Homepages/AC/CLAMO-Public.nsf. *See also* The Prosecutor v. Kordic & Cerkez, IT-95-14/2-A (Appeals Chamber, 17 Dec. 2004), para. 51 ("members of the armed forces" are "combatants").
14. The U.S. Navy, Annotated Supplement to the Commander's Handbook of Naval Operations 296 § 5.3 (Naval War College, Int'l L. Studies vol. 73, 1999).
15. Hague Convention No. IV Respecting the Laws and Customs of War on Land (18 Oct. 1907), Annex, art. 1, 36 Stat. 2277, T. S. No. 539. *See also* Goldman & Tittemore, *supra* note 11, at 8–9; Brussels Declaration Concerning the Laws and Customs of War, art. 9 (Aug. 27, 1874) ("The laws, rights, and duties of war apply . . . to armies, . . . [and] also to militia and volunteer corps fulfilling" certain conditions), *reprinted in* 1 Supp. Am. J. Int'l L. 96 (1907).
16. Instructions for the Government of Armies of the United States in the Field, General Orders No. 100 (April 24, 1863) [hereinafter 1863 Lieber Code].
17. *Id.* art. 57. *See also id.* arts. 49 ("All soldiers, of whatever species of arms; . . . all those who are attached to the army for its efficiency and promote directly the object of the war . . . are prisoners of war"), 82 (those "who commit hostilities . . . without commission, without being part and portion of the organized hostile army, . . . are public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.").
18. 75 U.N.T.S. 135 (12 Aug. 1949) [hereinafter GPW].

19. *See, e.g.*, United States v. Noriega, 808 F. Supp. 791, 795 (S. D. Fla. 1992); George H. Aldrich, *Editorial Comment*, 96 Am. J. Int'l L. 891, 894–95 (2002); Steven R. Ratner, Jus ad Bellum *and* Jus in Bello *After September 11*, 96 Am. J. Int'l L. 905, 911 (2002); Paust, *Antiterrorism* No. 1, *supra* note 1, at 5–6 n.15. *See also* G. I. A. D. Draper, The Red Cross Conventions 52 (1958); Morris Greenspan, The Modern Law of War 58 (1959); 1 Howard S. Levie, The Code of International Armed Conflict 13–14 (1986); Richard I. Miller, The Law of war 29 (1975); Julius Stone, Legal Controls of International Conflict 654 (1973); William Winthrop, Military Law and Precedents 789 (2d ed. 1920) ("The class of persons entitled upon capture to the privileges of prisoners of war comprises members of the enemy's armies, embracing both combatants and non-combatants. . . . It should comprise also civil persons engaged in military duty or in immediate connection with an army . . . "); George H. Aldrich, *New Life for the Laws of War*, 75 Am. J. Int'l L. 764, 768–69 (1981) (GPW Article 4(A)(2) criteria apply only to certain "irregular" armed forces and "[m]embers of regular, uniformed armed forces do not lose their PW entitlements no matter what violations of the law of war their units may commit, but the guerrilla unit is held to a tougher standard . . . "). *But see* Jean-Marie Henckaerts & Louis Doswald-Beck, 1 Customary International Humanitarian Law: Rules 384 (ICRC 2005) ("Combatants must distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. If they fail to do so, they do not have the right to prisoner-of-war status.").
20. *See, e.g.*, Goldman & Tittenmore, *supra* note 11, at 2; Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure*, 23 Mich. J. Int'l L. 677, 683–85 & n.35 (2002) [revised in Chapter Six, Section B].
21. Telford Taylor, Nuremberg and Vietnam: An American Tragedy 19–20 (1970). For a more extensive list of authorities concerning combat immunity, *see, e.g.*, Paust, *supra* note 20, at 683–84 n.35; Paust, *The Right to Life in Human Rights Law and the Laws of War*, 65 Sask. L. Rev. 463, 471–72 n.44 (2002).
22. 4 Trials of War Criminals Before the Neurnberg Military Tribunals Under Control Council Law No. 10, at 1 (1949).
23. *Id.* at 492–93. *See also* United States v. List, 11 Trials of War Criminals Before the Neurnberg Military Tribunals Under Control Council Law No. 10, at 757, 1236, 1246 (1950); *In re* Yamashita, 327 U.S. 1, 47 (1946) (Rutledge, J., dissenting) ("we have no question here of what the military might have done in a field of combat. . . . The purpose of battle is to kill."); United States v. Noriega, 746 F. Supp. 1506, 1529 (S. D. Fla. 1990) ("the essential purpose of" GPW "is to protect prisoners of war from prosecution for conduct which is customary in armed conflict"); United States v. Calley, 22 C. M. A. 534, 540 (1973); Arce v. State, 202 S. W. 951, 953 (Tex. Crim. App. 1918) (four soldiers under command of the *de facto* government of Mexico who killed a U.S. Army corporal during hostilities could not be lawfully prosecuted for such conduct); 1863 Lieber Code, *supra* note 16, arts. 49, 56–57.
24. 317 U.S. 1 (1942).
25. *Id.* at 36 ("the offense of unlawful belligerency"). *Cf supra* note 12.
26. *Id.* at 24–25, 31 ("offenders against the laws of war"), 37–38 ("those who participated in it without uniform").

27. *Id.* at 35 ("who though combatants").
28. *Id.* at 44.
29. *Id.* at 37 ("[i]t subjects those who participate in it" to prosecution).
30. *Id.* at 24–25.
31. *Id.* at 27.
32. *See, e.g.*, Paust, *supra* note 10 [revised in Chapter Four].
33. Insurgents during an armed conflict not of an international character to which merely common Article 3 applies (and perhaps Protocol II to the Geneva Conventions and certain other customary laws of war) presently have no right to POW status or combat immunity. Curiously, the Bush pretense of "war" against al Qaeda as such and "terrorism" might require such a status and immunity for those who do not even have the status of insurgents under the laws of war. This would not be a preferable result.

    An interesting argument has been made to change the laws of war and provide partial combatant immunity as an incentive to insurgents who wear distinguishing uniforms or insignia during fighting. *See, e.g.*, Eric Talbot Jensen, *Combatant Status: It Is Time for Intermediate Levels of Recognition for Partial Compliance*, 46 Va. J. Int'l L. 209 (2005). Yet, an insurgent, like a person of any status, who violates the laws of war can be prosecuted for war crimes.
34. Article 4(A)(1) and (3) of the GPW states: "A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy: (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces. . . . (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power." *Expressum facit cessare tacitum* (something expressed nullifies what is unexpressed). Only 4(A)(2) contains the four limitations. *Specialia generalibus derogant* (special words derogate from general words). *See, e.g.*, Paust, *Antiterrorism* No. 1, *supra* note 1, at 5–8 n.15. *See also* II-A Final Record of the Diplomatic Conference of Geneva of 1949 at 466–67 (GPW Article 4(A)(2) requirements were purposely not adopted for 4(A)(1) and (3) categories) *supra* note 19. Changing 4(A)(1) and 4(A)(3) to add a requirement that the armed forces generally follow the laws of war or a member will lose POW status (and combatant immunity) would be to adopt a system of collective punishment and might serve as a disincentive for particular members to follow the laws of war. Those members who violate the laws of war are already subject to prosecution and universal jurisdiction for purposes of prosecution and extradition.
35. *See, e.g.*, Henry J. Kenny, *Mission: Free the oppressed; U.S. commandos have special skills – and philosophy*, Chicago Tribune, Sept. 29, 2002, at C3 (wearing "beards, riding donkeys into combat"); Max Blenkin, *SAS troops are the mountain phantoms – war on terror*, The Daily Telegraph (Sydney), Sept. 21, at 10; Ian Bruce, *US Soldiers Ordered to Lose Beards*, The Herald (Glasgow), Sept. 16, 2002, at 11 ("beards and adopted local dress to allow them to blend in on undercover missions"); James Brooke, *Pentagon Tells Troops in Afghanistan: Shape Up and Dress Right*, N.Y. Times, Sept. 12, 2002, at B21 ("growing beards and donning local garb in an effort to blend in with the local people and their surroundings"); Glenn Mitchell, *Bin Laden Bolts After Surrender*, Herald Sun, Dec. 13, 2001, at 15 ("convoy

of five trucks carried US troops wearing Afghan dress"); The Austin American Statesman, Dec. 12, 2001, at A1 (same); The Wash. Post, Dec. 12, 2001, at A1 (same); Michael R. Gordon, *Securing Base, U.S. Makes Its Brawn Blend In*, N.Y. Times, Dec. 3, 2001, at B1 ("the soldiers wear Afghan clothing").

36. *See, e.g.*, Calley v. Callaway, 519 F.2d 184 (5th Cir. 1975).
37. Public Law No. 109–366, 109th Cong., 2d sess., 120 Stat. 2600 (2006).
38. *Id.* Section 3(a)(1), adding § 948a (1) and (2) to title 10 of the U.S. Code.
39. *See, e.g.*, Bas v. Tingy, 4 U.S. (4 Dall.) 37, 40–42(1800) (Washington, J.) (the word "enemy" applies to "a state of war . . . between two nations" or "hostilities" and "combating" between them); *id.*, 4 U.S. (4 Dall.) at 42–45 (Chase, J.) (because "war" existed, "France was an enemy"); *id.*, 4 U.S. (4 Dall.) at 45–46 (Peterson, J.) (U.S. and France were in a "qualified state of hostility" or "war" and, thus, "the term 'enemy,' applies"); Abraham D. Sofaer, Legal Advisor, U.S. Dep't of State, statement in *War Powers, Libya, and State-Sponsored Terrorism: Hearing Before the House Subcomm. on Arms Control, International Security and Science of the House Comm. on Foreign Affairs*, 99th Cong. 6–7 ("where no confrontation is expected between our units and forces of another state [during efforts to capture non-state "terrorists"] . . . such units can reasonably be distinguished from 'forces equipped for combat.' And their actions against terrorists differ greatly from the 'hostilities' contemplated by the [War Powers] Resolution."). *See also supra* note 7 (cannot be at "war" with a nonstate, nonbelligerent, noninsurgent actor).

    Additionally, one uses international law as a background for interpretation of federal statutes. *See, e.g.*, Jordan J. Paust, International Law as Law of the United States 70, 99, 120, 124–25 n.2 (2d ed. 2003), and cases cited. Thus, limitation of the reach of terms such as enemy, combatant, and hostilities under international law to circumstances of actual armed conflict is significant with respect to the proper meaning of § 948a.
40. *Supra* note 37, § 948a (1)(i), identifying the first type of "unlawful enemy combatant" as "a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces)." The phrase "associated forces" is ambiguous. Does it include Pakistani military units who reportedly fought alongside the Taliban as U.S. forces went into Afghanistan? *See* Paust, *supra* note 5, at 543 n.36.
41. *See, e.g.*, *supra* note 39.
42. *Supra* note 37, § 948a (1)(i), which reads: "who is not a lawful enemy combatant (including a person who is part of the Taliban . . .)." One might read the subsection to include "a person who is part of the Taliban" as an "unlawful enemy combatant," but this is not clear.
43. *See* Sections C–E *supra*. It would seem to be rare, but a "member" of al Qaeda could also be entitled to prisoner of war status if, for example, such person was also a member of the regular armed forces of the Taliban or a militia or volunteer force attached to a unit of the Taliban. *See* GPW, *supra* note 18, art. 4(A)(1).
44. *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 479–80 (D.D.C. 2005). *But see* John Yoo, War by Other Means 39 (2006) (regarding erroneous advice of the OLC that the President could engage in sweeping denials of status).

45. *See* Chapter Five, Section D.
46. Would the word "regular" preclude coverage of a person in the reserves who is called to active duty? GPW 4(A)(1) covers all members of the armed forces.
47. *See, e.g.*, Paust, *supra* note 39, at 99, 120, 124–25 n.2, and cases cited.
48. *Supra* note 37, § 948c. *But see id.* § 948b (a) ("military commissions to try alien unlawful enemy combatants *engaged in hostilities*") (emphasis added).
49. *See* GPW, *supra* note 18, art. 102.
50. *See* Chapter Six, Section A.
51. *See* Chapter Five, Section D.
52. *See also* Dan Eggen, *Justice Department's Brief On Detention Policy Draws Ire*, Wash. Post, Nov. 15, 2006, at A3 (In a motion before the Fourth Circuit, the Executive claimed a power to detain any foreign national arrested in the U.S. who is declared to be an "enemy combatant.").
53. *See also* Chapter Four.
54. *See* Chapter Four, Section B.
55. *See* United States v. Curtiss-Wright Export Corporation, 299 U.S. 304 (1936).
56. 355 F. Supp. 2d 443 (D.D.C. 2005).
57. 355 F. Supp. 2d at 445.
58. Rasul v. Bush, 542 U.S. 466 (2004), addressed in Chapter Four, Section E.2.
59. 355 F. Supp. 2d at 454. Concerning this point, *see also* Chapter Six, Section A, also addressing the fact that in any event various treaties require equality of treatment and equal protection.
60. Hamdi v. Rumsfeld, 542 U.S. 507 (2004), addressed in Chapter Four, Section E.2.
61. 355 F. Supp. 2d at 467.
62. *Id.*
63. *Id.*
64. *Id.* at 475.
65. *Id.*
66. *See also* Mark A. Drumbl, *Guantanamo*, Rasul, *and the Twilight of Law*, 53 Drake L. Rev. 897, 908 (2005) ("absurdly glorifying terrorism as armed conflict and terrorists as 'warriors'").

four. Judicial Power to Determine the Status and Rights of Persons Detained Without Trial

1. The Federalist No. 84, at 533 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961), also *quoting* William Blackstone: "'To bereave a man of life . . . without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny . . . ; but confinement of the person, by secretly hurrying him to jail, . . . is a less public, a less striking, and therefore a *more dangerous engine* of arbitrary government.'" *Id. quoting* 4 William Blackstone, Commentaries 438.
2. *See* John Hendren, *Alleged Bomb Plotter to be Held Indefinitely, Pentagon Says*, L.A. Times, June 11, 2002, at A18; Dana Priest, *U.S. Decries Abuse but Defends Interrogations*, Wash. Post, Dec. 26, 2002, at A1.
3. *See, e.g.*, Hamdi v. Rumsfeld, 296 F.3d 278, 280, 282–83 (4th Cir. 2002); U.S. Dep't of Defense, "DOD News Briefing – Secretary Rumsfeld and Gen. Myers," January 11,

2002, available at: DefenseLINK, http://www.defenselink.mil/news/Jan2002/t01112002_t0111sd.html. *See also* Lawyers Committee for Human Rights, *A Year of Loss – Reexamining Civil Liberties since September 11* 25–28, 35 (2002) [hereinafter Lawyers Committee Report], available at: http://www.lchr.org/ US_law/loss/loss_report.pdf; Chapter Three.

4. *See, e.g.*, Hamdi v. Rumsfeld, 296 F.3d at 283 ("In its brief before this court, the government asserts that 'given the [supposed] constitutionally limited role of the courts in reviewing military decisions, courts may not second-guess the military's determination that an individual is an enemy combatant and should be detained as such.' The government thus submits that we may not review at all its designation of an American citizen as an enemy combatant – that its determinations on this score are the first and final word."); Respondents' Response to, and Motion to Dismiss, the Petition for a Writ of Habeas Corpus, *Hamdi*, 296 F.3d at 16 ("a court's proper role . . . would be to confirm that there is a factual basis supporting the military's determination that the detainee is an enemy combatant. This return and the accompanying declaration more than satisfy that standard of review."); *id.* at 18 ("the military's determination . . . should be respected by the courts as long as the military shows some evidence for that determination"); David Cole, *Enemy Aliens*, 54 Stan. L. Rev. 953, 960–65 (2002); Lawyers Committee Report, *supra* note 3, at 31–39; Amnesty International Press Release, USA: one year on – the legal limbo of the Guantanamo detainees continues (Feb. 14, 2003), available at: http://web.amnesty.org/ai.nsf/Index/AMR510022003?OpenDocument&of=THEMES \ DET (noting that there are more than six hundred detainees from at least forty countries being detained at Guantanamo Bay, Cuba without trial or access to attorneys or courts); Chapter Three.

Even after losing *Hamdi*, the "government . . . argued that the district court [for the District of Columbia] had no authority to issue injunctive relief [for a U.S. citizen detained by U.S. military in Iraq who was to be transferred to Iraqi authorities] because doing so would 'inject [the court] into an exclusive Executive function' and . . . [would raise] 'non-justiciable political questions.'" *See* Omar v. Harvey, 479F3d1, 10 (D.C. Cir. 2007). The Circuit Court panel disagreed: "The Supreme Court's recent decision in *Hamdi* makes abundantly clear that Omar's challenge to his detention is justiciable" and that his "challenge to his transfer is equally justiciable." *Id.* at 10. The panel in *Omar* also noted that the Executive had argued in *Hamdi* that "'[a] commander's wartime determination that an individual is an enemy combatant . . . is a quintessentially military judgment representing a core exercise of the Commander-in-Chief authority.' Br. For the Resp'ts at 25, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03-6696). [But u]nequivocally rejecting this contention, the *Hamdi* plurality explained that 'it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.' *Hamdi*, 542 U.S. at 535." *Id.* at 10. "Resolving . . . questions of constitutional law," the *Omar* court added, "will require no judicial intrusion into the exclusive domain of the political branches. To be sure, a decision on the merits might well have *implications* for military and foreign policy, but that alone hardly makes the issue non-justiciable." *Id.* at 10 (emphasis in original).

5. Thus, human rights law applies during an armed conflict. *See, e.g.*, Advisory Opinion, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. paras. 105–06; Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 239, para. 25 ("the protection of the International Covenant of Civil and Political Rights does not cease in times of war"), *reprinted in* 35 I.L. M. 809, 820 (1996); U.N. Human Rights Comm., General Comment No. 29, paras. 3, 9, 11 & n.6, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 119 (1866), *quoted* at text *infra* note 84; Kadic v. Karadzic, 70 F.3d 232, 242–44 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996); Johann Bluntschli on the Law of War and Neutrality – A Translation from His Code of International Law 15, para. 24 (Francis Lieber trans.) (U.S. Army TJAG School library) ("Human rights remain in force during war."); Thomas Buergenthal, Dinah Shelton, & David Stewart, International Human Rights 331–32 (3d ed. 2002); Francisco Forrest Martin, *Using International Human Rights Law for Establishing a Unified Use of Force Rule in the Law of Armed Conflict*, 64 Sask. L. Rev. 347, 386–87 (2001), also *quoting* Coard v. United States, Case No. 10.951, Inter-Am. Comm. H.R., Report No. 109/99, at para. 39 (1999); Jordan J. Paust & Albert P. Blaustein, *War Crimes Jurisdiction and Due Process: The Bangladesh Experience*, 11 Vand. J. Trans. L. 1, 17–18 (1978); Jordan J. Paust, *Suing Saddam: Private Remedies for War Crimes and Hostage-Taking*, 31 Va. J. Int'l L. 351, 357 & n.27 (1991); *see also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 72 ("human rights during international armed conflict"), 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), preamble, 1125 U.N.T.S. 609; Second Optional Protocol, Aiming at the Abolition of the Death Penalty, art. 2 ("in time of war"), U.N. G.A. Res. 44/128, 44 U.N. GAOR, Supp. No. 49, at 206, U.N. Doc. A/44/49 (1989); American Convention on Human Rights, art. 27(1) ("In time of war"), 1144 U.N.T.S. 123, O.A.S. Treaty Ser. No. 36 (1969); European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 15(1) ("In time of war"), (2) ("lawful acts of war"), 213 U.N.T.S. 221, Eur. T.S. No. 5 (1950); Protocol to the American Convention on Human Rights to Abolish the Death Penalty, art. 2 ("in wartime"), 8 June 1990, O.A. S.T. S. No. 73, O.A. S.G. A. Res. 1042, 20th Sess.; Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2 ("in time of war"), Eur. T.S. No. 114 (1985); U.N.S.C. Res. 1199, preamble (23 Sept. 1998) ("violations of human rights and of international humanitarian law"); The Julia, 12 U.S. (8 Cranch) 181, 193 (1814) (Story, J.) ("rights of humanity" pertain in time of war); 11 Op. Att'y Gen. 19, 21 (1864) ("the most sacred questions of human rights" are at stake concerning wartime courts-martial). Additionally, there is no general war-context exception to human rights duties contained in major human rights instruments. *See, e.g.*, U.N. Charter, arts. 55(c), 56; Charter of the Organization of American States, art. 17 (states "shall respect the rights of the individual"), O.A. S.T. S. Nos. 1-C and 61 (1948); *infra* note 6.
6. *See, e.g.*, International Covenant on Civil and Political Rights, art. 9(1), 999 U.N.T.S. 171 (1966) [hereinafter ICCPR]; American Convention on Human Rights, *supra*

note 5, art. 7(1)-(3); African Charter on Human and Peoples' Rights, art. 6, O.A. U. Doc. CAB/LEG/67/3 Rev. 5 (1981); European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 4, art. 5(1); Universal Declaration of Human Rights, art. 9, U.N.G.A. Res. 217A, 3 U.N. GAOR, U.N. Doc. A/810, at 71 (1948); Helen Cook, *Preventive Detention – International Standards and the Protection of the Individual*, in PREVENTIVE DETENTION – A COMPARATIVE AND INTERNATIONAL PERSPECTIVE 1, 8 & n.17 (Stanislaw Frankowski & Dinah Shelton eds., 1992) (nonarbitrary detention must be "reasonable in all the circumstances"), *citing* H.R. Comm. Communication No. 305/1988, HRC Report 1990, Annex IX; Kim Ho Ma v. Ashcroft, 257 F.3d 1095, 1114 (9th Cir. 2001); Ma v. Reno, 208 F.3d 815, 830 (9th Cir. 2000); Martinez v. City of Los Angeles, 141 F.3d 1373, 1384 (9th Cir. 1992); De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1397 (5th Cir. 1985); Tachiona v. Mugabe, 216 F. Supp. 2d 262, 279–80 (S.D. N.Y. 2002); Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1328–29, 1344, 1349–50, 1352, 1357–58, 1360 (N.D. Ga. 2002); Wiwa v. Royal Dutch Petroleum Co., 2002 WL 319887, *6 (S.D. N.Y. Feb. 28, 2002); Xuncax v. Gramajo, 886 F. Supp. 162, 184 (D. Mass. 1995); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1538, 1541 (N.D. Cal. 1987); Rodriguez-Fernandez v. Wilkinson, 505 F. Supp. 787, 798 (D. Kan. 1980). *See also* RICHARD B. LILLICH & HURST HANNUM, INTERNATIONAL HUMAN RIGHTS 136 (3d ed. 1995) (U.S. recognizes that Article 9 of the Universal Declaration is one of several articles reflecting customary international law of universal application, *citing* Memorial of the United States (U.S. v. Iran) 1980 I.C. J. Pleadings (Case Concerning United States Diplomatic and Consular Staff in Tehran) 182 n.36); International Law Commission, 1996 Draft Code of Crimes Against the Peace and Security of Mankind, art. 18(h) (arbitrary imprisonment is a crime against humanity), 2 Y.B. Int'l L. Comm'n., U.N. Doc. A/48/10 (1996). Article 5(1) of the European Convention sets forth a more restrictive standard tied to a list of six circumstances when detention is lawful. Article 5(1)(c) requires "reasonable suspicion of having committed an offence" or the circumstance that "it is reasonably considered necessary to prevent" the detained person from "committing an offence or fleeing after having done so." *See* Murray v. United Kingdom, 300-A Eur. Ct. H.R., Ser. A (1994), 19 E.H. R.R. 193 (1995); Fox, Campbell, and Hartley v. United Kingdom, 182 Eur. Ct. H.R., Ser. A (1990); FRANCISCO FORREST MARTIN, *ET AL.*, INTERNATIONAL HUMAN RIGHTS LAW & PRACTICE 466–89 (1997).

The customary and treaty-based human right to freedom from arbitrary detention is not one that applies merely within a state's own territory. Not one of the human rights instruments cited here or in note 5, *supra*, sets forth such a limitation and the right applies wherever a state exercises its jurisdiction or control over a person. *See also* Chapters One and Two.

7. International Covenant, *supra* note 6, art. 9(1).
8. *Id.* Similar provisions exist in other human rights instruments. *See, e.g.*, American Convention, *supra* note 5, art. 7(2); African Charter, *supra* note 6, art. 6; European Convention, *supra* note 5, art. 5(1).
9. The need to accommodate interests of others is also reflected indirectly in Article 5(1) of the International Covenant, which states that nothing in the Covenant "may be interpreted as implying for any . . . group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and

freedoms recognized herein or at their limitation . . . " ICCPR, *supra* note 6, art. 5(1). *See also* American Convention, *supra* note 5, art. 32(2); African Charter, *supra* note 6, art. 27; European Convention, *supra* note 5, art. 17.

10. Although not addressing international law as such, dicta in U.S. cases recognize that governmental or national interests in security should also be weighed by the judiciary. *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 696 (2001) ("terrorism or other special circumstances" might allow "special arguments . . . [to] be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security," but detention of an alien awaiting deportation must be limited to time reasonably necessary to secure removal of the alien and not beyond six months. Yet, "[f]reedom . . . – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that" is protected by the Fifth Amendment. *Id.* at 690); United States v. Salerno, 481 U.S. 739, 748 (1987) ("Even outside the exigencies of war, we have found that sufficiently compelling governmental interests can justify detention of dangerous persons" so long as the government has met its burden of justification "by clear and convincing evidence." *Id.* at 750–52). The fact that various interests have to be weighed in context refutes the idea that decisions of the Executive branch in the interest of national security must be determinative.
11. *See* ICCPR, *supra* note 6, art. 9(4). Similar provisions exist in other human rights instruments. *See, e.g.*, American Convention, *supra* note 5, art. 7(5)–(6); African Charter, *supra* note 6, art. 7(1); European Convention, *supra* note 5, art. 5(3)–(4); Universal Declaration, *supra* note 6, arts. 8, 10; American Declaration of the Rights and Duties of Man, arts. XVIII, XXV, XXVI, O.A. S. Res. XXX (1948), O.A. S. Off. Rec. OEA/ser.L./V./I.4, rev. (1965); Velasquez Rodriguez Case, Judgment, Inter-Am. Ct. Hum. Rts. (Ser. C, No. 4), para. 186 (29 July 1988) (victim suffered "arbitrary detention, which deprived him of his physical liberty without legal cause and without a determination of the lawfulness of his detention by a judge or competent tribunal."); H.R. Comm., General Comment No. 8, para. 4, Report of the Human Rights Comm., U.N. GAOR, 37th Sess., Supp. No. 40, Annex 5, at 95 (1982) ("if so-called preventive detention is used, for reasons of public security, . . . it must not be arbitrary, . . . information of the reasons must be given . . . and court control of the detention must be available") (1982). If a detainee is also "arrested," the detainee has additional rights. *See, e.g.*, ICCPR, *supra* note 6, art. 9(2)–(3). Moreover, review by a military commission will not comply with the requirements of judicial review. *See generally infra* notes 13–15, 18–22.
12. *See* ICCPR, *supra* note 6, art. 14(1) ("everyone shall be entitled to a fair . . . hearing by a competent, independent and impartial tribunal").
13. General Comment No. 29, *supra* note 5, paras. 11, 15–16; H.R. Comm., General Comment No. 13, paras. 1–4, 39 U.N. GAOR, Supp. No. 40, at 143, U.N. Doc. A/39/40 (Twenty-first sess. 1984); H.R. Comm., General Comment No. 15, paras. 1–2, 7, 41 U.N. GAOR, Supp. No. 40, Annex VI, at 117, U.N. Doc. A/41/40 (Twenty-third sess. 22 July 1986); H.R. Comm., General Comment No. 20, para. 15, U.N. Doc. CCPR/C/21/Rev.1/Add.3 (7 April 1992); H.R. Comm., General Comment No. 24, paras. 8, 11–12, U.N. Doc. CCPR/C/21/Rev. 1/Add.6 (2 Nov. 1994). *See also* Dubai Petroleum Co., *et al.* v. Kazi, 12 S.W.3d 71, 82 (Tex. 2000) ("The Covenant not only guarantees foreign citizens equal treatment in the signatorie's courts, but also guarantees them equal access to these courts"); Jordan J. Paust, International

Law as Law of the United States 75 n.97, 198–203, 262 n.483, 256–72 nn.468–527, 362, 375–76, *passim* (1996) (citing numerous cases).

14. *See* ICCPR, *supra* note 6, art. 4(1)–(2).
15. The customary prohibition against "denial or justice" to aliens generally requires that aliens have access to courts and the right to an effective remedy. *See, e.g.*, Restatement of the Foreign Relations Law of the United States § 711 and cmts. a-c, h, RN 2 (3d ed. 1987); Paust, *supra* note 13, at 199, 259–61 n.481 (and cases cited), 290.
16. *See* ICCPR, *supra* note 6, art. 4(1). Similar provisions exist in other human rights instruments. *See, e.g.*, American Convention, *supra* note 5, art. 27(1); European Convention, *supra* note 5, art. 15(1). Equal protection and the norm of nondiscrimination are also standard in major human rights instruments. *See, e.g.*, ICCPR, *supra* note 6, arts. 2(1), 14(1) and (3), 26; American Convention, *supra* note 5, arts. 1(1), 24, 27(1).
17. *See* General Comment No. 29, *supra* note 5, para. 11; General Comment No. 24, *supra* note 13, para. 16. *See also* Restatement, *supra* note 15, § 702(e) and cmts. a, n, and RN 6 (customary *jus cogens* prohibition); Paust, *supra* note 13, at 375, 472. Peremptory norms *jus cogens* are far more than fundamental and preempt other more ordinary norms. *See, e.g.*, Jordan J. Paust, Jon M. Van Dyke, & Linda A. Malone, International Law and Litigation in the U.S. 61–64 (2d ed. 2005).
18. *See* General Comment No. 29, *supra* note 5, at n.9 (quoting U.N. Human Rights Comm., *Concluding Observations of the Human Rights Committee: Israel*, 63th Sess., 1694th mtg., para. 21, U.N. Doc. CCPR/C/79/Add.93 (18 Aug. 1998). Thus, human rights law requires "effective" independent, and fair judicial review. *See id.*; *supra* notes 11–13.
19. H.R. Comm., General Comment No. 29, *supra* note 5, para. 16; Amnesty International, *Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantanamo Bay* 4 & n.16, 22 & n.167 (quoting H.R. Comm., U.N. Doc. CCPR/C/79/Add.93, para. 21 (18 Aug. 1998) (a state "may not depart from the requirement of effective judicial review of detention") (Apr. 15, 2002), available at: http://web.amnesty.org/ai.nsf/Index/AMR510532002?OpenDocument&of=COUNTRIES\USA. *See also infra* note 29 (concerning review of detention when the laws of war apply).
20. *See* Advisory Opinion OC-9/87, Judicial Guarantees in States of Emergency (Arts. 27(2), 25, and 8 of the American Convention on Human Rights), Inter-Am. Ct. H.R. (Ser. A, No. 9) (6 Oct. 1987); *id.*, Advisory Opinion OC-8/87, at paras. 35, 38, 41–42, 48, Inter-Am. Ct. H.R. (Ser. A, No. 8) (30 Jan. 1987) ("habeas corpus and . . . 'amparo' are among those judicial remedies that are essential for the protection of various rights," "essential judicial guarantees necessary to guarantee" various rights); Cook, *supra* note 6, at 26; Joan Fitzpatrick, Human Rights in Crisis – The International System for Protecting Rights During States of Emergency 45–46 & n.74 (1994). The Human Rights Committee also expressly affirmed "that the right to habeas corpus and amparo should not be limited." General Comment No. 29, *supra* note 5, at n.9.
21. *See* Castillo Petruzzi Case, Merits, Judgment, Inter-Am. Ct. H.R. (Ser. C, No. 52) (30 May 1999).
22. *See, e.g.*, Al-Nashif v. Bulgaria, App. No. 50963/94, Eur. Ct. H.R. (20 June 2002) ("everyone who is deprived of his liberty is entitled to a review of the lawfulness

of his detention by a court. . . . The . . . requirement . . . is of fundamental importance . . . to provide safeguards against arbitrariness. . . . National authorities cannot do away with effective control of lawfulness of decision by the domestic courts whenever they choose to assert that national security and terrorism are involved . . . "); Aksoy v. Turkey, 23 E.H. R. Rep. 553, 588–90 (1997); Brogan and Others v. United Kingdom, 145 Eur. Ct. H.R. (Ser. A, No. 145B) (29 Nov. 1988) ("Judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee"); Winterwerp v. The Netherlands, 33 Eur. Ct. H.R. (Ser. A, No. 33) (24 Oct. 1979) ("it is essential that the person concerned . . . should have access to a court and the opportunity to be heard"); Fitzpatrick, *supra* note 20, at 47–49; Cook, *supra* note 6, at 18; Joan Fitzpatrick, *Terrorism and Migration*, at 12 (Oct. 2002), available at: http://www.asil.org/taskforce/fitzpatrick.pdf.

23. 75 U.N.T.S. 135 [hereinafter GPW]. Membership in the armed force of a state, nation, or belligerent or in militia or volunteer corps attached thereto, is the determining criterion under GPW Article 4(A)(1) and (3). *See also* United States v. Noriega, 808 F. Supp. 791, 795 (S.D. Fla. 1992). Other requirements of having "a fixed distinctive sign recognizable at a distance," "carrying arms openly" during an attack, and generally following the laws of war expressly apply only in Article 4(A)(2), which concerns members of certain "militias and members of other volunteer corps." These requirements do not appear in 4(A)(1), which applies to "[m]embers of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces," or in 4(A)(3), regarding "[m]embers of regular armed forces who profess allegiance to a government or an entity not recognized by the Detaining Power," or in any of the three remaining categories in Article 4(A). *See, e.g.*, George H. Aldrich, *Remarks*, 96 Am. J. Int'l L. 891, 894–95 (2002); Steven R. Ratner, Jus ad Bellum *and* Jus in Bello *After September 11*, 96 Am. J. Int'l L. 905, 911 (2002); Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 Mich. J. Int'l L. 1, 5–6 n.15 (2001) [hereinafter Paust, *Antiterrorism* No. 1] [revised in Chapter Six, Section A]. Similarly, Article 1 of the Annex to the 1907 Hague Convention (No. IV) Respecting the Laws and Customs of War on Land (18 Oct. 1907), 36 Stat. 2277, T.S. No. 539, states that belligerent status will "apply . . . to armies" and sets forth additional criteria to be met merely by "militia" or "volunteer corps." The customary 1863 Lieber Code (Instructions for the Government of Armies of the United States in the Field, General Order No. 100) also affirmed: "So soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses."

    Any attempt to add to all categories of prisoners of war identified in GPW Article 4(A) criteria expressly applicable only to one of six categories addressed in Article 4(A) (*i.e.*, those covered in 4(A)(2)), would be illogical; would be contrary to normal approaches to treaty interpretation; would seriously threaten POW status, combat immunity, and protections for soldiers of various countries; and would not be consistent with general state practice (which is also relevant for treaty interpretation). *See* Aldrich, *supra* at 895–96; Chapter Three.

24. GPW, *supra* note 23, art. 118.

25. *See* GPW, *supra* note 23, art. 119; *see also id.* arts. 85, 99, 129; United States v. Noriega, 746 F. Supp. 1506, 1524–28 (S.D. Fla. 1990).

26. 75 U.N.T.S. 287 [hereinafter Geneva Civilian Convention or GC].
27. Protocol I, *supra* note 5. Concerning individual status and relevant rights to due process guaranteed by these treaties and customary international law, *see, e.g.*, GC, *supra* note 26, arts. 3(1)(d) (all captured persons "shall in all circumstances" be tried in "a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples" – thus incorporating all such guarantees by reference and as nonderogable Geneva protections, including the customary guarantees mirrored in Article 14 of the International Covenant), 5 (even persons who have engaged in activities hostile to state security and who are not entitled to rights under the Convention "as would . . . be prejudicial to the security" of a state, "[i]n each case, shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention."); Geneva Protocol I, *supra* note 5, art. 75(4)(7); The Prosecutor v. Delalic, No. IT-96-21-T, para. 271 (ICTY, Trial Chamber II, Nov. 16, 1998) ("there is no gap between the Third and Fourth Conventions."), available at: http://www.un.org/icty/celebici/trialc2/judgment/index.htm; IV Commentary, Geneva Convention Relative to the Protection of Civilian Persons in Time of War 51 ("Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or . . . a member of the medical personnel. . . . There is no intermediate status; nobody in enemy hands can be outside the law."), 595 ("applying the same system to all accused whatever their status") (ICRC, Jean S. Pictet ed., 1958); U.S. Dep't of Army, Field Manual 27-10, The Law of Land Warfare 31, para. 73 (1956) ("If a person is determined by a competent tribunal, acting in conformity with Article 5, GPW . . . , not to fall within any of the categories listed in Article 4, GPW . . . , he is not entitled to be treated as a prisoner of war. He is, however, a "protected person" within the meaning of Article 4, GC . . . "); Paust, *Antiterrorism* No. 1, *supra* note 23, at 7 n.15, 11–18; Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure*, 23 Mich. J. Int'l L. 677, 678–90 (2002) [hereinafter Paust, *Antiterrorism* No. 2] [revised in Chapter Six, Section B]. *See also* III Commentary, Geneva Convention Relative to the Treatment of Prisoners of War 51 n.1 (common Article 3 is a "safety clause"), 76, 421, 423 (prisoners charged with war crimes retain benefits of the Convention) (Geneva, Jean S. Pictet ed., ICRC 1960). Today, common Article 3 provides a minimum set of rights for persons also in international armed conflicts. *See, e.g.*, Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), 1986 I.C. J. 14, at paras. 218, 255; The Prosecutor v. Tadic, Decision on the Defence Motion on Jurisdiction, IT-94-1-I, paras. 65–74 (Trial Chamber, Aug. 10, 1995), International Criminal Tribunal for Former Yugoslavia; Jordan J. Paust, M. Cherif Bassiouni, *et al.*, International Criminal Law 692–95, 813–14, 816–17 (2d ed. 2000).
28. GPW, *supra* note 23, art. 5; *infra* note 31. *Cf* Aldrich, *supra* note 23, at 898 (stating that customary law now requires a tribunal's determination also whenever a captive asserts the right to be a POW), *quoting* FM 27-10, *supra* note 27, at para. 71(b) (tribunal review requirement "applies to any person not appearing to be entitled to prisoner-of-war status . . . who asserts that he is entitled to treatment as a prisoner

of war or concerning whom any other doubt of a like nature exists."), and *citing* Protocol I, *supra* note 5, art. 45(1).

29. *See* GC, *supra* note 26, art. 5 (persons can be detained in U.S. territory if they are "definitely suspected of or engaged in activities hostile to the security of the" U.S.; persons can be detained in occupied territory if the person is "under definite suspicion of activity hostile to the security of the Occupying Power" if "absolute military security so requires"); Paust, *Antiterrorism* No. 2, *supra* note 27, at 681–83. Internment of persons in U.S. territory is further conditioned by GC Article 42, which allows internment "only if the security of the Detaining Power makes it absolutely necessary," and internment in occupied territory is further conditioned by Article 78, which allows internment if "necessary, for imperative reasons of security." GC, *supra* note 26, arts. 42, 78. *See also* IV Commentary, *supra* note 27, at 257–58, 367–68 ("such measures can only be ordered for real and imperative reasons of security"); Jordan J. Paust, Gerhard von Glahn, & Gunter Woratsch, *Report of the ICJ Mission of Inquiry Into the Israeli Military Court System in the Occupied West Bank and Gaza*, 14 Hast. Int'l & Comp. L. Rev. 1, 52–59 (1990). Thus, under Geneva law, review of the propriety of detention in U.S. or occupied territory must involve a high threshold of necessity (*i.e.*, "requires," "absolutely necessary," "necessary"). Persons interned in U.S. territory "shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose." GC, *supra* note 26, art. 43. *See also* IV Commentary, *supra* note 27, at 260–61 (adding that appeals should be reviewed "with absolute objectivity and impartiality" concerning whether detention is "absolutely necessary"). Rights of persons interned in occupied territory "shall include the right of appeal" and [a]ppeals shall be decided with the least possible delay" and "shall be subject to periodical review." GC, *supra* note 26, art. 78. *See also* IV Commentary, *supra* note 27, at 368–69; Paust, von Glahn, & Woratsch, *supra* at 55–59.

