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# Enemy Combatants in the War on Terror and the Implications for the U.S. Armed Forces

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## Enemy Combatants in the War on Terror and the Implications for the U.S. Armed Forces

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### INTRODUCTION

The terrorist attacks of September 11, 2001, changed life in America in many ways. Long lines at the airport, heavily armed police on the streets of major cities, and constant news of the “War on Terror” became pervasive parts of American life. But not all agree with the measures taken since September 11 to prevent another terrorist attack. From preemptive war<sup>1</sup> to warrantless domestic wiretaps,<sup>2</sup> several of the Bush administration’s decisions during the War on Terror have inspired strong opposition. The designation of individuals detained during Operation Enduring Freedom—and to a lesser extent Operation Iraqi Freedom—as enemy combatants rather

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1. See Peter Baker, *Bush To Restate Terror Strategy; 2002 Doctrine of Preemptive War To Be Reaffirmed*, WASH. POST, Mar. 16, 2006, at A1 (describing the Bush administration’s preemptive war policy).

2. See Adam Liptak, *In Limelight at Wiretap Hearing: 2 Laws, But Which Should Rule?*, N.Y. TIMES, Feb. 7, 2006, at A1 (discussing congressional hearings on the Bush administration’s decision to conduct wiretaps on certain international telephone calls to or from suspected al Qaeda members without court authorization).

than prisoners of war ("POWs") has occupied the attention of the American public and its courts in the years following September 11.<sup>3</sup> The Bush administration argues that the Geneva Conventions support the enemy combatant designation.<sup>4</sup> Administration opponents contend that there is no valid legal support for the administration's enemy combatant designations,<sup>5</sup> and argue that the detained individuals should instead be treated as POWs pursuant to the Geneva Conventions, which would guarantee them far more privileges and rights than those afforded to enemy combatants.<sup>6</sup>

An argument against the enemy combatant designation that has not received as much attention is the claim that the administration's use of the enemy combatant designation will jeopardize the status of members of the U.S. Armed Forces.<sup>7</sup> The argument is that enemies of the United States could potentially use the justifications for the enemy combatant designation against captured U.S. service members in the future.<sup>8</sup> U.S. special operations forces, whose missions usually

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3. See, e.g., Charles Lane, *Debate Crystallizes on War, Rights*, WASH. POST, Sept. 2, 2002, at A1 (stating that debate over the enemy combatant designation and other initiatives of the Bush administration is increasing); Neil A. Lewis, *In Rising Numbers, Lawyers Head for Guantanamo Bay*, N.Y. TIMES, May 30, 2005, at A10 (discussing the surge of lawyers volunteering to represent Guantanamo Bay detainees); see also *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2795 (2006) (holding that the military commissions conducted at Guantanamo Bay, Cuba, violated the principles of Common Article 3 of the Geneva Conventions); *Hamdi v. Rumsfeld*, 542 U.S. 507, 537 (2004) (holding that due process requires a U.S. citizen held as an enemy combatant be given a meaningful opportunity to contest the factual basis of his detention); *Rasul v. Bush*, 542 U.S. 466, 485 (2004) (holding that the federal habeas statute confers on district courts jurisdiction to hear challenges of aliens held at Guantanamo Bay).

4. See *infra* Part III. The Department of Defense defines an enemy combatant as "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners." Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., to Gordon England, Sec'y of the Navy 1 (July 7, 2004), available at <http://www.globalsecurity.org/security/library/policy/dod/d20040707review.pdf>.

5. See generally George C. Harris, *Terrorism, War and Justice: The Concept of the Unlawful Enemy Combatant*, 26 LOY. L.A. INT'L & COMP. L. REV. 31 (2003) (arguing that the Government should not abandon the basic principles of the U.S. criminal justice system to gather intelligence from terrorism suspects); Srividhya Ragavan & Michael S. Mireles, Jr., *The Status of Detainees from the Iraq and Afghanistan Conflicts*, 2005 UTAH L. REV. 619 (arguing that the Geneva Conventions warrant the application of POW status to al Qaeda and Taliban detainees).

