

Looking Back to Go Forward: Remaking U.S. Detainee Policy\*

by

James M. Durant, III, Lt Col USAF  
Deputy Head, Department of Law  
United States Air Force Academy

Frank Anechiarico  
Distinguished Visiting Professor of Law  
United States Air Force Academy

Maynard-Knox Professor of Government and Law  
Hamilton College

[WEB VERSION]

April, 2009

© James Durant, III, Frank Anechiarico

\* This article does not reflect the views of the Air Force, the United States Department of Defense, or the United States Government.

“By mid-1966 the U.S. government had begun to fear for the welfare of American pilots and other prisoners held in Hanoi. Captured in the midst of an undeclared war, these men were labeled war criminals. . . .Anxious to make certain that they were covered by the Geneva Conventions and not tortured into making ‘confessions’ or brought to trial and executed, U.S. Ambassador-at-Large Averell Harriman asked [*New Yorker* correspondent Robert] Shaplen to contact the North Vietnamese.” - Thomas Bass (2009)<sup>++</sup>

## Introduction

This article, first explains why and how detainee policy as applied to those labeled enemy combatants, collapsed and failed by 2008. Second, we argue that the most direct and effective way for the Obama Administration to reassert the rule of law and protect national security in the treatment of detainees is to direct review and prosecution of detainee cases to U.S. Attorneys and adjudication of charges against them to the federal courts.

The immediate relevance of this topic is raised by the decision of the Obama Administration to use the federal courts to try Ali Saleh Kahah al-Marri in a (civilian) criminal court. Marri is the last person labeled an enemy combatant to be held on the American mainland. Detained in December, 2001, Marri has been held for five of the last seven years in a Navy brig in Charleston, South Carolina. (Johnston and Lewis,2009:A01) The Administration’s decision to use “Article III” courts for detainee trials is justified and supported here.

---

<sup>++</sup>Thomas A. Bass (2009) *The Spy Who Loved Us* (New York: Public Affairs),p.156.

## A Change in Policy

Two days after taking office, President Barack Obama, in Executive Order 13492 began establishing took the first steps toward rebuilding detainee policy. After ordering immediate review of detainee status toward the goal of closing the detention facilities at Guantanamo “promptly,” (4897), the Order reverses the standing position on detainee policy and rejects the value behind it:

“Humane Standards of Confinement: No individual currently detained at Guantanamo shall be held in the custody of under the effective control of any officer, employee, or other agent of the United States Government or at any facility owned, operated, or controlled by a department or agency of the United States, except in conformity with all applicable laws governing the conditions of such confinement, including Common Article 3 of the Geneva Conventions.

[EO 13492 January 22, 2009: Review and Disposition of Individuals Detained At the Guantanamo Bay Naval Base and Closure of Detention Facilities” p. 4899]

Two other Executive Orders issued within a week of EO 13492 require compliance with prohibitions against torture of detainees as detailed in the *Army Field Manual*<sup>1</sup> and

Common Article 3 (Executive Order 13491, January 27, 2009, “Ensuring Lawful

---

<sup>1</sup> 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. Experience indicates that the use of force is not necessary to gain the cooperation of sources for interrogation. Therefore, the use of force is a poor technique, as it yields unreliable results, may damage subsequent collection efforts, and can induce the source to say whatever he thinks the interrogator wants to hear. However, the use of force is not to be confused with psychological ploys, verbal trickery, or other nonviolent and noncoercive ruses used by the interrogator in questioning hesitant or uncooperative sources. (Department of the Army, 1987:FM34-52)

Interrogations) and establish a Special Task Force on Detainee Disposition to “identify lawful options for the disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations.” The Special Task Force is composed of high-level officials and is co-chaired by the Attorney General and the Secretary of Defense and includes the Secretaries of State, Homeland Security, the Director of National Intelligence, the Director of the CIA, and the Chairman of the Joint Chiefs of Staff.

Clearly, the Obama Administration recognizes the need for a new approach to detainee policy. The establishment of the Special task forces indicates that the direction and policy content of the new approach have not been formalized, in spite of the decision on al-Marri’s trial. We direct our comments here to scholars, policy makers, and the many others interested in why a new, formalized approach is necessary (looking back) and what the new approach should be (going forward).