However, it should be noted that U.S. nationals and nationals of a neutral or cobelligerent country with which the United States has normal diplomatic relations are excluded from protections under Articles 42 and 78 of the Geneva Civilian Convention, unless the nationals of a neutral state are detained outside U.S. territory. *See* GC, *supra* note 26, art. 4. Nonetheless, they are protected under common Article 3 and Part II of the Convention (covering protections in Articles 13–26), Article 75 of Protocol I, and human rights law. *See id.* arts. 3–4, 13; Protocol I, *supra* note 5, art. 75(1), (3), (6); Paust, Bassiouni, *et al.*, *supra* note 27, at 813–14, 816–17; IV Commentary, *supra* note 27, at 14, 58.

Guantanamo does not appear to be an appropriate territory within the meaning of Article 5, as it is not technically U.S. territory, although it is quite close to such a status, and it is not war-related occupied territory. *See* Paust, *Antiterrorism* No. 1, *supra* note 23, at 25 n.70; *Antiterrorism* No. 2, *supra* note 27, at 691–92 & n.68. If so, detention at Guantanamo would be impermissible. Moreover, transfer of non–prisoners of war out of any U.S. occupied territory in Afghanistan or Iraq would be a war crime as well as a grave breach of the Geneva Civilian Convention. *See, e.g.*, GC, *supra* note 26, arts. 49, 76, 147; Paust, *Antiterrorism* No. 1, *supra* note 23, at 24 n.68; Paust, von Glahn, & Woratsch, *supra* at 59.

30. *See* GC, *supra* note 26, art. 6, stating the rule that application of the Convention in the territories of parties to the conflict (as opposed to war-related occupied territory), and thus rights and competencies of the detaining power thereunder, "shall cease on the general close of military operations," a circumstance that can arise before the existence or formal recognition of an end of war or an armistice. Thus, at least when the international armed conflict with the Taliban in Afghanistan ends, permissibility of detention under Article 5 of persons captured in Afghanistan or during that armed conflict will end. As a legal standard that is part of the laws of war, application of Article 6 by the judiciary (as with any rule of international law) is clearly within judicial power. *See, e.g.*, *infra* text accompanying notes 63–67. *But see* Ludecke v. Watkins, 335 U.S. 160, 169–70 (1948). Furthermore, because al Qaeda is not a state, nation, belligerent, or insurgent, the United States cannot be at war with al Qaeda as such (or with the tactic of "terrorism") and, outside some context of war, the laws of war do not apply to operations directed merely against or merely involving al Qaeda. *See, e.g.*, Paust, *Antiterrorism* No. 1, *supra* note 23, at 8 n.16; Chapter Three; *see also* Pan American World Airways, Inc. v. Aetna Casualty & Surety Co., 505 F.2d 989, 1013–15 (2d Cir. 1974) (similarly, the U.S. could not be at war with the Popular Front for the Liberation of Palestine (PFLP), despite terrorist attacks by the nonstate, noninsurgent group). Thus, outside the context of war to which the laws of war apply, members of al Qaeda cannot be "enemy combatants," prisoners of war, unlawful combatants, or lawful detainees under the laws of war. Yet, they can be detained consistently with human rights law if detention is reasonably needed and therefore is not "arbitrary." *See* Section B.1.a, *supra.* Perhaps curiously, it is during war, when the Geneva Conventions apply, that permissibility of detention of non-POWs rests upon the higher threshold of necessity. *Supra* note 29. Thus, with respect to permissibility of detention outside the context of actual armed conflict, it may have been a mistake for the Bush administration to have pretended that the United States is at "war" with al Qaeda and "terrorism."
31. GC, *supra* note 26, arts. 5, 43.
32. *Id.* These rights include protections under common Article 3, which incorporates customary human rights to due process by reference. *See supra* note 27.
33. *See* GPW, *supra* note 23, art. 5. *See also* United States v. Noriega, 808 F. Supp. at 796 (must be "fair, competent, and impartial"); Inter-American Commission on Human Rights, Decision on Request for Precautionary Measures (Detainees at Guantanamo Bay, Cuba) (March 12, 2002), *reprinted in* 41 I.L. M. 532, 533–34 (2002).
34. *Supra* note 27; Chapter Six, Sections A–C.
35. *See supra* notes 11–13, 17–22. For example, the Inter-American Commission on Human Rights has recognized that persons detained during the armed conflict in Grenada had the right to have the propriety of their detention heard and reviewed. *See* Coard v. United States, Case No. 10.951, Report No. 109/99, Annual Report of the IACHR 54–55, OEA/Ser.L/V/II.106, doc.6 rev. (1999), adding: "Supervisory control over detention is an essential safeguard. . . . This is an essential rationale of the right of habeas corpus, a protection which is not susceptible to abrogation." Concerning violations of this right by the Bush administration, *see, e.g.*, Paust,

Antiterrorism No. 2, *supra* note 27, at 679–81. Review of detention is also required under other articles of the Geneva Conventions. *See supra* note 29.

Even before the complete outlawry of reprisals, hostage-taking, and collective punishment under the 1949 Geneva Conventions, when the seizure of certain persons in reprisal might have been permissible, it was necessary during warfare to have a "judicial finding" to avoid arbitrary decisions of military commanders and deprivation of individual rights. *See, e.g.*, United States v. List, *et al.* (1948), 11 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, at 757, 1248–50, 1270 (1950).

36. *See, e.g.*, Paust, *supra* note 13, at 51–64, 143–46.
37. *Id.* at 5–9, 144–46; Jordan J. Paust, *Customary International Law and Human Rights Law* Are *Law of the United States*, 20 Mich. J. Int'l L. 301, 301–21, 331–36 (1999). These sources also demonstrate that customary international law has several constitutional bases for incorporation, is part of the laws of the United States, is not mere "common law," and has been used by U.S. courts for more than two hundred years. *See, e.g.*, Paust, *supra* note 13, at 5–6 (citing numerous cases and materials). *See also infra* text accompanying notes 50–54, 59–63, 70–73. *But see* Al Odah v. United States, 321 F.3d 1134, 1145 (D.C. Cir. 2003) (Randolph, J., concurring) (ignoring these points as well as views of the Founders, numerous cases, and materials on point, and arguing that customary international law is mere common law). That Judge Randolph's separate opinion in *Al Odah* adopts an argument unsupportable in view of such constitutional bases, the overwhelming views of the Founders and Framers, and overwhelming trends in judicial decision, and that the very few cases he cites to the contrary are inapt, *see* Paust, *supra* at 301–14, 320–21, 335–36.
38. Hamdi v. Rumsfeld, 316 F.3d 450, 468 (4th Cir. 2003).
39. *See* United States v. Lindh, 212 F. Supp. 2d 541, 553 (E.D. Va. 2002) ("the GPW, insofar as it is pertinent here, is a self-executing treaty"); United States v. Noriega, 808 F. Supp. 791, 797–99 (S.D. Fla. 1992) (re: GPW, "the Court would almost certainly hold that the majority of provisions of Geneva III [GPW] are, in fact, self-executing," "[m]ost of the scholarly commentators agree, and make a compelling argument for finding treaties designed to protect individual rights, like Geneva III, to be self-executing," and "it is inconsistent with both the language and spirit of the treaty and with our professed support of its purpose to find that the rights established therein cannot be enforced by the individual POW in a court of law," also *quoting* III Commentary, *supra* note 27, at 23 ("'It must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests.'").
40. *Hamdi*, 316 F.3d at 468.
41. *See, e.g.*, Baldwin v. Franks, 120 U.S. 678, 703–04 (1887) (Field, J., dissenting) ("when it declares the rights"); Edye v. Robertson, 112 U.S. 580, 598–99 (1884) ("whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined."); Owings v. Norwood's Lessee, 9 U.S. (5 Cranch) 344, 348–49 (1809) ("Whenever a right grows out of, or is protected by, a treaty, . . . it is to be protected"); Breard v. Pruett, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring) (if treaty "provides rights"), *citing* Faulder v. Johnson, 81 F.3d 515, 520 (5th Cir. 1996); People of Saipan v. United States, 502 F.2d 90, 101 (9th Cir. 1974) (Trask, J., concurring) (stating that if a "treaty contains language which

confers rights or obligations on the citizenry of the compacting nation then, upon ratification, it becomes a part of the law of the land under Article VI"); Standt v. City of New York, 153 F. Supp. 2d 417, 423, 425 (S.D. N.Y. 2001); Paust, Van Dyke, & Malone, *supra* note 17, at 242–61; Paust, *supra* note 13, at 54–59, and cases cited.

42. *See, e.g.*, United States v. Duarte-Acero, 208 F.3d 1282, 1284 (11th Cir. 2000); *id.*, 132 F. Supp. 2d 1036, 1040 n.8 (S.D. Fla. 2001) (individuals can raise International Covenant "claims defensively"); Paust, Van Dyke, & Malone, *supra* note 17, at 85–86, 266–68; Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 U. Conn. L. Rev. 423, 467, 470 (1997); Thomas M. McDonnell, *Defensively Invoking Treaties in American Courts – Jurisdictional Challenges Under the U.N. Drug Trafficking Convention by Foreign Defendants Kidnapped Abroad by U.S. Agents*, 37 Wm. & Mary L. Rev. 1401 (1996); John Quigley, *Human Rights Defenses in U.S. Courts*, 20 Hum. Rts. Q. 555 (1998); Kristen B. Rosati, *The United Nations Convention Against Torture: A Self-Executing Treaty That Prevents the Removal of Persons Ineligible for Asylum and Withholding of Removal*, 26 Denv. J. Int'l L. & Pol. 533, 562–63 (1998); David Sloss, *Ex parte Young and Federal Remedies for Human Rights Treaty Violations*, 75 Wash. L. Rev. 1103, 1108 & n.19, 1121 & n.79, 1203 n.114, 1123 & n.85, 1129–30, 1141–42, 1199 (2001); Ruth Wedgwood, *Remarks*, 85 Proc., Am. Soc. Int'l L. 139, 141 (1991); *see also* Restatement, *supra* note 15, § 111, cmt. h ("Some provisions of an international agreement may be self-executing and others non-self-executing"), *quoted in* United States v. Noriega, 808 F. Supp. at 797 n.9.

43. *See, e.g.*, GC, *supra* note 26, arts. 5 ("individual . . . rights and privileges under the present Convention," "rights of communication," and "rights of fair and regular trial"), 8 ("Protected persons may in no circumstance renounce in part or in entirety the rights secured to them by the present Convention"), 27 ("Protected persons are entitled to . . . "), 38 ("the following rights"), 43 (persons interned "shall be entitled to"), 48 ("right to leave"), 72 ("right to present evidence," "right to be assisted by a qualified advocate or counsel of their own choice," "right at any time to object"), 73 ("A convicted person shall have the right of appeal . . . "), 75 ("right of petition for pardon or reprieve"), 76 ("right to receive . . . spiritual assistance," "right to be visited," "right to receive"), 78 (persons interned for security reasons shall have "the right of appeal"), 80 ("rights" of internees), 101 ("Internees shall have the right . . . [t]hey shall also have the right . . . "), 147 ("rights of fair and regular trial"); GPW, *supra* note 23, arts. 5 ("persons shall enjoy the protection"), 6 ("nor restrict the rights which it [GPW] confers upon them"), 7 ("Prisoners of war may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention"), 14 ("are entitled"), 84 ("the rights and means of defence provided for in Article 105"), 85 ("shall retain . . . the benefits of the present Convention"), 98 ("shall continue to enjoy the benefits"), 105 ("shall be entitled to . . . these rights"), 106 ("Every prisoner of war shall have . . . the right of appeal. . . . "), 129 ("In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall . . . "), 130 ("rights of fair and regular trial"); IV Commentary, *supra* note 27, at 9, 13, 52, 56–58, 64, 70–72, 74–80, 214–15; III Commentary, *supra* note 27, at 23 (quoted *supra* note 39), 85, 87, 90–91, 415, 472, 484–87, 492–93, 625, 628; I Commentary, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field 65, 73–74,

77, 79–82 (Conventions are "devoted . . . solely to the protection of the individual"), 82–84 ("'rights which the Convention confers upon protected persons'" "to assert that a person has a right is to say that he possesses ways and means of having that right respected . . . " Claims are "to be evoked before an appropriate national court by the protected person who has suffered the violation" or through "any procedure available") (ICRC, Jean S. Pictet ed., 1952); Jean S. Pictet, Humanitarian Law and the Protection of War Victims 11, 22 (1975) ("rights secured to them by the Conventions"); Rita Hauser, *International Law and Basic Human Rights*, 23 Naval War Coll. Rev. 51 (June 1971); Theodore Meron, *The Geneva Conventions as Customary International Law*, 81 Am. J. Int'l L. 348, 351, 355, *passim* (1987); Richard R. Baxter, *Modernizing the Law of War*, 78 Mil. L. Rev. 165, 168 (1978) (Common Article 3 functions as a minimum "bill of rights" for persons within its ambit); *see also supra* note 39. Indeed, most of the language setting forth rights and obligations in the Geneva Conventions is mandatory, and thus self-executing in nature, and sets standards designed for the protection of individual human beings. There also are numerous provisions from which rights can be implied, thus meeting tests set forth in *Edye*, 112 U.S. at 598–99, and *Owings*, 5 U.S. (9 Cranch) at 348–49.

44. *See, e.g.*, Paust, *supra* note 5, at 360–64; *infra* note 71.

45. *See, e.g.*, GC, *supra* note 26, arts. 29 (state and individual responsibility), 148 (state "liability"); GPW, *supra* note 23, art. 131 (state "liability"); IV Commentary, *supra* note 27, at 210, 603 (addressing state liability for compensation); III Commentary, *supra* note 27, at 630 (state is "liable to pay compensation . . . material compensation for breaches of the Convention . . . liability"); Paust, *supra* note 5, at 360–69; *see also* Kenneth C. Randall, *Federal Questions and the Human Rights Paradigm*, 73 Minn. L. Rev. 349, 389–90 & n.221, 409–10 (1988); Hilao v. Estate of Marcos, 103 F.3d 767, 777 (9th Cir. 1996) (re: leader responsibility); Kadic v. Karadzic, 70 F.3d 232, 242–43 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996); Linder v. Portocarrero, 963 F.2d 332, 336–37 (11th Cir. 1992); Barrueto v. Larios, 205 F. Supp. 2d 1325, 1333 (S.D. Fla. 2002) (regarding individual responsibility); Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1350–54, 1358 (N.D. Ga. 2002); *In re* World War II Era Japanese Forced Labor Litigation, 114 F. Supp. 2d 939 (N.D. Cal. 2000) (private claims were settled by international agreement); Doe v. Islamic Salvation Front, 993 F. Supp. 3, 8 (D.D. C. 1998); Xuncax v. Gramajo, 886 F. Supp. 162, 171–72 (D. Mass. 1995) (re: leader liability); U.N.S.C. Res. 674, at paras. 8–9 (29 Oct. 1990) (referring to the Geneva Civilian Convention and reminding Iraq that "it is liable for any loss, damage or injury arising in regard to Kuwait and third states and their nationals" regarding breaches of the Convention and inviting "States to collect relevant information regarding their claims, and those of their nationals.").

46. *See, e.g.*, Estate of Cabello v. Fernandez-Larios, 157 F. Supp. 2d 1345, 1359–60 (S.D. Fla. 2001); Ralk v. Lincoln County, 81 F. Supp. 2d 1372, 1380 (S.D. Ga. 2000) ("because the ICCPR is not self-executing, Ralk can advance no private right of action under the" treaty, but "could bring a claim under the Alien Tort Claims Act for violations of the ICCPR"); Paust, Van Dyke, & Malone, *supra* note 17, at 266–67; Paust, *supra* note 13, at 179, 192–93, 207, 371–72. The International Covenant (ICCPR) is actually only partly non-self-executing (*i.e.*, for purposes of bringing a private cause of action), can be used defensively, and has been executed for certain other purposes

by various federal statutes. *See, e.g.*, Paust, Van Dyke, & Malone, *supra* note 17, at 266–67, 507–08; United States v. Duarte-Acero, 208 F.3d 1282, 1284 (11th Cir. 2000) (despite declaration, ICCPR is supreme law of the land); *id.*, 132 F. Supp. 2d 1036, 1040 n.8 (S.D. Fla. 2001) (declaration does not apply when raising "ICCPR claims defensively").

47. 28 U.S.C. § 2241 (2000). *See, e.g.*, Paust, Van Dyke, & Malone, *supra* note 17, at 266–67; Sloss, *supra* note 42, at 1203 n.114. Indeed, there are habeas cases that involve the ICCPR. *See, e.g.*, Caballero v. Caplinger, 914 F. Supp. 1374, 1378, 1379 n.6 (E.D. La. 1996). Even if the habeas statute did not execute such treaties, customary human rights law and customary provisions of the Geneva Conventions addressed in this chapter are directly incorporable as laws of the United States. *See infra* notes 49–50, 53.
48. 28 U.S.C. § 2241 (2000).
49. *See, e.g.*, Paust, et al., *supra* note 27, at 658, 689, 692–93, 695, 807, 823 (common Article 3 of the Geneva Conventions); Paust, *Antiterrorism* No. 2, *supra* note 27, at 678 n.9.
50. *See, e.g.*, Restatement, *supra* note 15, § 111; Paust, *supra* note 13, at 5–7, and numerous cases cited; *supra* note 39.
51. 505 F. Supp. 787 (D. Kan. 1980), *aff'd on other gds.*, 654 F.2d 1382 (10th Cir. 1981).
52. *Id.* at 798.
53. *Id.*, *citing* The Nereide, 13 U.S. (9 Cranch) 388, 422 (1815) (courts are "bound by the law of nations, which is part of the law of the land"); The Paquete Habana, 175 U.S. 677, 700, 708, 714 (1900); Filartiga v. Pena-Irala, 630 F.2d 876, 886–87 (2d Cir. 1980).
54. 505 F. Supp. at 799–800. For uniform views of the Founders and other cases recognizing that the President is bound by international law, *see, e.g.*, Paust, *supra* note 13, at 143–46, 154–60 nn.2–38; *infra* notes 55–56, 61, 71–73, 75. The primary constitutional basis for this duty is mirrored in the President's duty to execute the laws faithfully. *See* U.S. Const., art. II, § 3. Because those in the Executive branch are bound by international law, an order or directive to violate international law concerning detention, interrogation, or prosecution in a military commission, whether public or classified, would be patently illegal and of not lawful validity or effect. Concerning the duty of military personnel and others within the Executive branch to disobey such an order, *see*, e.g., Paust, *Antiterrorism* No. 1, *supra* note 23, at 28 n.81.
55. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936).
56. Dooley v. United States, 182 U.S. 222, 231 (1901), *quoting* 2 Henry W. Halleck, International Law 444 [1st ed. 1861].
57. Home Bldg. & Loan Ass'n v. Blaisdell, 209 U.S. 398, 426 (1934). *See also* Zweibon v. Mitchell, 516 F.2d 595, 626–27 (D.C. Cir, 1975), *cert. denied*, 425 U.S. 944 (1976).
58. *Zweibon*, 516 F.2d at 626–27.
59. *See* U.S. Const., art. III, § 2, art. VI, cl. 2; 28 U.S.C. § 1331; Restatement, *supra* note 15, § 111 and cmts. d-e, RN 4; Paust, *supra* note 13, at 6–9, 34–36 n.38, 40–48 nn.44–59, 51–55, 143–46, 198–203, *passim*; Paust, *supra* note 39, at 301–05, 307–08. *See also* Chapter Five, note 26.
60. 175 U.S. 677 (1900). For further analysis of little known claims of the Executive, the actual holding of the case, and errors with respect to the rationale and ruling and

misuse of the case, *see* Jordan J. Paust, Paquete *and the President: Rediscovering the Brief for the United States*, 34 Va. J. Int'l L. 981 (1994).

61. *Id.* at 700. *See also id.* at 708, 714 (a court is "bound to take judicial notice of, and to give effect to" international law; "it is the duty of this court"). Five years earlier, the same Court had recognized: "International law in its widest and most comprehensive sense . . . is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation . . . " Hilton v. Guyot, 159 U.S. 113, 163 (1895). For additional cases, *see, infra* notes 63, 71–73, 75. *See also* Trans World Airlines v. Franklin Mint Corp., 466 U.S. 243, 261 (1984) (O'Connor, J.) (power "delegated by Congress to the Executive Branch" as well as a relevant congressional–Executive "arrangement" must not be "exercised in a manner inconsistent with . . . international law.").
62. 317 U.S. 1 (1942).
63. *Id.* at 27.
64. 9 U.S. (5 Cranch) 344 (1809).
65. *Id.* at 348–49.
66. *See Ex parte* Quirin, 317 U.S. at 23.
67. *Id.* at 25. *See also infra* notes 71, 77, 89–90, 97–98, 108–110. The majority in *Johnson v. Eisentrager*, 339 U.S. 763, 771, 781, 785 (1950), denied the reach of habeas corpus to certain imprisoned enemy alien belligerents, but they were not being detained without trial and had been tried and convicted in China for war crimes committed in China. *See also* United States v. Tiede, Crim. Case No. 78–001A, 85 F.R.D. 227 (U.S. Ct. for Berline Mar. 14, 1979), *reprinted in* 19 I.L. M. 179, 193 & n.76 (distinguishing *Eisentrager*), 199–200 (distinguishing *Ex parte Quirin*) (1980). Moreover, *Eisentrager* occurred prior to the onset of obligations under the 1949 Geneva Conventions and human rights law addressed in this chapter. *See* Paust, *Antiterrorism* No. 1, *supra* note 23, at 25–26. For cases involving habeas review of detention of aliens outside the United States, *see* Paust, *Antiterrorism* No. 2, *supra* note 27, at 692 n.69. *But see* Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003) (assuming that habeas is only available to persons within the sovereign territory of the United States and deciding that the United States does not exercise any sort of sovereign jurisdiction and control at Guantanmo Bay, Cuba). *Al Odah* was decided erroneously. The habeas statute does not require "sovereignty" but only U.S. "jurisdiction." *See* 28 U.S.C. § 2241(a), (c)(3) (1994). The Supreme Court also rejected such an approach. *See* Rasul v. Bush, 542 U.S. 466 (2004); this chapter, Section E.
68. 343 U.S. 579 (1952).
69. *Id.* at 646, 649–50 (Jackson, J., concurring).
70. *Id. See also id.* at 655 (in order to preserve a "free government . . . the Executive . . . [must] be under the law"); Reid v. Covert, 354 U.S. 1, 14 (1957) ("expediency" of military prosecutions is no excuse); Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5, 8 (1936) (in an extradition context, declaring more generally: "the Constitution creates no executive prerogative to dispose of the liberty of the individual"); United States v. Lee, 106 U.S. 196, 219–21 (1882); United States v. Worrall, 2 U.S. (2 Dall.) 384, 393–94 (C.C. Pa. 1798) (Chase, J.).
71. *See, e.g.*, *Ex parte* Quirin, 317 U.S. at 25, 27 ("From the very beginning of its history this Court has recognized and applied the law of war as including that part of

the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals."); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 131 (1866) ("But it is insisted, that Milligan was a prisoner of war, and therefore excluded from the privileges of the statute. It is not easy to see how he can be treated as a prisoner of war" under the facts); *id.* at 134 (Chase, C.J., dissenting) ("Milligan was imprisoned under the authority of the President, and was not a prisoner of war"); United States v. Guillem, 52 U.S. (11 How) 47 (1850) (counsel arguing neutral crew could not be made prisoners of war – and have property confiscated – by the Executive, even if they were on an enemy vessel); The Nereide, 13 U.S. (9 Cranch) 398, 429 (1815); Colepaugh v. Looney, 235 F.2d 429, 431 (10th Cir. 1956) (regarding "access to the courts for determining the applicability of the law of war to a particular case," the Executive "could not foreclose judicial consideration of the cause of restraint, for to do so would deny the supremacy of the Constitution and the rule of law under it as construed and expounded in the duly constituted courts of the land. In sum, it would subvert the rule of law to the rule of man."), *cert. denied*, 352 U.S. 1014 (1957); *In re* Territo, 156 F.2d 142 (9th Cir. 1946); United States v. Noriega, 808 F. Supp. 791, 793–96 (S.D. Fla. 1992); *id.*, 746 F. Supp. 1506, 1525–29 (S.D. Fla. 1990); *Ex parte* Toscano, 208 F. 938, 942–44 (S.D. Cal. 1913) (Executive detention of belligerents from Mexico during a Mexican civil war was appropriate under Article 11 of the Hague Convention No. V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, T.S. No. 540, 36 Stat. 2310 (18 Oct. 1907), and was not unreasonable under the circumstances, including "admitted facts"; habeas "petitioners are completely within the provisions" of the treaty; and "the President has full authority . . . [under the treaty], and it was and is his duty to execute said treaty provisions."); *Ex parte* Orozco, 201 F. 106, 111–12 (W.D. Tex. 1912) (the arrest and imprisonment without trial of a person suspected of organizing an expedition against Mexico in violation of neutrality "merely upon an order directed by the President" were illegal and "cannot be sustained in a court of justice," and "[t]he conditions then existing repelled the thought that the intervention of the military was necessary to the administration of justice," "civil courts . . . were competent to deal with all disturbers of the peace and with all persons offending against the neutrality," and it was the duty of the military to deliver the detainees "to the civil authorities"); *id.* at 118 ("assaults of arbitrary power" are impermissible and despite the fact that the President "has earnestly and persistently endeavored to enforce" neutrality and "was actuated by the high motive to faithfully execute the laws," such considerations "should not affect the determination of legal questions" and, under the circumstances, there has been an "unlawful exercise of power"); *id.* at 111, also *quoting* 21 Op. Att'y Gen. 267, 273 (1895) ("'the executive has no right to interfere with or control the action of the judiciary'" concerning "proceedings against persons charged with being concerned in hostile expeditions"); *In re* Fagan, 8 F. Cas. 947, 949 (D.C. D. Mass. 1863) (No. 4,604) (re: "persons detained under military authority as soldiers or prisoners of war, or spies," "[t]he writ of habeas corpus is unquestionably applicable to all these cases, and had long been actually and frequently used therein."); *In re* Keeler, 14 F. Cas. 173, 175 (D.C. D. Ark. 1843) (No. 7,637) (the court will decide if detention is unlawful and will consider "the circumstances" and decide whether "reasonable grounds" support the habeas petition, but if "upon his own showing" petitioner

is "clearly a prisoner of war and lawfully detained" denial of habeas is proper; moreover, "a strong case ought to be made out" so as not to unduly interfere with lawful military authority); Juando v. Taylor, 13 F. Cas. 1179, 1183 (D.C. S.D. N.Y. 1818) (No. 7,558) ("the parties in this war must be considered as regularly at war under the government and protection of the common laws of war; to be treated as prisoners of war"); Respublica v. Chapman, 1 U.S. 53, 59 (S.Ct. Pa. 1781) ("Those persons were, accordingly, treated as Prisoners of War."); Straughan's Case, 2 Ct. Cl. 603, 604 (1866) (Loring, J., dissenting) (detainee was concluded to not be a prisoner of war and "his seizure and detention was a violation of the law of nations, a . . . wrong for which . . . the individual sufferers were entitled to reparation" from Great Britain); Herring v. Lee, 22 W. Va. 661, 668 (St. Ct. Apps. 1883); Grinnan v. Edwards, 21 W. Va. 347, 357–58 (S. Ct. Apps. 1883); Johnson v. Jones, 44 Ill. 142, 149–52 (S.Ct. Ill. 1867) (an imprisoned person who was a member of a secret society that sought to overthrow the Union was not a prisoner of war, the "allegation that the prisoner 'was in fact engaged in levying war against the government of the United States' . . . is too vague and general," and the detainee "did not become a belligerent, whatever may have been his sympathies, or however wicked his plots."); Holland v. Pack, 7 Tenn. 151, 153 (S.Ct. Tenn. 1823) (Indians at war are prisoners of war and are treated "not as offenders against the laws of this state or of the United States."). *See also* Omar v. Harvey, 479 F.3d at 10 (quoted supra note 4); Lloyd v. United States, 73 Ct. Cl. 722, 748 (1931) (recognizing that prisoners of war have personal rights and can have "[c]laims for losses based on personal injuries, death, maltreatment to prisoners of war"); Smith v. Shaw, 12 Johns. 257, 265 (N.Y. Sup. Ct. 1815) (Kent, C.J.) (civilian who allegedly was an enemy spy exciting mutiny and insurrection during war could not be detained by U.S. military for trial in a military tribunal); *In re* Stacy, 10 Johns. 328, 332 (N.Y. Sup. Ct. 1813) (habeas writ issued in wartime against a military commander holding a civilian charged with treason in aid of the enemy, as U.S. military did not have jurisdiction to detain him despite alleged threat to national security); Arndt-Ober v. Metropolitan Opera Co., 102 Misc. 320, 324, 169 N.Y. S. 304, 306 (S.Ct. N.Y. 1918) ("a prisoner of war . . . is in no worse position than any other individual who is in custody for an offense" and "is entitled . . . to maintain an action"). *See also infra* notes 77, 89–90, 97, 108–09. Writs of habeas corpus were issued against commanding generals even within the Confederacy during the Civil War with respect to those arrested for treason and conspiracy against the Confederate states. *See, e.g., Ex parte* Peebles, Roberts 17 (Tex. 1864) (when "the evidence is not legally sufficient," applicants are entitled to be discharged).

72. *See, e.g.*, Ford v. United States, 273 U.S. 593, 606 (1927) (Executive branch violation of a treaty would affect jurisdiction); United States v. Toscanino, 500 F.2d 267, 276–79 (2d Cir. 1974), *reh'g denied*, 504 F.2d 1380 (2d Cir. 1974) (also *quoting* Shaprio v. Ferrandina, 478 F.2d 894, 906 n.10 (2d Cir. 1973) (courts should assure "that the Executive lives up to our international obligations")); United States v. Ferris, 19 F.2d 925, 926 (N.D. Cal. 1927) (Executive seizure in violation of customary "international law" and a treaty obviated jurisdiction and is "not to be sanctioned by any court"); United States v. Yunis, 681 F. Supp. 909, 914–15 (D.D. C. 1988); *id.*, 681 F. Supp. 896, 906 (D.D. C. 1988) ("The government cannot act beyond the

jurisdictional parameters set forth in principles of international law . . . "); United States v. Ferris, 19 F.2d 925, 926 (N.D. Cal. 1927) (Executive seizure in violation of customary international law and a treaty obviated jurisdiction and is "not to be sanctioned by any court."). *See also* United States v. Verdugo-Urquidez, 494 U.S. 259, 275 (1990) (Rehnquist, C.J.) (explaining in dictum that, with respect to U.S. use of armed force abroad, "restrictions on searches and seizures which occur incident to such American action . . . [can] be imposed by . . . treaty"); Cook v. United States, 288 U.S. 102 (1933) (seizure of a ship in violation of a treaty).

73. *See, e.g.*, The Paquete Habana, 175 U.S. 677 (1900) (regarding illegal seizures and detention of enemy ships, cargo and crew outside the United States in time of armed conflict and the rejection of an Executive interpretation of customary international law); Brown v. United States, 12 U.S. (8 Cranch) 110 (1814); The Flying Fish, 6 U.S. (2 Cranch) 170 (1804). *See also* Juragua Iron Co. v. United States, 212 U.S. 297 (1909); United States v. Lee, 100 U.S. at 219–21; Miller v. United States, 78 U.S. (11 Wall.) 268, 314–16 (1870) (Field, J., dissenting) ("The power to prosecute war . . . is a power to prosecute war according to the law of nations, and not in violation of that law."); The Prize Cases, 67 U.S. (2 Black) 635 (1862) (involving judicial determination of the propriety of a blockade and seizures under the laws of war, with an admonition that the President "is bound to take care that the laws be faithfully executed," including the laws of war); United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801) (the President cannot authorize seizure of a vessel in violation of a treaty); Bas v. Tingy, 4 U.S. (4 Dall.) 37, 43 (1800) (Chase, J.) (war's "extent and operations are . . . restricted by . . . the law of nations"); Johnson v. Twenty-One Bales, 13 F. Cas. 855, 863 (C.C.D.N.Y. 1814) (No. 7,417); Elgee's Adm'r v. Lovell, 8 F. Cas. 449, 454 (C.C.D. Mo. 1865) (No. 4,344) (Miller, J., on circuit) (concerning the "law of nations, . . . no proclamation of the president can change or modify this law"); 11 Ops. Att'y Gen. 297, 299–300 (1865) (laws of war and more general laws of nations "are of binding force upon the departments and citizens of the Government" and neither Congress nor the Executive can "abrogate them or authorize their infraction."). *Bas* also involved a judicial determination whether a war existed and who was an "enemy." *See* 4 U.S. (4 Dall.) at 39 (Moore, J.), 40–42 (Washington, J.), 43–45 (Chase, J.), 46 (Paterson, J.).

74. Brown v. United States, 12 U.S. (8 Cranch) 110 (1814).

75. *Id.* at 153 (Story, J., dissenting). The majority did not disagree and affirmed that while exercising presidential discretion, the Executive can only pursue the law. *See id.* at 128–29 (Marshall, C.J.). For uniform views of the Founders and other cases recognizing that the President is bound by international law, *see, e.g.*, Paust, *supra* note 13, at 143–46, 155–60 nn.6–38. *See also* former Legal Advisor, U.S. Dep't of State, Monroe Leigh, *Is the President Above Customary International Law?*, 86 Am. J. Int'l L. 757, 760, 762–63 (1992) ("When the President orders a violation of customary international law, . . . he abuses his discretion and may be compelled by . . . the courts to obey the dictates of customary international law."); Chapter One, Section E; Chapter Five, Section A.

76. 287 U.S. 378 (1932).

77. *Id.* at 400–01. Concerning the extent of judicial review, *see id.* at 403 ("the findings of fact made by the District Court are fully supported by the evidence"). *See also*

United States v. United States District Court, 407 U.S. 297, 299–301, 316–17 (1972) (members of the Executive branch "should not be the sole judges" of their actions with respect to an Executive claim that a wiretap to gather intelligence was "a reasonable exercise of the President's power . . . to protect the national security"); Woods v. Cloyd W. Miller Co., 333 U.S. 138, 146–47 (1948) (Jackson, J., concurring); Korematsu v. United States, 323 U.S. 214, 218 (1944) (Black, J.) ("'we cannot reject as unfounded the judgment of the military'" when there is "'ground for believing,'") *quoting* Hirabayashi v. United States, 320 U.S. 81, 99 (1943) (which also stated that in context, "[v]iewing these data in all their aspects," the political branches "could reasonably have concluded"; *id.* at 98); *Korematsu*, *id.* at 234 (Murphy, J., dissenting) ("it is essential that there be definite limits to military discretion . . . the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled . . . ," next quoting *Sterling v. Constantin*, and adding: "[t]he judicial test . . . is whether the deprivation is reasonably related to a public danger that is so 'immediate, imminent, and impending' as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger."); *Ex parte* Bollman, 8 U.S. (4 Cranch) 75 101 (1807) (Marshall, C.J.) (deciding that there was not sufficient evidence that petitioners were levying war against the United States); United States *ex rel.* Zdunic v. Uhl, 137 F.2d 858, 861 (2d Cir. 1943) (regarding Executive detention of an alleged German enemy alien, "[o]n these and any other disputed facts he is entitled to a judicial inquiry before the court can determine whether his relation to the German 'nation or government' brings him within the statutory definition of alien enemies."); *Ex parte* Merryman, 17 F. Cas. 147, 148–50 (C.C.D. Md. 1861) (No. 9,487); Korematsu v. United States, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984) ("the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability."); Cruikshank v. United States, 431 F. Supp. 1355, 1359 (D. Haw. 1977) ("The Government should not have the 'discretion' to commit illegal acts. . . . In this area, there should be no policy option . . . [and] there is no exception to this rule for the acts of the CIA"); Johnson v. Jones, 44 Ill. 142, 147–48, 160–61 (Ill. 1867), *quoted in Ex parte* Orozco, 201 F. at 115–17 (W.D. Tex. 1912); Paust, *supra* note 13, at 472 & n.37 (concerning arbitrary arrests and detention of Vietnam War protesters); *supra* note 71; *infra* note 80.

78. 54 U.S. (13 How.) 115 (1851).
79. *Sterling*, 287 U.S. at 401, *quoting* 54 U.S. (13 How.) at 134.
80. *See, e.g.*, Raymond v. Thomas, 91 U.S. 712, 716 (1875) (finding a military order arbitrary and void under the circumstances and adding: "[i]t is an unbending rule of law, that the exercise of military power, where the rights of the citizen are concerned, shall never be pushed beyond what the exigency requires" as determined by the courts); United States v. Russell, 80 U.S. (13 Wall.) 623, 627–28 (1871) (judicial inquiry was required even where there was "a state of facts which plainly lead to the conclusion that the emergency was such that it justified" an action); Mitchell v. Harmony, 54 U.S. (13 How.) 115, 134–35 (1851) (judicial review of military action involves inquiry whether there is "reasonable ground for believing" that a seizure is required and "it is not sufficient to show that he exercised an honest judgment . . . ; [an executive officer] must show by proof the nature and

character of the emergency, such as he had reasonable grounds to believe . . . "); *see also* Paust, *supra* note 13, at 143–46, and cases cited; *supra* notes 55–56, 60–61, 63, 67, 71–75, 77. Even Executive efforts to conduct foreign intelligence surveillance and to obtain related evidence, for example, against foreign terrorists under the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. § 1801, *et seq*., are subject to a "probable cause" hearing by a Foreign Intelligence Surveillance court (*see id.* § 1805(a)(3) and (b)), review by a FISA Court of Review, and possible review by the Supreme Court (*see id.* § 1803(a)-(b). *See also* United States v. Squillacote, 221 F.3d 542, 553–54 (4th Cir. 2000)).

81. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866).
82. *Id.* at 120–21. *See also* Duncan v. Kahanamoku, 327 U.S. 304, 335 (1946) (Murphy, J., concurring), *quoting Ex parte* Milligan.
83. 71 U.S. (4 Wall.) at 121. *See also* U.S. Const., art. II, § 3 ("he shall take Care that the Laws be faithfully executed" – thus, there is simply no discretion to violate law); Kendall v. United States, 37 U.S. (12 Pet.) 524, 612–13 (1838) (whatever discretion the President may have concerning implementation of law, the President can never lawfully violate the law); *supra* notes 71–73, 75.
84. 71 U.S. (14 Wall.) at 119. Many do not realize that withdrawal of the protection of law (even through a martial law decree) was contemplated by President Nixon as a response to protesters during the Vietnam War and in an effort to remain in power. There were actual arbitrary arrests and detentions of thousands of protesters in a sports stadium in Washington, D.C., that led to lawsuits, some of which were hushed up as part of settlements. *See, e.g.*, Sullivan v. Murphy, 478 F.2d 938 (D.C. Cir. 1973); Andrew D. Gilman, *Thanks, Mr. Nixon*, N.Y. Times, Oct. 10, 1981, at 25, col. 4 (addressing McCarthy v. Kleindienst, settled, otherwise reported at 741 F.2d 1406 (D.C. Cir. 1984), and Adelman v. Kleindienst, settled, and the sweep arrests of more than eight thousand people); *see also* N.Y. Times, May 3, 1971, at 1, col. 5. Former White House Counsel John Dean provided a revealing email in 2007 concerning previously undisclosed information: "Nixon did ask me that question [about martial law], indirectly. He wanted to know if he had the same power as the prime minister of Canada, who was arresting protestors. I told him no, and to back myself up, asked Rehnquist (then at [DOJ] OLC) for a memo. Rehnquist gave me one, supporting my conclusion. But it was clearly on RN['s] mind." Email of John Dean to the author, Jan. 15, 2007. In a prior writing, I offered a hypothetical about other efforts to gain support for martial law, one that I have reason to believe is factual: "What would have happened . . . if President Nixon, through White House Chief of Staff H.R. Haldeman or General Alexander Haig, had asked high-level Pentagon officials to cooperate with a declaration of martial law to control dissent and allow his continuation in power? One hopes the Pentagon officials would have refused." Jordan J. Paust, *Is the President Bound by the Supreme Law of the Land? – Foreign Affairs and National Security Reexamined*, 9 Hast. Const. L.Q. 719, 719 n.2 (1982).
85. *See* United States v. Tiede, Crim. Case No. 78–001A (U.S. Ct. for Berlin, Mar. 14, 1979), 85 F.R. D. 227 (1979), *reprinted in* 19 I.L. M. 179, 188, 191–92 (1980); Herbert J. Stern, Judgment in Berlin 95–96 (1984). Judge Stern was a federal district judge from New Jersey. *Tiede*, like *Toscanino*, is one of the lower federal court cases recognizing that the U.S. Constitution applies abroad to restrain Executive actions

against aliens, as (consistently with the rationale in *Reid v. Covert*, 354 U.S. 1, 6, 12, 35 n.62 (1957)) the United States is entirely a creature of the Constitution and, thus, it can take no action here or abroad inconsistent with the Constitution. *See* Paust, *Antiterrorism* No. 1, *supra* note 23, at 18–20 [revised as Chapter Six, Section A]. Concerning such a rationale, *see also* United States v. Lee, 106 U.S. 196, 219–21 (1882); *Ex parte* Orozco, 201 F. 106, 112 (W.D. Tex. 1912).

86. *See* Stern, *supra* note 85, at 371–72.
87. United States v. Tiede, *supra* note 85, 19 I.L.M. at 193 n.78.
88. 296 F. 3d 278 (4th Cir. 2002).
89. *Id.* at 283. The panel also recognized that if petitioner was "an 'enemy combatant' who was captured during hostilities in Afghanistan, the government's present detention of him is a lawful one." *Id. See also supra* notes 67–71. Subsequently, the House of Delegates of the American Bar Association issued a recommendation that "U.S. citizens and residents who are detained by the United States based on their designation as 'enemy combatants' be afforded the opportunity for meaningful judicial review of their status, under a standard according such deference to the designation as the reviewing court determines to be appropriate to accommodate the needs of the detainee and the requirements of national security." A.B.A. House of Delegates, Recommendation, in Revised Report 109 (Feb. 10, 2003).
90. Hamdi v. Rumsfeld, 243 F. Supp. 2d 527, 528 (E.D. Va. 2002), *rev'd*, 316 F.3d 450 (4th Cir. 2003).
91. *Id.* at 532, *quoting* United States v. Robel, 389 U.S. 258, 264 (1967). *Robel* also affirmed that "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of . . . power which can be brought within its ambit. 'Even the war power does not remove constitutional limitations safeguarding essential liberties.'" *Id.* at 263–64, *citing Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 120–21 (1866), and *quoting* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426 (1934). Concerning standards for judicial review, *see also supra* note 71. In other contexts, claims of arbitrary detention have necessitated that the facts and decisions be "carefully reviewed" or that there be "meaningful review" of decisions. *See, e.g.*, Ma v. Ashcroft, 257 F.3d at 1099 ("carefully reviewed" the record and decision of the district court); Najjar v. Reno, 97 F. Supp. 2d 1329, 1354 (S.D. Fla. 2000) (there must be "meaningful review" of an immigration judge's decision that petitioner is a threat to national security based on classified evidence presented *in camera* and *ex parte*); Kiareldeen v. Reno, 71 F. Supp. 2d 402, 408–15 (D.N.J. 1999) (alien detained as a terrorist suspect and national security threat was granted writ of habeas corpus because due process was denied when the government relied on secret evidence presented *in camera*, unclassified summaries of information, and uncorroborated hearsay that detainee rebutted. These "rendered illusory any opportunity to defend himself." *Id.* at 408. Furthermore, "due process concerns are not satisfied unless the government provides the detainee with an opportunity to cross-examine the affiant, or at a minimum, submits a sworn statement by a witness who can address the reliability of the evidence." *Id.* at 416); *supra* note 10.
92. *Hamdi*, 243 F. Supp. 2d at 535.
93. *Id.* at 536.
94. *See also supra* notes 52–54, 59–63, 67, 71–73, 75. It also would involve an unconstitutional judicial suspension of the writ of habeas corpus. Only Congress has that

power. *See, e.g.*, *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 101 (1807) (Marshall, C.J.); *Ex parte* Merryman, 17 F. Cas. 144 (C.C. Md. 1861) (No. 9,487); *Ex parte* Benedict, 3 F. Cas. 159 (N.D.N.Y. 1862) (No. 1,292); Paust, *Antiterrorism* No. 1, *supra* note 23, at 22 & n.53. It would be incorrect to claim that the federal judiciary does not have a share of the war powers. As the cases cited demonstrate, significant judicial powers and responsibilities clearly exist during war, especially regarding "judgments on the exercise of war powers." *But see* Padilla *ex rel.* Newman v. Bush (Padilla II), 233 F. Supp. 2d 564, 607 (S.D.N.Y. 2002).

95. *See generally* United States v. Altstoetter (The Justice Case), 3 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 983–84 (1951); Paust, *Antiterrorism* No. 1, *supra* note 23, at 28 n.81.
96. 233 F. Supp. 2d 564 (S.D.N.Y. 2002).
97. *Id.* at 570, 599.
98. *Id.* at 569, 599–605.
99. *Supra* notes 89, 91–92. Concerning judicial tests, *see* Hamdi v. Rumsfeld (Hamdi II), 316 F.3d 450, 468 (4th Cir. 2003); *supra* notes 54, 60, 71–73, 75, 77, 79–80.
100. 233 F. Supp. 2d at 610. This was the standard that the administration had sought in *Hamdi. See Hamdi*, 296 F.3d at 283; *supra* note 4.
101. *See supra* note 29.
102. Padilla v. Rumsfeld (Padilla II), 243 F. Supp. 2d 42, 53 (S.D.N.Y. 2003).
103. *Id.* 53–54.
104. *Id.* at 54 (quoting the government's argument).
105. *Id.*
106. *Id.* at 56.
107. *See* Hamdi v. Rumsfeld, 316 F.3d 450, 476 (4th Cir. 2003).
108. *Padilla II*, 243 F. Supp. 2d at 56.
109. *Id.* at 57.
110. *See supra* notes 55–56, 58, 61, 70–73, 75, 78, 80, 82.
111. 316 F.3d at 461. It should be noted that a limitation on inquiry and deferential inquiry are not necessarily the same and some limitations can amount to partial abandonment or abdication of judicial responsibility.
112. *Id.*
113. *Id.* at 462.
114. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866).
115. *Hamdi II*, 316 F.3d at 464. *See also supra* note 71.
116. *Hamdi II*, 316 F.3d at 471. The panel seemed to stress that the habeas request and "deference" concerned Hamdi's initial detention "in the field" (*id.* at 465, 472), "in a zone of active combat" (*id.* at 474), or "in the arena of combat" (*id.* at 474), but the primary focus of the habeas petition was on the propriety of continued detention in the United States where courts are clearly open and functioning.
117. *Id.* at 472.
118. *See, e.g.*, *supra* notes 53, 55–56, 61, 63, 70–73, 77, 80.
119. *Hamdi II*, 316 F.3d at 462, the panel *citing* next, of all cases, *Ex parte* Quirin. *Compare* text *supra* at notes 66–67; *supra* note 115.
120. *Hamdi II*, 316 F.3d at 473.
121. *Id.* at 464.
122. *Id.* at 463.

123. *But see id.* at 463–64. Professor Gerald Neuman also offers relevant insight concerning the historic reach of habeas corpus in England. He notes that it served to assure that those who detain "explain the reason for the detention, so that the court could decide whether the detention was lawful," and under the First Judiciary Act of 1789, its purpose was to assure that judges "grant the writ 'for the purpose of an inquiry into the cause of commitment.'" *See* Gerald L. Neuman, *The Habeas Corpus Suspension Clause After* INS v. St. Cyr, 33 Colum. Hum. Rts. L. Rev. 555, 563, 569, *passim* (2002).
124. *See supra* note 29.
125. *Padilla II*, 243 F. Supp. 2d at 49 (quoting a declaration by Vice Admiral Lowell E. Jacoby, Director of the Defense Intelligence Agency).
126. *Id.* at 50.
127. *Id.* at 49.
128. *Id.* at 50.
129. 542 U.S. 507 (2004).
130. *Id.* at 509.
131. *Id.* at 515.
132. *Id.* at 527.
133. *Id.* at 533.
134. *Id.* at 537.
135. *Id.* at 520, citing the author and what is now Section B of this chapter.
136. *Id.* The Court also noted that "longstanding law of war principles" informed its understanding in this regard. *Id.* at 521. Concerning the impropriety of indefinite detention for the purpose of interrogation as such, *see also* text *supra* notes 122–25. *But see* John Yoo, War by Other Means 156 (2006) ("Those . . . who might have valuable information will continue to be held.").
137. *Id.* at 535, also *quoting* Korematsu v. United States, 323 U.S. 214, 233–34 (1944) (Murphy, J., dissenting); Sterling v. Constantin, 287 U.S. 378, 401 (1932); *see also supra* note 4.
138. *Id.* at 535–36 (emphasis in original). Justice Souter added: "In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive . . . " *Id.* at 545 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment). Justice Scalia added: "Absent suspension [of habeas], . . . the Executive's assertion of military exigency has not been thought sufficient to permit detention without charge" and "[t]he very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive." *Id.* at 554–55 (Scalia, J., dissenting).
139. *See* Section B.1.b and B.2.c *supra.*
140. 28 U.S.C. § 2241(a).
141. *See generally* Paust, *supra* note 13, at 5–9, 40–42 nn.44–45, *passim*, and numerous cases cited. Concerning treaties, *see also* Paust, Van Dyke, & Malone, *supra* note 17, at 266–67 (habeas corpus statute executes treaties for habeas petition purposes).
142. *See* Coalition of Clergy, *et al.* v. Bush, *et al.*, 189 F. Supp. 2d 1036, 1049–50 (C.D. Cal. 2002).
143. *See id.*

144. 28 U.S.C. § 2241(c)(3). *See also* Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892) (habeas used regarding a claimed violation of a federal statute); Ma v. Ashcroft, 257 F.3d 1095, 1095 (9th Cir. 2001) (habeas claim that statute violated the ICCPR); Beazley v. Johnson, 242 F.3d 248, 263–67 (5th Cir. 2001) (claim under human rights treaty); Cornejo-Barreto v. Seifert, 218 F.3d 1004, 1007 (9th Cir. 2000) (detainee claiming human rights violation can bring a habeas petition to challenge extradition); Beharry v. Reno, 183 F. Supp. 2d 584, 603–04 (E.D.N.Y. 2002) (habeas claim for relief under principles of international law). Another set of cases involves habeas claims of violation of the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. *See, e.g.*, Breard v. Greene, 523 U.S. 371, 373–75 (1998).
145. *Id.*, 189 F. Supp. 2d at 1048.
146. Indeed, ultimate "sovereignty" is retained by the people of the United States, but the government exercises delegated sovereign power here or abroad. *See* U.S. Const., preamble, amends. IX, X; Paust, *supra* note 13, at 329–31, 333–35, and references cited.
147. *See also* Paust, *Antiterrorism* No. 1, *supra* note 23, at 25 & n.70. It is not fair to state that under the treaty "Cuba explicitly retained sovereignty," because the treaty expressly states that Cuba only retained "ultimate sovereignty." Coalition of Clergy, 189 F. Supp. 2d at 1049. Before the treaty, the United States had been an occupying power of Cuba.
148. *See, e.g.*, *Ex parte* Hayes, 414 U.S. 1327, 1328–29 (1973) (granting habeas review to U.S. serviceman stationed in Germany); Grisham v. Hagan, 361 U.S. 278, 278–79 (1960) (habeas review of conviction of civilian employee of U.S. Army in France); McElroy v. United States *ex rel.* Guaglairdo, 361 U.S. 281, 282–83 (1960) (same); Reid v. Covert, 354 U.S. 1, 4 (1957) (habeas granted re: dependents of U.S. servicepersons abroad); United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 13 n.3 (1955) (habeas re: U.S. serviceman); Burns v. Wilson, 346 U.S. 137, 138 (1953); *In re* Yamashita, 327 U.S. 1, 4–6 (1946) (alien abroad convicted by U.S. military commission); Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892) (alien on a Japanese vessel who had been prevented from landing); United States v. Jung Ah Lung, 124 U.S. 621, 622–23, 626 (1888) (alien on ship in San Francisco harbor); Chew Heong v. United States, 112 U.S. 536 (1884) (alien on U.S. ship in San Francisco harbor); Kinnell v. Warner, 356 F. Supp. 779, 780–81 (D. Haw. 1973) (Navy servicemember petitioner at sea aboard U.S. aircraft carrier); *see also* Brownell v. Tom We Shung, 352 U.S. 180, 183 (1956) (granting habeas review to an excluded alien, without "entry"); Chen v. Carroll, 858 F. Supp. 569, 573 (E.D. Va. 1994) (same).
149. *See, e.g.*, Paust, *supra* note 13, at 387–88.
150. *See, e.g.*, Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21–22 (1963); Cook v. United States, 288 U.S. 102, 120 (1933); United States v. Payne, 264 U.S. 446, 448 (1924); Chew Heong v. United States, 112 U.S. 536, 539–40, 549–50 (1884); The Charming Betsy, 6 U.S. (2 Cranch) 64, 117–18 (1804) ("An Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and, consequently, can *never* be construed to *violate* . . . *rights* . . . further than is warranted by the law of nations . . . ") (emphasis added); Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 43 (1801); United States v. The Palestine Liberation Organization,

695 F. Supp. 1456, 1465, 1468 (S.D.N.Y. 1988); Paust, *supra* note 13, at 34, 99, 105, 107–08, 418; Paust, Van Dyke, Malone, *supra* note 17, at 156–57, 453–68.

151. *Supra* note 147.
152. *See* Section B.1.b and B.2.c *supra.*
153. *See also* Chapter Five, Section D.
154. Concerning the "rights under treaties" exception, *see, e.g.*, Jones v. Meehan, 175 U.S. 1, 32 (1899); Holden v. Joy, 84 U.S. (17 Wall.) 211, 247 (1872); Reichart v. Felps, 73 U.S. (6 Wall.) 160, 165–66 (1867); Wilson v. Wall, 73 U.S. (6 Wall.) 83, 89 (1867); Mitchel v. United States, 34 U.S. (9 Pet.) 711, 749, 755 (1835); Paust, *supra* note 13, at 86–87, 99, 116–17; *see also* The Charming Betsy, 6 U.S. (2 Cranch) at 117–18 (quoted *supra* note 147).
155. Concerning the "war powers" or law of war exception, *see, e.g.*, United States v. Macintosh, 283 U.S. 605, 622 (1931) (dictum) (international law imposes qualifications and limitations in the context of war that bind Congress); Miller v. United States, 78 U.S. (11 Wall.) 268, 314–16 (1870) (Field, J., dissenting) ("legislation founded [on] the war powers" is subject to 'limitations . . . imposed by the law of nations . . . " "The power to prosecute war . . . is a power to prosecute war according to the law of nations, and not in violation of that law. The power to make rules . . . is . . . subject to the condition that they are within the law of nations. There is a limit . . . imposed by the law of nations, and [it] is no less binding upon Congress than if the limitation were written in the Constitution."); United States *ex rel.* Schlueter v. Watkins, 67 F. Supp. 556, 564(S.D.N.Y. 1946) (quoting Albert Gallatin in 1798); 11 Ops. Att'y Gen. 297, 299–300 (1865) (Congress cannot abrogate or authorize an infraction of the laws of war, nor can the Executive); Paust, *supra* note 13, at 88, 95, 99, 120; *see also* Bas v. Tingy, 4 U.S. (4 Dall.) 37, 42 (1800) (Chase, C.J.) (war's "extent and operations are . . . restricted and regulated by the . . . law of nations").
156. *See supra* Section B.
157. *See, e.g.*, Paust, *Antiterrorism* No. 1, *supra* note 23, at 21–26. Whether Congress had authority to suspend the writ of habeas corpus when it enacted the Military Commissions Act of 2006 is addressed in Chapter Five, Section D. It did not.
158. 542 U.S. 466 (2004).
159. *Id.* at 475.
160. *Id.* at 476. In his concurring opinion, Justice Kennedy added: "The facts here are distinguishable from those in *Eisentrager* in two critical ways, leading to the conclusion that a federal court may entertain the petitions. First, Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities. The opinion of the Court well explains the history of its possession by the United States. In a formal sense, the United States leases the Bay; the 1903 lease agreement states that Cuba retains 'ultimate sovereignty' over it. Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, Art. III, T.S. No. 418. At the same time, this lease is no ordinary lease. Its term is indefinite and at the discretion of the United States. What matters is the unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay. From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it. *Eisentrager, supra*, at 777–778. . . . The second critical set of facts is that

the detainees at Guantanamo Bay are being held indefinitely, and without benefit of any legal proceeding to determine their status. In *Eisentrager*, the prisoners were tried and convicted by a military commission of violating the laws of war and were sentenced to prison terms. Having already been subject to procedures establishing their status, they could not justify 'a limited opening of our courts' to show that they were 'of friendly personal disposition' and not enemy aliens. 339 U.S., at 778. . . . Indefinite detention without trial or other proceeding presents altogether different considerations. It allows friends and foes alike to remain in detention." 542 U.S. at 487–88 (Kennedy, J., concurring).

161. *Id.* at 478–79, *quoting* Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484, 494–95 (1973).
162. *Id.* at 483.
163. As the Constitution mandates: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Case of Rebellion or Invasion the public Safety may require it." U.S. Const., art. I, § 9, cl. 2.
164. *See generally* text *supra* notes 70, 82–84, 91–93; Paust, *supra* note 13, at 169–80, 192, 194, 329–30, 339–40, *passim*; Jordan J. Paust, *Is the President Bound by the Supreme Law of the Land? – Foreign Affairs and National Security Reexamined*, 9 Hast. Const. L.Q. 719, 724, 727 n.24, 740–41, 743, 746–48, 750–52 (1982); *see also* Harold Honju Koh, *A United States Human Rights Policy for the 21 Century*, 46 St. Louis U.L.J. 293, 335 (2002) ("we have developed an elaborate system of domestic and international laws, institutions and decision-making procedures, precisely so that they may be consulted and obeyed, not ignored, at a time like this.").
165. 2 The Complete Writings of Thomas Paine 588 (P. Foner ed., 1945).

five. Executive Claims to Unchecked Power

1. President's Statement on Singing H.R. 2863, Dec. 30, 2005, available at: http://www.whitehouse.gov/news/releases/2005/12/20051230–8.html.
2. *See also* Senator John W. Warner and Senator John McCain Statement on Presidential Signing Detainee Provisions, Jan. 4, 2006 ("Congress declined when asked by administration officials to include a presidential waiver of the restrictions included in our legislation."), available at: http://mccain.senate.gov/ index.cfm?fuseaction=NewsCenter.ViewPressRelease&Content_id=1634. The President has no general legislative power (*see infra* note 27) and has not been delegated any legislative powers in the 2005 Act. Thus, as Senators Warner and McCain have indicated, there is no delegation of power to suspend, waive, or change restrictions contained in the legislation by Executive fiat, interpretation, or elsewise.
3. *See, e.g.*, U.S. Const., art. II, § 3; Jordan J. Paust, International Law as Law of the United States 109, 147–48 n.77, 169–73, 179, 487–90, 492–95 (2d ed. 2003) (addressing numerous relevant cases); Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 Columbia J. Transnat'l L. 811, 856–61 (2005) (documenting the consistent and unyielding judicial recognition in particular that the laws of war are binding on the Executive branch and limit the lawful exercise of commander in chief powers) [revised in Chapter One]. *See also* Hamdi v. Rumsfeld, 542 U.S. 507, 520–21

(2004) (regarding Hamdi's objection that Congress did not authorize indefinite detention, the majority agreed that "indefinite detention for the purpose of interrogation is not authorized"; "Congress' grant of authority . . . [was] to detain for the duration of the relevant conflict, and our understanding [of the AUMF's "grant of authority for the use of 'necessary and appropriate force'"] is based on long-standing law-of-war principles"; and "[i]t is a clearly established principle of the law of war that detention may last no longer than active hostilities."); Rosa Brooks, remarks, *The United States and International Law: Confronting Global Challenges*, 36 Geo. J. Int'l L. 669, 679 (2005); David Golove, *Military Tribunals, International Law, and the Constitution: A Franckian-Madisonian Approach*, 35 N.Y.U. J. Int'l L. & Pol'y 363, 364, 374–78 (2003); David M. Golove, *The Commander in Chief and the Laws of War*, 99 Proc., Am. Soc. Int'l L. 198, 198–201 (2005); Harold Hongju Koh, *A World Without Torture*, 43 Columbia J. Transnat'l L. 641, 648–49 (2005); Jules Lobel, *International Law Constraints*, in The U.S. Constitution and the Power to Go to War 107, 109 (Gary M. Stern & Morton H. Halperin eds., 1994).

4. *See, e.g.*, Hamdan v. Rumsfeld, _ U.S. _, _ n.23 (2006) ("Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers. . . . The Government does not argue otherwise."); *id.* _, U.S. at _ (Kennedy, J., concurring in part) ("It is a case where Congress, in the proper exercise of its powers as an independent branch of government, and as part of a long tradition of legislative involvement in matters of military justice, has considered the subject of military tribunals and set limits on the President's authority."), _ (the presidential military commission "exceeds the bounds Congress has placed on the President's authority"); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 643 (1952) (Jackson, J., concurring) ("He has no monopoly of 'war powers,' whatever they are . . . [Congress] is also empowered to make rules for the 'Government and Regulation of land and naval Forces,' by which it may to some unknown extent impinge upon even command functions."); *Ex parte* Quirin, 317 U.S. 1, 25 (1942) ("detention and trial . . . ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war . . . are not to be set aside by the courts without the clear conviction that they are in conflict with [, for example,] laws of Congress constitutionally enacted."); Herrera v. United States, 222 U.S. 558, 572 (1912), *quoting* Planters' Bank v. Union Bank, 83 U.S. (16 Wall.) 483, 495 (1873) ("It was there decided that the military commander at New Orleans 'had power to do all that the laws of war permitted, except so far as he was restrained by . . . the effect of congressional action.'"); *Ex parte* Milligan, 71 U.S. 2, 121 (1866) (during war, "[t]he President . . . is controlled by law, and has his appropriate sphere of duty, which is to execute . . . [and not violate] the laws." The Court added: "[b]y the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers." *Id.*, 71 U.S. at 119); *id.*, 71 U.S. at 139 (Chase, C.J., dissenting) ("Congress . . . has . . . the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns.");

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (Congress has the power to "conduct a war"); Gelston v. Hoyt, 16 U.S. (3 Wheat.) 246, 330–38 (1818) (statute controls presidential instructions re: seizure of vessels); The Thomas Gibbons, 12 U.S. (8 Cranch) 421, 427–28 (1814) (limits regarding seizure of vessels); Brown v. United States, 12 U.S. (8 Cranch) 110 (1814); Little v. Barreme (The Flying Fish), 6 U.S. (2 Cranch) 170, 177–78 (1804) (Marshall, C.J.) (despite presidential power as commander in chief to seize vessels during war, a congressional act "limits that authority" and Congress "prescribed the manner in which" a statutory "authority" "shall be carried into execution"); Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 28, 41 (1801) (Marshall, C.J.) ("The whole powers of war, being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides" and "congress may authorize general . . . or partial hostilities, in which case the laws of war . . . ["apply" and] must be noticed"); Bas v. Tingy, 4 U.S. (4 Dall.) 37, 40–45 (1800); Hamdan v. Rumsfeld, 344 F. Supp. 2d at 158–59; Dellums v. Bush, 752 F. Supp. 1141, 1145 n.5 (D.D.C. 1990); 9 Op. Att'y Gen. 517, 518–19 (1860) (Congress can limit use of land and naval forces that are otherwise "under his orders as their commander in chief"); Paust, *supra* note 3, at 461–62, 474–75 n.54, 478 n.58; Geoffrey S. Corn, *Presidential War Power: Do the Courts Offer Any Answers?*, 157 Mil. L. Rev. 180, 205–10 (1998); Paust, *supra* note 3, at 842 n.114; *see also* U.S. Const., art. I, § 8, cls. 1 ("Congress shall have Power To . . . provide for the Common Defense"), 11 (and to "make Rules concerning Captures on Land and Water"), 14–16, 18; Hamdi v. Rumsfeld, 542 U.S. 507, 509 ("Congress authorized the detention of combatants in the narrow circumstances alleged here" regarding detention of "a man whom the Government alleges took up arms with the Taliban during" the war in Afghanistan), 536 ("Whatever power the . . . Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."), 521 (quoted *supra* note 3) (2004) (O'Connor, J.); *id.*, 542 U.S. at 541 (Souter, J., dissenting in part and concurring in judgment) (statute controls detention of a citizen during war); *id.*, 542 U.S. at 574 (Scalia, J., dissenting) (same); Rumsfeld v. Padilla, 542 U.S. 426, 546–47 (2004) (Stevens, J., dissenting) (stressing the importance of "the constraints imposed on the Executive by the rule of law"); United States v. Verdugo-Urquidez, 494 U.S. 259, 275 (1990) ("restrictions on" Executive use of "armed force" can be imposed by "treaty, or legislation"); Madsen v. Kinsella, 343 U.S. 341, 348 (1952) ("In the absence of attempts by Congress to limit the President's power . . . as Commander in Chief . . . he may, in time of war . . . "); Ludecke v. Watkins, 335 U.S. 160, 168 (war "may be terminated by treaty or legislation"), 169 n.13 ("there are statutes which have provisions fixing the date of the expiration of the war powers they confer upon the Executive") (1948); Santiago v. Nogueras, 214 U.S. 260, 266 (1909) (Congress can impose limits on military government during occupation); The Prize Cases, 67 U.S. (2 Black) 635, 668 (1863) (addressed *infra* note 39); Fleming v. Page, 50 U.S. (9 How.) 603, 614 (1850) ("His duty and his power [as commander in chief] are purely military"); United States v. Smith, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342) (Paterson, J., on circuit) (regarding the Neutrality Act: "The president of the United States cannot control the statute, nor dispense with its execution,

and still less can he authorize a person to do what the law forbids. If he could, he would render the execution of the laws dependent on his will and pleasure; which is a doctrine that has not been set up, and will not meet with any supporters in our government. In this particular, the law is paramount. . . . [and it would not] be pretended that the president could rightly grant a dispensation or license" to avoid the statute); Padilla v. Hanft, 389 F. Supp. 2d 678, 690–91 (D.S.C. 2005) ("As Justice Jackson stated, 'Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy' . . . [and to allow the President to detain a U.S. citizen pursuant to an alleged "inherent authority" and commander in chief power contrary to congressional legislation] would not only offend the rule of law and violate the country's constitutional tradition, but it would also be a betrayal of this Nation's commitment to the separation of powers that safeguards our democratic values and individual liberties."), *rev'd on other gds.*, 423 F.3d 386 (4th Cir. 2005); Swaim v. United States, 28 Ct. Cl. 173, 221, *aff'd*, 165 U.S. 553 (1897); Louis Henkin, Foreign Affairs and the U.S. Constitution 103–04 (it appears that the "President's powers as Commander in Chief are subject to ultimate Congressional authority"), 233, 235 (international law is binding on the Executive) (2d ed. 1996); John E. Nowak, Ronald D. Rotunda, Constitutional Law 220 (4th ed. 1991) ("Constitutional language suggests that the president and Congress share the war power, the dominant authority being vested in the legislature. . . . Congress determines the rules of warfare"); Norman Redlich, John Attanasio, & Joel K. Goldstein, Understanding Constitutional Law 257 (3d ed. 2005) ("The Constitution, in requiring the President faithfully to execute the laws, does not except laws governing use of the armed forces abroad. The Supreme Court expressed this view in an early pronouncement on presidential power," addressing *Little v. Barreme*); Laurence Tribe, American Constitutional Law 209 (2d ed. 1988) ("commander in chief is conceived as commanded by law"); Golove, *supra* note 3; J. Andrew Kent, *Congress's Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 Tex. L. Rev. 843, 912, 915, 917–19 (2007); Koh, *supra* note 3; James Madison, The Federalist No. 51 (more generally: "In republican government the legislative authority, necessarily, predominates"); Abraham D. Sofaer, testimony, *War Powers Resolution: Hearings Before the Senate Committee on Foreign Relations*, 95th Cong., 1st sess. (1977) ("none of our early Presidents claimed that their constitutionally granted powers were beyond the legislature's authority to control"); *infra* notes 22 (patterns of legislation), 27 (quoting Jackson), 39 (addressing *The Prize Cases*); 40 (district court decision that commander in chief powers do not obviate requirements of the FISA). Furthermore, in this instance the 2005 legislation banning certain types of treatment merely implements part of treaty-based and customary international law that is already binding on the Executive.

5. Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893). *See also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. at 637 (Jackson, J., concurring) (dicta in *Curtiss-Wright* concerning presidential foreign affairs power does not suggest that the President "might act contrary to an act of Congress"); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936) (despite broad presidential foreign affairs powers to speak, listen, negotiate, and so forth, Executive "operations" in foreign "territory

must be governed by treaties . . . and the principles of international law."); PAUST, *supra* note 3, at 478 n.58.

6. 4 U.S. (4 Dall.) 37 (1800).
7. *Id.* at 40 (Washington, J.).
8. *Id.* at 43 (Chase, J.).
9. *Id.* at 45 (Paterson, J.). Justice Paterson added that "this modified warfare is authorized by the constitutional authority of our country," which is Congress. *Id.*
10. 12 U.S. (8 Cranch) 110 (1814).
11. *Id.* at 125–26.
12. *Id.* at 127.
13. *Id.* at 128.
14. *Id.* at 145 (Story, J., dissenting).
15. *Id.* at 150 (emphasis added).
16. *Id.* at 151 (emphasis added).
17. *Id.* at 149.
18. *Id.* at 145.
19. *Id.* at 153.
20. *Id.* at 153–54. Chief Justice Marshall clearly agreed that the President is bound by international law. *See, e.g.*, PAUST, *supra* note 3, at 170, 180 n.2, 181 nn.8, 11. No one disagreed. *See, e.g.*, *id.* at 169–71; *see also id.* at 7–9, 38–39 nn.32–45, 44–47 nn.54–56.
21. 12 U.S. (8 Cranch) at 153.
22. *See, e.g.*, Pub. Law 331, 77th Cong., 1st sess., chpt. 564, Joint Resolution declaring that a state of war exists between the Government of Germany and the Government and the people of the United States and making provision to prosecute the same (Dec. 11, 1941) ("the President is hereby authorized and *directed to employ the entire naval and military forces*") (emphasis added); Pub. Law 328, 77th Cong., 1st sess., chpt. 561, Joint Resolution declaring that a state of war exists between the Imperial Government of Japan and the Government and the people of the United States and making provisions to prosecute the same (Dec. 8, 1941) ("the President is hereby authorized and *directed to employ the entire naval and military forces*") (emphasis added); Joint Resolution No. 24, 30 Stat. 738 (April 20, 1898) ("Third. That the President . . . hereby is, *directed* and empowered *to use the entire land and naval forces* of the United States") (emphasis added); An Act Providing for Prosecution of the War Between the United States and the Republic of Mexico, 29th Cong., 1st sess., chpt. XVI, 9 Stat. 1 (May 13, 1846) (Sec. 1. the President "is hereby, authorized" "to call for and accept the services of any number of volunteers, not exceeding fifty thousand, who may offer their services, either as cavalry, artillery, infantry, or riflemen, to serve twelve months . . . "; Sec. 3. "the said volunteers shall furnish their own clothes, and if cavalry, their own horses and horse equipments . . . "; Sec. 5. "the said volunteers . . . shall be accepted by the President in companies, battalions, squadrons, and regiments, whose officers shall be appointed in the manner prescribed by law in the several States and Territories . . . "; Sec. 6. "the President shall, if necessary, apportion the staff, field, and general officers among the respective States and Territories from which the volunteers" come). Legislation during the limited war with France in 1798–1800 limited the conduct of war, including types of vessels that could be seized. *See, e.g.*, An Act Further to Suspend the Commercial

Intercourse between the United States and France and the Dependencies Thereof, Feb. 27, 1800, chpt. 10, 2 Stat. 7; *id.*, Feb. 9, 1799, chpt. 2, 1 Stat. 613, addressed in Little v. Barreme (The Flying Fish), 6 U.S. (2 Cranch) 170 (1804); An Act to Suspend the Commercial Intercourse between the United States and France and the Dependencies Thereof, June 13, 1798, chpt. 53, 1 Stat. 565; *see also* An Act for the Government of the Navy of the United States, Mar. 2, 1799, chpt. 24, 1 Stat. 709, addressed in Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800).

Some of the early congressional appropriations allocated monies in significant detail. *See, e.g.*, An Act making Appropriations for the Support of the Army for the Year ending the thirtieth June, eighteen hundred and sixty-five, and other purposes, 38th Cong., sess. I, chpt. CXXIV, June 15, 1864, 13 Stat. 126–30; An Act making Appropriations for the Support of the Army for the year ending the thirtieth of June, one thousand eight hundred and forty-nine, 30th Cong., sess. I, chpt. CLXXIII, Aug. 14, 1848, 9 Stat. 304–06 (and directing that the President can "increase the number of privates, of not more than five regiments, to such number as he may think discreet, not exceeding one hundred privates to each of the companies of said five regiments." *Id.* Sec. 2); An Act making Appropriations for the Support of the Army and of Volunteers for the Year ending the thirtieth of June, one thousand eight hundred and forty eight, and for other Purposes, 29th Cong., sess. II, chpt. XXXV, Mar. 2, 1847, 9 Stat. 149–52.

23. U.S. Const., art. I, § 8, cl. 18. Whatever lurks behind the Bush administration's unilateralist claim of power "to supervise the unitary executive branch" (*see* text *supra* note 1) – a phrase unknown to the Constitution – it is clear that clause 18 provides Congress an express authority to pass laws for carrying into execution the powers of any Executive "Department or Officer." *Id.*

24. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. at 535–36 (courts can "exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims," also *quoting* Sterling v. Constantin, 287 U.S. 378, 401 (1932) ("What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions"), and stating that an Executive claim to unreviewable power or to power subject only to "a heavily circumscribed role for the courts" cannot comport with the proper separation of powers because it "serves only to *condense* power into a single branch of government" (emphasis in original), adding "a state of war is not a blank check for the President"); Paust, *supra* note 3, at 856 n.169; Gerald L. Neuman & Charles F. Hobson, *John Marshall and the Enemy Alien*, 9 The Green Bag 39 (2005); Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 Harv. Int'l L.J.503, 514, 517–24 (2003), and the numerous cases cited [hereinafter Paust, *Judicial Power*] [revised in Chapter Four, Sections A–C].

25. *See, e.g.*, *supra* notes 3–4; text *supra* notes 18–21; Chapter One, Section E.

26. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. at 535–36 (quoted *supra* note 24); United States v. Nixon, 418 U.S. 683, 703 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803), "'[it] is emphatically the province and duty of the judicial department to say what the law is'"), 704 ("any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of tripartite government") (1974); *infra* note 27. With respect to ultimate

judicial determination of the content of customary and treaty-based international law (contrary to Executive views) and its application to Executive decisions and military conduct abroad during war, *see, e.g.*, The Paquete Habana, 175 U.S. 677 (1900); Paust, *supra* note 3, at 105, 174–75, 184 n.24, 189–90 n.67, 295–96, 387 n.47, 489–90, 493–95; Paust, *Judicial Power*, *supra* note 24 (addressing numerous cases affirming ultimate judicial authority to interpret and apply treaties and customary international law with respect to decisions and conduct of the Executive during war); Paust, *supra* note 3, at 858–59 (regarding *The Paquete Habana*); Jordan J. Paust, Paquete *and the President: Rediscovering the Brief for the United States*, 34 Va. J. Int'l L. 981 (1994) (addressing the Supreme Court ruling that an Executive interpretation of customary laws of war was incorrect and Executive conduct abroad during war was a violation of the laws of war); *see also* Sanchez-Llamas v. Oregon, _ U.S. _, _ (2006) (Roberts, C.J.) (regarding treaties, "determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department,'" quoting Marbury v. Madison, 5 U.S. (1 Cranch) at 177); Clark v. Allen, 331 U.S. 503, 513 (1947); Perkins v. Elg, 307 U.S. 325, 333 (1939); Factor v. Laubenheimer, 290 U.S. 276, 295 (1933) (an Executive interpretation of a treaty is "not conclusive upon courts"); Nielsen v. Johnson, 279 U.S. 47, 52 (1929) (the judiciary has ultimate authority to interpret treaties); Jordan v. Tashiro, 278 U.S. 123 (1928) (same); Asakura v. City of Seattle, 265 U.S. 332, 341 (1924) (same); Jones v. Meehan, 175 U.S. 1, 32 (1899) ("The construction of treaties is the peculiar province of the judiciary" and rights under treaties cannot "be divested by any subsequent action of . . . Congress, or of the Executive"); Reichart v. Felps, 73 U.S. (6 Wall.) 83, 89 (1867) (same); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 239–40, 249, 251, 253–54, 283 (1796); Alexander Hamilton, The Federalist No. 78 ("interpretation of the laws is the proper and peculiar province of the courts"); John Jay, The Federalist No. 3, at 62 (J.C. Hamilton ed., 1868) (regarding "the laws of nations" being "expounded," there is "wisdom . . . in committing such questions to the jurisdiction and judgment of courts"); Oliver Ellsworth, remarks of July 21, 1787 ("The law of Nations also will frequently come into question. Of this the Judges alone [not the Executive] will have competent information"), in 2 The Records of the Federal Convention of 1787 at 73–74 (Max Farrand ed., 1911). *But see* Julian G. Ku, Ali v. Rumsfeld: *Challenging the President's Authority to Interpret Customary International Law*, 37 Case W. Res. J. Int'l L. 371 (2006) (ignoring numerous directly relevant cases and baldly asserting in significant error that presidential "control over the interpretation of CIL . . . is . . . reflected in . . . judicial precedent" (*id.* at 371), asserting in outrageous error that "no court has preempted state law using CIL" (*id.* at 376 n.29; *but see* numerous federal and state cases addressed in Paust, *supra* note 3, at 10–11, 53 n.63, 116, 165–67 nn.134–35), asserting in outrageous error that "incorporation of CIL as federal law is unsupported by any judicial precedent prior to the 1980s" (*id.* at 376; *but see* numerous cases addressed in Paust, *supra* note 3, at 7–11, 38–59), misinterpreting *The Paquete Habana* (*id.* at 378), and asserting in outrageous error that the President can "reject CIL rules" and "make his interpretations binding on federal and state courts" (*id.* at 380; *but see* Paust, *supra* note 3, at 7–11, 53 n.63, 116, 165–67 nn.134–35, 169–73, 180–87 nn.2–42, 489–90, 493–95, 499–502 nn.23–31, 507–10 nn.82–103)); Julian G. Ku, *Gubernatorial Foreign Policy*, 115 Yale L.J.