6. See *infra* notes 45–48 and accompanying text (discussing the various rights to which POWs are entitled to).

7. See Ragavan & Mireles, *supra* note 5, at 623.

8. See *id.* at 623, 675. The White House press corps raised this same concern during the press secretary's announcement of the President's policy toward al Qaeda and Taliban detainees. See Press Release, White House Office of the Press Sec'y, White House Press Secretary Announcement of President Bush's Determination re Legal Status of Taliban

include unconventional tactics and uniforms,<sup>9</sup> could be particularly vulnerable. This Comment analyzes the Bush administration's decision to classify al Qaeda and Taliban detainees as enemy combatants, focusing on the legal justifications for the decision. It argues that the administration's rationale for classifying the detainees as enemy combatants will not place U.S. Armed Forces in justifiable legal jeopardy in future armed conflicts, as the Geneva Conventions simply do not support an argument that U.S. forces can be designated as enemy combatants and held indefinitely.

In Part I, this Comment discusses the origins and nature of the War on Terror, specifically the events of September 11 and its aftermath, focusing on al Qaeda's and the Taliban's behavior as fighting forces and the Taliban's status as the purported government of Afghanistan. This Part also discusses the detainee issue and the Bush administration's approach to the problem. Part II discusses the applicable international and domestic law addressing the detainee problem, focusing on the Geneva Convention Relative to the Treatment of Prisoners of War ("GPW"). Part III discusses the Bush administration's justifications for the enemy combatant designation. Part IV discusses the legal implications of these justifications on U.S. conventional forces and special operations forces. This Part argues that the classification of detainees as enemy combatants, rather than POWs, should have no legal effect on the classification of U.S. forces in the future, but that the current policy may give forces capturing U.S. service members a propaganda argument for such an action. This Comment concludes by recommending measures that may mitigate any residual threat to U.S. forces from current administration policy.

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and al Qaeda Detainees (Feb. 7, 2002), *available at* <http://www.state.gov/s/l/38727.htm> (Question to Mr. Ari Fleischer: "But the concern, the debate here was about if you don't do it here, then U.S. soldiers could be mistreated abroad. Isn't that correct?").

9. See DEP'T OF DEF., JOINT PUBL'N 1-02; DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 499-500 (Dep't of Def. ed. 2006), *available at* [http://www.dtic.mil/doctrine/jel/new\\_pubs/jp1\\_02.pdf](http://www.dtic.mil/doctrine/jel/new_pubs/jp1_02.pdf) (describing the mission and methods of special operations elements); W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L. 493, 496-98 (2003) (noting special operations forces use of unconventional uniforms); Militaryphotos.net, *Special Forces-Afghanistan*, [http://media.militaryphotos.net/photos/Special\\_Forces-Afghanistan](http://media.militaryphotos.net/photos/Special_Forces-Afghanistan) (last visited Dec. 11, 2006) (showing pictures of Special Forces soldiers in Afghanistan during Operation Enduring Freedom).

## I. THE ORIGINS AND NATURE OF THE WAR ON TERROR

### A. *The War on Terror*

Although there was some awareness of al Qaeda's activities before September 11, 2001,<sup>10</sup> the events of that day instantly made this organization the preeminent problem and threat facing America. Terrorist attacks heavily damaged the Pentagon, destroyed the twin towers of New York's World Trade Center, ground the U.S. economy and air traffic to a halt, and killed almost 3,000 people.<sup>11</sup> The U.S. Government immediately responded to these attacks by demanding that the Taliban turn over all al Qaeda members residing in and operating out of Afghanistan.<sup>12</sup> Although it did not officially declare war, Congress enacted a joint resolution authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons."<sup>13</sup>