### Looking Back

At his first new conference on February 9, 2009, President Obama addressed a question from Sam Stein of the Huffington Post about Senator Patrick Leahy’s plan to use “a truth and reconciliation committee to investigate the misdeeds of the Bush administration.”

Mr. Obama’s answered with an assertion and a qualification.

My view is . . . that nobody is above the law, and if there are clear instances of wrongdoing, that people should be prosecuted just like any ordinary citizen; but

that generally speaking, I'm more interested in looking forward than I am in looking backward. ("Transcript: Obama Press Conference," cbsnews.com, February 9, 2009.)

The title of this article is central our thesis: understanding the value conflict in detainee policy between 2002 and 2008 lead to the policy's collapse. Directly addressing the value conflict is necessary to the development of a new policy based on the rule of law in full recognition of national security requirements.

We argue that a forward -looking detainee policy begins with understanding the implications of detainee policy collapse from 2002-2008. Studying policy implications is the way decision makers use the past to set a course toward broad goals like security and the rule of law. Toward that understanding we begin with key indicators of detainee policy collapse from 2002-2008.

### Value Conflict and Policy Collapse

Conflict over legal values guiding U.S. detainee policy has resulted in the policy's collapse. On January 14, 2009, the military commission convening authority, Susan J. Crawford, told the *Washington Post* that she would not refer for prosecution the case of Mohammed al-Qahtani (thought to be the 20<sup>th</sup>, 9/11 hijacker) because Qahtani had been tortured.(Woodward,2009:A01). As Duke Law Professor Scott Silliman put it, "What do you do when you have an allegation from a senior official of the Bush administration that we committed a war crime?" (Glaberson,2009:2) The story of value conflict and policy

failure cannot answer Silliman's question. The story of value conflict can, however, explain what prompts Silliman to ask the question.

The interplay of values and policy has been dealt with at a practical level by the Churches Center for Theology and Public Policy. In fall, 2000, the Center published a set of articles in its journal each identifying a value failure that prevents a "just" resolution of conflict. There were elements in common among the disparate policy areas represented. For example, parties to the conflict had little understanding of or trust in each other and there was a sense on both sides of each conflict that the stakes were too high for compromise, or even for a basic exchange of information. As a result, values are rejected as useful elements and are replaced by instrumental justifications. While values like sovereignty, equality, and fairness can bridge differences, justifications such as the assertion of leadership authority or the threat to religious hegemony promote differences.

The result of value failure may be called policy collapse. As noted in the Churches Center publication, policy collapse means that the values of neither side prevail and that the purpose of the conflict becomes secondary to the political standing of the parties defined by instrumental justification. The eventual close of communication leaves core policy differences in place, as attention shifts away from the main issues. The winner has not used persuasion through democratic discourse, but has closed debate by asserting political control. This control can hold in the short term. In the longer-term, though, failed values (Bozemen,2002) leave a legal void.

### Premises Related to the Detainee Policy: 2002-2008

The first premise concerns the undisputed legal status of detainees taken captive by U.S. forces in Afghanistan and Iraq. In military operations other than war (MOOTW) some enemy combatants are unprivileged actors whose belligerency amounts to crime, especially the crime of terrorism. If they do not fall under the enemy combatant description recognized under the Geneva Conventions (either ascriptively or by declaration of their captors), they are not "prisoners of war" as defined by the Conventions.

Our second premise is that in making the determination of a captive's status, the National Command Authority (NCA: the Commander in Chief and other constitutionally recognized defense and intelligence authorities in the U.S.) is guided by law and military necessity- both based on values of fairness and justice in armed conflict. According to these values, even if detainees are determined not to be "prisoners of war", the NCA must always ensure that detained persons are provided humane treatment and just process during captivity. Common Article III of the Geneva Conventions enjoins signatories that detainees of any status "shall in all circumstances be treated humanely, without any adverse distinction." (Geneva Conventions,1949: III,Pt.1.Sec4).

### Contrasting Uses of NCA Discretion

Two examples well illustrate the discretion in the selection of values available to the NCA. First is the use of NCA discretion during Operation Allied Force, a U.S. led

NATO incursion and bombing campaign in support of Kosovo in 1999. Three soldiers from the 1<sup>st</sup> Infantry Division of the U.S. Army were captured by Yugoslav (Serbian) forces. The United States declared that the three soldiers were not combatants entitled to prisoner of war protection granted under the Geneva Conventions and therefore demanded their immediate release to US. custody. The second incident occurred two weeks later. The Kosovo Liberation Army detained a Yugoslav Army lieutenant. The Pentagon immediately declared that this officer was a prisoner of war and was entitled to the protections under the Geneva Conventions enabling NATO to keep the lieutenant in custody until the end of the “international armed conflict.”