2380, 2404 n.103 (2006) (asserting in error and without citation that "Congress and the President hold the power to recognize rules of customary international law as binding on the U.S. government"); John C. Yoo, *Rejoinder: Interpretation and the False Sirens of Delegation*, 90 Cal. L. Rev. 1305, 1309 (2002) (preferring a radical change and theorizing that the "treaty power as a whole . . . ought to be regarded as an exclusively executive power"); John C. Yoo & Robert J. Delahunty, Memorandum for William J. Haynes II, General Counsel, Department of Defense, Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002), at 28 (opining in error that "the President has a variety of constitutional powers with respect to treaties, including powers to . . . contravene them . . . . [P]ower[s] over treaty matters . . . are within the President's plenary authority."), available at: http:www/msnbc.msn.com/id/5025040/site/newsweek.

27. *See also* Paust, *supra* note 3, at 109, 147–48 n.77, 169–73, 179, 487–90, 492–95, 497–510. Although some misconstrue an "oversimplified" nondeterminative formula once proffered by Justice Jackson, the Justice was emphatic that the President is bound by law. *See, e.g.*, *id.* at 191–92 n.81, 487, 489–90 (Jackson adding: unreviewable "powers *ex necessitate*" were omitted by the Framers, who assured "control of executive powers by law" and that "it is not a military prerogative, without support of law, to seize persons or property because they are important or even essential for the military"), 497 nn.1–3, 502 n.31; *supra* note 4 (quoting Jackson in *Youngstown*); *see also* Hamdi v. Rumsfeld, 542 U.S. at 535 (O'Connor, J.) ("We have long since made clear that a state of war is not a blank check for the President"); *id.*, 542 U.S. at 552 (Souter, J., concurring in part, dissenting in part) ("it is instructive to recall Justice Jackson's observation that the President is not Commander in Chief of the country, only of the military."); Rumsfeld v. Padilla, 542 U.S. 426, 465 (2004) (Stevens, J., dissenting); Duncan v. Kahanamoku, 327 U.S. 304, 335 (1946) (Murphy, J., concurring), *quoting Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 120–21 (1866) (the claim of Executive power to suspend the Constitution during war is "pernicious" and "the theory of necessity on which it is based is false"); *Ex parte* Merryman, 17 F. Cas. 144, 149 (C.C.D. Md. 1861) (No. 9,487) (Taney, C.J., on circuit) ("Nor can any argument be drawn from . . . necessity . . . [or] self-defense in times of tumult and danger. The government of the United States is one of delegated and limited powers; it derives its existence and authority altogether from the constitution . . . ," adding that the Constitution provides "security against imprisonment by executive authority." *Id.* at 150). *Youngstown* also affirmed that the President's duty "to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *See* 343 U.S. at 587. It follows that the President's constitutional duty of faithful execution also refutes the idea that the President can simply suspend or change the reach of rights and duties based in legislation and it refutes the idea that his views of the content of law are determinative. *See also* United States v. Smith, 27 F. Cas. at 1230; Neil Kinkopf, *Statutes and Presidential Power: The Case of Domestic Surveillance*, JURIST, Mar. 13, 2003 (deference to Executive interpretations of statutes conferring powers on the President would be improper), available at: http://jurist.law.pitt.edu/forumy/2006/03/statutes-and-presidential-power-case.php; *supra* note 26. As Richard Nixon learned, presidential authorizations to violate law are, in the words of the House Judiciary Committee,

"subversive of constitutional government." House Judiciary Committee Articles of Impeachment of Richard Nixon, H.R. Doc. No. 93–1305, 93d Cong., 2d Sess. (1974).

28. *See* Declaration of the Causes and Necessity of Taking Up Arms, July 6, 1775, *reprinted in* Richard L. Perry, Sources of Our Liberties 295, 298 (1972).
29. *Id.*
30. Declaration of Independence, July 4, 1776, *reprinted in* Perry, *supra* note 28, at 319, 321.
31. *See, e.g.*, Paust, *supra* note 3, at 7–9, 67–69, 169–71, 180–83 nn.1–22. *See also* Paust, *supra* note 3, at 195–202, 208–09 (concerning early commitment to human rights); Jordan J. Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 Mil. L. Rev. 99, 112–13 (1972) (concerning other early adherence to laws of war and more general laws of nations).
32. Declaration of Independence, *supra* note 30. *See also* Constitution of Virginia §§ 2 (all "magistrates are . . . at all times amendable to" the people), 13 ("in all cases the military should be under strict subordination to, and governed by, the civil power.") (June 12, 1776), *reprinted in* Perry, *supra* note 28, at 311–12; A Declaration of the Rights of the Inhabitants of the Commonwealth, or State, of Pennsylvania arts. IV ("all officers of government, whether legislative or executive, are . . . at all times accountable to" the people), XIII ("the military should be kept under strict subordination to, and governed by, the civil power.") (Aug. 16, 1776), *reprinted in* Perry, *supra* note 28, at 329–30; Delaware Declaration of Rights, § 20 ("in all cases and at all times the military ought to be under strict subordination to and governed by the civil power.") (Sept. 11, 1776), *reprinted in* Perry, *supra* note 28, at 339; Constitution of Maryland, art. XXVII ("in all cases, and at all times, the military ought to be under strict subordination to and control of the civil power.") (Nov. 3, 1776), *reprinted in* Perry, *supra* note 28, at 348; Constitution of North Carolina, art. XVII ("the military should be kept under strict subordination to, and governed by, the civil power.") (Dec. 14, 1776), *reprinted in* Perry, *supra* note 28, at 356; Declaration of the Rights of the Inhabitants of the State of Vermont, arts. V ("all officers of government, whether legislative or executive, are . . . at all times accountable to" the people), XV ("the military should be kept under strict subordination to, and governed by, the civil power."), in the Constitution of Vermont (July 8, 1777), *reprinted in* Perry, *supra* note 28, at 365–66; Constitution of Massachusetts, art. XVII ("the military power shall always be held in an exact subordination to the civil authority, and be governed by it.") (Oct. 25, 1780), *reprinted in* Perry, *supra* note 28, at 376; Constitution of New Hampshire, arts. VIII ("all the magistrates and officers of government . . . ["are"] at all times accountable to" the people), XXVI ("In all cases, and at all times, the military ought to be under strict subordination to, and governed by the civil power.") (June 2, 1784), *reprinted in* Perry, *supra* note 28, at 383, 385. Additionally, at the Constitutional Convention, Charles Pinckney of South Carolina warned that giving the President unfettered power over war "would render the Executive a Monarchy of the worst kind." 1 The Records of the Federal Convention of 1787, at 64–65 (Max Farrand ed., 1911).
33. *See also supra* note 32 (the quoted language "civil power" and "governed by it" appears in various early state declarations of right and constitutions). Alexander Hamilton declared that the President's commander in chief power "in substance [is]

much inferior to . . . [the British King's power and] would amount to nothing more than the command and direction of the military and naval forces, as first general and admiral," adding that the British King's power "extends to the . . . regulating of fleets and armies, all of which, by the Constitution . . . , would appertain to the legislature." Alexander Hamilton, The Federalist No. 69. No Founder is known to have claimed that a "first general" should not ultimately be controlled and "governed by" the "civil power." *Cf* Alexander Hamilton, The Federalist No. 72 ("the direction of the operations of war" as such "are matters of a like nature what seems to be most properly" executive). Moreover, the Declaration of Independence decried "usurpations" by the King of England such as "abolishing the free system of English laws in a neighbouring province," "abolishing our most valuable laws," "suspending our own legislatures," and other acts "which may define a tyrant." Declaration of Independence, *supra* note 30. Thus, it would have been inconceivable that the Founders would have tolerated a commander in chief who violated our laws and claimed a power to ignore them. *See also* Declaration of the Causes and Necessity of Taking Up Arms, *supra* note 28 (decrying "the tyranny of irritated ministers"); 1 Op. Att'y Gen. 492, 493 (1821) ("in a government purely of laws, no officer should be permitted to stretch his authority and carry the influence of his office beyond the circle which the positive law of the land has drawn around him. This . . . is republican orthodoxy"). Most assuredly this was "common sense." *See* Thomas Paine, Common Sense (Phila., Jan. 9, 1776) ("in America THE LAW IS KING. For as in absolute governments the King is law, so in free countries the law ought to be King; and there ought to be no other."), *reprinted in* The Essential Thomas Paine 49 (Sidney Hook ed., 1969).

Madison had expressed a related distrust of Executive power regarding more general decisions concerning war, peace, and their limitation: "It is in war . . . that laurels are to be gathered, and it is the executive brow they are to encircle. The strongest passions, and most dangerous weaknesses of the human breast; ambition, avarice, vanity, the honorable or venial love of fame, are all in conspiracy against the desire and duty of peace." James Madison, *"Helvidius" Number 4*, in The Papers of James Madison 106, 109 (Robert Rutland, *et al.* eds., 1985). In a letter to Jefferson, Madison also noted: "The constitution supposed, what the History of all Gov[ernmen]ts demonstrates, that the Ex[ecutive] Is the branch of power most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the Legisl[ature]." Letter from James Madison to Thomas Jefferson, Apr. 2, 1798, available at: http://press-pubs.uchicago.edu/founders/documents/a1_8_11s8.html.

34. *See, e.g.*, John Yoo, War by Other Means 35 (instead of faithful execution of Geneva law, the Executive did a cost-benefit analysis of compliance and decided not to comply), 192 ("coercive interrogation . . . should not be ruled out"), 202 ("[t]he executive branch should continue . . . deciding when to use coercive interrogation") (2006); *infra* note 45; Chapter Two, Section B.

35. *See, e.g.*, Paust, *supra* note 3, at 824 (Gonzales), 828 (Bush), 831 (Delahunty and others), 835 n.90 (Bybee), 836–38 nn.96–97, 842 n.114 (Mary Walker and others); Rosa Brooks, *Orwell Had Nothing on This White House*, L.A. Times, July 14, 2006, at B13 (Acting Chief of the OLC, DOJ, Steven Bradbury testified before the Senate

Armed Service Committee on July 11, 2006, in serious error, that "[u]nder the law of war . . . the president is always right"); Jane Mayer, *The Hidden Power*, The New Yorker, July 3, 2006, at 44 (Addington); Chitra Ragavan, *Cheney's Guy*, U.S. News & World Rpt., May 29, 2006, at 32 (Addington). *See also* Jose E. Alvarez, *Torturing the Law*, 37 Case W. Res. J. Int'l L. 175, 197–98 (2006); Diane Marie Amann, *Abu Ghraib*, 153 U. Pa. L. Rev. 2085, 2100 n.58 (2005) (addressing the claim of Gonzales in 2005 that the President "'could theoretically decide that a U.S. law – such as the prohibition against torture – is unconstitutional'"); Eric Lichtblau, *Gonzales Says Humane-Policy Order Doesn't Bind C.I.A.*, N.Y. Times, Jan. 19, 2005, at A17 (Gonzales still claimed in 2005 that CIA and nonmilitary personnel are outside the reach of any remaining limitations on treatment contained in the Bush February 7, 2002, directive and that a congressional ban on cruel and inhumane treatment does not apply to "'aliens overseas'"); Alberto Gonzales, Press Briefing, June 22, 2004 (the President "has not exercised his Commander-in-Chief override, he has not determined that torture is, in fact, necessary"), available at: http://www.whitehouse.gov/news/releases/2004/06/20040622–14.html; *infra* note 45.

36. *See, e.g.*, Paust, *supra* note 3, at 842 n.114; Memo from General Counsel of the Navy Alberto J. Mora to Inspector General, Dep't of Navy, Vice Admiral Albert Church, Statement for the Record: Office of General Counsel Involvement in Interrogation Issues, July 7, 2004, available at: http://www.newyorker.com/images/pdfs/moramemo.pdf, at 17–18.
37. *See, e.g.*, Paust, *supra* note 3, at 835 & n.89; Koh, *supra* note 3, at 648–50. The Bybee memo was later withdrawn, but the commander-above-the-law theory was not denounced.
38. *See, e.g.*, Amann, *supra* note 35, at 2100; Norman C. Bay, *Executive Power and the War on Terror*, 83 Denv. L. Rev. 335, 362, 364, 367–68 (2005); Erwin Chemerinsky, *Enemy Combatants and Separation of Powers*, 1 J. Nat. Security L. & Pol'y 73, 87 (2005); Paust, *Judicial Power*, *supra* note 24, at 504 & n.4. The Supreme Court rejected this claim in *Hamdi*. *See* 542 U.S. at 535–36 (quoted *supra* note 24).
39. *See* DOJ memorandum, Legal Authorities Supporting the Activities of the National Security Agency Described by the President, Jan. 19, 2006, at 3, 35 (arguing that an implied Executive power termed an "inherent constitutional authority as Commander in Chief and sole organ for the Nation in foreign affairs to conduct warrantless surveillance" exists, is somehow an exclusive power both here and abroad, and that in the event of a clash with the Foreign Intelligence Surveillance Act (FISA), the "FISA would be unconstitutional"), available at: http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf. Eric Lichtblau & James Risen, *Legal Rationale By Justice Dept. on Spying Effort*, N.Y. Times, Jan. 19, 2006, at 1; Charlie Savage, *Bush Challenges Hundreds of Laws: President Cites Powers of His Office*, Boston Globe, Apr. 30, 2006, at 1 (in signing statements, President Bush has "claimed authority to disobey more than 750 laws enacted since he took office," including laws regulating domestic spying, the McCain Amendment, requirements to report to Congress concerning use of the Patriot Act, laws forbidding use of U.S. troops in combat in Colombia, laws requiring retraining of prison guards on requirements of the Geneva Conventions, and a law creating an inspector general for Iraq); *see also* Eric Lichtblau, *Nominee Says N.S.A.*

Stayed Within Law on Wiretaps, N.Y. Times, May 19, 2006, at A20 (former head of the National Security Agency General Michael Hayden testified before the Senate Intelligence Committee: "I talked to the N.S.A. lawyers . . . they were very comfortable with the Article II arguments and the president's inherent authorities. . . . Our discussion anchored itself on Article II"); Mayer, *supra* note 35 (Addington and Cheney told N.S.A. lawyers "that the President, as Commander-in-Chief, had the authority to override" the FISA); Ragavan, *supra* note 35 (Addington used the commander-in-chief-above-the-law claim in support of President Bush's decision to engage in domestic surveillance in violation of FISA); *infra* note 48; *but see* Paust, *supra* note 3, at 509 n.97; David A. Cole, remarks, *NSA Wiretapping Controversy*, 37 Case W. Res. J. Int'l L. 509, 513–14, 529 (2006); Jordan J. Paust, *Not Authorized By Law: Domestic Spying and Congressional Consent*, JURIST, Dec. 23, 2005 (also noting that Congress set limits on domestic surveillance in the FISA and did not expressly or impliedly authorize their obviation with respect to surveillance either within or outside the U.S. in any subsequent legislation, including the 2001 Authorization for Use of Military Force (AUMF) – addressed in Section C *infra*), available at: http://jurist.law.pitt.edu/forumy/2005/12/not-authorized-by-law-domestic-spying.php; *Lawyers Group Opposes Warrantless Spying*, L.A. Times, Feb. 14, 2006, at A13; ABA res., Feb. 13, 2006, and Report, ABA Task Force on Domestic Surveillance in the Fight Against Terrorism (Feb. 2006), available at: http://www.abanews.org/docs/domsurvrecommendationfinal.pdf; Joyce Apple & Gary Hart, *Wake Up, America, to a Constitutional Crisis: "Congress has been supine in the face of the president's grab for unconstitutional power*," Chicago Sun-Times, Apr. 2, 2006, at B2. *See also* President Jimmy Carter, Statement on Signing S.1566 [the Foreign Intelligence Surveillance Act of 1978] Into Law (Oct. 25, 1978) (the law "requires . . . a prior judicial warrant for *all* electronic surveillance for foreign intelligence or counterintelligence purposes in the United States in which communications of U.S. persons might be intercepted. It clarifies the Executive's authority . . . "), available at: http://www.cnss.org/Carter.pdf.

Similar claims were made in a letter to four congresspersons on December 22 by Assistant Attorney General Moschella. *See* Ass't Att'y Gen. William Moschella, letter to Chairmen Roberts and Hoekstra and Vice Chairman Rockefeller and Ranking Member Harman (Dec. 22, 2005), available at: http://cryptome.org/doj-nsa-spy.htm. Senator Roberts, who is the Chairman of the Senate Select Committee on Intelligence, has openly accepted the commander-above-the-law theory. *See* Senator Pat Roberts, remarks, Meet the Press, Feb. 12, 2006 (regarding limits in the FISA, "the president has the constitutional authority. It rises above any law passed by the Congress."). With respect to the commander in chief power, Assistant Attorney General Moschella seriously misread the *Prize Cases* by ignoring the fact that immediately before the language he quoted the Supreme Court expressly referred to two early federal statutes that "authorized . . . [and] bound" the President to use armed force, demonstrating another instance of congressional power to regulate portions of the commander in chief power during actual war. *See* The Prize Cases, 67 U.S. (2 Black) 635, 668 (1862) ("*by the Acts of Congress* of February 28th, 1795, and 3d March, 1807, he is *authorized* to . . . use the military and naval forces of the United States in case of invasion by foreign nations. . . . [Thus, i]f a war be made by

invasion of a foreign nation, the President is not only *authorized* but *bound* to resist force by force." (emphasis added)); *see also id.*, 67 U.S. at 691 (Nelson, J., dissenting) (regarding the Acts of 1792 and 1795). The Court also expressly affirmed that the President "has no power to initiate or declare a war" and "is bound to take care that the laws be faithfully executed" (*id.*) and that "[t]he right of . . . capture has its origin in the '*jus belli*,' and is governed and adjudged under the law of nations" (*id.* at 666). Justice Thomas engaged in the same misread of *The Prize Cases* in Hamdan v. Rumsfeld, _ U.S. at _, _ (Thomas, J., dissenting) (not only misreading the opinion like the administration lawyers, but also making up other alleged judicial recognitions, *e.g.*, that the opinion "observed" that the President has "broad constitutional authority to protect the Nation's security in the manner he deems fit" and "recogniz[ed] that war may be initiated by 'invasion . . . ,' and that . . . the President's response, usually precedes congressional action").

It does not follow merely because intelligence gathering is an accepted and important war measure (1) that Congress cannot set limits on its use during war (*e.g.*, under the FISA), or (2) that Congress impliedly authorizes such a measure when it authorizes the use of force, much less a very selective use of appropriate force. *See also supra* note 4; text *supra* notes 27–28, 30–33; Paust, *supra* (no congressional authorization exists in the AUMF to override the requirements of FISA and such would not be "appropriate"); *cf* Hamdi v. Rumsfeld, 542 U.S. at 518 (the 2001 congressional authorization of certain necessary and appropriate force impliedly authorized detention of a limited category of individuals from the war in Afghanistan as a "fundamental and accepted . . . incident to war" regarding the "'force' Congress has authorized").

40. *See* American Civil Liberties Union v. National Security Agency, 438 F. Supp. 2d 754 (E.D. Mich. 2006). In that case, the court ruled that the President's domestic spying program "has undisputedly been implemented without regard to FISA and of course the more stringent standards of Title III, and obviously in violation of the Fourth Amendment"; has violated the First Amendment rights of plaintiffs; "undisputedly, has violated the provisions of FISA for a five-year period . . . [and violated] the Separation of Powers ordained by the very Constitution of which this President is a creature"; is not authorized by the 2001 Authorization for Use of Military Force (especially since the FISA and Title III "have made abundantly clear that prior warrants must be obtained from the FISA court for such surveillance, with limited exceptions," and FISA's "highly specific . . . requirements" would prevail over the more general AUMF even if it impliedly applied to antiterrorist intelligence surveillance); and is not permissible because of a claim that the President, as commander in chief, "has been granted the inherent power to violate not only the laws of the Congress but the First and Fourth Amendments of the Constitution." 438 F. Supp. 2d at 775–76, 778–80.

41. *See, e.g.*, Mimi Hall & David Jackson, *Bush Administration Defends Warrantless Mail Inspection*, USA Today, Jan. 5, 2007, at 4A (addressing a December 20, 2006, signing statement that is not even limited to contexts of war or terrorism).

42. *See, e.g.*, David Johnston & David Sanger, *Cheney's Aide Says President Approved Leak*, N.Y. Times, Apr. 7, 2006, at A1; Richard B. Schmitt & Peter Wallstein, *Libby Said Bush Okd Leaks*, L.A. Times, Apr. 7, 2006, at A1 (leaks of classified information

from the National Intelligence Estimate of 2003, which "was [only] officially declassified almost two weeks later," occurred with approval of Cheney and Addington, who stated that Bush authorized the leaking of classified information); Richard B. Schmitt, *Libby Says "Superiors" Authorized Leaks*, L.A. Times, Feb. 10, 2006, at A1; Andrew Zajac, *Libby Said He Had OK to Leak Secrets*, Chic. Trib., Feb. 10, 2006, at 1. *See also* Mayer, *supra* note 35 ("Documents embarrassing to Addington's opponents were leaked to the press"). Members of the Bush administration also intentionally leaked highly classified information concerning the identity of high-level covert CIA employee Valerie Plame Wilson for political purposes with clearly foreseeable harm of great significance to CIA operatives, the Agency, and our national security. *See, e.g.*, Bob Deans, *Plame: Leak Felt Like "Hit in the Gut": On Capital Hill, Former CIA Operative Says Covert Identity Exposed, U.S. Intelligence Efforts Undercut for Political Purposes*, Atlanta-J.-Const., Mar. 17, 2007, at 1A; Trevor Royle, *The Fall Guy*, The Sunday Herald, Mar. 11, 2007, at 42; Raymond Whitaker & Andrew Buncombe, *How An Article in the "IOS" Led to the Conviction of Lewis "Scooter" Libby*, The Independent (London), Mar. 11, 2007, at 50; Zajac, *supra.* This is just one set of detrimental consequences that has followed from an arrogant commander-above-the-law policy that has shifted the war to one against our own institutions. Leaks of such a nature are far different from leaks by lower level officials to disclose governmental illegality of highest level officials. The latter sort of leaks can also involve a claimed defense of "justification," especially when disclosures of illegality to highest level officials that authorized the illegality would be futile. Concerning the justification defense, *see, e.g.*, Note, *Stealing Information: Application of a Criminal Anti-Theft Statute to Leaks of Confidential Government Information*, 55 Fla. L. Rev. 1043, 1072 n.170 (2003).

43. *See also* United States v. Nixon, 418 U.S. at 695–96 ("So long as this regulation is extant it has the force of law. . . . So long as [an Executive] regulation remains in force the Executive branch is bound by it, and indeed . . . [the three branches are] bound to respect and to enforce it" despite the power in the Executive to amend or terminate it); 10 Op. Att'y Gen. 11, 17 (1861); William Winthrop, Military Law and Precedents 32 (2d ed. 1920).
44. *See, e.g.*, *supra* notes 26, 36–37; Chapter Two, Section B.
45. *See, e.g.*, David Golove, *United States: The Bush Administration's "War on Terrorism" in the Supreme Court*, 3 Int'l J. Const. L. 128, 145 (2005); Paust, *supra* note 3, at 835 n.89 (quoting John Yoo: regarding "the Commander-in-Chief function," Congress "can't prevent the President from ordering torture"); John C. Yoo, *A Crucial Look at Torture*, L.A. Times, Jul. 6, 2004, at B11 ("as commander in chief, may have to take measures . . . that might run counter to Congress' wishes"); Anne-Marie O'Connor, *In Wartime, This Lawyer Has Got Bush's Back*, L.A. Times, Dec. 12, 2005, at E1 (reporting that Yoo was opposed to the McCain amendment and quoting him: "The real effect of the McCain amendment would be to shut down coercive interrogation."); Teddy O'Reilly, *Who is watching the watchmen?*, The Daily Cardinal, Dec. 14, 2005 (reporting John Yoo's outrageous if no longer surprising remarks during a debate: Professor Doug Cassel: "If the President deems that he's got to torture somebody, including by crushing the testicles of the person's child, there is no law that can stop him? Yoo: No treaty. Cassel: Also, no law by Congress – that is

what you wrote in the August 2002 memo. . . . Yoo: I think it depends on why the President thinks he needs to do that." [Yoo also stated during the debate in Chicago: "I don't think a treaty can constrain the President as commander in chief"]), available at: http://www.dailycardinal.com/article.php?storyid=1028126; Peter Slevin, *Scholar Stands by Post-9/11 Writings on Torture, Domestic Eavesdropping*, Wash. Post, Dec. 26, 2005, at A3; Andrew Sullivan, *Nixon's Revenge: The Return of the Wiretappers*, Sunday Times (London), Jan. 1, 2006, at 4; Cass R. Sunstein, *The 9/11 Constitution*, The New Republic, Jan. 16, 2006, at 21; John C. Yoo, Memorandum Opinion for the Deputy Counsel to the President, Sept. 25, 2001 ("Neither statute [addressed] . . . can place any limits on the President's determinations as to . . . the method, timing, and nature of the response. These decisions . . . are for the President alone to make. . . . [and *id.* n.32:] In the exercise of his plenary power to use military force, the President's decisions are for him alone and are unreviewable."), available at: http://www.usdoj.gov/olc/warpowers925.htm. *See also* Yoo, *supra* note 34, at 120–21 ("emergencies . . . cannot be addressed by existing laws" and "presidents [should not be] . . . duty-bound to obey any and all acts of Congress, even those involving the commander-in-chief power"), 200–02 (even after the prohibition of coercive interrogation in the 2005 Detainee Treatment Act, "[t]he executive branch should continue . . . deciding when to use coercive interrogation"). His coauthor of the 2002 Yoo-Delahunty memo (*supra* note 26) continues to claim that the President has a commander in chief authority "to authorize torture" "in violation of statutory law and the CAT." *See* Robert J. Delahunty, *The CINC Authority and the Laws of War*, 99 Proc., Am. Soc. Int'l L. 190, 192 (2005). The autocratic Yoo and Delahunty commander-above-the-law theory seems to have a few academic supporters. *See, e.g.*, Julian G. Ku, *Is There an Exclusive Commander-in-Chief Power?*, available at: http://www.thepocketpart.org/2006/03/ku.html (preferring that the President should have "an exclusive Commander-in-Chief power that authorizes him to refuse to execute laws and treaties that impermissibly encroach upon his inherent constitutional power," with merely imperfect attention to two cases and missing judicial recognition of the significant reach of congressional power documented herein); *see also infra* note 60 (Bradley and Goldsmith).

46. *See generally* Golove, *supra* note 45; Neal Kumar Katyal, *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 Harv. L. Rev. 65, 100 (theory that "statutes could be set aside" is a "reactionary ideology . . . that has pervaded . . . [the Bush administration's] activity in the past five years"), 105 ("a reactionary constitutional ideology") (2006); Paust, *supra* note 3, at 856–59, 862 n.198; W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 Cornell L. Rev. 67, 68 n.2, 70 & n.7, 112–14, 120, 128 (2005); Mayer, *supra* note 35 (quoting Attorney Scott Horton, historian Arthur Schlesinger, Jr., conservative Attorney Bruce Fein, Professor Richard A. Epstein, and others); *supra* note 4. *See also* Cornelia Pillard, *Unitariness and Myopia: The Executive Branch, Legal Process, and Torture*, 81 Ind. L.J. 1297, 1297–98 (2006) ("The failure [of "the rule of law"] was predictable in an administration whose legal decision making bespeaks prerogatives of power more than limitations of law. Hand-picked political appointees collaborated secretly on the Torture Memo, driving directly to a desired bottom line . . . the torture debacle was born in part of ideologically driven myopia."). *See also* Louis Fisher, *President's*

Game? History Refutes Claims of Unlimited Presidential Power Over Foreign Affairs, Legal Times, Dec. 4, 2006 (Yoo and others misuse dictum in *Curtiss-Wright* and ignore historic trends).

47. *See also* Jordan J. Paust, *International Law Before the Supreme Court: A Mixed Record of Recognition*, 45 Santa Clara L. Rev. 829, 851–52 & n.118 (2005) [hereinafter Paust, *Before the Supreme Court*]; Delahunty, *supra*, note 45; Ku, *supra* note 45; Michael D. Ramsey, *Toward a Rule of Law in Foreign Affairs*, 106 Columbia L. Rev. 1450, 1451, 1453, 1458–61, 1466, 1470–72 (2006) (criticizing Yoo's theories regarding war and treaty powers as ahistorical, antitextual, and shockingly ignoring of actual views of the majority of Founders and Framers and actual trends in judicial decision); Yoo & Delahunty, *supra* note 26, at 35 & n.108. In practice, the approach failed to provide the Executive branch with sound, realistic, and professional legal advice. *See also* Alvarez, *supra* note 35, at 186 ("shoddy and incomplete," "reckless"), 191 ("a perversion of . . . law"), 215–18, 222–23; Richard B. Bilder & Detlev F. Vagts, *Speaking Law to Power: Lawyers and Torture*, 98 Am. J. Int'l L. 689 (2004); Aaron R. Jackson, *The White House Counsel Torture Memo: The Final Product of a Flawed System*, 42 Cal. W.L. Rev. 149 (2005); Koh, *supra* note 3, at 647–50, 652–54; Wayne McCormack, *Emergency Powers and Terrorism*, 185 Mil. L. Rev. 69, 134 (2005) (Bybee Memo "seems irresponsible lawyering at best"); Pillard, *supra* note 46, at 1297–98; Geoffrey R. Stone, book review, *Taking Liberties*, Wash. Post, Nov. 5, 2006, at T6 ("extreme, reckless and dangerous view"); Wendel, *supra* note 46, at 68–70 & nn.2, 7, 112–14, 126–27; Kathleen Clark & Julie Mertus, *Torturing the Law: The Justice Department's Legal Contortions on Interrogation*, Wash. Post, June 20, 2004, at B3; Geoffrey S. Corn, *Pentagon Process Subverted? The Lost Battle of Alberto Mora*, JURIST, Feb. 22, 2006, available at: http://jurist.law.pitt.edu/forumy/2006/02/pentagon-process-subverted-lost-battle.php; Lawyers' Statement on Bush Administration Torture Memos (2004), available at: http://www.afj.org/spotlight/0804statement.pdf; *supra* note 5.

    Westlaw-phobia is an apparent affliction shared by other professors who offer sometime sophistic speculation about important aspects of the reach of law or who, having discovered alleged controversy or uncertainty among themselves, assume that the content of law is no longer extant and discoverable. Lack of attention to actual and directly relevant holdings and expectations of the judiciary set forth in judicial opinions can render even eloquent prattle sterile. The affliction would be of little consequence if left lifeless in law reviews, but it can be dangerous if it migrates to memoranda under the pretense of providing our Government a statement of "law." Are those in the Executive branch bound by the laws of war? Is the commander in chief power completely free from legislative limits? Does the judiciary have authority to review the legality of Executive decisions and conduct during war? Directly relevant and stable holdings and patterns of juristic expectation regarding each question are discoverable in the cases and should not be ignored.

48. *See also* Mayer, *supra* note 35 (quoting especially the claims of Addington and Cheney); Wendel, *supra* note 46, at 84; Byron York, *Listening to the Enemy – The Legal Ground on Which the President Stands*, National Rev., Feb. 27, 2006; Eric Lichtblau, *Panel Rebuffed on Documents on U.S. Spying*, N.Y. Times, Feb. 2, 2006, at A1; *Spy Crimes*, The New Republic, Jan. 16, 2006, at 7; Chapter Two, Sections B–C

(Bush stated that he will not abandon secret detentions and "tough" interrogation tactics in apparent violation of the 2005 Detainee Treatment Act, § 1003(a); *supra* notes 35, 39–40.

49. *See also* Bay, *supra* note 38, at 362, 367, 386; *supra* notes 3–26, 48.
50. Authorization for Use of Military Force, Pub. Law 107–40 (Sept. 18, 2001) [hereinafter AUMF].
51. *See id.* preamble ("To authorize . . . against those responsible for the recent attacks"), § 2(a) ("those . . . [that] planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such"); Paust, *Before the Supreme Court, supra* note 47, at 838 n.51; Tung Yin, *Ending the War on Terrorism One Terrorist at a Time: A Noncriminal Model for Holding and Releasing Guantanamo Bay Detainees*, 29 Harv. J.L. & Pub. Pol'y 149, 189–90 ("Whatever other targets may be encompassed when the President refers to the global war on terrorism, the entities that Congress has designated to be the subject of military force are limited to those that either played a role in planning or carrying out the 9/11 attacks or sheltered those responsible"), 192 ("The class of persons" addressed "under President Bush's executive order" regarding military commissions "is significantly broader than the class of persons fitting within the terms of Congress's Military Force Authorization.") (2005). *See also* Yoo, *supra* note 14, at 115, 124.
52. *See, e.g.*, Paust, *Before the Supreme Court*, *supra* note 47, at 838 n.51; Yin, *supra* note 51.
53. The fact that the United States uses military "force" in a foreign state in legitimate self-defense against a nonstate actor engaged in a process of armed attacks against the United States, its military, and/or its nationals here or abroad does not create a "war," "armed conflict," armed "hostilities," or "combat" if the nonstate actor is not a belligerent or insurgent and U.S. military forces do not engage in hostilities with the armed forces of the state in whose territory the self-defense measure takes place. *See, e.g.*, Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 Cornell Int'l L.J. 533, 535 n.3 (2002) [hereinafter Paust, *Use of Force*]; Jordan J. Paust, *Post 9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, The Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 Notre Dame L. Rev. 1335, 1341 & n.23 (2004) (noting remarks of former U.S. Department of State Legal Adviser Abraham D. Sofaer). *See also* Louis Henkin, *War and Terrorism: Law or Metaphor*, 45 Santa Clara L. Rev. 817, 821 (2005). *Cf* Yoram Dinstein, War, Aggression and Self-Defence 245 (4th ed. 2005) (arguing that such creates an "armed conflict" with the state [which per hypo has no basis in fact] but not a "war"). The fact that Section (b)(1) of the AUMF stated that the AUMF was specific statutory authorization within the meaning of Section 8(a)(1) of the War Powers Resolution (50 U.S.C. §§ 1541–48) does not mean that Congress contemplated that use of any sort of force in the future would create a state of war. It was contemplated that U.S. military would be engaged in conflict with al Qaeda in Afghanistan where the Taliban was engaged in a war with the Northern Alliance. Additionally, the AUMF authorized use of force against certain nations, which at the time might have been thought to have included the state of Afghanistan, which was a nation controlled by the Taliban. *See also infra* note 59. Under the circumstances, it was contemplated that

U.S. armed forces would be introduced "into situations where imminent involvement in hostilities" between the Taliban and the Northern Alliance or against the Taliban clearly could occur within the meaning of the War Powers Resolution and the international laws of war. Additionally, Congress is presumed to understand that under international law (and apparently under U.S. domestic law) the United States cannot be at "war" with a "person" or "organization" or any entity lacking even insurgent status. *See also infra* note 56.

54. *See, e.g.*, David Abramowitz, *The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International Terrorism*, 43 Harv. Int'l L.J. 71, 72–74 & n.5 (not a declaration of war) (2002); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2079 & nn.133–35 (2005).
55. *See, e.g.*, The Prize Cases, 67 U.S. (2 Black) at 668 (the President "has no power to initiate or declare a war"); *Id.*, 67 U.S. (2 Black) at 693 (Nelson, J., dissenting) ("Congress alone can determine whether war exists or should be declared"), 698 ("this power belongs exclusively to the congress of the United States"); United States v. Smith, 27 F. Cas. at 1230 (Paterson, J., on circuit) ("Power of making war . . . is exclusively vested in congress"); National Savings and Trust Co. v. Brownell, 222 F.2d 395, 397 (D.C. Cir. 1955) ("a state of war, constitutionally speaking . . . , is a matter of congressional declaration"); Alexander Hamilton, *Pacificus No. 1* (June 29, 1793) ("the Legislature can alone declare war, can alone actually transfer the nation from a state of Peace to a state of War"), in 15 The Papers of Alexander Hamilton 33, 42 (H. Syrett ed., 1969); F. Wormuth & E. Firmage, To Chain the Dog of War 24, 28, 30–31 (quoting James Madison: "power to declare war . . . is fully and exclusively vested in the legislature . . . [and] the executive has no right, in any case, to decide the question, whether there is or is not cause for declaring war"), 66, 76 (quoting Thomas Jefferson: "Congress alone is constitutionally invested with the power of changing our conditions from peace to war"), 84, 179 n.4 (quoting James Wilson: "vested" in Congress) (1986); James Monroe, letter to former President James Madison (1824) ("The Executive has no right to compromit the nation in any question of war"), *quoted in* The Record of American Diplomacy 185 (R. Bartlett ed., 1954); Paust, *supra* note 3, at 470 n.25; *cf* The Prize Cases, 67 U.S. (2 Black) at 667, 669 (regarding merely "a civil war . . . , its actual existence is a fact . . . which the Court is bound to notice and to know"); *but see id.*, 67 U.S. (2 Black) at 670 (the "court must be governed by the decisions" of the President whether a civil war as such with "belligerents" exists).
56. *See, e.g.*, Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 Yale J. Int'l L. 325, 326–28 (2003) [hereinafter *Enemy Status*] [revised in Chapter Three]. *But cf* Hamdan v. Rumsfeld, _ U.S. at _ n.31 ("we do not question the Government's position that the war commenced with the events of September 11, 2001"). Most textwriters agree that we cannot be at "war" or in "armed conflict" or "combat" with al Qaeda as such or a mere tactic of "terrorism." *See, e.g.*, Bruce Ackerman, *This Is Not a War*, 113 Yale L.J. 1871 (2004); Silvia Borelli, *Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the "War on Terror,"* 87 Int'l Rev. Red Cross 39, 45 (2005); Michael Byers, *Terrorism, the Use of Force, and International Law After 11 September*, 51 Int'l & Comp. L.Q. 401

(2002); David Cole, *Enemy Aliens*, 54 Stan. L. Rev. 953, 958 (2002); Christopher Greenwood, *War, Terrorism, and International Law*, 56 Current L. Probs. 505, 529 (2004); Joan Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 Am. J. Int'l L. 345, 347–48 (2002); Wayne McCormack, *Emergency Powers and Terrorism*, 185 Mil. L. Rev. 69, 70 & n.6 (2005); Jennifer Moore, *Practicing What We Preach: Humane Treatment for Detainees in the War on Terror*, 34 Denv. J. Int'l L. & Pol'y 33, 36 (2006); Mary Ellen O'Connell, symposium, "Terrorism on Trial," *The Legal Case Against the Global War on Terror*, 37 Case W. Res. J. Int'l L. 349, 349–57 (2005); Kenneth Roth, *The Law of War in the War on Terror*, Foreign Aff. 2 (Jan.–Feb. 2004); Leila N. Sadat, *Terrorism and the Rule of Law*, 3 Wash. U. Global Stud. L. Rev. 135, 140 (2004); Marco Sassoli, *Use and Abuse of the Laws of War in the "War on Terrorism,"* 22 Law & Ineq. 195 (2004); Warren Richey, *Tribunals on Trial*, The Christian Science Monitor, Dec. 14, 2001, at 1 (quoting Professor Leila Sadat: not a war); Scott Silliman, testimony before the Senate Judiciary Committee, *On DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing on Review of Military Terrorism Tribunals Before Congress*, 107th Cong. (2001) (United States not at war with al Qaeda and the 9/11 attacks could not be violations of the laws of war), *available at* 2001 WL 26187921; Detlev F. Vagts, *"War" in the American Legal System*, 12 ILSA J. Int'l & Comp. L. 541, 543–45 (2006); *see also* Zerrougui, *et al.*, Report, *Situation of Detainees at Guantanamo Bay*, Commission on Human Rights, 62nd sess., items 10 and 11 of the provisional agenda, U.N. Doc. E/CN.4/2006/120 (Feb. 15, 2006), at 36, para. 83 ("The war on terror, as such, does not constitute an armed conflict for the purposes of the applicability of international humanitarian law."); Mark A. Drumbl, *Guantanamo, Rasul, and the Twilight of Law*, 53 Drake L. Rev. 897, 908 (2005) (Bush policy has the unwanted consequence of "absurdly glorifying terrorism as armed conflict and terrorists as 'warriors'"); Zbigniew Brzezinski, former National Security Adviser, interview with Wolf Blitzer, CNN, May 14, 2006 ("I don't buy the proposition we are at war. . . . [T]his is really a distortion of reality. We have a serious security problem with terrorism. . . . But to create an atmosphere of fear, almost of paranoia, claiming that we're a nation at war, opens the door to a lot of legal shenanigans." Without compliance with FISA, "[w]e slide into a pattern of illegality"); Jenny S. Martinez, *Inherent Executive Power: A Comparative Perspective*, 115 Yale L.J. 2480, 2500 (2006) (quoting Lord Hoffman in A (FC) & Others (FC) v. Sec'y of State for the Home Dep't, [2004] UKHL 56, 96 ("'Terrorist violence, serious as it is,'" is not a "'war or other public emergency threatening the life of the nation'"); *cf* Bay, *supra* note 38, at 337 n.6; Yin, *supra* note 51, at 189–90 ("important to distinguish the rhetoric of the 'war on terrorism' from the congressional authorization," "the current war on terrorism"); *but see* Yoo, *supra* note 14, at 12–13 (recognizing that we cannot be at war with terrorism, but claims that we are "in an international armed conflict with al Qaeda"); Jane Gilliland Dalton, *What Is War? Terrorism as War After 9/11*, 12 ILSA J. Int'l & Comp. L. 523 (2006); John C. Yoo & James C. Ho, *The Status of Terrorists*, 44 Va. J. Int'l L. 207 (2003).