The international community also rallied to support the United States. Soon after the attacks, the United Nations Security Council approved a resolution acknowledging the United States' right to defend itself.<sup>14</sup> In addition to this resolution, sixty-eight countries supported U.S. actions in Afghanistan, with twenty eventually committing troops to the effort.<sup>15</sup>

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10. See THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 71–108 (authorized ed. 2004) [hereinafter THE 9/11 COMMISSION REPORT] (discussing U.S. efforts to adapt to the new threats posed by al Qaeda); *id.* at 108–44 (discussing the Government's response to al Qaeda's bombing of two U.S. embassies in Africa); *id.* at 190–97 (discussing the Government's response to al Qaeda's bombing of the U.S. Navy destroyer U.S.S. *Cole*); *id.* at 254–77 (noting that some government officials feared an al Qaeda attack in the months prior to September 11, 2001).

11. See *id.* at 4–14, 285–315 (describing the actions aboard the four aircraft hijacked on September 11, 2001, and the attacks on the World Trade Center and the Pentagon); Eric Lipton, *Death Toll Is Near 3,000, but Some Uncertainty over the Count Remains*, N.Y. TIMES, Sept. 11, 2002, at G47 (describing the aftermath of the terrorist attacks).

12. 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 in Abu Ghraib*, 36 CASE W. RES. J. INT'L L. 541, 543–44 (2004).

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

14. See S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

15. See Dep't of Def., Fact Sheet: International Contributions to the War Against Terrorism (May 22, 2002), <http://www.defenselink.mil/news/May2002/d20020523cu.pdf> (containing a partial list of the military contributions of more than thirty-five countries).

Operation Enduring Freedom (“OEF”) began on October 7, 2001.<sup>16</sup> President Bush stated that OEF’s initial objectives included the destruction of al Qaeda training camps, the capture of its leaders, and the end of terrorist activities in Afghanistan.<sup>17</sup> Even though the United States had overwhelming support, both inside and outside the country, it still faced a significant challenge due to the unconventional nature of its foe. Al Qaeda is a terrorist organization consisting of groups operating in several countries and composed of members from around the world.<sup>18</sup> The organization conducts terrorist attacks against the United States and other Western nations in support of extremist Islamic political and religious objectives.<sup>19</sup> Due to its nature as a terrorist organization and its illegal activities, al Qaeda is not a state, is not subject to international law, and has no legal international status.<sup>20</sup> As a nonstate, al Qaeda is not a party to the Geneva Conventions or any other international agreement governing the law of war.<sup>21</sup> The Taliban—the governing party of Afghanistan at the time—became a target in OEF because it chose to give al Qaeda members sanctuary rather than expel them from Afghanistan.<sup>22</sup> Although the Taliban was the operating government of Afghanistan,

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16. See GlobalSecurity.org, Operation Enduring Freedom, <http://www.globalsecurity.org/military/ops/enduring-freedom.htm> (last visited Dec. 11, 2006). Early U.S. military deployments to Afghanistan included several conventional units and numerous Army, Navy, and Air Force aviation assets operating from adjacent countries and the Indian Ocean. See GlobalSecurity.org, Operation Enduring Freedom Deployments, [http://www.globalsecurity.org/military/ops/enduring-freedom\\_deploy.htm](http://www.globalsecurity.org/military/ops/enduring-freedom_deploy.htm) (last visited Dec. 11, 2006). In addition to these conventional forces, an undisclosed number of special operations forces were deployed to Afghanistan, including Army Special Forces teams, Navy SEALs, and Australian Special Operations soldiers. *Id.*

17. See Address to a Joint Session of Congress, 2 PUB. PAPERS 1140 (Sept. 20, 2001); Address to the Nation, 2 PUB. PAPERS 1201 (Oct. 7, 2001).