The value conflict over the status and treatment of detainees held by the U.S. at Guantanamo Bay, Cuba, involves NCA decisions made at the time the first captives from the conflict in Afghanistan arrived in Cuba, in late 2001 and early 2002. At that time John C. Yoo, Robert J. Delahunty and other U.S. Justice Department attorneys drafted a number of official memoranda which provided the legal basis for circumventing or ignoring the Geneva Conventions with regards to the status of those detained at Guantanamo Bay. As discussed in more detail below, the conclusion of the Justice Department lawyers was that the Geneva Conventions were inapplicable to detainees from the Afghanistan war. Explicitly, the Justice Department memoranda were designed to protect members of the Bush Administration from charges of war crimes based on the means used to detain and interrogate those held at Guantanamo Bay. The memoranda argued that since Afghanistan was a failed state, persons captured during Operation Enduring Freedom in Afghanistan could not be legally recognized under the Geneva



Conventions. Thus, persons captured in Afghanistan during Enduring Freedom were actors without a state, i.e., terrorists. The value stated here was most clearly articulated by President George W. Bush in the 2002 “State of the Union” address, “Terrorists who once occupied Afghanistan now occupy cells at Guantanamo Bay.” The war on terror justified the detentions. (January 29, 2002)

While the NCA adopted the Justice Department’s argument and the President’s value as the basis of an official policy, Secretary of State Colin L. Powell relied on an opposing value in a statement just three days before the President’s speech. Powell argued that declaring the [Geneva Convention Articles III and IV] inapplicable would reverse. . .

. . . U.S. policy and practice in supporting the Geneva Conventions [Articles III and IV] and undermine the protections of the laws of war for our troops... it would [also] undermine public support among critical allies. (2002)

It is clear in Common Article III that before the decision on status is made, the Article’s provisions are in force to protect detainees. This provision was neglected by the NCA with regard to persons held at Guantanamo Bay on the advice of the Justice Department and the White House Office of Legal Counsel. Starkly, protection from terrorists trumped what then Secretary of State Colin Powell called “protections of the laws of war for our troops.”

#### Limits of National Command Discretion

The NCA is responsible for treating detainees humanely. The law in this area distinguishes between humanitarian protections and basic human rights protections:

Humanitarian Law refers to those conventions from the law of war that protect the victims of war (primarily the Geneva Conventions). Human Rights Law refers to a small core of basic individual rights embraced by the international community during the past forty years as reflected in various declarations, treaties, and other international provisions beginning with the UN Charter and Universal Declaration of Human Rights. (Puls:2005,ch.2)

The broad role of the U.S. government, beyond the NCA, in complying with humanitarian and other international law, is often overlooked. In Article I Sec. 8 of the U.S. Constitution, Congress is given the power to punish “offenses against the law of nations.” J.Andrew Kent’s recent analysis of this clause provides an historical argument bringing Congress’ interpretation of customary international law to bear in shaping the decisions of the NCA. Kent argues that the Congress might well delegate a good deal of this interpretation to the NCA, but that it can and should play a role in applying the law of nations and customary international law to MOOTW and to the treatment of detainees. If Congress can punish offenses against the law of nations, it can interpret such law. As Kent’s historical analysis finds:

[A] central project of the seventeenth-and eighteenth-century law-of-nations theorists was to explain how the seemingly anarchic state system - in which there is no common sovereign and each state is left to decide for itself when it has been injured, and how to respond - is actually subject to a semblance of the rule of law. (p.891) Texas Law Review, Vol. 85, p. 843, 2007

The implication that Kent draws from the original meaning of the “law of nations” clause is that the Congress has the authority to impose obligations and limitations on the NCA/Executive by identifying and codifying the “law of nations” as customarily understood. In this way, the open discretion of individual nations and NCAs can be prevented from undermining the possibility of authoritative, legal control of their actions regarding all aspects of international conflict, including the treatment of captives. For example, the concern about detainees’ eligibility to be brought before a court or tribunal and to be covered by standards like the speedy trial requirement of the Sixth Amendment to the U.S. Constitution, is a question that was not raised until 2009, though it is clearly an issue related to the precepts of customary international law.