57. There are several reasons why the rhetoric of "war on terror" is not preferable. One is that it can mask and sanitize choices based on underlying nationalistic, racist, or

religious-based aggression and violence against other human beings, not that all responses to acts of human beings who use the tactic of terrorism are based on any such circumstance. During what is claimed to be a "war on terror," it may be that certain members of the general public choose not to know what forms of violence are actually practiced against a dehumanized "them" as long as it is done "over there." In this sense, some of the Abu Ghraib photos might have been disturbing, not so much because of the cruel, inhuman, and degrading treatment portrayed, but because it was "brought home." *Cf* Kim Lane Scheppele, *Hypothetical Torture in the "War on Terrorism,"* 1 J. Nat'l Security L. & Pol'y 285, 292 n.17 (2005) (addressing results of a USA Today/CNN/Gallup poll in 2005).

58. *See* Hamdi v. Rumsfeld, 542 U.S. at 520–21. The "active hostilities" in Afghanistan have lasted longer than World War II.

59. There is no convincing proof that the Taliban knew of the pending 9/11 attacks or helped to plan, authorize, commit, or aid the 9/11 attacks. Thus, by its terms, the AUMF would not authorize use of force against the Taliban unless they had "harbored" al Qaeda before or during the 9/11 attacks, which in the context of its use in the AUMF seems to mean had harbored with knowledge of the pending 9/11 attacks as such. *See supra* note 51; *see also* Paust, *Use of Force*, *supra* note 53, at 542–43, 554–55. The same points pertain with respect to Saddam Hussein's regime in Iraq except that there is no known factual basis to even suggest that Iraq had "harbored" al Qaeda before the 9/11 attacks and with reference to such attacks. There were other reasons for use of force in Iraq. *See, e.g.*, Paust, *Use of Force*, *supra* note 53, at 549–50, 555–56. Nonetheless, rightly or wrongly, we have been at war in Afghanistan and Iraq and both armed conflicts had been international armed conflicts to which all of the customary laws of war and relevant treaties applied. *See also* Paust, *supra* note 3, at 813–14, 816; *supra* note 27.

60. *See* text *supra* notes 3–5, 7–9, 14–18, 20–22. Legislative history documents the recognition that only "appropriate" force was authorized and that, therefore, force must comply with "international laws." *See, e.g.*, 147 Cong. Rec. H5673 (daily ed. Sept. 14, 2001) (statement of Rep. Clayton); *see also* Hamdi v. Rumsfeld, 542 U.S. at 520–21 (quoted *supra* note 3); Bradley & Goldsmith, *supra* note 54, at 2078 (the AUMF authorization to use necessary and appropriate force specifies "both the resources that the President can use and the methods that he can employ"); *but see id.* at 2066 (inconsistently and illogically claiming that the AUMF somehow authorized the President to "fully" prosecute a "war"), 2081 (regarding their inconsistent statement and unproven assumption that legislative debates "suggest that Congress did not view the 'necessary and appropriate' phrase as a limitation on presidential action" – with footnoted quotations referring merely to a "wide" or "broad delegation of authority" and to an express recognition that the word "appropriate" encompasses international legal requirements), 2089 (preferring that the "AUMF should not be read as prohibiting the President from violating international law"), 2097 (same).

Even if the limiting word "appropriate" had not been used, it is certain that there was no clear and unequivocal expression of congressional intent to override international law, which is a requirement based in Supreme Court decisions and part of the five-step process regarding potential conflicts between statutes and international law. *See, e.g.*, Weinberger v. Rossi, 456 U.S. 25, 35 (1982) ("congressional

expression [to override is] necessary"); Cook v. United States, 288 U.S. 102, 120 (1933) (purpose to override or modify must be "clearly expressed"); Cheung Sum Shee v. Nagle, 268 U.S. 336, 345–46 (1925) (the "Act must be construed with the view to preserve treaty rights unless clearly annulled, and we cannot conclude . . . a congressional intent absolutely to exclude"); United States v. Lee Yen Tai, 185 U.S. 213, 221 (1902) ("purpose . . . must appear clearly and distinctly from the words used" by Congress); Paust, *supra* note 3, at 99, 107, 120, 124–25 nn.2–3, and other cases cited. Precedent also exists affirming that Congress has no authority to authorize a violation of the laws of war. Paust, *supra* note 3, at 106–09, 114. In view of this, it would be quite illogical to claim that a congressional requirement to use "appropriate" force should not be read as prohibiting the President from violating relevant international law, especially given the President's constitutionally based duty to faithfully execute the laws and an unswerving judicial recognition of Executive duties to comply with the laws of war. *See also supra* notes 3, 20–21; Chapter One, Section E.

61. *See, e.g.*, Spector v. Norwegian Cruise Line, Ltd., 545 U.S. at 143–44 (2005) (Ginsburg, J., concurring); Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984); Weinberger v. Rossi, 456 U.S. 25, 32 (1982); United States v. Flores, 289 U.S. 137, 159 (1933); Cook v. United States, 288 U.S. 102, 120 (1933); United States v. Payne, 264 U.S. 446, 448 (1924); MacLeod v. United States, 229 U.S. 416, 434 (1913); Whitney v. Robertson, 112 U.S. 190, 194 (1888); The Pizarro, 15 U.S. (2 Wheat.) 227, 245–46 (1817); Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 117–18 (1804); Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 43 (1801); 1 Op. Att'y Gen. 26, 27 (1792); Paust, *supra* note 3, at 12–13, 43–44 n.53, 47–49 n.57, 59 n.73, 70, 99, 101, 120, 124–25 n.2, 134 n.18, 137 n.41, 143–44 n.73; *see also* Hamdi v. Rumsfeld, 542 U.S. at 521 ("our understanding [of the AUMF] is based on longstanding law-of-war principles"); *id.*, 542 U.S. at 551 (Souter, J., dissenting in part and concurring in judgment) (using the law of war and stating: "there is reason to question whether the United States is acting in accordance with the laws of war. . . . I conclude accordingly that the Government has failed to support the position that the" AUMF "authorizes the described detention"). This well-recognized interpretive criterion would apply whether or not Congress uses the word appropriate.
62. *Supra* note 3; text *supra* notes 18–21, 25.
63. *See* The War Crimes Act, 18 U.S.C. § 2441 (incorporating many of the laws of war by reference for prosecution of "[w]hoever" might be reasonably accused); 10 U.S.C. § 818 (incorporating all of the laws of war by reference).
64. *See also* Hamdan v. Rumsfeld, _ U.S. at _ (there was no intent to limit requirements concerning the structure and procedures in military commissions contained in 10 U.S.C. §§ 821, 823, 836); *supra* notes 39–40 (there was no congressional intent to limit the requirements of the FISA concerning domestic spying).
65. Public Law No. 109–366, 109th Cong., 2d sess., 120 Stat. 2600 (Oct. 17, 2006) [hereinafter MC Act].
66. *See, e.g.*, Senator John McCain, remarks, *quoted in* R. Jeffrey Smith & Charles Babington, *White House, Senators Near Pact on Interrogation Rules*, Wash. Post, Sept. 22, 2006, at A1.
67. Senator John McCain, remarks on the Senate floor, Sept. 28, 2006, available through Lexis, McCain Urges Final Passage of Military Commissions Act of 2006, States

News Service, Sept. 28, 2006. Upon signing the Act, President Bush stated that it "complies with both the spirit and the letter of our international obligations." *See, e.g.*, *President Signs "Military Commissions Act of 2006,"* U.S. Fed News, Oct. 17, 2006.

68. *See, e.g.*, *supra* note 60. One does not apply the last in time rule unless there is a clear and unequivocal expression of congressional intent to override a prior treaty. *See supra* note 60. Even if the last in time rule could be applicable, the traditional "rights under" treaties exception to the last in time rule documented in Supreme Court decisions (*See* Paust, *supra* note 3, at 104–05, 121, 137–39 nn.39–49) and the law of war exception recognized by Supreme Court Justices and Attorneys General (*see* Paust, *supra* note 3, at 106–07, 114, 121, 141–42 nn.52–57; *see also* United States *ex rel.* Schlueter v. Watkins, 67 F. Supp. 556, 564 (S.D.N.Y. 1946) (quoting Albert Gallatin in 1798: "By virtue of . . . [the war power], Congress could . . . [act], provided it be according to the laws of nations and treaties")) would assure the primacy of "rights under" the Geneva Conventions and primacy of the Geneva Conventions more generally as laws of war.
69. *See, e.g.*, Paust, *supra* note 3, at 105, 174–75, 184 n.24, 189–90 n.67, 295, 387 n.47; Paust, *Judicial Power*, *supra* note 24, at 514–25. Section 6(a)(3) adds that a relevant executive order "shall be authoritative (except as to grave breaches of common Article 3) as a matter of United States law, in the same manner as other administrative regulations," but such an authoritative provisional characterization by the Executive concerning the meaning of common Article 3 of treaty law of the United States must still be subject to ultimate review by the judiciary in view of constitutionally based judicial power and authority at stake.
70. *See, e.g.*, Paust, *Judicial Power*, *supra* note 24, at 514–25; *infra* note 108.
71. Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1948, 75 U.N.T.S. 287, art. 3(1) [hereinafter GC].
72. *Id.*
73. *See generally* Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (1969), art. 31(1); Jordan J. Paust, Jon M. Van Dyke, & Linda M. Malone, International Law and Litigation in the U.S. 69–70, 255, 365, 390, 413, 417, 419 (2d ed. 2005).
74. Statute of the International Tribunal for Rwanda, U.N.S.C. Res. 955 (8 Nov. 1994).
75. *Id.* art. 4.
76. Trial Chamber, ICTR-96-13-T (27 Jan. 2000).
77. *Id.* para. 287 (emphasis added). In a related manner, the U.S. Congress has determined that "cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges and trial, [and] causing the disappearance of persons by the abduction and clandestine detention of those persons" are among "flagrant" and "gross violations of internationally recognized human rights." 22 U.S.C. § 2304(d).
78. *Supra* note 76, para. 285.
79. *Id.*
80. *Id. See also* Zubeda v. Ashcroft, 333 F.3d 463, 472 (3d Cir. 2003) (rape and sexual assault "can constitute torture"); Al-Saher v. INS, 268 F.3d 1143, 1147 (9th Cir. 2001) (torture in Iraq included "rape, breaking limbs, denial of food and water, and threats to rape or otherwise harm relatives"); 22 U.S.C. § 2152 note ("rape and other forms of sexual violence" constitute torture).

81. *See* Paust, *supra* note 3, at 845–46.
82. *Id.* at 821–22 n.40.
83. Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 5, 66, para. 167 (1978).
84. *Id.*
85. T & V v. United Kingdom, Judgment of Dec. 16, 1999, 30 E.H.R.R. 121, para. 71 (2000); Selmouni v. France, 1999-V 149, 29 E.H.R.R. 403, para. 99 (Grand Chamber July 28, 1999).
86. Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1347–48 (N.D. Ga. 2002). More generally, the Supreme Court has recognized the impermissibility of "coercive cruelty." Weems v. United States, 217 U.S. 349, 373 (1910). U.S. cases also have provided informing recognition of what types of conduct can amount to cruel treatment under the Eighth Amendment. *See, e.g.*, Hudson v. McMillian, 503 U.S. 1, 14, 17 (1992) (Blackmun, J. concurring) ("shocking them with electric currents, asphyxiating them short of death, intentionally exposing them to undue heat or cold" and infliction of "psychological pain"); Wilson v. Seiter, 501 U.S. 294, 305 (1991) (combination of deprivation of food and warmth, "for example a low cell temperature at night combined with a failure to issue blankets"); Estelle v. Gamble, 429 U.S. 97, 104 (1976) ("deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain'"); Brooks v. Florida, 389 U.S. 413, 414–15 (1967) (deprivation of adequate food and detention naked in a small cell was in context "a shocking display of barbarism"); Beecher v. Alabama, 389 U.S. 35, 36, 38 (1967) ("gross coercion" existed when an officer pressed a gun to the face and stated "'If you don't tell the truth I am going to kill you'" and thereafter another officer fired a rifle nearby); United States v. Rojas Tapia, 466 F.3d 1, 5 (1st Cir. 2006) ("physically coercive punishment, such as an unreasonable deprivation of food or sleep" obviates voluntariness of a confession); Littlewind v. Rayl, 33 F.3d 985, 985 (8th Cir. 1994); *id.*, 839 F. Supp. 1369, 1372 (D.N.D. 1993) (restraint naked for seven hours, denied clothing for six days, denied a blanket for two days, restraint seven days in leg irons and handcuffs, and tied to a bed for eight hours); Wright v. McMann, 387 F.2d 519, 526 (2d Cir. 1967) (cruel where solitary confinement conditions in a "'strip cell'" (where a prisoner is nude and exposed to bitter cold) "serve to destroy completely the spirit and undermine the sanity of the prisoner"); Scarver v. Litscher, 371 F. Supp. 2d 986, 993 (W.D. Wis. 2005) (stripping a person naked and placing him in a cold cell without a mattress, blankets, etc.); Ferola v. Moran, 622 F. Supp. 814, 821 (D.R.I. 1985) (restraint so as to deny access to a bathroom for fourteen hours); Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969) (forcing persons to strip nude and sleep on cement floors with no means to maintain personal cleanliness); Al Ghashiyah v. McCaughtry, 230 Wis.2d 587, 602 N.W.2d 307 (Wis. App. 1999) (strip searches employed for the purpose of intimidating a person or humiliating or harassing).
87. Concluding Observations of the Committee Against Torture: Israel, 18th Sess., paras. 256–57, U.N. Doc. A/52/44 (1997). With respect to use of cold air to chill, a U.S. case decided that among acts of "torture" is that of "[f]orcing a detainee while wet and naked to sit before an air conditioner." *In re* Estate of Ferdinand E. Marcos, 910 F. Supp. 1460, 1463 (D. Haw. 1995). *See also* U.N. Experts' Report, *supra* note 1, at 25, paras. 51 ("stripping persons naked . . . can in individual cases cause extreme psychological pressure and can amount to degrading treatment, or even torture.

The same holds true for the use of dogs, especially if it is clear that an individual phobia exists. Exposure to extreme temperatures, if prolonged, can conceivably cause severe suffering."), 52 ("use of dogs, exposure to extreme temperatures, sleep deprivation for several consecutive days and prolonged isolation were perceived as causing severe suffering."). The Committee Against Torture has also recognized that "incommunicado detention" is a form of cruel, inhuman, and degrading treatment and that, if prolonged, can even rise to the level of torture. *See* U.N. Committee Against Torture, Methods of Combating Torture, Fact Sheet No. 4 (Rev.1), at 32, available at: http://www.unhchr.ch/html/menu6/2/fs4rev1.pdf. *See also* Aschraft v. Tennessee, 322 U.S. 143, 154 (1944) (incommunicado detention is coercion violative of the Fifth Amendment).

88. *See, e.g.*, MC Act, *supra* note 65, Section 6(b)(1), adding a new subsection (d)(2)(A)–(C) and (E) to 18 U.S.C. § 2441.
89. *See* Conclusions and Recommendations of the Committee Against Torture: United States of America, 15/05/2000, U.N. Doc. A/55/44, paras. 179–180 (2000) ("The Committee expresses its concern about (a) The failure of the State Party to enact a federal crime of torture in terms consistent with article 1 of the Convention; (b) The reservation lodged to article 16, in violation of the Convention, the effect of which is to limit the application of the Convention . . . ").
90. MC Act, *supra* note 65, Section 6(a)(2).
91. *See, e.g.*, *supra* notes 24, 26, 61.
92. *See, e.g.*, Paust, *supra* note 3, at 12, 61 n.103, 73, 388 n.64, 437 n.69, and cases cited; *see also* Vienna Convention on the Law of Treaties, *supra* note 73, art. 31(3)(c) (treaties are to be interpreted in light of other relevant international law).
93. *See* MC Act, *supra* note 65, Section 6(b)(1), regarding 18 U.S.C. § 2441 (d)(1)(B).
94. *Id.*, regarding 18 U.S.C. § 2441 (d)(1)(E).
95. *Id.*, regarding 18 U.S.C. § 2441 (d)(2)(D)(iii).
96. *Id.*, regarding 18 U.S.C. § 2441 (d)(2)(D)(i)–(ii) and (iv).
97. *See id.* Section 6(c).
98. *Id.* Section 6(c)(2).
99. *See* Chapter Two, Section B, n.47, and accompanying text.
100. *See id.* n.47.
101. *See id.* n.51.
102. MC Act, *supra* note 65, Section 5(a). The attempt in this section to deny habeas corpus to any person with respect to their treaty-based Geneva rights and claims is an attempted suspension of habeas corpus unlimited as to time, place, nationality, necessity, and the circumstance of invasion that is beyond the lawful authority of Congress and unconstitutional. *See infra* note 114. Moreover, the attempt was to preclude the right to "invoke the Geneva Conventions," not customary international law. Because the rights reflected in the Geneva Conventions are now customary international law (*see, e.g.*, Paust, *supra* note 1, at 813 & n.8), one can still invoke such rights as customary international law. There is no ambiguity in that regard and if there had been, the Supreme Court has long recognized that a federal statute "can never be construed to violate . . . rights [under the customary law of nations] . . . further than is warranted by the law of nations." The Charming Betsy, 6 U.S. (2 Cranch) 64, 117–18 (1804).

103. The Act defines "unlawful enemy combatant" to include within one such category "a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant." MC Act, *supra* note 65, Section 3(a)(1), adding § 948a(1) to Title 10 of the U.S. Code. The Act defines three types of "lawful enemy combatant" in a way that only partly mirrors Article 4(A)(1)-(3) of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135, 20 U.S.T. 3316 [hereinafter GPW], and improperly excludes certain persons under Article 4(A)(1) and (3) as well as three other types of persons who are entitled to prisoner of war status under Article 4(A)(4)–(6). *Compare* Section 3(a)(1) of the Act, adding § 948a(2) to Title 10 *with* GPW, *supra* art. 4(A)(1)–(6). Thus, some persons who are prisoners of war and lawful combatants under Geneva law might be "unlawful enemy combatants" under the Act (unless the Act is construed in a manner consistent with treaty law of the United States, which is required by Supreme Court decisions. *See supra* notes 24, 26, 61). Moreover, the Act attempts to deny combatant and prisoner of war rights under Geneva law to "a person who is part of the Taliban." Section 3(a)(1), adding § 948a(1)(i) to Title 10. But such a broad denial is violative of Geneva law, especially for members of the regular armed forces of the Taliban who are protected under GPW Article 4(A)(1) and (3). Concerning combatant and prisoner of war status under Geneva law, *see, e.g.*, Paust, *Enemy Status*, *supra* note 56, at 328–34. Under the Act, anyone else of any nationality, including a civilian or prisoner of war of any sort, might be classified by the Executive as an unlawful enemy combatant. *See* MC Act, *supra* note 65, Section 3(a)(1), adding § 948a(1)(ii) to Title 10.

It must be recalled, however, that outside the context of actual wars in Afghanistan and Iraq mere members of al Qaeda cannot be engaged in "hostilities" or "combat" against the United States. *See supra* notes 56–59. They are not "combatants" and, having no combatant immunity, can be prosecuted for criminal acts of violence. *See* Paust, *Enemy Status*, *supra* note 56, at 327–28, 332. However, they can only be prosecuted for war crimes with respect to acts occurring during an actual war to which the laws of war apply, such as the wars in Afghanistan and Iraq.

104. *Supra* note 65, Section 3(a)(1), amending 10 U.S.C. to add a new § 948b(g) that attempts such a sweeping denial. Here, the attempt was merely to deny a right to "invoke the Geneva Conventions" and not customary international law. Because rights reflected in the Geneva Conventions are also customary international law, such rights can be invoked as customary international legal rights. *See supra* note 101.

105. *See, e.g.*, GC, *supra* note 71, arts. 3(1)(d), 29 (regarding state and individual liability), 43 (propriety of detention must be reconsidered "by an appropriate court or administrative board"), 78 ("right of appeal" of detention), 148 ("liability"); GPW, *supra* note 103, arts. 3(1)(d), 84, 99, 102, 105–106; IV Commentary, Geneva Convention Relative to the Protection of Civilian Persons in Time of War 209–11, 260–61, 368–69, 595–96, 602–03 (ICRC, Jean S. Pictet ed., 1958) ("liable to pay compensation"); 1 Commentary, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field

84 (ICRC, Jean S. Pictet ed., 1952) ("'[i]t should be possible . . . for the rules of the Convention to be evoked before an appropriate national court by the protected person who has suffered a violation'"); Paust, *supra* note 3, at 852–53 n.154 (also addressing nonimmunity), and cases cited; Paust, *Judicial Power*, *supra* note 24, at 514, 516 & nn.43–45. *See also* Hamdan v. Rumsfeld, _ U.S. at _ n.57 (rights guaranteed by the Geneva Conventions are rights "written 'first and foremost to protect individuals'").

Although the provisions are violative of the Geneva Conventions, there was no clear and unequivocal expression of a congressional intent to override the Conventions. See *supra* notes 66–70, and accompanying text. Thus, the last in time rule does not apply and Geneva law must have primacy. *See supra* notes 60, 68. Even if the last in time rule could apply, the "rights under" treaties and law of war exceptions to the last in time rule would assure the primacy of Geneva law. *See supra* notes 60, 68.

Article 23(h) of the Annex to the 1907 Hague Convention No. IV Respecting the Laws and Customs of War on Land, done at The Hague, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539, sets forth another relevant law of war prohibition: "it is especially forbidden . . . [t]o declare abolished, suspended, or inadmissible in a court of law the rights . . . of the nationals of the hostile party." *See also* Rome Statute of the International Criminal Court, art. 8(2)(a) (vi) ("Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial" is a "grave breach" of the Geneva Conventions), (b)(xiv) ("Declaring abolished, suspended or inadmissible in a court of law the rights . . . of the nationals of the hostile party" is a serious war crime), adopted by the U.N. Diplomatic Conference (17 July 1998), *reprinted in* Jordan J. Paust, M. Cherif Bassiouni, *et al.*, International Criminal Law Documents Supplement 268, 272–73 (2007). Denial of the use of rights under the Geneva Conventions in a court of law would violate the law of war and constitute a war crime. Every violation of the law of war is a war crime. *See, e.g.*, U.S. Dep't Army, FM 27-10,The Law of Land Warfare 178, para. 499 (1956); Chapter One, Sections A–B. In view of such war crime responsibility, there is an additional reason to recognize the primacy of Geneva law – one that is in the interest of congresspersons and judges alike.

106. *See* Hamdan v. Rumsfeld, _ U.S. at _ ("there is at least one provision of the Geneva Conventions that applies here. . . . Common Article 3. . . . Common Article 3, then, is applicable here"), _ (and the phrase "'regularly constituted court'" in common Article 3 "must be understood to incorporate at least the barest of those trial procedures that have been recognized by customary international law"); *id.* at _ (Kennedy, J., concurring in part) ("the requirement of the Geneva Conventions . . . a requirement that controls here. . . . The Court is correct to concentrate on one provision of the law of war that is applicable to our Nation's armed conflict with al Qaeda in Afghanistan. . . . That provision is Common Article 3. . . . The provision is part of a treaty the United States has ratified and thus accepted as binding law. . . . By Act of Congress, moreover, violations of Common Article 3 are considered 'war crimes,' punishable as federal offenses"). *See also* Chapter One, Section B.

107. *See, e.g.*, U.S. Const., art. III, §§ 1 ("The judicial Power of the United States, shall be vested in one supreme Court"), 2 ("In all cases affecting Ambassadors,

other public Ministers and Consuls . . . , the supreme Court shall have original Jurisdiction"). *See also* Durousseau v. United States, 10 U.S. (6 Cranch) 307, 314 (1810) (Marshall, C.J.) (the "appellate powers of this court" are not created by statute but are "given by the constitution"), *quoted in* Hamdan v. Rumsfeld, _U.S._, _ (2006).

108. *See, e.g.*, U.S. Const., art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under . . . Treaties"); Paust, *supra* note 3, at 67–70, 105, 189, 295, 387 n.47; Paust, Van Dyke, & Malone, *supra* note 73, at 123–29; Paust, *Judicial Power*, *supra* note 24, at 518–24. As Chief Justice Marshall recognized concerning the textual commitment to the judiciary authority to decide cases arising under treaties, "[t]he reason for inserting that clause was, that all persons who have real claims under a treaty should have their causes decided" by the judiciary and that "[w]henever a right grows out of, or is protected by, a treaty, . . . it is to be protected" by the judiciary. Owings v. Norwood's Lessee, 9 U.S. (5 Cranch) 344, 348–49 (1809). The next year, he also confirmed a fundamental expectation of the Framers concerning an essential reach of judicial power when he affirmed that our judicial tribunals "are established . . . to decide on human rights." Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 133 (1810). Concerning the rich history of Founder, Framer, and judicial attention to human rights and their use in thousands of federal and state cases, *see, e.g.*, Paust, *supra* note 3, at 193–223.

109. *See, e.g.*, United States v. Klein, 80 U.S. (13 Wall.) 128, 145–47 (1871) (a violation of the separation of powers exists where Congress withholds appellate jurisdiction "as a means to an end," "to deny . . . the effect which this court had adjudged" acts "to have" and when the Court had "decided . . . to consider them and give them effect," "to prescribe a rule for the decision of a cause in a particular way," or to "prescribe rules of decision . . . in cases pending before" the judiciary); John E. Nowak & Ronald D. Rotunda, Constitutional Law 38–39 (4th ed. 1991); Bernard Schwartz, Constitutional Law 20 (2d ed. 1979). *See also* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218–28 (1995); Walker v. HUD, 912 F.2d 819, 829 (5th Cir. 1990) ("Congress cannot prescribe a rule of decision in a case pending before the courts so as to decide a matter as Congress would like."), *citing* United States v. Sioux Nation of Indians, 448 U.S. 371, 404 (1980); Hyundi Merchant Marine Co., Ltd. v. United States, 888 F. Supp. 543, 548 (S.D.N.Y. 1995) (a "violation of separation of powers doctrine occurs when Congress enacts legislation that prescribes a rule of decision to the judicial branch of government in cases pending before it"), also *citing Sioux Nation of Indians*, *supra*; Brown v. Hutton Group, 795 F. Supp. 1307, 1313 (S.D.N.Y. 1992) (same). The Act attempts to deny habeas relief and various other actions in "all cases, without exception, pending on or after the date of" enactment. MC Act, *supra* note 65, Section 7(b).

110. *See supra* notes 106, 109.

111. *See, e.g.*, U.S. Const., art. VI, cl. 2 ("all Treaties" are "supreme Law of the Land; and the Judges in every State shall be bound thereby," whereas congressional legislation merely has that effect if it is "made in Pursuance" of the Constitution and not if it is made inconsistently with the Constitution to deny traditional judicial independence, authority, and responsibility regarding "all" treaties of the U.S.), amend. X; Paust, Van Dyke, & Malone, *supra* note 73, at 506–08.

112. Concerning application of the Fifth and Sixth Amendments of the U.S. Constitution abroad as textual and structural restraints on executive authority, *see, e.g.*, Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 Mich. J. Int'l L. 1, 18–20 (2001) [revised in Chapter Six, Section A]; Elizabeth Sepper, Note, *The Ties That Bind: How the Constitution Limits the CIA's Actions in the War on Terror*, 81 N.Y.U. L. Rev. 1805 (2006). Additionally, aliens within the United States have rights under the Firth and Sixth Amendments whether or not they have the same rights abroad.
113. *See* MC Act, *supra* note 65, Section 7(a). The word "awaiting" might mean that a denial of habeas could last for years if the provision was not otherwise unconstitutional and trumped by treaty law.
114. The Constitution expressly mandates that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Case of Rebellion or Invasion the public Safety may require it."). U.S. Const., art. I, § 9, cl. 2. *See also* Perry, *supra* note 28, at 195, addressing the proposal by Charles Pinckney that suspension shall not occur "except upon the *most urgent and pressing* occasions" (emphasis added), a phrase relevant to the restrictive meaning of the word "require" that was finally adopted by the Framers even though the "occasions" were expressly limited to two (*i.e.*, rebellion and invasion). In this instance, there had been no rebellion or invasion at the time of enactment in 2006 and suspension of habeas corpus had not been required for five years after 9/11 and for two years after the decision of the Supreme Court in *Rasul*. Moreover, the attempted suspension is without limits concerning time, place, necessity, or invasion. Thus, the attempt in Section 7(a) to suspend the writ is contrary to constitutional textual strictures and structural limitations on governmental power and is therefore *ultra vires*. The attempt in Section 5(a) to suspend habeas for any person (citizen or alien), here or abroad, in time of peace or war, regardless of any alleged necessity due to invasion, and at all times in the future with respect to claims under the Geneva Conventions (see *supra* note 102 and accompanying text) suffers from the same constitutional impropriety.

    In Hamdan v. Rumsfeld, 464 F. Supp. 2d 9 (D.D.C. Dec. 13, 2006), the district court found that "[t]he MCA is not a constitutionally valid suspension of the writ of habeas corpus," since "[n]either rebellion nor invasion was occurring at the time the MCA was enacted," as required by the Constitution. It noted that Congress had previously suspended habeas only four times and that each suspension was "accompanied by clear statements expressing congressional intent to suspend the writ and limiting suspension to periods during which the predicate conditions (rebellion or invasion) existed." *Id.* at 12, 14–16. However, the district court thought that "Congress's removal of jurisdiction from the federal courts was not a suspension of habeas corpus," but a "removal" without limits, and merely a "jurisdiction-stripping" denial of Hamdan's "statutory access to the writ." *Id.* at 18. This appears to be plain sophistry and ignores the fact that Congress simply has no constitutional authority to suspend or indefinitely remove habeas corpus in this instance. More particularly, the Framers did not allow Congress to terminate habeas and a claim that "termination," which can be operative only until the next Congress (or the present one) changes the legislation, is not "suspension" is patently silly. Similarly nonsensical is a claim that legislation is not suspending

habeas when it suspends (or terminates) the jurisdiction of federal courts to hear habeas claims. *See also* Hamdi v. Rumsfeld, 542 U.S. 507, 525 (2004) (the parties "[a]ll agree that, absent suspension, the writ of habeas corpus remains available. . . . At all other times, it has remained a critical check on the Executive . . . ").

In Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), the circuit panel decision focused on rights as opposed to the fact that our government is one of limited powers and that some governmental acts are *ultra vires* and decided that aliens abroad did not have rights to complain about the constitutionality of the MCA's suspension of habeas corpus. *Id.* at 990–91. The dissenting judge stated that the focus on rights was inapt, "the Suspension Clause is a limitation on the powers of Congress . . . [and] limits the removal of habeas," "[t]he MCA . . . offends the constitutional constraint on suspension . . . [and] is therefore void and does not deprive this court or the district courts of jurisdiction." 995. *Id.* at 995. (Rogers, J., dissenting). With respect to suspension, the dissent stated that the constitutional "proscription applies equally to removing the writ itself and to removing all jurisdiction to issue the writ. *See* United States v. Klein . . . " *Id.* at 1000.

It is of historic interest that despite an authorization in an 1863 Act of Congress to suspend habeas corpus "in any case throughout the United States, or any part thereof" (12 Stat. 755, Mar. 3, 1863), the Supreme Court refused to recognize suspension in the state of Indiana, which was outside the Civil War rebellion. *Ex parte* Milligan, 71 U.S. 2, 126 (1866).

115. MC Act, *supra* note 65, Section 7(a). The word "action" indicates an intent to cover a civil action, not a criminal prosecution. The only limit mentioned is found in the phrase "[e]xcept as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note)." Section 8(b) of the MC Act revises the reach of 42 U.S.C. § 2000dd-1 with respect to a defense in civil actions and criminal prosecutions where, under § 2000dd-1, the "officer, employee, member of the Armed Forces, or other agent of the United States Government who is a United States person . . . did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful" but does not "provide immunity from prosecution for any criminal offense by the proper authorities." *See* MC Act, *supra* note 65, Section 8(b). The "would not know" appears to be related to the international legal "should not have known" test, which rests on a negligence standard. *See, e.g.*, Paust, Bassiouni, *et al.*, International Criminal Law 51–78 (regarding leader responsibility), 100–14 (regarding superior orders) (3d ed. 2007).

116. *See, e.g.*, Paust, *supra* note 3, at 199, 259–61 n.481, 290; Restatement of the Foreign Relations Law of the United States § 711 & cmnts. a–c, h (3d ed. 1987).

117. *See, e.g.*, International Covenant on Civil and Political Rights (ICCPR), 999 U.N.T.S. 171 (1966), preamble, arts. 2(1), (3) (also affirming nonimmunity by assuring the right to "an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity"), 9(4), 14(1), (5), 26; American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX (1948), O.A.S. Of. Rec. OEA/Ser. L./V/I.4 Rev. (1965), arts. II, XVIII, XXV–XXVI (operative through the O.A.S. Charter, *see* Chapter Two, Section C); Universal Declaration

of Human Rights, U.N.G.A. Res. 217A, 3 U.N. GAOR, U.N. Doc. A/810, at 71 (1948), preamble, arts. 1–2, 7–8, 10–11; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85 (1984), preamble, arts. 14–15; Hague Convention No. IV, Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539, Annex, art. 23(h); GC, *supra* note 71, arts. 29, 148; U.N. Committee Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee Against Torture, United States of America*, 36th sess., U.N. Doc. CAT/C/USA/CO/2 (18 May 2006), paras. 27–28, 32 (each quoted in Chapter Two, Section C, n.33), available at: http://www.ohchr.org/english/bodies/cat/docs/AdvanceVersions/CAT.C.USA.CO.2.pdf; General Comment No. 7 (in Chapter Two, Section C, n.33); General Comment No. 20 (in *id.* n.34, para. 15); General Comment No. 24 (in *id.* n.28, paras. 8, 11–12); Paust, *supra* note 3, at 224–29; Paust, Van Dyke, Malone, *supra* note 73, at 340–42, also quoting the state court decision in Dubai Petroleum Co., *et al.* v. Kazi, 12 S.W.3d 71, 82 (Tex. 2000); Paust, *Judicial Power*, *supra* note 24, at 507–10, 514; Paust, *supra* note 112, at 10–15, 17, also noting the requirements of access to courts and equality of treatment contained in bilateral friendship, commerce, and navigation treaties with numerous states that would necessarily be violated if the treaties did not have primacy (*id.* at 17 n.38); Paust, *supra* note 3, at 852–53 n.154 (also addressing nonimmunity for violations of the ICCPR, the CAT, and war crimes); *supra* notes 105, 116. *See also* United States v. Altstoetter (The Justice Case), 3 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 22 (1951) (Indictment, para. 16: "discriminatory measures against Jews, Poles, 'gypsies,' and other designated 'asocials' resulted in . . . deprivations of rights to file private suits and rights of appeal" and were war crimes). Even if the last in time rule could apply, but it cannot since there is no clear and unequivocal expression of congressional intent to override *any* of these treaties (*see also supra* notes 60, 68), the traditional "rights under" treaties exception would apply to guarantee the primacy of such rights (*see supra* note 68).

118. *See supra* notes 108–09.

119. Degradation can include moral and psychologic degradation and detrimental impacts on military morale, retention, and recruitment. *See also* Corn, *supra* note 47. Ultimately, a strong and effective military that serves the national interest in a constitutional democracy is one that operates within the law. The same point pertains more generally with respect to the presidency.

120. An especially apt affirmation appears in United States v. Lee, 106 U.S. 196, 220 (1882):

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

See also Hamdan v. Rumsfeld, _ U.S. at _ ("the Executive is bound to comply with the Rule of Law").

six. Antiterrorism Military Commissions

1. Military Order on the Trial of Terrorists by Military Commission of Nov. 13, 2001, 66 Fed. Reg. 57,833, §§ 1(e) and 2 (a)(1)(ii) and (iii) (Nov. 16, 2001) [hereinafter Military Order].
2. Pub. L. 107–40, 107th Cong., 1st sess., 115 Stat. 224 (2001).
3. *See* Military Order, *supra* note 1, §§ 1(e) and 2 (a)(1)(ii). Counsel to the President Alberto Gonzales apparently did not understand the Order. He claimed that it "covers only foreign enemy war criminals . . . and they must be chargeable with offenses against the international laws of war." Alberto R. Gonzales, *Martial Justice, Full and Fair*, N.Y. Times, Nov. 30, 2001, at A27, col. 2. *See also* George Lardner, *Legal Scholars Criticize Wording of Bush Order*, Wash. Post, Dec. 3, 2001, at A10; *infra* note 55 (regarding other false claims of Gonzales); Committee on Military Affairs and Justice of the Association of the Bar of the City of New York, *Inter Arma Silent Leges: In Times of Armed Conflict, Should the Laws be Silent? – A Report on the President's Military Order of November 13, 2001* at 25–26 & n.68, 28 (Dec. 2001) [hereinafter N.Y. City Bar Report]. The ill-conceived order was apparently prepared by only a few new White House and Department of Justice lawyers who failed to seek input from those at the Departments of State or Defense or other JAG lawyers familiar with international law. *See, e.g.*, Josh Tyrangiel, *The War on Terror/ The Legal War*, Time, Nov. 26, 2001, at 66 (naming then deputy assistant attorney general John Yoo and deputy White House counsel Tim Flanigan as individuals that "felt that offshore military tribunals would be upheld without much problem"); Toni Locy & Richard Willing, *Proposal Would Widen Defendants' Rights*, USA Today, Dec. 31, 2001, at 9A, also noting that in the face of widespread criticism DOD lawyers have attempted to form rules of procedure that meet some of the international law concerns despite inconsistent language in the Order. John Yoo has written that "[a]n OLC colleague and I were asked to review President Bush's military order in the weeks after 9/11." John Yoo, War by Other Means 205 (2006).
4. Military Order, *supra* note 1, § 1(f).
5. The statement apparently involved an attempt to comply with the congressional mandate in 10 U.S.C. § 836a that military commissions follow, to the extent practicable, "the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter." Since the President is bound by the U.S. Constitution faithfully to execute the law (U.S. Const., art. II § 3) and Congress has created a legislative mandate concerning rules of evidence to be applied in military commissions, the judiciary should not accept a sweeping and illogical statement concerning what is allegedly not practicable for every military commission in every circumstance now and in the future. *See generally* Woods v. Cloyd W. Miller Co., 333 U.S. 138, 146–47 (1948) (Jackson, J., concurring); Sterling v. Constantin, 289 U.S. 378, 400–01 (1932) ("What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are

judicial questions"); Jordan J. Paust, International Law as Law of the United States 469–78 (1996); N.Y. City Bar Report, *supra* note 3, at 9–10 & n.31 (10 U.S.C. § 821 sets limits regarding jurisdiction), 19 (exclusive jurisdiction conflicts with the congressional mandate of concurrent jurisdiction in 10 U.S.C. §§ 818, 821). *See also infra* notes 8–9, 51 (discretion is limited by international law), 54, 80.