18. See George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT’L L. 891, 893 (2002).

19. See *id.*

20. *Id.*

21. See *id.*

The Geneva Conventions of 1949 . . . make no provision for an international armed conflict between a state and a transnational criminal network with control over no territory, a “head of state” who is apparently stateless, a multinational membership, and operational cells in many states. . . . The September 11 attacks did not launch an internal armed conflict in the United States, as understood in international humanitarian law.

Joan Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 AM. J. INT’L L. 345, 348 (2002).

22. See Aldrich, *supra* note 18, at 893.

the United States and the vast majority of the rest of the world's countries refused to extend diplomatic recognition to this group.<sup>23</sup>

*B. The Detainee Problem*

As OEF unfolded, the United States and its allies captured a considerable number of suspected al Qaeda and Taliban members.<sup>24</sup> Because these detainees were captured during an international armed conflict, questions arose regarding their status under international law and to what protections, if any, they were entitled.<sup>25</sup> On February 7, 2002, the White House announced its plan for the disposition of these detainees.<sup>26</sup> The Bush administration determined that the GPW applied to the conflict between the United States and the Taliban but not to the conflict between the United States and elements of al Qaeda.<sup>27</sup> The administration further announced that Taliban personnel would not be entitled to POW status due to the fact that their behavior on the battlefield was not in accordance with the requirements of the GPW.<sup>28</sup> The result of these decisions was that neither al Qaeda nor Taliban detainees would be granted POW status. Regardless of their designation, the administration stated that all detained al Qaeda and Taliban personnel would be treated humanely and consistently with the general principles of the Geneva Conventions.<sup>29</sup> Significantly, Secretary of State Colin Powell argued

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23. *Id.* Most countries instead recognized Burhanuddin Rabbani, the political leader of the Northern Alliance, who was President of Afghanistan before the Taliban's takeover, as the official head of state of Afghanistan. See Amy Waldman, *Rabbani Holds Court in Kabul*, N.Y. TIMES, Jan. 4, 2002, at A14.

24. The Department of Defense released a list of 759 individuals detained by the U.S. Navy at Guantanamo Bay, Cuba, from January 2002 through May 2006. See Dep't of Def., List of Individuals Detained by the Department of Defense at Guantanamo Bay, Cuba, from January 2002 through May 15, 2006 (May 15, 2006), <http://www.dod.mil/pubs/foi/detainees/detaineesFOIArelease15May2006.pdf>. This total does not include individuals the United States is detaining outside of Guantanamo Bay or individuals who were captured and released prior to transfer to the detention center. See *id.*

25. Aldrich, *supra* note 18, at 891.

26. See Press Release, White House Office of the Press Sec'y, *supra* note 8.

27. *Id.*

28. See *id.* Ari Fleischer, the White House press secretary, announced that

[u]nder Article 4 of the Geneva Convention . . . Taliban detainees are not entitled to POW status . . . . Al Qaeda is an international terrorist group and 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 under the treaty.

*Id.*

29. *Id.* Mr. Fleischer stated that

against the decision to deny POW status to al Qaeda and Taliban detainees, partly on the basis that it might encourage potential enemies of the United States to find loopholes permitting them to deny GPW protections to captured U.S. service members.<sup>30</sup>

The decision not to apply the GPW to al Qaeda and Taliban detainees—and later to foreign insurgents in Iraq—would eventually lead to numerous problems for the administration. Some have argued that the administration's decision not to apply the GPW to these detainees set the stage for abuses against prisoners conducted by U.S. service members in Afghanistan and Iraq.<sup>31</sup> The decision also led to legal problems for the White House as the Supreme Court heard and decided several high-profile cases regarding the rights of detainees housed at Guantanamo Bay, Cuba, including *Hamdan v. Rumsfeld*,<sup>32</sup> *Hamdi v. Rumsfeld*,<sup>33</sup> and *Rasul v. Bush*.<sup>34</sup>

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the United States has treated and will continue to treat all Taliban and al Qaeda detainees in Guantanamo Bay humanely and consistent with the principles of the Geneva Convention. They will continue to receive three appropriate meals a day, excellent medical care, clothing, shelter, showers, and the opportunity to worship. The International Committee of the Red Cross can visit each detainee privately.