In its decision on the process available to detainees in *Rasul*, on 28 June 2004, the United States Supreme Court ruled, six to three, that the detainees at Guantanamo Bay, Cuba, must be afforded an opportunity to be heard before a court. (60). This ruling is significant because it provided a legal basis for U.S. Federal Judges to decide upon writs of *habeas corpus* filed by the detainees (61). In reaction to the *Rasul* decision, Congress passed the Military Commissions Act of 2006 which provided that:

No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination. 10 USC 47a Sec.7(e)1.

The Supreme Court heard the Government’s appeal of a Circuit Court ruling that held unconstitutional the 2006 Act’s prohibition of detainee habeas corpus applications in *Boumediene v. Bush* (553 U.S. , 2008). In 5-4 decision, Justice Anthony Kennedy wrote a detailed analysis of the history and application of the habeas corpus guarantee. He concluded, following *Rasul*, that the writ applied to detainees at Guantanamo and that suspending the writ was a particular power of Congress that could not be implied from the 2006 Act. Neither was the creation of the on-site Combat Status Review Tribunal process at Guantanamo an adequate substitute for habeas corpus review by an Article III court:

[M]ost of the major legislative enactments pertaining to habeas corpus have acted not to contract the writ’s protection but to expand it or to hasten resolution of prisoners’ claims. . . We do consider it uncontroversial. . . that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to “the erroneous application or interpretation” of relevant law.

Although we make no judgment as to whether the CSRTs, as currently constituted, satisfy due process standards, we agree with petitioners that, even when all the parties involved in this process act with diligence and in good faith, there is considerable risk of error in the tribunal’s findings of fact. This is a risk inherent in any process that, in the words of the former Chief Judge of the Court

of Appeals, is “closed and accusatorial.” . . . And given that the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more, this is a risk too significant to ignore.. . .We hold that petitioners may invoke the fundamental procedural protections of habeas corpus. The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law.

The Boumediene decision showed the value conflict in high relief. With reference to the review operations at Guantanamo, Gen Thomas Hemingway (USAF,ret.), former legal adviser to the military commissions convening authority, rates the process afforded detainees after *Rasul* as “sufficient,” Gen Hemingway goes on to note that the policy may have been less controversial had the administration worked more closely with congress from the outset.. (Hemingway,2009 interview)

Col Gunn’s observations are reinforced by the resignations of two prosecutors assigned to the military commissions, Air Force Co.1 Morris Davis and Army Reserve Lt .Col. Darrel Vandeveld. According to reports in the *Los Angeles Times*, Lt.Col. Vandeveld filed a “four page declaration “. .with the court charging that, as he put it, “‘potentially exculpatory evidence has not been provided’ to the defense.” When Col. Davis left his position as chief prosecutor for the commissions he “went public with claims that he had

been pressured by politically appointed senior Defense officials to pursue cases deemed ‘sexy’ in the run-up to the 2008 elections.” (Meyer,2008:A-19)

### Legal Values

The legal grounding of detention and interrogation at Guantanamo was the prospect of trial by military commission. First authorized by President George W. Bush’s executive order 13440 of November 13, 2002, commission trials were designed to comply with Common Article III which prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” The Hamdan and Rasul decisions of the US Supreme Court found the military commissions as authorized by the President to be constitutionally deficient. Commission regulations, in the executive order and in Secretary Rumsfeld’s implementing policies, did not allow those accused to petition the judiciary to require the military to prove that those accused were being held legally (by applying for a writ of *habeas corpus*). As noted above the controversy over detainee habeas corpus applications continued until the Supreme Court ruled that the Military Commissions Act of 2006 had not constitutionally removed the power of federal courts to hear detainee habeas applications.

In the seven years following President Bush’s executive order, only two cases have been completely processed by a military commission, *US v. David Hicks* (2004,2007) and *Hamdan v. Rumsfeld* (2006). Hicks, an Australian national, was released before trial pursuant to a plea agreement. Salim Hamdan, who garnered notoriety when the challenge

launched by his lawyers resulted in the US Supreme Court declaring that the military commissions established by President Bush were unconstitutional, eventually went before a military commission in 2008. Hamdan was eventually found guilty of providing material support to al Qaeda, but was cleared of conspiracy charges. His trial resulted in his being sentenced by a military jury to five-and-a-half years of imprisonment after being given credit for having already served five years.