6. Military Order, *supra* note 1, § 1(e). John Yoo has written that "[m]ilitary commissions seemed a good choice" because "[t]rial in open federal court posed obvious national security and secrecy issues" and would have "more relaxed rules of evidence." Yoo, *supra* note 3, at 205–06. However, several of us had warned John Yoo and the administration of the procedural improprieties evident in the President's Order. *See, e.g.*, William Glaberson, *Critics' Attack on Tribunals Turns to Law Among Nations*, N.Y. Times, Dec. 26, 2001, at B1; Yoo, *supra* note 3, at 205. Such points also were made during a panel session during a National Workshop for District Judges II, sponsored by the Federal Judicial Center, San Diego, California, Dec. 3–5, 2001, at which John Yoo, Professor Peter Raven-Hansen, and I and a few others served as panelists.
7. Military Commissions, Dep't of Defense, Office of the General Counsel and Dep't of the Army, OTJAG, MJ 1970 (copy on file with the author) [hereinafter 1970 DOD Study].
8. *See, e.g.*, Jordan J. Paust, *After My Lai: The Case for War Crime Jurisdiction Over Civilians in Federal District Courts*, 50 Tex. L. Rev. 6, 6 & n.1 (1971), *reprinted in* 4 The Vietnam War and International Law 447 & n.1 (Richard Falk ed., 1976), also *citing* Michael Getler, *Viet Trials of Ex-GIs: "Too Hot,"* Wash. Post, Apr. 13, 1971, § A, at 1. *See also* William McGaffin, *U.S. May Try 22 Ex-GIs for My Lai*, N.Y. Post, Mar. 11, 1970, at 4 (Pentagon and Justice Dep't lawyers had reached a decision to create a military commission, but would await the decision in the trial of Lt. William L. Calley, Jr.). During the same time, Nixon had engaged in highly questionable intervention in the Calley case after Calley's conviction and sentencing. *See, e.g.*, William George Eckhardt, *Essay on the Trials of the Century: My Lai: An American Tragedy*, 68 U.M.K.C. L. Rev. 671, 682–83 & n.48 (2000); Charles W. Corddry, *Nixon Upsets Army Over Calley Actions*, Balt. Sun, Apr. 6, 1971, at 1; Spencer Rich, *Calley Prosecutor Hits Nixon's Move*, Wash. Post, April 7, 1971, at 1.
9. 1970 DOD Study, *supra* note 7, tab G, at 1.
10. *Id.* tab G, at 2 (citing 10 U.S.C. § 836). *See also* sources cited *infra* notes 35, 51, 54. Under Article II, § 3 of the U.S. Constitution, the President is bound faithfully to execute such law as well as relevant international law. With respect to the President's constitutionally based duty to comply with international law, *see, e.g.*, Paust, *supra* note 5, at 143–66, and numerous cases cited; Jordan J. Paust, Paquete *and the President: Rediscovering the Brief for the United States*, 34 Va. J. Int'l L. 981 (1994).

    Additionally, federal statutes, such as 10 U.S.C. §§ 821 (concerning jurisdiction of military commissions) and 836 (concerning procedures to be followed), must be construed consistently with international law. Furthermore, they "can never be construed to violate . . . rights . . . further than is warranted by the law of nations . . . " *See, e.g.*, The Charming Betsy, 6 U.S. (2 Cranch) 64, 117–18 (1804). *See also* Paust, *supra* note 5, at 107–08 n.9, *passim*; Jordan J. Paust, Jon M. Van Dyke, & Linda A. Malone, International Law and Litigation in the U.S. 155–56 (2d

ed. 2005); *see also* Manual for Courts-Martial, United States, 1984, preamble para. 2(b)(2) (2000) ("Subject to any applicable rule of international law . . . military commissions . . . shall be guided by the appropriate principles of law and rules of procedure and evidence prescribed for courts-martial."). Thus, Sections 821 and 836 must be interpreted consistently with the confluence of human rights, denial of justice, law of war, and other international law requirements noted in this chapter.

11. 1970 DOD Study, *supra* note 7, at tab G, at 3. Previously, U.S. military commissions had generally followed the rules of procedure and evidence that obtained in general courts-martial. *See, e.g.*, William Winthrop, Military Law and Precedents 841 (2d ed. 1920). Today, it would seem to be "inconsistent with this chapter" within the meaning of 10 U.S.C. § 836 to do less.

12. 75 U.N.T.S. 135, 6 U.S.T. 3316, T.I.A.S. No. 3364 [hereinafter GPW]. Important due process guarantees under the Convention include those in Articles 3(1)(d), 84–85, 99, 102, 104–06, 129–30. Additional protections for persons who do not benefit from more favorable treatment under the 1949 Geneva Conventions can be found in Article 75 of Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (8 June 1977), 1125 U.N.T.S. 3 [hereinafter Geneva Protocol I]. Most of the rights and protections in Protocol I are now customary international law. *See, e.g.*, Jordan J. Paust, M. Cherif Bassiouni, *et al.*, International Criminal Law 817 (2d ed. 2000); *Customary International Law and Additional Protocol I to the Geneva Conventions for Protection of War Victims*, 81 Proc., Am. Soc. Int'l L. 26, 29–31, 37, 42 (1987) (remarks of: Meron, Carnahan, Matheson). Geneva rights and protections are nonderogable *obligatio erga omnes* (*i.e.*, obligations owing to and among all humankind of a higher status than ordinary international law) and must be observed and ensured "in all circumstances," much like norms *jus cogens*. *See, e.g.*, GPW, *supra*, art. 1; Geneva Protocol I, *supra*, art. 75; Paust, Van Dyke, & Malone, *supra* note 10, at 59–60.

"[W]ilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in" the Geneva Prisoner of War Convention is not merely a war crime but also a "grave breach" of the Convention and Protocol I. *See* GPW, *supra*, art. 130; Geneva Protocol I, *supra*, art. 85(4) (e); III Commentary, Geneva Convention Relative to the Treatment of Prisoners of War 628 (International Committee of the Red Cross, Jean S. Pictet ed., 1960) [hereinafter III Commentary]; U.S. Dep't of Army Field Manual 27-10, The Law of Land Warfare 178, para. 499, 179, para. 502 (b), 180, para. 505 (c) (1956) [hereinafter FM 27-10]; *see also* Hague Convention No. IV Respecting the Laws and Customs of War on Land, done at The Hague, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539, Annex, art. 23(h) ("it is especially forbidden . . . [t]o declare abolished, suspended, or inadmissible in a court of law the rights . . . of the nationals of the hostile party."); Rome Statute of the International Criminal Court, art. 8(2)(a)(vi) ("Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial" is a "grave breach" of the Geneva Conventions), (b)(xiv) ("Declaring abolished, suspended or inadmissible in a court of law the rights . . . of the nationals of the hostile party" is a serious war crime), 2187 U.N.T.S. 90, adopted by the U.N. Diplomatic Conference (17 July 1998), *reprinted in* Jordan J. Paust, M. Cherif Bassiouni, *et al.*, International

Criminal Law Documents Supplement 239–43 (2000) [hereinafter Docs.]. It is apparent that the present Military Order does just that, although a prosecutor would have to prove relevant mens rea.

13. *See* U.N. Supplemental Rules of Criminal Procedure for Military Commissions of the United Nations Command, Korea, *reprinted in* Docs., *supra* note 12, at 155–61 [hereinafter U.N. Rules]. Under Rule 45, appeals could have been brought before a board of review.
14. *See, e.g.*, *In re* Yamashita, 327 U.S. 1, 11–13 (1946) (such power exists after cessation of hostilities "at least until peace has been officially recognized"); *Ex parte* Quirin, 317 U.S. 1, 28 (1942); Cross v. Harrison, 57 U.S. (16 How.) 164, 190 (1853); 24 Ops. Att'y Gen. 570, 571 (1903); Paust, Bassiouni, *et al.*, *supra* note 12, at 309–10; Winthrop, *supra* note 11, at 86 (jurisdiction of military commissions "is determined by the existence and continuance of war"), 831 (jurisdiction is tied to the war powers, "exclusively war-court"), 836 ("A military commission . . . can legally assume jurisdiction only of offences committed within the field of the command of the convening commander," and regarding military occupation, "cannot take cognizance of an offence committed without such territory. . . . The place must be the theatre of war or a place where military government or martial law may be legally exercised; otherwise a military commission . . . will have no jurisdiction . . . "), 837 ("An offence . . . must have been committed within the period of the war or of the exercise of military government. . . . [J]urisdiction . . . cannot be maintained after the date of a peace . . . "); Digest of Opinions of the Judge Advocates General 1068 (1912); Major General Henry Wager Halleck, *Military Tribunals and Their Jurisdiction*, 5 Am. J. Int'l L. 958, 965–66 (1911), and Mil. L. Rev. Bicentennial Issue 15, 21 (1975) (military commissions "are established by the President, by virtue of his war power as commander-in-chief, and have jurisdiction in cases arising under the laws of war. . . . [They] are war courts and can exist only in time of war." Halleck was a General during the Civil War and a prominent international legal scholar who participated in the creation of the 1863 Lieber Code on the laws of war); Michael A. Newton, *Continuum Crimes: Military Jurisdiction Over Foreign Nationals Who Commit International Crimes*, 153 Mil. L. Rev. 1, 15 (1996); N.Y. City Bar Report, *supra* note 3, at 9; *infra* notes 79–83.
15. *See generally* Paust, Bassiouni, *et al.*, *supra* note 12, at 807–20. When an international armed conflict exists, certain persons are entitled to prisoner of war status under GPW Article 4. It should be noted that requirements of having "a fixed distinctive sign recognizable at a distance," "carrying arms openly" during an attack, and generally following the laws of war appear only in Article 4 (A) (2) with respect to members of certain "militias and members of other volunteer corps" and do not appear in 4 (A) (1) regarding "[m]embers of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces" or in 4 (A) (3) regarding "[m]embers of regular armed forces who profess allegiance to a government or an entity not recognized by the Detaining Power." *See also* G.I.A.D. Draper, The Red Cross Conventions 52 (1958); Morris Greenspan, The Modern Law of War 58 (1959); 1 Howard S. Levie, The Code of International Armed Conflict 13–14 (1986); Richard I. Miller, The Law of war 29 (1975); Julius Stone, Legal Controls of International Conflict 654

(1973); George H. Aldrich, *New Life for the Laws of War*, 75 Am. J. Int'l L. 764, 768–69 (1981) (GPW Article 4 (A) (2) criteria apply only to certain "irregular" armed forces and "[m]embers of regular, uniformed armed forces do not lose their PW entitlements no matter what violations of the law of war their units may commit, but the guerrilla unit is held to a tougher standard . . . "); *cf* III Commentary, *supra* note 12, at 49 (1949 Convention did not follow the 1907 Hague Convention or 1929 Convention but listed separate categories of pows), 52 (yet States should assure that members of armed forces are recognizable from civilians); Protocol I, *supra* note 12, arts. 43–44 ("Any combatant . . . shall be a prisoner of war . . . except as provided in paragraphs 3 and 4" of Article 44, *e.g.*, in some cases if they do not distinguish themselves from the civilian population and in some cases if they do not carry arms openly, but even those who forfeit POW status under the Protocol "shall, nevertheless, be given protections equivalent in all respects to those accorded prisoners of war by the Third Convention [GPW] and by this Protocol . . . " Furthermore, the Protocol "is without prejudice to the right of any person to be a prisoner of war pursuant to Article 4 of" GPW. *Id.* art. 44(6)); *but see* FM 27-10, *supra* note 12, at 31, paras. 73–74 (stating that members of armed forces also lose POW status in such circumstances but are protected by the Geneva Civilian Convention); Ruth Wedgwood, *The Rules of War Can't Protect Al Qaeda*, N.Y. Times, Dec. 31, 2001, at A11, col. 2 (also assuming in error that "unlawful combatants" lose "protection of the law" concerning due process). It is a war crime to engage in such attacks (*see, e.g.*, *Ex parte* Quirin, 317 U.S. 1, 31, 33–36 (1942)), but whether POW status is lost under the 1949 Convention is a separate issue. Even if POW status is lost, any criminal accused has due process protections under the Geneva Conventions and Protocol I, human rights law, and other international laws as noted herein. There is no gap in protection and in case of doubt as to their status, all persons "having committed a belligerent act and having fallen into the hands of the enemy" shall enjoy POW protections "until such time as their status has been determined by a competent tribunal." GPW, *supra* note 12, art. 5. Furthermore, all such persons are entitled to the due process guarantees contained in GPW concerning trials of prisoners of war whether or not the person is being prosecuted for a crime that occurred prior to the creation of prisoner of war status. *See also* GPW, *supra* note 12, art. 85; FM 27-10, *supra* note 12, at 180, para. 505 (c) ("prisoners of war accused of war crimes benefit from the provisions of GPW, especially Articles 82–108"); III Commentary, *supra* note 12, at 413–23, 476, 623, 625, 628. There was a split in *In re* Yamashita whether Articles 60 and 63 of the old 1929 Convention applied to pre-capture offenses. *Compare In re* Yamashita, 327 U.S. at 20–24 *with In re* Yamashita, 327 U.S. at 74–76, 78 (Murphy, J., dissenting). *See also* Johnson v. Eisentrager, 339 U.S. 763, 790 (1950). Whether or not the majority was in error, materials cited above make clear that the 1949 Conventions were changed and that due process provisions apply to all judicial proceedings against a prisoner of war. The International Committee of the Red Cross Commentary expressly notes *In re* Yamashita and that the 1949 changes provide due process protections for all prisoners of war with respect to all offenses. *See, e.g.*, III Commentary, *supra* note 12, at 413, 415–18, 421–22; IV Commentary, Geneva Convention Relative to the Protection of Civilian Persons in Time of War 349, 354 (International Committee of the Red

Cross, Jean S. Pictet ed., 1958) [hereinafter IV COMMENTARY]; GPW, *supra* note 12, art. 85 ("prosecuted . . . for acts committed prior to capture"); Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, art. 70 (applies to those "prosecuted . . . for . . . acts committed . . . before the occupation . . . [that were] breaches of the laws and customs of war"), 75 U.N.T.S. 287, 6 U.S.T. 3516, T.I.A.S. No. 3365 [hereinafter GC or Geneva Civilian Convention].

Some persons accused of crimes arising from the September 11 attack may not have been prisoners of war before October 7 (*see also infra* note 16), but might be prisoners of war thereafter if they met the criteria set forth in Article 4 from October 7 until their capture. Members of the armed forces of the Taliban were clearly members of the armed forces of a "Party to the conflict" that occurred since October 7 within the meaning of GPW Article 4 (A) (1) and it is probable that they also had distinctive recognizable dress and carried arms openly. The word "Party" does not have the same meaning as and is not limited to state, nation, or government. Whether various al Qaeda units in Afghanistan were "militias or volunteer corps forming part of such armed forces" would have to be considered in context. *See also* Bryan Bender, *Red Cross Disputes US Stance on Detainees*, BOSTON GLOBE, Feb. 9, 2002, at A1 (ICRC considers "both Taliban and al Qaeda fighters held by US forces . . . to be prisoners of war"); Tamara Lytle, *Taliban, Al-Qaeda Captives Arrive as Rights Groups Fret*, ORLANDO SENTINEL, Jan. 12, 2002, at A1; Thom Shanker & Katharine Q. Seelye, *Behind-the-Scenes Clash Led Bush to Reverse Himself on Applying Geneva Conventions*, N.Y. TIMES, Feb. 22, 2002, at A12, col. 1 (ICRC disagreed with denial of POW status and DOD and State Dept. worked for reversal of DOJ and White House Counsel Gonzales denial of application of Geneva law). Secretary of Defense Rumsfeld's statement that they are all "unlawful combatants" seems clearly overly broad and of doubtful validity and threatens protection of U.S. military under GPW Article 4 (A) (1). *See, e.g.*, *id.*; John Hendren, *"Bad Guys" 1st to Arrive at U.S. Base*, L.A. TIMES, Jan. 12, 2002, at A1. Under GPW Article 5, it would have to be tested by a competent court or tribunal. During an armed conflict, all persons who are not prisoners of war, including so-called unprivileged or "unlawful combatants" who may or may not have POW status, have at least various nonderogable rights to due process under the Geneva Civilian Convention and Geneva Protocol I. *See, e.g.*, IV COMMENTARY, *supra*, at 595 ("applying the same system to all accused whatever their status"); FM 27-10, *supra* note 12, at 31, para. 73 ("If a person is determined by a competent tribunal, acting in conformity with Article 5, GPW . . . , not to fall within any of the categories listed in Article 4, GPW . . . , he is not entitled to be treated as a prisoner of war. He is, however, a 'protected person' within the meaning of Article 4, GC . . . "); GC, *supra*, arts. 3(1)(d) (all captured persons "shall in all circumstances" be tried in "a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples" – thus incorporating all such guarantees by reference and as nonderogable Geneva protections (*see supra* note 12), including the customary guarantees mirrored in Article 14 of the International Covenant), 5 (even persons who have engaged in activities hostile to state security and who are not entitled to rights under the Convention "as would . . . be prejudicial to the security" of a state, "[i]n each case, shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present

Convention."); Geneva Protocol I, *supra* note 12, art. 75 (4) (7); *see also* III Commentary, *supra* note 12, at 51 n.1 (common Article 3 is a "safety clause"), 76, 421, 423 (prisoners charged with war crimes retain benefits of the Convention). Today, common Article 3 of the Geneva Conventions provides customary minimum protections for all persons captured in any armed conflict. *See, e.g.*, Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), 1986 I.C.J. 4, at paras. 218, 255; The Prosecutor v. Dusko Tadic, Decision on the Defence Motion on Jurisdiction, ICTY, Trial Chamber, at paras. 65–74 (10 Aug. 1995), reproduced in Docs., *supra* note 12, at 692–95; Paust, Bassiouni, *et al.*, *supra* note 12, at 813–14, 816; Chapter One, Section B. Additionally, all persons have minimum due process guarantees under human rights law.

In 2002, the White House reported in response to disagreement with the State Department that al Qaeda "cannot be considered a state party to the Geneva Convention. Its members, therefore, are not covered by the Geneva Convention and are not entitled to POW status," adding, "The war on terrorism is a war not envisaged when the Geneva Convention was signed in 1949." *See, e.g.*, Katharine Q. Seelye, *In Shift, Bush Says Geneva Rules Fit Taliban Captives*, N.Y. Times, Feb. 8, 2002, at A1, col. 6. The White House statement demonstrates remarkable ignorance of the nature and reach of treaties and customary international law. First, any member of al Qaeda who is a national of a state that has ratified the treaties is protected by them. Nearly every state, including Saudi Arabia, is a signatory. Second, the 1949 Geneva Conventions are part of customary international law that is universally applicable in times of armed conflict and protect all human beings according to their terms. For example, common Article 3 provides nonderogable protections and due process guarantees for every human being who is captured and, like common Article 1, assures their application "in all circumstances." Also, international terrorism and terrorism in war are not new and clearly were contemplated. *See, e.g.*, Jordan J. Paust, *Terrorism and the International Law of War*, 74 Mil. L. Rev. 1 (1974); GC, *supra*, art. 33; IV Commentary, *supra*, at 31, 40, 220, 225–26, 594.

16. Whether war crimes were committed by Mr. bin Laden and his followers before October 7 is highly problematic, as he was not then a leader or member of a state, nation, belligerent, or insurgent group (or in a territory where such a group operated that was) at war with the United States, unless the Taliban was at war with the United States at the very moment of the September 11 attack (which could have been the case if the Taliban had attacked the United States and had not merely harbored or received money and other support from bin Laden and his followers) and if bin Laden was complicit in that attack. *See, e.g.*, Paust, comments, in Analyses of International Legal Issues Related to the Terrorist Attacks, available at: http://www.asil.org/insights/insight77.htm#addendum2, and http://www.asil.org/insights/insight77.htm#addendum5; Warren Richey, *Tribunals on Trial*, The Christian Science Monitor, Dec. 14, 2001, at 1 (quoting Professor Leila Sadat: not a war or war crimes on Sept. 11). Under international law, "war" conduct and war crimes can occur at the hands of nonstate actors, but they must be participants in a war (*e.g.*, an armed conflict between states, a state and a nation, or a state and a "belligerent") or insurgency (the lowest level of "armed conflict" and one implicating common Article 3 of the Geneva Conventions. *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232, 242–43 (2d Cir. 1995); The Prosecutor v. Dusko

Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY, Appeals Chamber, IT-94-1-AR72, at paras. 87–127 (2 Oct. 1995), *reprinted in* 35 I.L.M. 32 (1996)) or have achieved a status of belligerents or insurgents involved in an armed conflict. Al Qaeda did not meet insurgent criteria of controlling their own defined territory, having their own government, having an organized armed force, having their own stable population, or purporting to be or to have the characteristics of a state.

Any attempts to expand the concept of "war" beyond the present minimal levels of belligerency and insurgency would be extremely dangerous because certain forms of nonstate actor violence and targetings that would otherwise remain criminal (even during an insurgency) could become legitimate. *See* Telford Taylor, Nuremburg and Vietnam 19–20 (1970); Waldemar A. Solf, *War Crimes and the Nuremberg Principle*, in National Security Law 359–61 (J.N. Moore, F.S. Tipson, & R.F. Turner eds., 1990). Two such targetings could be the September 11 attack on the Pentagon and the earlier attack on the U.S.S. *Cole*, which during "war" are lawful military targets and legitimate belligerent acts (assuming no other violations existed, such as attacking without uniforms or distinctive insignia). *See* William Glaberson, *Critics' Attack on Tribunals Turns to Law Among Nations*, N.Y. Times, Dec. 26, 2001, at B1, B6, cols. 3–6. Section 1(a) of the November 13 Military Order pretends that all forms of international terrorism have been "carried out . . . on a scale that has created a state of armed conflict." This, of course, is legal nonsense. Its acceptance would have unwanted consequences of legitimizing various attacks on proper military targets like the President and U.S. "military personnel and facilities" mentioned in that very section of the Military Order. The President's new and unique defense for prior and future nonstate terrorists must be rejected.

Some may assume that a "war" necessarily exists whenever the United States has been subjected to an armed attack by a nonstate actor that triggers a right of self-defense under Article 51 of the U.N. Charter. This would be incorrect. Self-defense is not limited to armed attacks by states, nations, or belligerents. *See, e.g.*, Thomas M. Franck, *Terrorism and the Right of Self-Defense*, 95 Am. J. Int'l L. 839, 840 (2001); Jordan J. Paust, *Responding Lawfully to International Terrorism: The Use of Force Abroad*, 8 Whittier L. Rev. 711, 716, 723, 729 (1986); Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 Cornell Int'l L.J. 533, 533–35 (2002); Robert F. Turner, *Legal Responses to International Terrorism: Constitutional Constraints on Presidential Power*, 22 Hous. J. Int'l L. 77, 87, 89 (1999); U.N. S.C. Res. 1373, preamble and para. 3 (c) (28 Sept. 2001); the Caroline Incident (1837), in 2 Moore, Digest of International Law 412 (1906) (self-defense against insurgents); Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law: Missile Attacks on Afghanistan and Sudan*, 93 Am. J. Int'l L.161, 162–63 (1999) (self-defense claimed regarding armed attacks by bin Laden). Furthermore, as noted earlier, an armed attack by a nonstate actor that was also not a nation, belligerent, or insurgent would not create a state of "war."

17. Because their authority is tied to war powers, military commissions generally have jurisdiction only over war crimes, which are violations of the laws of war. *See* sources cited *supra* note 14; *infra* notes 44, 53, 80–81. 10 U.S.C. §§ 818 and 821 expressly confer jurisdiction for prosecution of war crimes and are at best silent

with respect to other crimes. Section 4(a) of the Military Order states that accused shall be tried for "offenses triable by military commission." Thus, one question is whether military commissions can address crimes other than war crimes. In practice, some have addressed other crimes under international law that occurred during war (such as crimes against humanity during World War II) when, but only when, the military commissions were convened in occupied territory. *See, e.g.*, Paust, Bassiouni, *et al.*, *supra* note 12, at 288–93. *See also* Reid v. Covert, 354 U.S. 1, 21 (1957) ("jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language of art. I, § 8," concerning offenses against the law of nations). Occupying powers actually have a greater competence under the law of war to prosecute various crimes. *See, e.g.*, GC, *supra* note 15, arts. 64, 66–68, 71–75, 147; Hague Convention No. IV, *supra* note 12, Annex, art. 43. Because international law is part of the law of the United States and law that the President is bound faithfully to execute (*see supra* note 10), the President actually has an enhanced power to execute laws of war that confer powers on an occupying power to prosecute crimes. Concerning enhancement of Executive power by international law, *see, e.g.*, Paust, *supra* note 5, at 6, 34–37 n.39, 72 n.82, 154 n.2, 159 n.36, 441, 464–65 n.62. Thus, when the United States is an occupying power, a military commission could prosecute crimes other than war crimes because of a special competence conferred by the law of war. When the United States is not an occupying power, it is apparent that military commission jurisdiction is limited to prosecution of war crimes. Concerning the issue of whether the United States had been an occupying power of part of Afghanistan, *see infra* note 70. An American Bar Association (A.B.A) resolution recommended that the military commissions prosecute only war crimes. *See* Jeff Blumenthal, *ABA Votes to Favor Curbs on Bush's Military Tribunals*, The Legal Intelligencer, Feb. 5, 2002, at 24 [hereinafter A.B.A. res.].

18. Concerning prosecution in federal district courts, including prosecution for war crimes, *see, e.g.*, Paust, Bassiouni, *et al.*, *supra* note 12, at 253–61; Paust, *supra* note 4 (using 10 U.S.C. § 818 (incorporating offenses against the law of war as offenses against the laws of the United States) in conjunction with 18 U.S.C. § 3231); Paust, comments, *supra* note 16; The War Crimes Act, 18 U.S.C. § 2441; United States v. bin Laden, *et al.*, 92 F. Supp. 2d 189 (S.D.N.Y. 2000). *See also Ex parte* Quirin, 317 U.S. at 27–28 ("From the very beginning of its history this Court has recognized and applied the law of war . . . "); United States v. Noriega, 746 F. Supp. 1506, 1525 (S.D. Fla. 1990) ("Under 18 U.S.C. § 3231, federal district courts have concurrent jurisdiction with military courts over all violations of the laws of the United States"); Harold Hongju Koh, *We Have the Right Courts for Bin Laden*, N.Y. Times, Nov. 23, 2001, at A39, col. 1. Exclusive jurisdiction in a military commission would violate the mandate in 18 U.S.C. § 3231 that federal district courts shall have jurisdiction over all offenses against the laws of the United States. *See* 18 U.S.C. § 3231. *See also* sources cited *supra* note 5.
19. *See, e.g.*, the Inter-American Convention on the Forced Disappearance of Persons, art. IX ("Persons alleged to be responsible . . . may be tried only in the competent jurisdictions of ordinary law in each state, to the exclusion of all other special jurisdictions, particularly military jurisdictions"), done in Belen, Brazil (9 June 1994), *reprinted in* Docs., *supra* note 12, at 281.

20. *See* Castillo Petruzzi, Merits, Judgment, Inter-Am. Ct. H.R., Ser. C, No. 52 (30 May 1999), addressed in Jeanine Bucherer, *International Decisions*, 95 Am. J. Int'l L. 171 (2001).
21. H.R. Comm., General Comment No. 13, on Article 14 (1984), at para. 4, 21st Sess., U.N. Doc. HRI/GEN/1/REV.1 (1994), available at: http://www1.umn.edu/humanrts/gencomm/hrcom13.htm. *See also infra* note 29.
22. U.S. Dep't of State, Report on Peru, at 14, available at: http://www.state.gov/www/global/human_rights/1999_hrp_report/peru.html.
23. U.S. Dep't of State, Report on Egypt, at 10, available at: http://www.state.gov/www/global/human_rights/1999_hrp_reports/egypt.html.
24. U.S. Dep't of State, Report on Nigeria, at 13, available at: http://www.state/gov/www/global/human_rights/1999_hrp_reports/nigeria.html.
25. U.S. Dep't of State, Report on Thailand, at 6, available at: http://www.state/gov/www/global/human_rights/1999_hrp_reports/thailand.html.
26. 3 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1951).
27. *Id.* at 1046–47.
28. 999 U.N.T.S. 171 (9 Dec. 1966) [hereinafter International Covenant or ICCPR]. In times of armed conflict or occupation, rights under the 1949 Geneva Conventions and Geneva Protocol I will also be applicable. *See, e.g.*, *supra* note 12; *infra* notes 34–35, 37–39, 42.
29. *See, e.g.*, The Prosecutor v. Dusko Tadic, Appeals Chamber, *supra* note 16, at paras. 45–48; Advisory Opinion on the Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Inter-Am. Ct. H.R. (1 Oct. 1999), reviewed in William J. Aceves, *International Decisions*, 94 Am. J. Int'l L. 555, 559 (2000); Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, at para. 106 and Annex, arts. 20–22, 25 (1993), U.N. Doc. S/25704 (3 May 1993), also noting that "the right of appeal . . . is a fundamental element of individual civil and political rights," *id.* at para. 116; *Report of the Mission of the International Commission of Jurists, Inquiry into the Israeli Military Court System in the Occupied West Bank and Gaza*, *reprinted in* 14 Hast. Int'l & Comp. L. Rev. 1, 10, *passim* (1990); 1 Gabrielle Kirk McDonald & Olivia Swaak-Goldman (eds.), Substantive and Procedural Aspects of International Criminal Law 420, 430–31 (2000). *See also* Human Rights Committee, General Comment No. 29 (31 Aug. 2001), U.N. Doc. CCPR/C/21/Rev.1/Add.11 ("As certain elements of the right to fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule or law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence."), available at: http://www.unhchr.ch; *supra* notes 16–17; *infra* note 179.

    In its General Comment No. 24, the Human Rights Committee also noted that "a general reservation to the right to a fair trial would not be" permissible because of the customary, nonderogable, and peremptory character *jus cogens* of the human right to a fair trial. U.N. Doc. CCPR/C/21/Rev.1/Add.6, at para. 8

(2 Nov. 1994). Customary international law also requires that there be no "denial of justice" to aliens, such as "denial of access to courts, or denial of procedural fairness and due process in relation to judicial proceedings." Restatement of the Foreign Relations of the United States § 711, cmnt. a (3d ed. 1987) [hereinafter Restatement], also listing among customary violations: denials of due process in criminal proceedings, an unfair trial, a tribunal manipulated by the executive, denial of the right to defend oneself and to confront witnesses, conviction without diligent and competent counsel, and denial of an interpreter. *Id.* § 711, reporters' note 2. The A.B.A. resolution also recommended "compliance with Articles 14 and 15" of the ICCPR. *See* A.B.A. res., *supra* note 17. Common Article 3 of the Geneva Conventions incorporates such customary guarantees by reference and they are nonderogable under Geneva law. *See supra* notes 12, 15; *infra* notes 177–80 and accompanying text.

30. When it ratified the International Covenant, the United States placed a declaration in its instrument of ratification that attempted to function as a declaration of partial (not full or general) non-self-execution for a very limited purpose. The declaration expressly did not apply to Article 50 of the International Covenant, which requires that all of the provisions of the treaty apply "without any limitations or exceptions." Furthermore, the Executive Explanation assured that the intent was merely to clarify that the treaty itself "will not create a private cause of action in U.S. courts." *See* U.S. Reservations, Understandings, and Declarations Concerning the 1966 Covenant on Civil and Political Rights, U.S. Senate Executive Report 102–23, 102d Cong. 2d Sess. (1992); Paust, Van Dyke, & Malone, *supra* note 10, at 85–87, 262, 265–66. Thus, the declaration does not limit the reach of Article 50 or the use of the due process and equal protection provisions defensively in a criminal proceeding. *See, e.g.*, Paust, Van Dyke, & Malone, *supra* note 10, at 85–87, and references cited; Ruth Wedgwood, remarks, 85 Proc., Am. Soc. Int'l L. 139, 141 (1991); United States v. Duarte-Acero, 208 F.3d 1282, 1284 (11th Cir. 2000) (despite the declaration, the ICCPR is supreme law of the land); *id.*, 132 F. Supp. 2d 1036, 1040 n.8 (S.D. Fla. 2001) (the declaration does not apply when raising "ICCPR claims defensively"). Additionally, the declaration is not relevant to the universal reach of customary human rights to due process (now reflected in Article 14 of the ICCPR), customary prohibitions of "denial of justice" to aliens, or customary human rights norms *jus cogens.*

31. U.N. Charter, arts. 55(c), 56. Concerning the guarantee of customary human rights to all persons by and through the U.N. Charter, *see, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876, 882 (2d Cir. 1980). The legal duty of States under the Charter to promote respect for and to observe human rights, like customary international law, is "universal" in its reach. *See, e.g.*, U.N. Charter, arts. 55(c), 56; ICCPR, *supra* note 28, preamble.

32. ICCPR, *supra* note 28, art. 14(1). *Cf* GPW, *supra* note 12, art. 105 ("exceptionally . . . held *in camera* in the interest of State security"); GC, *supra* note 15, art. 74 ("as an exceptional measure, to be held *in camera*"); *but see supra* at notes 20, 22 and accompanying text; United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 551 (1950) (Jackson, J., dissenting) ("In the name of security the police state justifies its arbitrary oppression on evidence that is secret . . . "); Rafeedie v. INS, 880 F.2d 506,

516 (D.C. Cir. 1989). It is in the dark of secrecy that evil often lurks. Under the International Covenant and GPW, if full trials cannot be held in secret, at least national security interests can be accommodated through use of *in camera* inspection of materials and the closing of portions of proceedings to the general public. *See also* Rome Statute of the International Criminal Court, *supra* note 12, arts. 68(2) ("to protect victims and witnesses or an accused, conduct any part of the proceedings in camera"), 72 (regarding protection of national security information). Section 4(c)(4) of the Military Order directs the Secretary of Defense to devise rules of procedure that protect certain classified information from unauthorized disclosure.

33. ICCPR, *supra* note 28, art. 14(2). Human rights and law of war treaties typically do not mention the applicable standard of proof, but the trend evident in rules of procedure and evidence in the newer international criminal tribunals, reflecting current and widespread *opinio juris* concerning human rights to due process, is to require proof beyond a reasonable doubt. *See, e.g.*, the Rome Statute of the International Criminal Court, *supra* note 12, art. 66(3) ("the Court must be convinced of the guilt of the accused beyond reasonable doubt"), *reprinted in* Docs., *supra* note 12, at 238; 1998 Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, Rule 87 (A) ("A finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond a reasonable doubt."), *reprinted in* Docs., *supra* note 12, at 189 [hereinafter ICTY Rules]; U.N. Rules, *supra* note 13, Rule 32.

34. ICCPR, *supra* note 28, art. 14(3)(a)–(b). Concerning access to counsel and adequate time and facilities for preparation, *see also Report of the Mission*, *supra* note 29, at 37–42; GPW, *supra* note 12, arts. 104–05; GC, *supra* note 15, art. 72; *supra* notes 13, 20, 22; *see also* GC, *supra* note 15, arts. 3(1)(d), 5 (3d para. therein), 71 (three weeks' notice before trial), 76 ("right to be visited"), 146 ("In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Articles 105 and those following of" GPW); GPW, *supra* note 12, arts. 3(1)(d), 102, 129; Geneva Protocol I, *supra* note 12, art. 75(4)(a); U.N. Rules, *supra* note 13, Rules 25–27; IV Commentary, *supra* note 15, at 356–57, 595–96 (GC art. 146 guarantees are too numerous to list but include those mirrored in GPW arts. 87, 99, 101, 103, 105–06); McDonald & Swaak-Goldman, *supra* note 29, at 439–41, 531; Restatement, *supra* note 29, § 711, reporters' note 2. The November 13 Military Order did not state that accused had a right to counsel of their choice. *See* Military Order, *supra* note 1, at § 4(c)(5). However, it had to be interpreted consistently with international law. *See supra* note 10.

    Once a detainee is reasonably accused of a crime, the detainee should be provided notice of the right to counsel and foreign accused should be notified of the right to communicate with their government under Article 36 of the Vienna Convention on Consular Relations, 596 U.N.T.S. 261 (1963). Concerning notification under the Vienna Convention, *see, e.g.*, Paust, Van Dyke, & Malone, *supra* note 10, at 502–04; Frederic L. Kirgis, *Restitution as a Remedy in U.S. Courts for Violations of International Law*, 95 Am. J. Int'l L. 341 (2001). No logical reason exists why U.S. nationals should be informed of their rights without delay but foreign nationals should not.