*Id.*

30. See Memorandum from Colin Powell, Sec'y of State, to Alberto Gonzales, Counsel to the President 1–2 (Jan. 26, 2002) [hereinafter Powell Memorandum], available at <http://msnbc.msn.com/id/4999363/site/newsweek/>. The Secretary of State advanced several justifications for this opinion, including: past U.S. adherence to the GPW; likely condemnation from allied nations; encouragement of potential enemies to find loopholes to avoid application of the GPW; discouraging other nations from turning over terrorists; and undermining a U.S. military culture that emphasizes maintaining the highest standards of conduct. *Id.*

31. See, e.g., Wallach, *supra* note 12, at 541–43, 623–25 (examining how the Bush administration's decision not to apply the GPW to al Qaeda and Taliban detainees might have been a catalyst for the abuses at Abu Ghraib prison). Revelations of detainee abuse at Abu Ghraib prison soiled the U.S. reputation as a protector of civil rights and human dignity. An official Army investigation identified numerous acts of abuse that shocked the world. See U.S. ARMY, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 16 (2004), available at [http://www.npr.org/iraq/2004/prison\\_abuse\\_report.pdf](http://www.npr.org/iraq/2004/prison_abuse_report.pdf) (finding that “between October and December 2003 . . . numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees”). Major General Antonio M. Taguba, who conducted the Army investigation, documented numerous instances of abusive behavior, including physical abuse, videotaping and photographing naked detainees, forcibly arranging naked detainees in sexually explicit positions for photographs, forcing groups of naked detainees to masturbate while being photographed, using military working dogs to intimidate detainees (which resulted in at least one severe dog bite), threatening detainees with a pistol, and sodomy with foreign objects. *Id.* at 16–19. Similar allegations of abuse surfaced in Afghanistan. See Tim Golden, *Army Faltered at Investigating Detainee Abuse*, N.Y. TIMES, May 22, 2005, at A1.

32. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2795 (2006) (holding that the military commissions conducted at Guantanamo Bay, Cuba, violated the principles of Common Article 3 of the Geneva Conventions).



## II. INTERNATIONAL LAWS OF ARMED CONFLICT AND SUPREME COURT PRECEDENT

### A. *The Geneva Conventions*

A discussion of the classification of those captured on the battlefield must begin with the Geneva Conventions. The Geneva Conventions are a series of international treaties designed to ensure that individuals found or detained on or near a battlefield are properly classified as combatants or noncombatants and treated accordingly.<sup>35</sup> The Geneva Conventions grant certain rights and benefits to specified classes of individuals. Combatant countries must provide these rights and benefits to all detainees who fall within a specified class of protected persons.<sup>36</sup>

The two conventions that are relevant to this discussion are the Geneva Convention Relative to the Treatment of Prisoners of War<sup>37</sup> and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (“GCP”).<sup>38</sup> Article 2 of both the GPW and GCP (“Common Article 2”) governs the applicability of the Geneva Conventions to an armed conflict.<sup>39</sup> It provides that “the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one

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33. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 537 (2004) (holding that due process requires a U.S. citizen held as an enemy combatant be given meaningful opportunity to contest the factual basis of his detention).

34. See *Rasul v. Bush*, 542 U.S. 466, 485 (2004) (holding that the federal habeas statute conferred on district courts jurisdiction to hear challenges of aliens held at Guantanamo Bay).

35. See Int’l Comm. of the Red Cross, *The Geneva Conventions: The Core of International Humanitarian Law*, [http://www.icrc.org/Web/Eng/siteeng0.nsf/html/geneva\\_conventions](http://www.icrc.org/Web/Eng/siteeng0.nsf/html/geneva_conventions) (last visited Dec. 11, 2006).