### The Value of Due Process and Humane Treatment Disputed

Susan J. Crawford, the convening authority of military commissions explained, “We tortured [Mohammed al-]Qahtani. His Treatment met the definition of torture. And that’s why I did not refer the case” to prosecutors. (Woodward,2009,A01). Judge Crawford’s statement opens a policy debate that had been closed, since Alberto Mora left the Pentagon.

Relevant decisions of the U.S. Supreme Court, as noted, came late in the process. Detainees had already suffered maltreatment and many had been held for years without charge or review. In the short-run, the exercise of political power was a “victory” for the NCA. In the longer term, the instrumental justification of detainee treatment and of military commissions put forward by the NCA failed and detainee policy collapsed. We are left with a situation in which an ostensibly very dangerous detainee like Qahtani will not be tried. Others are in the same situation, (by early 2009, approximately 250 detainees are reported to be held at the Guantanamo camps.) The fact that after seven

years, there is no formal policy for dealing with the remaining detainees at Guantanamo is a clear indication that no value yet prevails.

As noted above, the nature of process due to detainees has been in dispute. The value debate, over what is “just” in view of a demonstrable security threat from detainees, never took place. Argument centered on the legal foundations of detention and of the use of military commissions. One of the best examples of the nature of the argument over the nature of justice for detainee is a widely circulated 2002 paper by Curtis Bradley and Jack Goldsmith of Harvard Law School. The Bradley-Goldsmith argument hinges on historical and cultural support for the constitutionality of military commissions as adequate judicial process for detainees. The authors begin by recognizing that “the United States is in an armed conflict with al Qaeda” (2002:17). The authors proceed to the assertion that “President Bush has independent power, as Commander in Chief to establish military commissions to try war crimes violations. . .”(6) Bradley and Goldsmith find additional support for military commissions in the congressional resolution authorizing the use of force (Joint Resolution,2001) and in historical precedent.

Bradley and Goldsmith raise one particular issue that presages the collapse of the policy for which they find constitutional authority. Bradley and Goldsmith refer to Common Article III to support the application of formal judicial authority to “conflicts involving non-state actors.” (17), specifically, “armed conflict not of an international character. . .” (1949) The latter phrase is read in line with the argument that Afghanistan was at the



beginning of hostilities a failed state and that those taken captive in Iraq and elsewhere are terrorists and therefore, non-state actors. This point is also made in the Memorandum of January 9, 2002, by John Yoo and Robert Delahunty, when they quote the very same words from Article III that were selected by Bradley and Goldsmith. They continue more specifically, “. . . Article 3’s text strongly supports the interpretation that it applied to large-scale conflicts between a State and an insurgent group.”(7)

However, we note again that Article III explicitly requires that those “placed ‘hors de combat’ [out of combat] by sickness, wounds, detention, or other cause, “shall in all circumstances be treated humanely. . .” And to leave no doubt about what humane treatment means, the Article requires that “the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons [which includes those in “detention”]: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture. . .(c) outrages upon personal dignity, in particular humiliating and degrading treatment (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. . .” (Geneva Conventions, 1949:III.1.4.)

These general, humanitarian provisions are read out of Article III in the Yoo-Delahunty Memorandum. After considering the historical setting of traditional armed conflict that they argue was most familiar to the framers of Article III, Yoo and Delahunty conclude that “it seems to us overwhelmingly likely that an armed conflict between a Nation State

and a transnational terrorist organization could not have been within the contemplation of the drafters of common Article 3.” (10) This is a heavily qualified surmise that begs the question of how to determine who is a member, supporter, and /or combatant of “a transnational terrorist organization.” This determination is especially relevant, since detainees are not within the Geneva description of enemy combatants,

The basis of U.S. detainee policy was not a textual analysis of Common Article III, but instead the Yoo-Delahunty interpretation based on an assessment of the “contemplation of the drafters of Article 3.” This memo, together with the Bradley-Goldsmith article is in stark contrast to the interpretation of Geneva Articles III and IV by then Secretary Colin Powell. This contrast sets the stage for value failure. In brief, there was no clear, convincing argument and thus no consensus within the Administration about the meaning and applicability of, most importantly, Common Article III. The Yoo-Delahunty interpretation simply did not convince several key actors in the policy process. As a consequence, four years after the Memorandum, a more immediate value conflict detailed above emerges between Navy Counsel Alberto Mora and DOD Counsel William Haynes. It was to William Haynes that the Yoo-Delahunty Memorandum was written.