35. ICCPR, *supra* note 28, art. 14(3)(c)–(e). *See also supra* notes 20, 29; GPW, *supra* note 12, art. 105; GC, *supra* note 15, arts. 3(1)(d), 72; Geneva Protocol I, *supra* note 12, art. 75(4) (g). Unlike U.S. practice, this does not include full cross-examination and does not seem to preclude every use of hearsay evidence. *See, e.g.*, McDonald & Swaak-Goldman, *supra* note 29, at 448–49, 473–74, 460–62, 532–35, 556–57, 569–70, 580; Paust, Bassiouni, et al., *supra* note 12, at 649, 669–71, 712; Rome Statute of the International Criminal Court, *supra* note 12, arts. 63, 67–69, 72–73, *reprinted in* Docs., *supra* note 12, at 206, 236–42; Marsha V. Mills, *War Crimes in the 21st Century*, 3 Hofstra L. & Pol'y Symp. 1, 55–56 (1999) (also addressing ICTY and ICTR decisions regarding permissible hearsay evidence); Restatement, *supra* note 29, § 711, reporters' note 2; *cf supra* note 20. The November 13 Military Order directs that orders and regulations prepared by the Secretary of Defense "shall . . . provide for . . . admission of . . . evidence" of "probative value to a reasonable person." *See* Military Order, *supra* note 1, at § 4(c)(3). However, the 1970 DOD study focused on Article 36 of the U.C.M.J. (10 U.S.C. § 836); noted that Congress has directed the President to follow rules of evidence, as far as practicable, that conform with those applicable in federal district courts; and concluded that "it would be difficult to argue that hearsay or other arguably probative but objectionable evidence would [be] permissible by 'practicality'" and, further, "the right to confront witnesses is clearly fundamental to a fair trial." *See* 1970 DOD Study, *supra* note 7, at tab K; *see also infra* note 54. Additionally, prisoners of war must have at least the same due process rights that U.S. military personnel would have. *See* GPW, *supra* note 12, art. 102; III Commentary, *supra* note 12, at 623; *see also* GC, *supra* note 15, art. 146; IV Commentary, *supra* note 15, at 595–96 ("the same system" is required for civilians and others protected by the Convention who are prosecuted for war crimes); Geneva Protocol I, *supra* note 12, art. 75(1); *infra* note 42. Furthermore, human rights law requires equal protection for all accused. *See infra* notes 40–41. Prisoners of war are also specifically entitled to "the documents which are generally communicated to the accused by virtue of the laws in force in the armed forces of the" United States. *See* GPW, *supra* note 12, art. 105.
36. ICCPR, *supra* note 28, art. 14(3)(f)–(g), 5.
37. *See* Military Order, *supra* note 1, § 7 (b)(2)(i), concerning related denials addressed at text *infra* notes 60–64. With respect to prisoners of war, the November 13 Military Order also would violate the Geneva Conventions. *See* GPW, *supra* note 12, arts. 106 ("Every prisoner of war shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any sentence pronounced upon him, with a view to the quashing or revising of the sentence or the reopening of the trial."), 129. With respect to foreign civilians held during an international armed conflict or occupation and "unlawful combatants" who do not have POW status, the November 13 Order would violate GC Articles 73 and 146; *see also* GC, *supra* note 15, arts. 3(1)(d), 5 (3d para. therein), 78, 147; IV Commentary, *supra* note 15, at 369 ("appeals either to a 'court' or a 'board'. That means that the decision will never be left to one individual."), 595–96; Geneva Protocol I, *supra* note 12, art. 75(4)(j). The European Court of Human Rights has ruled that British military tribunal use of appointment of members and review by the convening authority violates human rights to a fair trial by an independent and impartial tribunal and to an appeal by a tribunal reflected in

Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, Eur. T.S. No. 5 (1950), and Article 2(1) of Protocol No. 7 to the European Convention, Eur. T.S. No. 117 (1988). *See, e.g.*, Findlay v. United Kingdom, 30 Eur. Ct. H.R. (Ser. B) 263 (1997), 24 E.H.R.R. 221, available at: http://www.echr.coe.int/eng/Judgments.htm. *See also* R. v. Genereux, 1 S.C.R. 259 (S. Ct. Canada 1992) (Canadian military tribunals lacked independence and impartiality in violation of the Canadian Charter); Restatement, *supra* note 29, § 711, reporters' note 2 ("tribunal manipulated by the executive" results in a "denial of justice"); Report of the Secretary-General, *supra* note 29 (human right to appeal is fundamental); Castillo Petruzzi, Merits, Judgement, text *supra* at note 20; Constitutional Rights Project v. Nigeria, African Commission on Human and Peoples' Rights, Comm. No. 60/91, ACHPR/RPT/8th/Rev.1, Annex VI, at 4 (1994–95), reproduced in part in Francisco Forest Martin, *et al.*, International Human Rights Law & Practice 607–08 (1997); U.S. Dep't of State Country Reports on Egypt, Nigeria, and Thailand, *supra* notes 23–25. Concerning appellate review of U.S. courts-martial decisions, *see, e.g.*, 10 U.S.C. §§ 866–867(a), 869. As this demonstrates, presidential review in place of an appellate tribunal also would violate the customary human right to independent and impartial justice. The A.B.A. resolution also recommended "certiorari review by the U.S. Supreme Court (in addition to the right to petition for a writ of habeas corpus)." *See* A.B.A. res., *supra* note 17.

38. *See, e.g.*, Abebe-Jira v. Negewo, 72 F.3d 844, 845–46 (11th Cir. 1996); Kadic v. Karadzic, 70 F.3d 232, 237, 243 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996); Filartiga v. Pena-Irala, 630 F.2d at 882–84; Estate of Cabello v. Fernandez-Larios, 157 F. Supp. 2d 1345, 1360–61 (S.D. Fla. 2001); Xuncax v. Gramajo, 886 F. Supp. 162, 184–87 (D. Mass. 1995);Paust, Van Dyke, Malone, *supra* note 10, at 352–452. Such conduct would also be illegal under the Geneva Conventions regardless of the status of accused (*e.g.*, as a POW or civilian, terrorist or terrorist supporter). *See, e.g.*, GPW, *supra* note 12, arts. 3, 13–14, 87, 99, 130; GC, *supra* note 15, arts. 3, 27, 31–33, 147; Geneva Protocol I, *supra* note 12, arts. 75(1) and (2), 85(3). Section 3(b) of the Military Order rightly required that persons subject to the order "shall be . . . treated humanely . . . " Rule 95 of the 1998 ICTY Rules, *supra* note 33, required that evidence "obtained directly or indirectly by means which constitute a serious violation of internationally protected human rights shall not be admissible." Rule 95 was changed: "No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings." A similar provision pertains in the Rome Statute of the International Criminal Court, *supra* note 12, art. 69(7), if "[t]he violation casts substantial doubt on the reliability of the evidence" or "admission of the evidence would be antithetical to and would seriously damage the integrity of the proceeding." *See also* Garcia Perez v. Peru, Inter-Am. Comm. H.R., Report No. I/95, Case 11.0006, OEA/Ser.L/V/II.88, doc. 9 rev. (1995) (exclusionary rule applies to material seized during a search in violation of due process and other rights), reproduced in part in Martin, *et al.*, *supra* note 37, at 644–46; Kirgis, *supra* note 34, at 346–48; *infra* note 201.

39. *See, e.g.*, Chahal v. United Kingdom, Eur. Ct. H.R., No. 70/1995/576/662 (15 Nov. 1996), *reprinted in* 92 Am. J. Int'l L. 71 (1998); the Soering Case, 161 Eur. Ct. H.R.,

Ser. A (1989), 11 Eur. Hum. Rts. Rep. 439 (1989). *See also* U.N. Charter, arts. 55(c), 56 (duty to take action to achieve universal respect for and observance of human rights); GPW, *supra* note 12, art. 12 (transferee must be willing and able to comply with the Convention); GC, *supra* note 15, art. 1 (it is the duty of all signatories "to respect and to ensure respect for the present Convention in all circumstances"); Geneva Protocol I, *supra* note 12, art. 88(2)–(3); IV COMMENTARY, *supra* note 15, at 16. Spain has already indicated that it will not extradite eight persons suspected of complicity in the September 11 attack unless the United States agrees that they will not be tried in a military commission. *See, e.g.*, Sam Dillon & Donald G. McNeil, Jr., *A Nation Challenged: The Legal Front; Spain Sets Hurdle for Extradition*, N.Y. TIMES, Nov. 24, 2001, at A1, col. 3 (adding: "a senior European Union official . . . doubted that any of the 15 [EU] nations . . . would agree to extradition that involved the possibility of a military trial"); Shanker & Seelye, *supra* note 15 ("Britain and France warned they might not turn over Taliban and Al Qaeda fighters captured by their troops in Afghanistan unless Mr. Bush" pledges to honor the Geneva Conventions). Furthermore, an occupying power cannot transfer a person protected under the Geneva Civilian Convention out of occupied territory. *See, e.g.*, GC, *supra* note 15, arts. 49, 66, 76, 147; Geneva Protocol I, *supra* note 12, art. 85(4)(a); Rome Statute of the International Criminal Court, *supra* note 12, art. 8(2)(a)(vii) and (b)(viii).

40. On the prohibition of national or social origin discrimination, *see, e.g.*, ICCPR, *supra* note 28, arts. 2, 26; Universal Declaration of Human Rights, arts. 2, 7, U.N. G.A. Res. 217A, 3 U.N. GAOR, U.N. Doc. A/810, at 71 (1948); Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia, 1971 I.C.J. 16, 57, para. 131 ("To establish . . . , and to enforce, distinctions, exclusions, restrictions, and limitations exclusively based on grounds of . . . national . . . origin which constitute a denial of fundamental human rights is a flagrant violation of the . . . [U.N.] Charter."); *infra* note 41. The same human rights provisions prohibit discrimination on the basis of "status," which should cover, for example, discrimination on the basis of military or nonmilitary status. On the nature of the Universal Declaration as customary international law and as an authoritative aid for interpretation of human rights protected by and through the U.N. Charter, *see, e.g.*, MYRES S. MCDOUGAL, HAROLD D. LASSWELL, & LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 272–74, 302, 325–30 (1980); PAUST, *supra* note 6, at 181, 191, 198–200, 228 n.182, 246 n.372, 256 n.468, 286 n.595, 436–37 n.48; Filartiga v. Pena-Irala, 630 F.2d at 882; Rodriguez Fernandez v. Wilkinson, 505 F. Supp. 787, 796–97 (D. Kan. 1980).

41. On the prohibition of a denial of equal protection of the law, especially concerning enforcement in courts or tribunals, *see, e.g.*, ICCPR, *supra* note 28, arts. 14 (1) ("All persons shall be equal before the courts and tribunals") and (3) ("everyone shall be entitled to the following minimum guarantees, in full equality"), 26 ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law"); Universal Declaration of Human Rights, *supra* note 33, arts. 2, 7.

Additionally, bilateral friendship, commerce, and navigation treaties often require access to courts and equality of treatment. *See, e.g.*, RESTATEMENT, *supra* note 29, § 713 (2) and cmnt. h and reporters' note 3; Wilson, *Access-to-Courts Provisions in United States Commercial Treaties*, 47 AM. J. INT'L L.20 (1953); Asakura

v. City of Seattle, 265 U.S. 332, 340–41 (1924); Provisional Agreement in Regard to Diplomatic and Consular Representation, Juridical Protection, Commerce, and Navigation between the United States and Saudi Arabia (3 Nov. 1933), art. II (nationals of one country in the "territories and possessions" of the other country "shall enjoy the fullest protection of the laws and authorities of the country, and they shall not be treated . . . in any manner less favorable than the nationals of any other foreign country."), 142 L.N.T.S. 329, 48 Stat. 1826, 1933 U.S.T. Lexis 55.

42. Prisoners of war "can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power . . . " GPW, *supra* note 12, art. 102; *see also id.* arts. 106, 129, 130 ("grave breach" war crime occurs if a prisoner of war is "wilfully deprived" of procedural rights mandated by GPW); GC, *supra* note 15, arts. 3(1)(d), 146; Geneva Protocol I, *supra* note 12, art. 75 (1) (no adverse discrimination is allowed and courts must be "regularly constituted" and utilize "regular judicial procedures"); IV Commentary, *supra* note 15, at 595–96 (GC requires provision of "the same system to all accused whatever their personal status" and GC art. 146 guarantees for civilians and others protected by the Convention who are prosecuted for war crimes are too numerous to list but include those mirrored in GPW arts. 87, 99, 101, 103, 105–06); Rome Statute of the International Criminal Court, *supra* note 12, art. 8(2)(b)(xiv) (quoted *supra* note 12); U.S. Dep't Army JAG School, Law of War Workshop Deskbook chpt. 8, at 26 ("treaty obligations provide a floor of procedural rights, at least as to offenses by prisoners of war, that precludes military commissions in this category of cases"), available at: http://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/TJAGSAWeb.nsf/8f7edfd448e0ec6c8525694b0064ba51/9dc02ec45aba401d852569ad007c79df/$FILE/Chapter%208.pdf. The International Committee of the Red Cross Commentary warns: "The court proceedings should be carried out in a uniform manner, whatever the nationality of the accused. Nationals, friends, enemies, all should be subject to the same rules of procedure and judged by the same courts. There is therefore no question of setting up special tribunals to try war criminals of enemy nationality." III Commentary, *supra* note 12, at 623; *see also id.* at 476; IV Commentary, *supra* note 15, at 595–96; *supra* note 15. Professor Wedgwood missed these points as well as those noted *supra* notes 40–41. *See* Wedgwood, *supra* note 15. So did the A.B.A. *See* A.B.A. res., *supra* note 17 (recommending that the military commissions not be applicable to U.S. citizens, lawful resident aliens, and other persons lawfully present in the Unite States).

With respect to the death penalty, U.S. military prosecuted in general courts-martial can receive the death penalty only by unanimous verdict, but the Military Order states that rules concerning conviction and sentencing "shall at a minimum provide for" conviction and sentencing "*only upon* the concurrence of two-thirds of the members of the commission present at the tie of the vote, a majority being present." Military Order, *supra* note 1, at § 4(c)(6)–(7) (emphasis added). GPW Article 102 requires conviction and sentencing of prisoners of war in at least the same manner as conviction and sentencing of U.S. military. The same requirement pertains with respect to civilians and others protected by the Geneva Conventions. *See supra.* Additionally, all persons are entitled to equal protection

under customary human rights law (*see supra* note 41 and accompanying text) and must therefore benefit from at least the same rules concerning conviction and sentencing that pertain in federal district courts. Yet, absent such equal protection guarantees, international law would not require unanimous verdicts. *See also* Rome Statute of the International Criminal Court, *supra* note 12, art. 74(3) and (5); ICTY Rules, *supra* note 33, Rules 87 (A), 88 (C).

43. 354 U.S. 1 (1957).

44. Johnson v. Eisentrager, 339 U.S. 763 (1950). *Eisentrager* involved the limiting circumstance of arrest and prosecution in China of wartime enemy belligerents for war crimes committed "by engaging in, permitting or ordering military activity against the U.S. after surrender of Germany and before surrender of Japan"; occurred before to *Reid*; did not use a lawful powers approach to decision identified in the *Reid* rationale; occurred before major developments in human rights law concerning due process; and merely held by a 6–3 vote that enemy alien belligerents "engaged in the hostile service of a government at war with the United States" charged and prosecuted in a foreign country for war crimes have no constitutional "right of security or an immunity from military trial and punishment" and could not seek relief by habeas corpus. *See id.* at 771, 781, 785. Concerning the limited reach and suspect precedential authority of *Eisentrager*, *see also* United States v. bin Laden, *et al.*, 132 F. Supp. 2d 168, 181–83 & n.10 (S.D.N.Y. 2001); United States v. Yunis, 681 F. Supp. 909, 916 & n.13 (D.D.C. 1988), *rev'd on other gds.*, 859 F.2d 953 (D.C. Cir. 1988); Jordan J. Paust, *An Introduction to and Commentary on Terrorism and the Law*, 19 Conn. L. Rev. 697, 726–34 (1987); text *infra* at notes 66–70. *But see* Paul B. Stephan III, *Constitutional Limits on the Struggle Against International Terrorism: Revisiting the Rights of Overseas Aliens*, 19 Conn. L. Rev. 831, 834–45 (1987). There are also serious questions whether bin Laden and his followers were enemy alien belligerents or committed war crimes on September 11. *See supra* note 16.

45. *See also* United States v. Yunis, 681 F. Supp. at 915, 917; United States v. Tiede, Crim. Case No. 78-001A, 86 F.R.D. 227 (U.S. Ct. for Berlin 1979); Herbert Stern, Judgment in Berlin (1984).

46. *See* 354 U.S. at 5–6, 12, 35 n.62. *See also* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 668–69 n.5 (1974), *quoting* Mora v. Mejias, 206 F.2d 377, 382 (1st Cir. 1953) ("'there cannot exist under the American flag any governmental authority untrammeled by the requirements of due process of law as guaranteed by the Constitution of the United States'"); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952) (President's power "must stem either from an act of Congress or from the Constitution itself"); *id.* at 646, 649–50 (Jackson, J., concurring) (the President's power to execute law "must be matched against words of the Fifth Amendment" and the Founders omitted "powers *ex necessitate* to meet an emergency"); *Ex parte* Quirin, 317 U.S. at 25 ("Congress and the President . . . possess no power not derived from the Constitution"); Balzac v. Porto Rico, 258 U.S. 298, 312–13 (1922) ("The Constitution of the United States is in force . . . wherever and whenever the sovereign power of that government is exerted," but the "real issue" is "which of its provisions were applicable," and finding that the requirements of due process apply); United States v. Lee, 106 U.S. 196, 200 (1882); United States v. Worrall, 2 U.S.

(2 Dall.) 384, 393–94 (C.C. Pa. 1798) (Chase, J., on circuit) ("government can never assume any power, that is not expressly granted by that instrument, nor exercise a power in any other manner that is there prescribed"); Paust, *supra* note 5, at 329, 333–34, 469–78, *passim*; Elizabeth Sepper, Note, *The Ties That Bind: How the Constitution Limits the CIA's Actions in the War on Terror*, 81 N.Y.U. L. Rev. 1805 (2006); *infra* notes 47, 50.

47. *See also* Paust, *supra* note 44, at 722–34; *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866), recognizing that the Executive has no powers outside the Constitution or *ex necessitate*, that the Constitution "covers within the shield of its protection all classes of men, at all times, and under all circumstances," and, importantly, that trials must occur in federal district courts when such courts are reasonably available. *Id.* at 120–23, 127, 131. With respect to human rights, *Milligan* also affirmed: "By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers . . . " *Id.* at 119.
48. United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).
49. *See id.* at 265–66 (the phrase "the people" in the Fourth Amendment refers to a class of people with a "sufficient connection with this country" in contrast with "person" and "accused" used in the Fifth and Sixth Amendments. *Cf id.* at 269 (regarding *Eisentrager*, 339 U.S. at 781–83); Paust, Van Dyke, & Malone, *supra* note 10, at 282–83. *Reid* also recognized that the Fifth and Sixth Amendments "are . . . all inclusive with their sweeping references to 'no person' and to 'all criminal prosecutions.'" Reid v. Covert, 354 U.S. at 8. The Fourteenth Amendment also provides equal protection guarantees to "any person" and such guarantees have been applied to the federal government through the Fifth Amendment. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 215 (1995).
50. *See, e.g.*, *In re* Yamashita, 327 U.S. at 26–27 (Murphy, J., dissenting); *id.* at 79–81 (Rutledge, J., dissenting); United States v. Caicedo, 47 F.3d 370, 371–72 (9th Cir. 1995); United States v. Toscanino, 500 F.2d 267, 276–80 (2d Cir. 1974); *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 443, 453–68 (D.D.C. 2005); United States v. Yunis, 681 F. Supp. at 911, 916–18 & nn.13–14; United States v. Tiede, 86 F.R.D. 227, 259 (also recognizing the reach of the Fifth and Sixth Amendments to any "person" or "accused"); *see also* Dostal v. Haig, 652 F.2d 173, 176–77 (D.C. Cir. 1981) ("we accept, arguendo, [Judge Stern's] attractive position that the Bill of Rights is fully applicable to govern the conduct . . . in Berlin"); Turney v. United States, 115 F. Supp. 457 (Ct. Cl. 1953) (Fifth Amendment applies abroad regarding taking of alien property); *but see* Harbury v. Deutch, 233 F.3d 596, 602–04 (D.C. Cir. 2000) (distinguishing, among others, cases applying the Fifth Amendment to conduct in "territories controlled by the U.S." or to conduct in foreign territory when an accused is later subject to "trial in a United States court." *Id.* at 603–04. There was no consideration of relevant international law or its use as an interpretive aid.).
51. *See, e.g.*, *In re* Yamashita, 327 U.S. at 26–28 (Murphy, J., dissenting); United States v. Caicedo, 47 F.3d at 372; United States v. Davis, 905 F.2d 245, 249 n.2 (9th Cir. 1990), *cert. denied*, 498 U.S. 1047 (1991); Paust, *supra* note 5, at 192, 196, 248 n.392 (citing several Supreme Court and other courts addressing human rights and due process under the Fifth and Sixth Amendments), 254–55 n.459 (same). In 1814, Justice Story affirmed the unswerving expectation that the President "has a discretion vested in

him, as to the manner and extent; but he cannot lawfully transcend the rules of warfare established among civilized nations. He cannot lawfully exercise powers, or authorize proceedings, which the civilized world repudiates and disclaims." Brown v. United States, 12 U.S. (8 Cranch) 110, 153 (1814) (Story, J., dissenting); *see also supra* note 10. *Verdugo–Urquidez* also recognized that restrictions on government conduct can be imposed by treaty despite inapplicability of the Fourth Amendment to aliens abroad. *See* 494 U.S. at 275.

52. *See supra* notes 32, 35. Whether or not the Fifth Amendment applies abroad in a certain way, due process and equal protection requirements under international human rights law, other treaties, and laws of war will still apply. *See also supra* notes 10, 40, 42; text *infra* at notes 75–78.
53. *See supra* note 47 and accompanying text; *see also* Duncan v. Kahanamoku, 327 U.S. 304, 326 (1946) ("Only when a foreign invasion or civil war actually closes the courts and renders it impossible for them to administer criminal justice can martial law validly be involved to suspend their functions."); United States v. Averette, 19 USCMA 363, 41 C.M.R. 363 (1970) ("words 'in time of war' mean, for the purposes of Article 2 (10) [of the U.C.M.J., 10 U.S.C. § 802 (10)] . . . , a war formally declared by Congress," the Vietnam War was not such a war, and military courts therefore do not have jurisdiction over civilians). *Cf Ex parte* Quirin, 317 U.S. at 23–24 (noting that federal courts were open). *Ex parte* Quirin distinguished *Milligan* because the case at hand involved "offenses committed by enemy belligerents against the laws of war" in the Eastern Defense Command of the United States, war crimes were charged against "an enemy belligerent either entitled to the status of a prisoner of war or subject to the penalties imposed upon unlawful belligerents," and *Milligan* had involved an accused who was not "part of or associated with the armed forces of the enemy" in time of war and who was "not an enemy belligerent," but was a "non-belligerent" and was "not subject to the law of war." *See* 317 U.S. at 22 n.1, 38, 40–41, 45–46. There are serious questions whether bin Laden and his followers were enemy belligerents or committed war crimes on September 11. *See supra* note 16.
54. *See* United States v. bin Laden, *et al.*, 92 F. Supp. 2d 189 (S.D.N.Y. 2000); United States v. Moussaoui, indictment (E.D. Va. Dec. 10, 2001); United States v. Reid, indictment (D. Mass. 2002). Trial of Moussaoui in a federal district court was approved by President Bush. *See, e.g.*, Don Van Natta, *A Nation Challenged: The Legal Venue; Compromise Settles Debate Over Tribunal*, N.Y. Times, Dec. 12, 2001, at B1, col. 5. Successful prosecution of some of the accused also demonstrates that trial in a federal district court with rules of procedure and evidence utilized therein is "practicable" within the meaning of 10 U.S.C. § 836.
55. The language in the Order is extremely broad and clearly attempts to deny habeas corpus: "the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States . . . " Military Order, *supra* note 1, § 7(b)(2). *See also* N.Y. City Bar Report, *supra* note 3, at 2. Professor Peter Raven-Hansen agrees and noted that the word "privilege" appears rarely in the U.S. Constitution and is used uniquely in connection with the suspension of habeas corpus provision found in Article I, Section 9, concerning congressional power.

Oral remarks during a panel session at the Federal Judicial Center's Workshop for Federal District Judges II, in San Diego, Dec. 4, 2001 (at which the author also participated). Counsel to the President Alberto Gonzales was in extreme error when he wrote: "The order preserves judicial review in civilian courts. Under the order, anyone arrested . . . will be able to challenge . . . through a habeas corpus proceeding in a federal court." Gonzales, *supra* note 3. This is the same person who, as General Counsel to Governor George Bush and in response to a letter from the Office of the Legal Adviser of the U.S. Department of State in 1997 inquiring about implementation of the Vienna Convention on Consular Relations (a treaty ratified by the United States), wrote: "Since the State of Texas is not a signatory to the Vienna Convention . . . , we believe it is inappropriate to ask Texas to determine whether a breach" occurred. Letter of June 16, 1997, quoted in part in Paust, Van Dyke, & Malone, *supra* note 10, at 498–99. *But see* U.S. Const., Art. VI, cl. 2.

56. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. at 632 n.1 (Douglas, J. concurring), *citing Ex parte* Merryman, 17 F. Cas. 144 (C.C. Md. 1861) (No. 9,487) (Taney, C.J.) (the President alone has no power to suspend the writ of habeas corpus); Joseph Story, Commentaries on the Constitution 342 (1883); N.Y. City Bar Report, *supra* note 3, at 3 (the power to suspend habeas corpus "is vested by Constitution only with the Congress"), 21–22 & n.61, 25; *see also* INS v. St. Cyr, 121 S.Ct. 2271, 2280 (2001). Moreover, congressional participation seems critical for an adequate check and balance of powers, especially when suspension of the writ can preclude even the limited judicial role in the check and balance process available through habeas corpus review.
57. Calley v. Callaway, 519 F.2d 184, 194–202 (5th Cir. 1975), *cert. denied*, 425 U.S. 911 (1975), also permitting inquiry into errors of "substantial constitutional dimension" such as those "so fundamental as to have resulted in a gross miscarriage of justice." Since international law is supreme federal law with constitutional bases and moorings (*see infra* note 77), it would appear to be appropriate under even habeas review to address violations of international law that have such a substantial dimension or that would result in a gross miscarriage of justice.
58. 317 U.S. at 25.
59. *Id.* at 19. *See also Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 102–03 (1868) (regarding review of the trial of a civilian by a military commission, the Court "in the exercise of its appellate jurisdiction, may, by the writ of habeas corpus, aided by the writ of certiorari, revise" lower military or judicial decisions).
60. *See* 317 U.S. at 23; Pres. Proclamation No. 2561 (July 2, 1942), 7 Fed. Reg. 5101, 56 Stat. 1964 (containing nearly the same language found in Section 7(b)(2)(i) of the Bush Military Order).
61. 317 U.S. at 25.
62. *Id. See also* Johnson v. Eisentrager, 339 U.S. at 794–95 (Black, J., dissenting) ("The contention that enemy alien belligerents have no standing whatever to contest conviction for war crimes by habeas corpus proceedings has twice been emphatically rejected by a unanimous Court" in *Quirin* and *Yamashita*); *Ex parte* Milligan, 71 U.S. (4 Wall.) at 121, 124–25 ("cannot justify [creation of a military commission] on the mandate of the President" or because martial law has been declared).
63. 327 U.S. at 9. *See also supra* note 62.

64. *See In re* Yamashita, 327 U.S. at 30 (Murphy, J., dissenting). *See also supra* note 62. Concerning constitutional limits on congressional authority to suspend habeas corpus, *see* U.S. Const., art. I, § 9, cl. 1; Chapter Five, Section D.
65. 339 U.S. at 771, 781, 785.
66. *Id.* at 795 (Black, J., dissenting).
67. *Id.* at 780.
68. *Id.* at 781 (adding: "None of these heads of jurisdiction can be invoked by these petitioners." *Id.* at 780).
69. *See id.* at 798 (Black, J., dissenting) (claiming that habeas corpus should be available "in any land we govern"); Balzac v. Porto Rico, 258 U.S. at 312–13 (1922); Downes v. Bidwell, 182 U.S. 244 (1901); Hague Convention No. IV, *supra* note 12, Annex, art. 43 ("The authority of the legitimate power having in fact passed into the hands of the occupant . . . "); IV Commentary, *supra* note 15, at 60 ("occupation" under Geneva law "has a wider meaning than it has in" the Hague Convention and applies to "troops advancing into" foreign enemy territory, "whether fighting or not," and "[e]ven a patrol which penetrates into enemy territory without any intention of staying there must respect the Conventions. . . . When it withdraws, for example, it cannot take civilians with it, for that would be contrary to Article 49. . . . The same thing is true of raids made into enemy territory or on his coasts."). *Cf* FM 27-10, *supra* note 12, at 140, para. 358 (occupation "does not transfer sovereignty . . . , but . . . the authority or power to exercise some of the rights of sovereignty"); *but see* Johnson v. Eisentrager, 339 U.S. at 748 (not applicable to "military occupation"). Under the Geneva standard, the United States seems to have been an occupying power over portions of Afghan territory before any control exercised with the consent of the new Afghan regime. For example, U.S. military completed the prison camp at Kandahar on December 15, 2001. *See, e.g.*, Patrick Healy, *Fighting Terror/Military Plans Kandahar; US Readies Prison for Anticipated Hard-Line Captives*, Boston Globe, Dec. 26, 2001, at A30. The first detainees arrived there on December 18, 2001. *See, e.g.*, First prisoners arrive at US detention centre in Kandahar, Agence France Presse, Dec. 18, 2001; Michael R. Gordon, *The Prisoners; One Certainty So Far for Captured Fighters: Conditions Are Awful*, N.Y. Times, Dec. 18, 2001, at §B, at 4, col. 1. However, the new iterim Afghan regime did not assume power until December 22, 2001. *See, e.g.*, David Rohde, *Afghan Leader Is Sworn In, Asking for Help to Rebuild*, N.Y. Times, Dec. 23, 2001, §1A, at 1, col. 5; Elizabeth Neuffer, *Fighting Terror Afghanistan; Diverse Afghan Cabinet Takes Helm*, Boston Globe, Dec. 23, 2001, at A1. A U.S. detention facility had been used earlier at the U.S. Marine Camp Rhino. *See, e.g.*, Tony Perry, *Officials Struggling with Lindh Case*, L.A. Times, Dec. 10, 2001, pt. A, at 3; Howard Witt, *Bin Laden Haunts Take Air Pounding*, Chicago Tribune, Dec. 10, 2001, at 1. Clearly, the United States had been in complete control of certain areas and of its own military units.
70. Under international law, U.S. flag vessels (especially warships) are the equivalent of U.S. territory and provide "territorial jurisdiction" (a phrase addressed in *Eisentrager*, 339 U.S. at 770). *See, e.g.*, Paust, Van Dyke, & Malone, *supra* note 10, at 514 & n.2 (cases cited), 851–57. U.S. warships are also "territory" over which the U.S. exercises full sovereign power, including the exercise of military justice and other enforcement competencies. *See also* Neil A. Lewis, *The Military Tribunals; Rules on*

Tribunal Require Unanimity on Death Penalty, N.Y. Times, Dec. 28, 2001, at A1, col. 6 ("Holding the trials on ships remains an option . . . "). When the United States is an occupying power, the Geneva Civilian Convention and Geneva Protocol I prohibit transfers of protected persons (including civilians and "unlawful combatants" – *see supra* note 15) from the occupied territory and require detention and trial of criminal accused and the serving of sentences in the occupied territory. *See* GC, *supra* note 15, arts. 49, 66, 76; Geneva Protocol I, *supra* note 12, art. 85(4)(a); IV Commentary, *supra* note 15, at 60. Furthermore, "unlawful . . . transfer or unlawful confinement of a protected person" is a "grave breach" of the Convention and Protocol. *See* GC, *supra* note 15, art. 147; Geneva Protocol I, *supra* note 12, art. 85(4)(a); Rome Statute of the International Criminal Court, *supra* note 12, art. 8(2)(a)(vii) and (b)(viii). However, when the United States is not an occupying power it should be able to capture in foreign territory (without foreign state consent) and bring to trial in the United States persons who are directly responsible for an armed attack or process of attacks against the United States or its military and other nationals overseas in conformity with Article 51 of the U.N. Charter or when authorized to use force by the U.N. Security Council or under a lawful exercise of power of a regional organization in accordance with Articles 52–53 of the U.N. Charter. *See, e.g.*, Paust, Bassiouni, *et al.*, *supra* note 12, at 500, 504–05; Paust, Van Dyke, & Malone, *supra* note 10, at 593, 605. Other persons would have to be transferred, and other law enforcement activities would have to be engaged in, with the consent of the foreign government. *See, e.g.*, Paust, Van Dyke, & Malone, *supra* note 10, at 574–75, 581–607, 610; Restatement, *supra* note 29, §§ 432–433. The ICJ has ruled that a state exercising self-defense cannot use such power merely to obtain evidence of prior infractions of the law. The Corfu Channel Case (United Kingdom v. Albania), 1949 I.C.J. 1, 34–35.

71. Like warships, U.S. military aircraft are the equivalent of U.S. territory and both territorial and enforcement jurisdictional competencies exist on board such aircraft, especially when flying over the high seas. *See, e.g.*, Paust, Van Dyke, & Malone, *supra* note 10, at 514, 525.
72. Guantanamo Bay is territory specially occupied by the United States under military occupation and a treaty regime providing "'complete jurisdiction and control'" by the United States. *See, e.g.*, Rasul v. Bush, 542 U.S. 466 (2004); Jordan J. Paust, *Non-Extraterritoriality of "Special Territorial Jurisdiction" of the United States: Forgotten History and the Errors of* Erdos, 24 Yale J. Int'l L. 305, 327 (1999); Haitian Ctr. Council, Inc. v. McNary, 969 F.2d 1326, 1342 (2d Cir. 1992); United States v. Rogers, 388 F. Supp. 298, 301 (E.D. Va. 1975); *cf* Cuban Am. Bar Ass'n v. Christopher, 43 F.3d 1412, 1425 (11th Cir. 1995) (not U.S. territory as such). Guantanamo Bay is clearly outside the war zone in Afghanistan and outside the reach of relevant presidential war powers, especially since the offenses were not committed in Guantanamo. *See, e.g.*, Winthrop, *supra* note 11, at 831, 836; Chapter Four, Section E. Thus, it is apparent that a military commission cannot be properly constituted at Guantanamo Bay. Even if one could, federal district courts are "available" a few miles away.
73. *See supra* notes 44–47, and accompanying text.
74. *See supra* notes 12, 15, 20–22, 29, 33–35, 37–38, 40–42 and accompanying text; GC, *supra* note 15, arts. 3(1)(d), 70–73, 147.

75. *See, e.g.*, ICCPR, *supra* note 28, art. 14; Universal Declaration of Human Rights, *supra* note 40, art. 8; H.R. Comm., General Comment No. 13, *supra* note 21, at paras. 1–4; H.R. Comm., General Comment No. 15, at para. 7, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (22 July 1986); H.R. Comm., General Comment No. 20, at para. 15, U.N. Doc. CCPR/C/21/Rev.1/Add.3 (7 April 1992); H.R. Comm., General Comment No. 24, *supra* note 29, at paras. 8, 11–12; PAUST, *supra* note 5, at 75 n.97, 198–203, 262 n.483, 256–72 nn.468–527, 362, 375–76, *passim*, and numerous cases cited; Dubai Petroleum Co., *et al.* v. Kazi, 12 S.W.3d 71, 82 (Tex. 2000) ("The Covenant not only guarantees foreign citizens equal treatment in the signatorie's courts, but also guarantees them equal access to these courts"); *supra* notes 22, 29, 41.
76. *See supra* notes 20–22, 29, 37 and accompanying text. The Geneva Conventions require at least the same forms of appellate review, including habeas corpus petitions, that would be available to U.S. military. *See* GPW, *supra* note 12, arts. 102, 106; GC, *supra* note 15, art. 146.
77. *See, e.g.*, U.S. Const., Arts. II, § 3, III, § 2, VI, cl. 2; PAUST, *supra* note 5, at 6–9, 34–48, 51–59, 62–63, 65–73, 76, 92–93, 100, 108–11, 121, 129, 132–33, 143–64, *passim*, and numerous cases cited.
78. *See supra* note 51 and accompanying text.
79. 11 Ops. Att'y Gen. 297, 298 (1865). Clearly, Congress can regulate the jurisdiction and procedure of military commissions, but must do so consistently with international law and the requirements of international law "are of binding force upon the departments and citizens of the Government, though not defined by any law of Congress." *See, e.g.*, *id.* at 298–300; Madsen v. Kinsella, 343 U.S. 341, 348–49 (1952); *supra* notes 5, 10.
80. *See also* Madsen v. Kinsella, 343 U.S. at 348–49; WINTHROP, *supra* note 11, at 831, 836–37; Halleck, *supra* note 14, at 21; Newton, *supra* note 14, at 15, 19–21 (stating that jurisdiction apparently exists only over violations of the laws of war); O'Callahan v. Parker, 395 U.S. 258, 267 ("court-martial jurisdiction cannot be extended to reach any person not a member of the Armed Forces . . . no matter how intimate the connection between their offense and the concerns of military discipline. . . . [C]ourts-martial have no jurisdiction over nonsoldiers, whatever their offense"), 302 ("we deal with peacetime offenses, not with authority stemming from the war power. Civil courts were open. The offenses were committed within our territorial limits, not in the occupied zone of a foreign country.") (1969); United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 13–14 & n.4 (1955) (stating that ex-servicepersons are not subject to prosecution in military courts-martial regarding murder, yet the case did not involve congressional power to punish offenses against the law of nations).
81. *See* 317 U.S. at 22 n.1. Petitioners also had been charged with wartime espionage, but the Supreme Court merely approved military commission jurisdiction to try violations of the laws of war. *Id.* at 25.
82. *See* WINTHROP, *supra* note 11, at 836. *See also supra* notes 14, 17, and accompanying text.
83. *Id.* at 836; The Grapeshot, 76 U.S. 129, 132–33 (1869) (jurisdiction exists "wherever the insurgent power was overthrown"); *see also* Madsen v. Kinsella, 343 U.S. 341, 348 (1952) (a military commission is proper in a war-related occupied enemy territory "in time of war"); Duncan v. Kahanamoku, 327 U.S. 304, 324 (1946) (jurisdiction

exists in "occupied enemy territory"); *id.* at 326 (Murphy, J., concurring) (jurisdiction exists "[o]nly when a foreign invasion or civil war actually closes the courts"); Coleman v. Tennessee, 97 U.S. 509, 515 (1878) ("when . . . in the enemy's country"); *id.* at 517 (when occupation of enemy territory occurs).

84. *See also* Rasul v. Bush, 542 U.S. 466, 487 (2004) (Kennedy, J., concurring) (describing Guantanamo, Cuba as territory "far removed from any hostilities").
85. *See* Military Order, *supra* note 1, § 7(b)(1)–(2).
86. *See* Chapter Four, Sections B–D.
87. *See, e.g.*, *supra* notes 40–41.
88. *See supra* note 8.
89. An amendment to Section 821 could add the following to the end of the section: "or in federal district courts. Furthermore, any military tribunal must provide at least the due process and equal protection guarantees required by international law."
90. *See, e.g.*, Paust, Bassiouni, *et al.*, *supra* note 12, at 112–15; Rome Statute of the International Criminal Court, *supra* note 12, art. 33(1)(c); Dep't of Defense Directive 5100.77, DOD Law of War Program (Dec. 9, 1998); *see also* FM 27-10, *supra* note 12, at 182, para. 509 (a) (order is not a defense unless one did not know "and could not reasonably have been expected to know" of the illegality); Mitchell v. Harmony, 54 U.S. (13 How.) 115, 137 (1852) (superior's "order to do an illegal act . . . can afford no justification" for unlawful conduct abroad in time of war); Brown v. United States, 12 U.S. (8 Cranch) at 153; The Flying Fish, 6 U.S. (2 Cranch) 170, 179 (1804) (Marshall, C.J., opinion) (presidential orders to military officers in time of war cannot legalize illegal action abroad); United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801) (Marshall, C.J., opinion) (President cannot authorize seizure of a vessel in violation of a treaty); United States v. Smith, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342) (Paterson, J., on circuit) (President cannot authorize violations of law); Johnson v. Twenty-One Bales, 13 F. Cas. 855, 863 (C.C.D.N.Y. 1814) (No. 7,417) (court "cannot give to . . . orders a construction that will lead to . . . " "the executive abrogating" a right vested by the law and given and recognized in modern warfare); Elger's Adm'r v. Lovell, 8 F. Cas. 449, 454 (C.C.D. Mo. 1865) (No. 4,344) (Miller, J., on circuit) (regarding "law of nations, . . . no proclamation of the president can change or modify this law . . . "); 11 Ops. Att'y Gen. 297, 299–300 (1865) (the Constitution does not permit Congress or the government to abrogate the law of nations or to authorize their infraction); *supra* note 10.

    If they do not disobey such orders, violations of the Geneva Conventions can result in war crime prosecutions in the United States, other countries, or an international criminal court exercising universal and/or other bases of jurisdiction. *See also* FM 27-10, *supra* note 12, at 178, paras. 498–99, 181, para. 506 (b); United States v. Altstoetter, *supra* note 26 (conviction of German judges, prosecutors, and other ministerial officers in the judicial system for war crimes and crimes against humanity by complicit destruction of law and justice and utilization of "emptied forms of legal process" in perpetuation of international crime), addressed in Paust, Bassiouni, *et al.*, *supra* note 12, at 289, 863–64; United States v. Uchiyama, Case No. 35–46 (trial at Yokohama, Japan, 18 July 1947), addressed in Robert W. Miller, *War Crimes Trials at Yokohama*, 15 Brook. L. Rev. 191, 192 (1949); *supra* note 12.