36. See *id.* (“The Geneva Conventions and their Additional Protocols are part of international humanitarian law . . . . They specifically protect people who do not take part in the fighting (civilians, medics, chaplains, aid workers) and those who can no longer fight (wounded, sick and shipwrecked troops, prisoners of war).”).

37. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW].

38. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 3518, 75 U.N.T.S. 287, 288 [hereinafter GCP].

39. Note that Article 2 is one of several “Common Articles” of the Geneva Conventions. The Common Articles are found in all four of the Geneva Conventions, and they generally relate to the scope of application of the Conventions and the obligations of Convention parties. See INT’L & OPERATIONAL LAW DEP’T, U.S. ARMY JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCH., DEP’T OF THE ARMY, LAW OF WAR WORKSHOP DESKBOOK 27 (Commander Brian J. Bill ed., 2000) [hereinafter LAW OF WAR DESKBOOK].

of them.”<sup>40</sup> It further provides that even if one of the countries in the conflict is not a party to the Conventions, those countries that are parties remain bound to their mutual obligations pursuant to the Conventions.<sup>41</sup> These clauses establish that the United States is bound by the Geneva Conventions in both Afghanistan and Iraq because both conflicts are armed conflicts between parties to the Geneva Conventions.<sup>42</sup>

If the conflict rises to the level of an “armed conflict,” Article 4 of the GPW states the criteria that a capturing party must consider when determining if a captured person is a POW.<sup>43</sup> Although this may in certain circumstances be a relatively simple determination to make, the drafters of the Conventions apparently realized that it might at times be significantly more difficult. Article 5 addresses these difficult circumstances with a default clause, stating that if “any doubt arise[s] as to whether persons . . . belong to any of the categories enumerated in Article 4, such person shall enjoy the protection of the [GPW] until such time as their status has been determined by a competent tribunal.”<sup>44</sup> Article 5 essentially establishes that if there is any doubt, the capturing party should play it safe.

If a captured person is ultimately determined to be a POW, the GPW sets forth the rights afforded to the POW. For example, Article 13 provides that POWs must be treated humanely and protected from acts of violence, intimidation, insults, and public curiosity at all times.<sup>45</sup> Article 17 provides that no physical or mental torture, insults, threats, disadvantageous treatment, or other forms of coercion can be inflicted on a POW in an effort to obtain information or intelligence.<sup>46</sup> Given the treatment of some detainees in Afghanistan and Iraq,<sup>47</sup> this Article would have been a serious problem if the detainees were designated as POWs. Many of the other articles essentially indicate

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40. GPW, *supra* note 37, art. 2; GCP, *supra* note 38, art. 2.

41. GPW, *supra* note 37, art. 2; GCP, *supra* note 38, art. 2.

42. See Int’l Comm. of the Red Cross, *Geneva Conventions for the Protection of War Victims of 12 August 1949 and Additional Protocols of 8 June 1977*, INT’L REV. OF THE RED CROSS, Mar. 31, 1998, at 178, 178–85, available at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/57jp52?opendocument> (showing the states that have become parties to the Geneva Conventions).

43. See GPW, *supra* note 37, art. 4; *infra* Parts III–IV (discussing the criteria in detail).

44. GPW, *supra* note 37, art. 5.

45. See GPW, *supra* note 37, art. 13.

46. GPW, *supra* note 37, art. 17.

47. See *supra* note 31 (discussing mistreatment of detainees at Abu Ghraib prison in Iraq and alleged detainee mistreatment in Afghanistan).

that the POW's life should be as comfortable as possible given the circumstances.<sup>48</sup>