There was disagreement about the implementation of the proscriptions and values stated in Common Article III, but little debate and no public discourse. The declaration on January 14, 2009, by Judge Crawford that torture and degrading treatment had been inflicted on at least one detainee turns any conflict over the constitutionality of military commissions into a sideshow.

### Convergence of Approaches?

In an article published six years after Bradley and Goldsmith's defense of the constitutionality of military commissions, Robert Chesney and Goldsmith argue that the commissions system had moved closer to the traditional American criminal justice model, while the criminal justice system has shown itself capable of trying terrorists.

During the past five years, the military detention system has instituted new rights and procedures designed to prevent erroneous detentions, and some courts have urged detention criteria more oriented toward individual conduct than was traditionally the case. At the same time, the criminal justice system has diminished some traditional procedural safeguards in terrorism trials and has quietly established the capacity for convicting terrorists based on criteria that come close to associational status. Each detention model, in short, has become more like the other. (2008:1081)

The authors argue that "convergence" of the two systems indicates the inadequacy of either to address the problem of justice at the center of detainee policy. In contrast to the confident tone of the 2002 article, Chesney and Goldsmith's 2008 assessment concludes that "the convergence process is no recipe for the sustainable reform now required." (1132)

In a view shared by others, Chesney and Goldsmith argue that by early 2008 there had been no values developed to guide detainee policy. Instrumental justifications like the

security of sensitive information were used to defend the statutory weakness of a detainee's legal defense under the military commission process. The opaque nature of actual detention even to insiders like Alberto Mora and Col Gunn forced the policy to collapse. Once the results of actions at Guantanamo surfaced and were verified, value failure was palpable.

### Summary and Conclusion

We return to practical matters in order to discern a way to reestablish values of justice and national security as the basis of a policy on detention—a policy that, if we are to have one at all, must be rebuilt. (We note that the day after taking office, President Barack Obama suspended any further action by military commissions (Finn,2009:A02) ) The value dilemma with which we began calls into question exactly who is responsible for articulating and explaining first, a concept of justice for those detained in Guantanamo Bay and second, the value of national security for the American people. The immediate response has been that the Commander in Chief has such responsibility and authority. However, this response only begins to reveal the interrelated judicial and bureaucratic layers that prevented values from emerging. The lack of guiding legal values is illustrated by the highly controversial definition of torture developed by Administration lawyers up to 2009.<sup>2</sup>

Both justice and security values ought to be clear to those holding captives taken in a war or in MOOTW. And those values ought to be clearly communicated to the public. The

---

<sup>2</sup> *Ibid.*

Bush Administration relied on processes (incarceration without charge or with limited review) that could not be defended by reliance on conventional values of justice. The Administration put in place the aforementioned Combatant Status Review Tribunals as process to manage detainees. The CSRTs were not adversarial nor were they based on formal rules of evidence. However, as noted in the *Boumediene* decision, they were presented by the Government as “due process.” Thus, instead of following established law and practice, the Administration relied on instrumental justification for its detention and judicial processing policy and on interpretations of international and U.S. law that were developed in confidential memoranda. In Justice John-Paul Stevens’ opinion for the Court in *Hamdan v. Rumsfeld* “[I]n undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction.”(548 U.S. 557, 2006:72)

Controversy over the treatment of captives related to conflicts in Iraq and Afghanistan, like all conflicts since World War II, took place in the absence of a congressional Declaration of War.<sup>3</sup> Few would argue that the United States is likely to return to a regime in which this singular congressional power is used<sup>4</sup>.

---

<sup>3</sup> Detainee Camps were established in 1942 for presumed domestic terrorists, American citizens of Asian Pacific decent . (See *Karamatsu v. U.S.*, 323 U.S. 214,1944) These camps were located on American soil within the jurisdictional and geographical limits of the United States. Similarly, certain detainee camps were established on foreign soil for German detainees and prisoners of war. However, both species of camps were cognizant of a lawful declaration of war wherein the United States of America was a party belligerent. Of course, these camps were not under the auspices of the 1949 Geneva Conventions relative the treatment of Enemy Prisoners of War (Article III of the Geneva Conventions), as that specific international agreement would be a future global endeavor.