Furthermore, the President cannot lawfully order violations of the laws of war. *See, e.g.*, *supra* note 10; N.Y. City Bar Report, *supra* note 3, at 31.

91. 2 The Complete Writings of Thomas Paine 588 (P. Foner ed., 1945).
92. Dep't of Defense Military Commission Order No. 1 (March 21, 2002) [hereinafter DOD Order], available at: http://www.defenselink.mil/news/Mar2002/d20020321dact.pdf.
93. *See, e.g.*, Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 Mich. J. Int'l L. 1, 10–17, 25–26 (2001) [revised in Chapter Six, Section A].
94. They were ad hoc because they could have been changed at any time. *See* DOD Order, *supra* note 92, §§ 1, 7(A), 11.
95. *See* Paust, *supra* note 93, at 17 & n.37, 25 (addressing the prohibition of national or social origin discrimination under the U.N. Charter and treaty-based and customary human rights law); Michael J. Kelly, Essay, *Understanding September 11th – An International Legal Perspective on the War in Afghanistan*, 35 Creighton L. Rev. 283, 289–90 (2002) ("The illegal nature of [President Bush's Military] order only serves to perpetuate a sense of unfairness.").
96. *See* Paust, *supra* note 93, at 17 & nn.38–39, 25 (addressing the prohibition of a denial of equal protection under customary and treaty-based human rights law and bilateral treaties of friendship, commerce, and navigation).
97. *See id.* at 12 & n.26, 25 (addressing the customary prohibition of "denial of justice" to aliens and identifying various relevant examples).
98. *Compare* Paust, *supra* note 93, at 10 & n.20 (discussing the opinion of the Inter-American Court and human rights violations by Peruvian military commissions in the Castillo Petruzzi Case (Merits), Judgment, Inter-Am. Ct. H.R., ser. C, No. 52 (1999)).
99. ICCPR, *supra* note 28. Customary human rights to due process are also incorporated by reference as nonderogable rights of all detainees, regardless of status, in common Article 3(1)(d) of the 1949 Geneva Conventions. *See, e.g.*, Paust, *supra* note 93, at 7 n.15, 12 n.26. *See also* Annotated Supplement to Commander's Handbook on the Law of Naval Operations 490 n.47 (Naval War College, Int'l Studies vol. 73, A.R. Thomas & James C. Duncan eds., 1999) ("GPW is the universally accepted standard for treatment of Pws; virtually all nations are party to it and it is now regarded as reflecting customary law."); *infra* notes 171–74, 177–80 and accompanying text.
100. *Compare* Paust, *supra* note 93, at 10–15, and references cited.
101. *See, e.g.*, ICCPR, *supra* note 28, art. 9 (4); European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 37, art. 5 (3)–(4); American Convention on Human Rights, art. 7 (5)–(6), 1144 U.N.T.S. 123 (1969); American Declaration of the Rights and Duties of Man, arts. XVIII, XXV, XXVI, O.A.S. Res. XXX (1948), O.A.S. Off. Rec. OEA.Ser. L/V/I.4 Rev. (1965); Universal Declaration of Human Rights, *supra* note 40, art. 10. Concerning nonderogability of this right, *see, e.g.*, Human Rights Committee, General Comment No. 29, at paras. 11, 16, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (31 Aug. 2001); Amnesty International, Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantanamo Bay, 4 & n.16, 22 & n.167 (quoting Hum. Rts. Comm., U.N. Doc. CCPR/C/79/Add.93 (18 Aug. 1998) (a state

"may not depart from the requirement of effective judicial review of detention") (Apr. 15, 2002) [hereinafter Amnesty International, Memorandum], available at: http://web.amnesty.org/ai.nsf/Index/AMR510532002?OpenDocument&of=COUNTRIES \ USA; *supra* note 99.

102. The Appointing Authority was a "designee" of the Secretary of Defense. *See* DOD Order, *supra* note 92, § 2 ("In accordance with the President's Military Order, the Secretary of Defense or a designee ('Appointing Authority') may issue orders from time to time appointing one or more military commissions to try individuals subject to the President's Military Order and appointing any other personnel necessary to facilitate such trials.").
103. *Id.* § 6(H)(3). Section 6(H)(3) read: Review by the Appointing Authority. If the Secretary of Defense is not the Appointing Authority, the Appointing Authority shall promptly perform an administrative review of the record of trial. If satisfied that the proceedings of the Commission were administratively complete, the Appointing Authority shall transmit the record of trial to the Review Panel constituted under Section 6(H)(4). If not so satisfied, the Appointing Authority shall return the case for any necessary supplementary proceedings.
104. *See id.* § 6(H)(4). This allowed the one lawyer on a Review Panel to be overruled by non-lawyers reviewing issues concerning the identity, interpretation, and application of relevant law and a decision whether a "material error" of law occurred. Section 6(H)(4) read: Review Panel. The Secretary of Defense shall designate a Review Panel consisting of three Military Officers, which may include civilians commissioned pursuant to reference (e). At least one member of each Review Panel shall have experience as a judge. The Review Panel shall review the record of trial and, in its discretion, any written submissions from the Prosecution and the Defense and shall deliberate in closed conference. The Review Panel shall disregard any variance from procedures specified in this Order or elsewhere that would not materially have affected the outcome of the trial before the Commission. Within thirty days after receipt of the record of trial, the Review Panel shall either (a) forward the case to the Secretary of Defense with a recommendation as to disposition, or (b) return the case to the Appointing Authority for further proceedings, provided that a majority of the Review Panel has formed a definite and firm conviction that a material error of law occurred.
105. *Id.* § 6(H)(5). Section 6(H)(5) read: Review by the Secretary of Defense. The Secretary of Defense shall review the record of trial and the recommendations of the Review Panel and either return the case for further proceedings or, unless making the final decision pursuant to a presidential designation under Section 4(c)(8) of the President's Military Order, forward it to the President with a recommendation as to disposition.
106. *See id.* § 6(H)(2) and (6).
107. *See id.* § 6(H)(4).
108. *See id.* § 7(B).
109. *See* Paust, *supra* note 93, at 15 & n.34, 21.
110. *See* Paust, *supra* note 93, at 10. Additional recognition is contained in Habeas Corpus in Emergency Situations, Inter-Am. Ct. Hum. Rts. Advisory Opinion OC-8/87, Ser. A, No. 8, at paras. 38, 41–42, 48 (30 Jan. 1987) ("habeas corpus and . . . 'amparo'

are among those judicial remedies that are essential for the protection of various rights," "essential judicial guarantees necessary to guarantee" various rights), addressed in Richard B. Lillich & Hurst Hannum, International Human Rights 805, 927–28 (3d ed. 1995).

111. *See* Paust, *supra* note 93, at 18, 21, 25–26.
112. *See, e.g.*, *id.* at 5 & n.14, 26–27. For additional cases, *see, e.g.*, Duncan v. Kahanamoku, 327 U.S. 304, 324 (1946) ("occupied enemy territory"); The Grapeshot, 76 U.S. (9 Wall.) 129, 132–33 (1869) ("wherever the insurgent's power was overthrown," "so long as the war continued," "during war").
113. *See, e.g.*, *id.* at 25 & n.70, 26.
114. *See* GC, *supra* note 15, art. 5. Guantanamo does not appear to be an appropriate territory within the meaning of Article 5, as it is not technically U.S. territory, although it is close to such a status, and it is not war-related occupied territory. *See* Paust, *supra* note 93, at 25 n.70. If so, detention at Guantanamo would be impermissible. Moreover, transfer of non–prisoners of war out of any U.S. occupied territory in Afghanistan or Iraq is a war crime. *See, e.g.*, GC, *supra* note 15, arts. 49, 76, 147; Paust, *supra* note 93, at 24 n.68.
115. *See* GC, *supra* note 15, arts. 42, 78.
116. *See* GC, *supra* note 15, art. 6 (application of the Convention in the territories of parties to the conflict, and thus rights and competencies of the detaining power thereunder, "shall cease on the general close of military operations").
117. *Id.* art. 5.
118. *Id.* Members of the armed forces of the Taliban should be treated as prisoners of war under the Geneva Convention Relative to the Treatment of Prisoners of War. GPW, *supra* note 12, art. 4(A)(1). *See, e.g.*, Paust, *supra* note 93, at 7 n.15; Chapter Three. Prisoners of war are to be "released and repatriated without delay after the cessation of active hostilities" (GPW art. 118), unless they are being lawfully prosecuted or have been lawfully convicted of crimes and are serving sentence. GPW, *supra* note 12, art. 119; *see also id.* arts. 85, 99, 129; United States v. Noriega, 746 F. Supp. 1506, 1524–28 (S.D. Fla. 1990).
119. *See supra* note 99 and accompanying text.
120. *See, e.g.*, text *supra* at notes 98–100; Amnesty International Memorandum, *supra* note 101, at 28–30.
121. *See, e.g.*, Carol Rosenberg, *Base's New Chief Calls Captives "Killers,"* Miami Herald, Apr. 10, 2002, at 9A; Katharine Q. Seelye, *Rumsfeld Backs Plan to Hold Captives Even if Acquitted*, N.Y. Times, Mar. 29, 2002, at A18; Katharine Q. Seelye, *Pentagon Says Acquittals May Not Free Detainees*, N.Y. Times, Mar. 22, 2002, at A13; Warren Richey, *How Evidence Stacks Up on Military Tribunals*, Christian Science Monitor, Mar. 22, 2002, at 3; Amnesty International, Memorandum, *supra* note 101, at 13–14, 20–22, 28–29, 43–46; *infra* note 122 and accompanying text. One news report states that the United States was not releasing the names of detainees or even confirming names identified by countries of nationality of the detained persons. *See, e.g.*, Katharine Q. Seelye, *Moscow Seeking Extradition, Says 3 Detainees Are Russian*, N.Y. Times, Apr. 3, 2002, at A13. The International Committee of the Red Cross (ICRC) Commentary recognizes that the detaining power has obligations to transmit "particulars of any protected person who is kept in custody for more than two weeks" to an official

Information Bureau, which does not exist but some of whose functions can be performed by the ICRC. *See* IV Commentary, *supra* note 15, at 56.

122. *See, e.g.*, Warren Richey, *How Long Can Guantanamo Prisoners Be Held?*, Christian Science Monitor, Apr. 9, 2002, at 1 (quoting Deputy Ass't Attorney General John Yoo: "Does it make sense to ever release them if you think they are going to continue to be dangerous even though you can't convict them of a crime?"); Stuart Taylor, *Al Qaeda Detainees: Don't Prosecute, Don't Release*, 34 The National Journal 1203 (2002).
123. *See supra* notes 116, 118 and accompanying text.
124. *See, e.g.*, Paust, *supra* note 93, at 8 n.16. *See also* Pan American Airways, Inc. v. Aetna Casualty & Surety Co., 505 F.2d 989, 1013–15 (2d Cir. 1974) (United States could not have been at war with the PFLP, which had engaged in terrorist acts as a nonstate, nonbelligerent, noninsurgent actor).
125. *See, e.g.*, Paust, Bassiouni, *et al.*, *supra* note 12, at 43–46, and references cited.
126. This is a form of "combat immunity" with respect to lawful acts of warfare. *See, e.g.*, Chapter Three, Section D.
127. *See, e.g.*, Paust, *supra* note 93, at 8 n.16; *see also supra* note 124 and accompanying text.
128. *See id.* at 10–11, 12 n.26, 15, 25–26; Leila N. Sadat, The International Criminal Court and the Transformation of International Law 241, 251 (2002); *supra* note 101 and accompanying text. *See also* Margaret Graham Tebo, *Qualified Praise: ABA Reps See Things They Like in Tribunal Rules, Still Have Some Legal Concerns*, A.B.A. J. 59 (May 2002) (Neal R. Sonnet, chair of the A.B.A. Criminal Justice Section, expressed concerns over the lack of "appeals to a civilian court" and "lack of appellate review," and Evan A. Davis, President of the Association of the Bar of the City of New York, stated "We feel that it's very important that the final word rest with Article III judges as the Constitution provides") [hereinafter ABA Reps.].
129. DOD Order, *supra* note 92, § 6(H)(4). In sharp contrast, the Appeals Chamber of the International Criminal Court can reverse or amend a decision or sentence or order a new trial if it "finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error." Rome Statute of the International Criminal Court, *supra* note 12, art. 83(2). As noted, the Bush military Review Panel could only "return" a case to the "Appointing Authority" if a majority of the panel (who could be non-lawyers) decides that "a material error of law occurred" and the panel is ordered to disregard any variance from procedures that would "not materially have affected the outcome." *See* DOD Order, *supra* note 92, § 6(H)(4).
130. *See* Paust, *supra* note 93, at 15.
131. *See, e.g.*, *id.* at 10–13, 15 n.34, 17 n.39; Amnesty International, Memorandum, *supra* note 101, at 25–26 & n.198, *quoting* Gonzalez del Rio v. Peru (263/1987) (28 Oct. 1992), Report of the Human Rights Committee, vol. II, at 20, U.N. Doc. A/48/1993 (1993) ("an absolute right that may suffer no exception"); Report of the Human Rights Committee, *supra* at 25–26.
132. *See* DOD Order, *supra* note 92, § 4(A)(2). Section 4(A)(2) read: Number of Members. Each Commission shall consist of at least three but no more that seven

members, the number being determined by the Appointing Authority. For each such Commission, there shall also be one or two alternate members, the number being determined by the Appointing Authority.

133. *See id.* § 4(A)(3). Section 4(A)(3) read: Qualifications. Each member and alternative member shall be a commissioned officer of the United States armed forces ("Military Officer"), including without limitation reserve personnel on active duty, National Guard personnel on active duty in Federal service, and retired personnel recalled to active duty. The Appointing Authority shall appoint members and alternate members determined to be competent to perform the duties involved. The Appointing Authority may remove members and alternate members for good cause.
134. *See id.* § 4(A)(4). Section 4(A)(4) read: Presiding Officer. From among the members of each Commission, the Appointing Authority shall designate a Presiding Officer to preside over the proceedings of that Commission. The Presiding Officer shall be a Military Officer who is a judge advocate of any United States armed force.
135. *Id.* § 4(A)(3).
136. *See id.* § 6(D)(1). Section 6(D)(1) read: Admissibility. Evidence shall be admitted if, in the opinion of the Presiding Officer (or instead, if any other member of the Commission so requests at the time the Presiding Officer renders that opinion, the opinion of the Commission rendered at that time by a majority of the Commission), the evidence would have probative value to a reasonable person.
137. *See* Paust, *supra* note 93, at 15 n.34 (regarding relevant British and Canadian military justice system violations of human rights, denial of justice); Morris v. United Kingdom, 34 Eur. Ct. H.R. 52, para. 75 (2002) ("risk of outside pressure being brought to bear on the two relatively junior serving officers who sat on the applicant's court-martial . . . [who] had no legal training . . . [and] remained subject to army discipline and reports" were factors contributing to the lack of independence and impartiality in violation of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms).
138. *See* DOD Order, *supra* note 92, § 6(F)–(G). A two-thirds vote would have sufficed "except that a sentence of death requires a unanimous affirmative vote of all of the members." *Id.* § 6(F). However, this scheme was inconsistent with the President's Military Order (allowing a death sentence by a two-thirds vote). *See* Paust, *supra* note 93, at 18 n.39. Thus, § 7(B) of the DOD Order, stating that the President's Military Order "shall govern" in the event of any inconsistency, seems to have required use of merely a two-thirds vote for any sort of conviction and sentencing.
139. *See* ABA Reps., *supra* note 128, at 59. Section 6(D)(1) of the DOD Order provided the focus for this criticism. *See supra* note 136. *See also* remarks of Don Rehkopf, Co-Chair of the Military Law Committee of the National Association of Criminal Defense Lawyers, in Seelye, *Pentagon Says Acquittals May Not Free Detainees*, *supra* note 121 (rules of the tribunals are stacked against the defendants); Jess Bravin, *Two Prosecutors at Guantanamo Quit in Protest*, Wall St. J., Aug. 1, 2005, at B1; Neil Lewis, *Two Prosecutors Faulted Trials for Detainees*, N.Y. Times, Aug. 1, 2005, at A1.
140. *See* DOD Order, *supra* note 92, §§ 5(I) ("The Accused may have Defense Counsel present evidence at trial in the Accused's defense and cross-examine each witness presented by the Prosecution who appears before the Commission."), 6(D)(2)(c)

("Examination of Witnesses. A witness who testifies before the Commission is subject to both direct and cross-examination . . . ").

141. *Id.* § 6(D)(2)(a), which read: "Production of Witnesses. The Prosecution or the Defense may request that the Commission hear testimony of any person, and such testimony shall be received if found to be admissible and not cumulative. The Commission may also summon and hear witnesses on its own initiative. The Commission may permit the testimony of witnesses by telephone, audiovisual means, or other means; however, the Commission shall consider the ability to test the veracity of that testimony in evaluating weight to be given to the testimony of the witness."
142. *Id.* § 6(D)(2)(d), which read in pertinent part: "Protection of Witnesses. The Presiding Officer shall consider the safety of witnesses and others, as well as the safeguarding of Protected Information as defined in Section 6(D)(5)(a), in determining the appropriate methods of receiving testimony and evidence. . . . The Presiding Officer may authorize any methods appropriate for the protection of witnesses and evidence. Such methods may include, but are not limited to: testimony by telephone, audiovisual means, or other electronic means; closure of the proceedings; introduction of prepared declassified summaries of evidence; and the use of pseudonyms."
143. *Id.* § 6(D)(3), which read: "Other Evidence. Subject to the requirements of Section 6(D)(1) concerning admissibility, the Commission may consider any other evidence including, but not limited to, testimony from prior trials and proceedings, sworn or unsworn written statements, physical evidence, or scientific or other reports."
144. *Id.*
145. *Id.*
146. *See, e.g.*, ICCPR, *supra* note 28, art. 14(3)(e); Paust, *supra* note 93, at 10, 14 & n.32. The International Criminal Tribunal for Former Yugoslavia has allowed depositions, but the general rule is that a witness must be physically present before the Tribunal. When depositions are used "in exceptional circumstances and in the interests of justice," there must be reasonable notice to the accused of a putative deposition, "who shall have the right to attend the taking of the deposition and cross-examine the person whose deposition is being taken," the witness testimony must be under oath and the witness must be informed "that he is liable to prosecution for perjury in case of false testimony," and "testimony must be given in the physical presence of the Presiding Officer [appointed by the Trial Chamber] unless the chamber decides otherwise." *See* Judge Lal Chand Vohrah, *Pre-trial Procedures and Practices*, in McDonald & Swaak-Goldman, *supra* note 29, at 532–34; *see also* Christine Chinkin, *The Protection of Victims and Witnesses*, in *id.* at 451, 462 (accused must have "the opportunity to confront and examine all witnesses").
147. *See* DOD Order, *supra* note 92, § 4(C)(4).
148. *See id.* § 4(C)(2)-(4).
149. *See id.* §§ 4(C)(3), 6(B)(3), 6(D)(5).
150. *See, e.g.*, Paust, *supra* note 93, at 10–14; Amnesty International, Memorandum, *supra* note 101, at 27; *see generally* M. Cherif Bassiouni & Peter Manikas, The Law of the International Criminal Tribunal for the Former Yugoslavia 963 ("The UN Human Rights Committee stated that 'lawyers should be able to represent their clients in accordance with their established professional standards

and judgement without restrictions, influence, pressures or undue interference from any quarter'"), 967–68 (1996); GERT-JAN G.J. KNOOPS, DEFENSES IN CONTEMPORARY INTERNATIONAL CRIMINAL LAW 221, 238–43 (2002).

151. *See, e.g.*, Paust, *supra* note 93, at 4 n.12, 10 n.18, 28 n.81; *supra* note 28 and accompanying text; *infra* note 201.
152. *See, e.g.*, Alien Tort Claims Act, 28 U.S.C. § 1350; Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671–80 (1994); PAUST, BASSIOUNI, *ET AL.*, *supra* note 12, at 849–50; Jordan J. Paust, *Suing Saddam: Private Remedies for War Crimes and Hostage-Taking*, 31 VA. J. INT'L L. 351, 360–70, 378 (1991).
153. _ U.S. _ (2006).
154. *Id.* at _.
155. *Id.* at _.
156. *Id.* at _, *quoting Ex parte* Quirin, 317 U.S. at 28–29.
157. *Id.* at _.
158. *Id.* at _, *quoting* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 836–39 (2d ed. 1920).
159. *Id.* at _. *See also In re* Yamashita, 327 U.S. 1, 19 (when Congress enacted the 1916 Articles of War, Congress "gave sanction" to uses of a "military commission contemplated by the common law of war"), 20 n.7 (a military commission is a "war court") (1946).
160. *Id.* at _, *citing*: *Cf* Rasul v. Bush, 542 U.S. at 487 (Kennedy, J., concurring in judgment) (observing that "Guantanamo Bay is . . . far removed from any hostilities").
161. *Id.* at _.
162. GC, *supra* note 15, art. 3(1)(d).
163. *Hamdan*, _ U.S. at _, *citing*: *Ex parte* Quirin, 317 U.S. at 28 – including, *inter alia*, the four Geneva Conventions signed in 1949. *See In re* Yamashita, 327 U.S. at 20–21, 23–24.
164. *Id.* at _.Justice Kennedy added that Geneva common Article 3 "necessarily requires that the accused have the right to be present at all stages of a criminal trial." *Id.* at _ (Kennedy, J., concurring in part).
165. *Id.* at _. As Justice Kennedy emphasized: "These structural differences between the military commissions and courts-martial – the concentration of functions, including legal decisionmaking, in a single executive official; the less rigorous standards for composition of the tribunal; and the creation of special review procedures in place of institutions created and regulated by Congress – remove safeguards that are important to the fairness of the proceedings and the independence of the court." *Id.* at _. (Kennedy, J., concurring in part). He added: "The rule here could permit admission of multiple hearsay and other forms of evidence generally prohibited on grounds of unreliability. Indeed, the commission regulations specifically contemplate admission of unsworn written statements, MCO No. 1, § 6(D)(3); and they make no provision for exclusion of coerced declarations save those "established to have been made as a result of torture," MCI No. 10, § 3(A) (Mar. 24, 2006)." *Id.* at _.
166. *Id.* at _.
167. *Id.* at _. Justice Kennedy added that the requirement in common Article 3 of the Geneva Conventions that there be a "'regularly constituted court affording all the judicial guarantees recognized as indispensable' supports, at least, a uniformity

principle similar to that codified in § 836(b)" of the UCMJ. *Id.* at _. (Kennedy, J., concurring in part).

168. *Id.* at _.
169. *Id.* at _, *citing* Hamdi, 542 U.S. at 520–521 (plurality opinion).
170. *Id.*
171. *Id.* at _, adding: "there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between signatories," common Article 3, and it "affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory 'Power' who are involved in a conflict 'in the territory of' a signatory." *Id.* at _. In the Court's footnote 63, one also finds the following recognitions: "See also GC III Commentary 35 (Common Article 3 'has the merit of being simple and clear. . . . Its observance does not depend upon preliminary discussions on the nature of the conflict'); GC IV Commentary 51 ('[N]obody in enemy hands can be outside the law'); U.S. Army Judge Advocate General's Legal Center and School, Dept. of the Army, Law of War Handbook 144 (2004) (Common Article 3 'serves as a "minimum yardstick of protection in all conflicts, not just internal armed conflicts"' (quoting Nicaragua v. United States, 1986 I.C.J. 14, para. 218, 25 I.L.M. 1023)); Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 102 (ICTY App. Chamber, Oct. 2, 1995) (stating that 'the character of the conflict is irrelevant' in deciding whether Common Article 3 applies)." *Id.* at n.63.
172. GC, *supra* note 15, art. 3(1)(d).
173. *Id.* at _. (Kennedy, J., concurring in part).
174. *Id.* at _.
175. *Id.* at _. Justice Kennedy added that the "regularly constituted" requirement reflects "the importance of standards deliberated upon and chosen in advance of crisis." *Id.* at _ (Kennedy, J., concurring in part). This point is relevant also to the standards rushed through Congress during creation of the Military Commissions Act.
176. *Id.* at n.65, also stating "See Commission Order No. 1, § 11 (providing that the Secretary of Defense may change the governing rules 'from time to time')."
177. *Id.* at _.
178. *Id.* at _, also stating: "Although the United States declined to ratify Protocol I, its objections were not to Article 75 thereof. Indeed, it appears that the Government 'regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled.' Taft, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 Yale J. Int'l L. 319, 322 (2003)."
179. *Id.* at _, *citing* Protocol I, *supra* note 12, art. 75(4)(e), and aptly recognizing in its footnote 66: "Other international instruments to which the United States is a signatory include the same basic protections set forth in Article 75. *See, e.g.*, International Covenant on Civil and Political Rights, Art. 14, para. 3(d), Mar. 23, 1976, 999 U.N.T.S. 171 (setting forth the right of an accused '[t]o be tried in his presence, and to defend himself in person or through legal assistance of his own choosing'). Following World War II, several defendants were tried and convicted by military commission for violations of the law of war in their failure to afford captives fair trials before imposition and execution of sentence. In two such trials,

the prosecutors argued that the defendants' failure to apprise accused individuals of all evidence against them constituted violations of the law of war. *See* 5 U.N. War Crimes Commission 30 (trial of Sergeant-Major Shigeru Ohashi), 75 (trial of General Tanaka Hisakasu)." *Id.* at n.66.

180. *Id.* at _.
181. Public Law No. 109–366, 109th Cong., 2d sess., 120 Stat. 2600 (Oct. 17, 2006) [hereinafter MC Act].
182. *Id.* § 3(a)(1), amending 10 U.S.C. by providing a new § 948c.
183. *See* MC Act, *supra* note 181, Section 3(a)(1), adding § 948b to 10 U.S.C.
184. *See id.*, Sections 5(a) and 7(a).
185. *See* Chapter Five, Section D.
186. *See* Sections A and B. 3 of this chapter.
187. *See* MC Act, *supra* note 181, Section 3(a)(1), adding § 950c.
188. *See id.*, adding § 950g (a)–(c).
189. *See id.*, adding § 950g (d).
190. *Id.*, adding § 950g (c)(1)–(2).
191. *See, e.g.*, Henfield's Case, 11 F. Cas. 1099, 1101 (C.C.D. Pa. 1793) (No. 6,360) (Jay, C.J.); Jordan J. Paust, International Law as Law of the United States 7–11, 67–80 (2d ed. 2003), and numerous other cases cited; Restatement, *supra* note 29, § 111; Paust, Van Dyke, & Malone, *supra* note 10, at 123–47, *passim*.
192. *See, e.g.*, Spector v. Norwegian Cruise Line, Ltd., 545 U.S. 119, 143–44 (2005) (Ginsburg, J., concurring); Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984); Weinberger v. Rossi, 456 U.S. 25, 32 (1982); United States v. Flores, 289 U.S. 137, 159 (1933); Cook v. United States, 288 U.S. 102, 120 (1933); United States v. Payne, 264 U.S. 446, 448 (1924); MacLeod v. United States, 229 U.S. 416, 434 (1913); Whitney v. Robertson, 112 U.S. 190, 194 (1888); The Pizarro, 15 U.S. (2 Wheat.) 227, 245–46 (1817); Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 117–18 (1804); Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 43 (1801); 9 Op. Att'y Gen. 356, 362–63 (1859) ("law . . . must be made and executed according to the law of nations"); 1 Op. Att'y Gen. 26, 27 (1792); Paust, *supra* note 191, at 12–13, 43–44 n.53, 59 n.73, 70, 99, 101, 107, 120, 124–25 n.2, 134 n.18, 137 n.41, 143–44 n.73; Restatement, *supra* note 29, § 114; Paust, Van Dyke, & Malone, *supra* note 10, at 155–56, and numerous cases cited. *See also* Hamdi v. Rumsfeld, 542 U.S. at 521 ("our understanding [of the AUMF] is based on longstanding law-of-war principles"); *id.*, 542 U.S. at 551 (Souter, J., dissenting in part and concurring in judgment) (using the law of war and stating: "there is reason to question whether the United States is acting in accordance with the laws of war. . . . I conclude accordingly that the Government has failed to support the position that the" AUMF "authorizes the described detention").
193. *See* MC Act, *supra* note 181, adding § 949a (b)(2)(E)(i) ("hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial may be admitted in a trial by military commission if . . . ").
194. *Id.*, adding § 949a (b)(2)(A).
195. *Id.*, adding § 949j (c)(B)–(C). Similar provisions exist in § 949d (f)(2)(A)(ii)–(iii).
196. *Id.*, adding § 948r (b).
197. Title X of the Department of Defense Appropriations Act, "Detainee Treatment Act of 2005," § 1003(d), Public Law 109–148, 119 Stat. 2680 (Dec. 30, 2005). *See* Chapter Two, Section F.

198. *See* MC Act, *supra* note 181, Section 3(a)(1), adding § 948r (c)(1)–(2). *See also id.*, adding § 949a (b)(2)(C) ("A statement of the accused that is otherwise admissible shall not be excluded from trial by military commission on grounds of alleged coercion or compulsory self-incrimination so long as the evidence complies with the provisions of section 948r").
199. *Id.*, adding § 948r (d)(1)–(3).
200. *See, e.g.*, GC, *supra* note 15, arts. 3(1) (detainees must be "treated humanely"), (a) (no "mutilation" is allowed), (c) (no "outrages upon personal dignity" are allowed and no "humiliating" treatment is allowed), 27 (persons must be "humanely treated"), 31 ("[n]o physical or moral coercion shall be exercised . . . , in particular to obtain information"), 32 (no "physical suffering" is allowed), 33 ("all measures of intimidation or of terrorism are prohibited"), 147 ("great suffering or serious injury" are "grave" breaches); GPW, *supra* note 12, arts. 3(1) and (a), (c), 13–14, 130. *See also infra* note 201.
201. *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, 1465 U.N.T.S. 85 (done Dec. 10, 1984), arts. 15 ("Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be involved as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."); ICCPR, *supra* note 28, art. 14(3)(g) ("everyone shall be entitled . . . [n]ot to be compelled . . . to confess guilt"); U.N. G.A. Res. 60/148, para. 6 (2005) (states should "ensure that any statement that is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made"). *See also* Hum. Rts. Comm., General Comment No. 20, para, 12 (1992) ("It is important . . . that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment" under Article 7 of the ICCPR), in International Human Rights Instruments, U.N. Doc. HRI/GEN/1 (4 Sept. 1992), at 29–32; United States v. Altstoetter, *supra* note 26, at 1093–94 (addressing war crime responsibility of defendant Klemm: "it can hardly be assumed that the defendant Klemm was unaware of the practice of the Gestapo with regard to obtaining confessions. He had dealt with this matter during his early period with the department of justice. It is hardly credible that he believed that the police methods which at an earlier time were subject to some scrutiny by the Ministry of Justice, had become less harsh because the Gestapo . . . was placed beyond the jurisdiction of law. He must have been aware that a prolific source of clear cases based on confessions and, therefore, legally incontestable, came to him from the obscurity of the torture chamber. . . . More specifically, Klemm knew of abuses in concentration camps. He knew of the practice of severe interrogations. . . . While he as in the Party Chancellery he wrote the letter . . . denying the application of the German . . . law to Poles, Jews, and gypsies"); Garcia Perez v. Peru, Inter-Am. Comm. H.R., Report No. I/95, Case 11.0006, OEA/Ser.L/V/II.88, doc. 9 rev. (1995) (exclusionary rule applies to material seized during a search in violation of due process and other rights); A (FC) & Others (FC) v. Sec'y of State for the Home Dep't, [2004] UKHL 71 (evidence obtained by torture engaged in by a foreign government cannot be used in view of the prohibition of torture in the European Convention on Human Rights and Freedoms); *supra* note 38.

202. *Recall* Chapter Five, Section D, and cases cited therein.
203. *Id.*
204. 355 F. Supp. 2d 443 (D.D.C. 2005).
205. 355 F. Supp. 2d at 472, *citing* Jackson v. Denno, 378 U.S. 368, 386 (1964). The Supreme Court has condemned the totalitarian practice of using "unrestrained power to seize persons . . . [and] hold them in secret custody, and wring from them confessions by physical and mental torture." Ashcraft v. Tennessee, 322 U.S. 143, 155 (1944). *See also* Beecher v. Alabama, 389 U.S. 35 (1967); Brown v. Mississippi, 297 U.S. 218, 286 (1936) ("The rack and torture chamber may not be substituted for the witness stand . . . methods . . . revolting to the sense of justice"). Concerning constitutional textual and structural restraints on executive conduct abroad, *see also* Chapter Four, Section C.2; Chapter Six, Section A.
206. *See* MC Act, *supra* note 181, adding §§ 950f (d) (scope of review of the CMCR) and 950g (b) (scope of review of the D.C. Circuit).
207. *Id.*, adding § 949c (b)(3). Recall the concern expressed in *Hamdan*, text *supra* note 164. *See also* Pamela A. MacLean, *JAG Lawyers in a "Catch-22" Trap*, Nat'l L.J., Oct. 2, 2006, at 7.
208. MC Act, *supra* note 181, adding § 949c (b)(4).
209. Statements of LTC Colby Vokey Feb. 23, 2007, on a panel addressing Prosecution of Unlawful Enemy Combatants Under the Military Justice System during a J.B. Moore Society of International Law Symposium on International Law at a Crossroads, at the University of Virginia School of Law (notes of the author).
210. *Id.*, adding § 950v (b)(27).
211. *Id.*, adding § 950v (b)(28).
212. That spying is not an offense under the laws of war, *see, e.g.*, United States *ex rel.* Wessels v. McDonald, 265 F. 754, 762 (E.D.N.Y. 1920) ("A spy may not be tried under the international law when he returns to his own lines, even if subsequently captured, and the reason is that, under international law, spying is not a crime, and the offense which is against the laws of war consists of being found during the war in the capacity of a spy. Martin v. Mott, 12 Wheat. 19 . . . "); Paust, Bassiouni, *et al.*, *supra* note 12, at 1025; FM 27-10, *supra* note 12, at 33, para. 77 (spying is "no offense against international law. Spies are punished not as violators of the laws of war"). *See also* Totten v. United States, 92 U.S. 105 (1876) (use of spies in enemy territory is permitted during war); Smith v. Shaw, 12 Johns. 257, 265 (N.Y. Sup. Ct. 1815) (holding that a civilian who allegedly was an enemy spy exciting mutiny and insurrection during a war could not be detained by the U.S. military for trial in a military tribunal); John Yoo, War by Other Means 113 (2006). Spying is a crime against the state or "pure political offense" for which extradition is not allowed. *See, e.g.*, Paust, Bassiouni, *et al.*, *supra* note 12, at 332–33, 367–69.
213. That "conspiracy" as such is not a war crime, *see, e.g.*, Hamdan v. Rumsfeld, _ U.S. at _ (neither the old UCMJ nor the "law of war supports trial by this commission for the crime of conspiracy"), _ ("Neither the purported agreement with Osama bin Laden and others to commit war crimes, nor a single overt act, is alleged to have occurred in a theater of war or on any specified date after September 11, 2001. None of the overt acts that Hamdan is alleged to have committed violates the law of war. These facts alone cast doubt on the legality of the charge and, hence, the commission; as Winthrop makes plain, the offense alleged must have been

committed both in a theater of war and during, not before, the relevant conflict. But the deficiencies in the time and place allegations also underscore – indeed are symptomatic of – the most serious defect of this charge: The offense it alleges is not triable by law-of-war military commission."), _ ("The crime of 'conspiracy' has rarely if ever been tried as such in this country by any law-of-war military commission not exercising some other form of jurisdiction, and does not appear in either the Geneva Conventions or the Hague Conventions – the major treaties on the law of war"), _ ("If anything, *Quirin* supports Hamdan's argument that conspiracy is not a violation of the law of war. Not only did the Court pointedly omit any discussion of the conspiracy charge, but its analysis of Charge I placed special emphasis on the completion of an offense; it took seriously the saboteurs' argument that there can be no violation of a law of war – at least not one triable by military commission – without the actual commission of or attempt to commit a 'hostile and warlike act.' *Id.*, at 37–38."), _ ("Winthrop confirms this understanding . . . when he emphasizes that 'overt acts' constituting war crimes are the only proper subject at least of those military tribunals not convened to stand in for local courts. Winthrop 841, and nn.22, 23 . . . (citing W. Finlason, Martial Law 130 (1867))"), _ ("Finally, international sources confirm that the crime charged here is not a recognized violation of the law of war. As observed above, none of the major treaties governing the law of war identifies conspiracy as a violation thereof. . . . As one prominent figure from the Nuremberg trials has explained, members of the Tribunal objected to recognition of conspiracy as a violation of the law of war on the ground that '[t]he Anglo-American concept of conspiracy was not part of European legal systems and arguably not an element of the internationally recognized laws of war.' T. Taylor, Anatomy of the Nuremberg Trials: A Personal Memoir 36 (1992)"). Importantly, Congress has no power to expand jurisdiction beyond that allowed by international law. *See, e.g.*, United States v. Darnaud, 25 F. Cas. 754, 759–60 (C.C.E.D. Pa. 1855) (No. 14,918) ("if the Congress . . . were to call upon the courts of justice to extend the jurisdiction of the United States beyond the limits . . . [set by the "law of nations"], it would be the duty of courts of justice to decline"). In particular, Article I, § 8, cl. 10 of the Constitution does not permit Congress to define and punish as offenses against the law of nations conduct that is not proscribed by customary international law. *See, e.g.*, Representative John Marshall, speech March 4, 1799, in 6 Annals of Cong. 607 (1800) (recognizing that "that clause can never be construed to make to the government a grant of power, which the people making it do not themselves possess," *e.g.*, to define as piracy under the law of nations that which is not piracy, and "cannot be considered . . . as affecting acts which are piracy under the law of nations").

214. *See supra* notes 157–158, 161 and accompanying text.

215. *See, e.g.*, GC, *supra* note 15, art. 33; Geneva Protocol I, *supra* note 12, art. 51; Jordan J. Paust, *Terrorism and the Laws of War*, 64 Mil. L. Rev. 1 (1974); United States v. Altstoetter, *supra* note 26, at 21 (secret trials with the "purpose of terrorizing the victim's relatives and associates"), 1031 (same), 1058–59 ("The IMT held that the Hitler . . . decree was 'a systematic rule of violence, brutality, and terror', and was therefore a violation of the laws of war as a terroristic measure. . . . This secrecy of the proceedings was a particularly obnoxious form of terroristic measure").

216. *See* MC Act, *supra* note 181, at Section 3(a)(1), adding § 950v (b)(24).
217. *Id.*
218. *See, e.g.*, U.N. G.A. Res. 49/60, Declaration on Measures to Eliminate International Terrorism, Annex, para. 3 ("Criminal acts intended or calculated to provoke a state of terror . . . for political purposes") (9 Dec. 1994); Paust, Bassiouni, *et al*, *supra* note 12, at 1004–05; Jordan J. Paust, *An Introduction to and Commentary on Terrorism and the Law*, 19 Conn. L. Rev. 697, 701, 703–05 (1987); 2 The Compact Edition of the Oxford English Dictionary 3268 (1971) ("terror" is defined as "[t]he state of being terrified or greatly frightened; intense fear, fright or dread").
219. *See* MC Act, *supra* note 181, at Section 3(a)(1), adding § 950v (b) (25).
220. *See id.*, adding § 950v (b).

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