Even if the captured individual is determined not to be a POW under the GPW, the individual is still minimally protected by Common Article 3 of the Conventions. Common Article 3 provides that combatants who have surrendered or those who have left the battle due to sickness, injury, detention, or any other cause should be treated humanely regardless of their classification.<sup>49</sup> Those captured in Afghanistan and Iraq have been detained,<sup>50</sup> and they therefore fall under the "detention" category of Common Article 3. The provision specifically states that the following acts are prohibited as to persons falling into one of the Common Article 3 categories:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (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.<sup>51</sup>

The plain meaning of this Article and the Supreme Court's recent decision in *Hamdan* indicate that regardless of the behavior of the Taliban and al Qaeda fighters, they are, at a minimum, entitled to the protections of Common Article 3 of the GPW.<sup>52</sup>

#### B. Relevant Supreme Court Precedent

In addition to the Geneva Conventions, there are also several Supreme Court cases that bear on the issue of which captured

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48. For example, POWs must be quartered under conditions similar to those of the service members of the detaining power. See GPW, *supra* note 37, art. 25. The detaining power should encourage the POWs to engage in intellectual, educational, and recreational activities. See GPW, *supra* note 37, art. 38. Articles 70 and 71 provide that the POW is entitled to inform his family of his location and correspond regularly with family and friends. See GPW, *supra* note 37, art. 70, 71.

49. GPW, *supra* note 37, art. 3; GCP, *supra* note 38, art. 3.

50. The Department of Defense defines a "detainee" as "any person captured or otherwise detained by an armed force." DEP'T OF DEF., JOINT PUBL'N 1-02, *supra* note 9, at 159.

51. GPW, *supra* note 37, art. 3; GCP, *supra* note 38, art. 3.

52. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2795 (2006) (holding that Common Article 3 applies to all armed conflicts).

individuals qualify as POWs. In *Ex parte Quirin*,<sup>53</sup> the Court heard the case of eight German troops who sailed to the United States aboard a submarine during World War II, on a mission to destroy war industries and facilities within the United States.<sup>54</sup> When they landed on U.S. soil these troops wore German Marine infantry uniforms, but they removed and buried the uniforms after landing and then proceeded on in civilian dress to New York City and Jacksonville, Florida.<sup>55</sup> Shortly after their arrival, they were captured and prosecuted.<sup>56</sup> The Germans filed a writ of habeas corpus challenging their prosecution and asserting that they should be classified as POWs and treated accordingly.<sup>57</sup>

In ruling on the Germans' petitions for habeas corpus, the Supreme Court defined the distinction between lawful and unlawful combatants.<sup>58</sup> The Court stated that lawful combatants should be detained as POWs when captured by the opposing armed force.<sup>59</sup> Unlawful combatants, on the other hand, "are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful."<sup>60</sup> The Court included as an unlawful combatant the "*enemy combatant* who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property," and determined that these individuals "are generally deemed not to be entitled to the status of prisoners of war, but to be . . . subject to trial and punishment by military tribunals."<sup>61</sup> This case is regarded as the origin of the term "enemy combatant."<sup>62</sup>

The *Quirin* opinion is heavily cited in *Hamdi* and *Rasul*, two of the most recent Supreme Court cases regarding the issue of classification of captured personnel. These cases, when considered together, establish the most current guidance from the Supreme Court on the classification and treatment of al Qaeda and Taliban detainees. The *Hamdi* Court held that the United States may hold detainees, including U.S. citizens, captured during OEF pursuant to

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53. 317 U.S. 1 (1942).

54. *See id.* at 21.

55. *See id.*

56. *See id.*

57. *See id.* at 31.

58. *See id.*

59. *Id.*

60. *Id.*

61. *Id.* (emphasis added).

62. *See* Joanna Woolman, *The Legal Origins of the Term "Enemy Combatant" Do Not Support Its Present Day Use*, 7 J.L. & SOC. CHALLENGES 145, 147 (2005).