<sup>4</sup> Common Article III pertains to the common article found among several treaties that enunciates rights of people against states withholding liberty restraints upon their lives. Common Article III normally concerns human rights protections, namely the continued provision of adequate food, water, shelter and medical care without discrimination or limitation. ....

The first step in moving past the value dilemma is to reject the notion that the National Command Authority encompasses anyone or any agency other than the President. If executive power is diffuse, it cannot be checked or held accountable. The responsibility for decisions made by the Commander in Chief (National Command Authority is a pale substitute for this explicitly constitutional title) is the President's, entirely.

If the President is once again recognized as the repository of executive authority in time of armed conflict, it is possible to bring forward the role, not only of the judiciary, but also of the Congress as a check and balance. Returning to J. Andrew Kent's interpretation of congressional power to "punish. . . offenses against the law of nations" (Art I Sec 8) we disagree with Chesney and Goldsmith that American criminal law is somehow inadequate to the challenge of trying and punishing non-state offenders captured in extra-territorial conflict..

There is no doubt that the Guantanamo detainees may be tried as criminal actors charged with committing felonies under the jurisdiction of U.S. courts with competent jurisdiction, both *in rem* and *in personum*.<sup>5</sup> Consequently, they may be punished with sentences specified in a legislative process that is unable to avoid or neglect basic policy values. The technique of keeping captives beyond the reach of U.S. law by moving them to prisons outside of the U.S., often called "extraordinary rendition," should be ended by an act of Congress that extends U.S. jurisdiction to those taken and held by U.S. forces, unless they are declared "prisoners of war" under the Geneva Conventions. This

---

<sup>5</sup> *In Rem* Jurisdiction and *In Personum* Jurisdiction is best elucidated in the sentinel case, *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945).

extension of jurisdiction would only extend to territory over which no duly constituted local judicial authority has functioning jurisdiction.

Such a statute would clarify and enforce the value of justice in MOOTW as well as in undeclared armed conflicts such as Operation Enduring Freedom. It would also include specifications of process and sanction distinct from other parts of the federal criminal code, just as the Racketeer Influenced Corrupt Organizations Act of 1970 is distinct in its definition of criminality and sanction.(18 USC 1963; Blakey,2008) The exception for declared “prisoners of war”—a declaration made in the First Gulf War-- clarifies and enforces security values by indicating the conflict has, the characteristics of a “conventional war” with identifiable enemies and a foreseeable endpoint. If detainees are not identified as POWs, justice and security will include the federal criminal process, as specified in public laws.

The Obama Administration’s decision to prosecute al-Marri in federal court is not a new idea. Jane Mayer reports on a recent interview with former U.S. Attorney for the Southern District of New York David Kelley .

[Kelley] thought that Marri could be convicted in a matter of a few months, and sentenced to years in prison. Kelley, who is now a partner at Cahill Gordon, in Manhattan, was disappointed when, on the basis of a one-page executive order, Marri was suddenly sent to the brig. ‘My view is, we haven’t really exhausted the potential for using the criminal-justice system,’ he said.

(Mayer,2009:newyorker.com)

The Marri case has come full circle and has taken over five years to do so.

Once the legislative branch resumes its role in the definition and punishment of offenses “against the law of nations,” the judiciary will be relieved from taking on the difficult and politically freighted issues of the validity of *casus belli* and of the President’s role as Commander in Chief. Instead, the federal court may consider, under ample precedent, the validity of process and sanction as specified in the U.S. Code. Security concerns can be dealt with, as Col Will Gunn suggests, according to the Confidential Information Procedure and Statistical Efficiency Act of 2001, and as they are now.

Arguments have been made on the possibility of creating hybrid courts or for the use of courts-martial to review status and try detainees such as those held at Guantanamo. (Guiora,2008) It may be that additional resources or special “parts” of the federal courts will be necessary. Nevertheless, the legitimacy and strength of precedent in the currently constituted federal judiciary make it the clearest choice for the reestablishment of the values of security and justice and for the reconstruction of a ruined policy.



## REFERENCES

Adams, Jonathan (2009) "Red Cross Report Says Detainees at CIA 'Black Sites' Were Tortured," *Christian Science Monitor*, csmonitor.com, March 16.

Blakey, G. Robert (2008) *The R.I.C.O. Act* (Amazon Digital Publishing, LeClue22).

Bozeman, Barry (2002) "Public Value Failure: When Efficiency Markets May Not Do," *Public Administration Review*, 62 (2), April, pp.145-161.

Bradley, Curtis A. and Jack L. Goldsmith (2002) *The Constitutional Validity of Military Commissions*, 5 *Green Bag 2<sup>nd</sup>* (Spring). SSRN-id298163.pdf

Bush, George W. (2007) Executive Order 13440, July 10.

Bybee, Jay (2002) "Memorandum for Alberto R. Gonzales Counsel to the President: Standards of Conduct for Interrogation under 18 U.S.C. Secs 2340-2340A," U.S. Department of Justice, Office of Legal Counsel, August 1.

Chesney, Robert and Jack Goldsmith (2006) "Terrorism and the Convergence of Criminal and Military Detention," *Stanford Law Review*, 60,1079.

England, Gordon (2006) "Memorandum for the Secretaries of the Military Departments, et al. 'Application of Common Article 3 of the Geneva Conventions to the Treatment of Detainees in the Department of Defense'", July 7.

Finn, Peter (2009) "Obama Seeks Halt to Legal Proceedings at Guantanamo," *Washington Post*, January 21, p. A02.

Geneva Conventions (1949) Common Article III, Part 1. Sec. 4, August 12.

\_\_\_\_\_ (1949) "Article III," [nytimes.com/ref/us/AP-Guantanamo-Geneva-Conventions.html](http://nytimes.com/ref/us/AP-Guantanamo-Geneva-Conventions.html)

Glaberson, William (2009) "Torture Acknowledgment Highlights Detainee Issue," *New York Times*, January 15, A01.

Guiora, Amos N. (2008) "Improving Detainee Policy: Handling Terrorism Detainees Within the American Justice System," Testimony Prepared for the U.S. Senate Judiciary Committee, June 4.

International Committee of the Red Cross (2009) "International Humanitarian Law: Treaties and Documents," (Geneva: ICRC.org).

Johnston, David and Neil A. Lewis (2009) "U.S. Will Give Al Qaeda Suspect a Civilian Trial," *New York Times*, February 27, p. A-1.

Kent, J. Andrew (2007) "Congress's Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations," *Texas Law Review*, 85, p. 843.

Meyer, Josh (2008) "Guantanamo Prosecutor Quits," *Los Angeles Times*, September 25 p.A-19.

Obama, Barack (2009) “Executive Orders: 13491, 13492 (January 22) 13493 (January 27).

Powell, Colin (2002) “Memorandum to the Presiden’t Counsel on the Geneva Conventions,” January 29.

Puls, Keith E. ed. (2005) *Law of War Handbook* (Charlottesville, Va.: The Judge Advocate General’s Center and School)

Saint-Marin, Emmanuel (2008) “9/11 Suspects Say They Will Plead Guilty,” *France 24.com* – Agence France-Presse

“Transcript, Obama Press Conference,” (2009) cbs.com February 9.

United States Department of the Army (1987) *Army Field Manual*, FM34052.

United States Code, Title 18, Sec. 1963, “Racketeer Influenced Corrupt Organizations Act of 1970,”

United States Code (2001) Title 5, Sec.501, “Confidential Information Protection and Statistical Efficiency Act.”

United States Code (2006) Title 10, 47a Sec.7(e)1, “Military Commissions Act.”

United States Congress (2001) Public Law 107-40 107th Congress, Joint Resolution: “To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States,” September 18.

United States Department of the Army (1987) “Army Field Manual,” FM34-52.

Woodward, Bob (2009) “Detainee Tortured, Says U.S. Official: Trial Overseer Cites ‘Abusive’ Methods’ Against 9/11 Suspect,” *Washington Post* , January 14, A01

Yoo, John and Robert J. Delahunty, “Memorandum for William J. Haynes II General Counsel, Department of Defense: Application of Treaties and Law to al Qaeda and Taliban Detainees,” U.S Department of Justice, Office of Legal Counsel, January 9, 2002.

## **TABLE OF CASES**

*Boumediene v. Bush*, 553 U.S. 466 (2008)

*Hamdan v. Rumsfeld*, 548 U.S. 557, 2006

*Rasul v. Bush*, 542 U.S. 466 (2004)

*U.S. v. David Hicks*, U.S. Military Commission, 18 October (2004)