Congress's Authorization for Use of Military Force.<sup>63</sup> The Court wrote that

detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the "necessary and appropriate force" Congress has authorized the President to use.<sup>64</sup>

As for the length of detention, the Court found that the United States could detain individuals for the "duration of these hostilities."<sup>65</sup>

Although the *Hamdi* Court determined that the United States is allowed to hold al Qaeda and Taliban detainees as enemy combatants rather than POWs, *Rasul* provides these detainees with some degree of process to challenge their detention. The *Rasul* opinion establishes that the U.S. federal courts have jurisdiction to hear detainee arguments challenging their detention.<sup>66</sup> The majority wrote that no Supreme Court precedent prohibits aliens detained in military custody outside the United States from bringing suit and asserting their rights in U.S. courts.<sup>67</sup> This victory for the detainees was relatively short lived. The Detainee Treatment Act of 2005 ("DTA")<sup>68</sup> included a provision expressly stripping from the federal courts habeas jurisdiction over Guantanamo Bay detainees.<sup>69</sup> Section 1005(e) provides that, except as specified by the DTA, "no court,

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63. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004). Yaser Esam Hamdi was an American citizen who resided in Afghanistan in 2001 when the Northern Alliance seized and transferred him to U.S. forces. See *id.* at 510. The U.S. military initially detained Mr. Hamdi in Afghanistan and then in Guantanamo Bay, but transferred him to a naval base in the continental United States upon discovering that he was a U.S. citizen. See *id.* In 2002, Mr. Hamdi's father filed a writ of habeas corpus in the United States District Court for the Eastern District of Virginia, arguing that, as a U.S. citizen, his son should receive all the benefits and protections of the Constitution, and complaining that the Government was holding his son without access to counsel and without any charges filed against him. See *id.* at 511.

64. *Id.*

65. *Id.* at 521.

66. See *Rasul v. Bush*, 542 U.S. 466, 483–84 (2004). In *Rasul*, the Court heard the case of two Australian citizens and twelve Kuwaitis captured abroad by the United States and its allies during the conflict with the Taliban and held for two years (at the time the case was heard by the Court) at Guantanamo Bay. See *id.* at 470–71. The petitioners filed several actions in the United States District Court for the District of Columbia, each alleging that they had never been combatants against the United States or committed terrorist acts, and that "none has been charged with any wrongdoing, permitted to consult with counsel, or provided access to the courts or any other tribunal." *Id.* at 471–72.

67. *Id.* at 484. The Court passed on answering the question of which type of proceedings may be necessary to hear these cases. See *id.*

68. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739.

69. See *id.* § 1005(e)(1).

justice, or judge shall have jurisdiction to hear or consider . . . a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba.”<sup>70</sup> The *Hamdan* Court later limited the applicability of § 1005(e) to only those habeas petitions not already filed with the courts.<sup>71</sup>

The *Hamdan* Court also addressed the legality of the military commission system<sup>72</sup> the Government devised for use at Guantanamo Bay and the procedures to be used by these commissions.<sup>73</sup> In its decision, the Court determined that Common Article 3 of the Conventions did apply to detainees, therefore giving them the minimal level of protection offered by the Geneva Conventions, but it did not address whether the detainees are entitled to the extensive protections of the GPW.<sup>74</sup> Because the Court chose not to address this issue, the decision to deny POW classification to al Qaeda and Taliban detainees remains a contested issue.

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70. *Id.*

71. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2762–69 (2006) (holding that § 1005(e)(1) does not apply to those habeas petitions already filed at the time of the DTA’s enactment). The Court chose not to address Hamdan’s argument that § 1005(e) unconstitutionally suspends habeas corpus because “[o]rdinary principles of statutory construction suffice to rebut the Government’s theory—at least insofar as this case, which was pending at the time the DTA was enacted, is concerned.” *Id.* at 2763–64.

72. President Bush established the military commission system to try al Qaeda and Taliban detainees in a November 13, 2001 military order. Military Order of November 13, 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,831, 57,833 (Nov. 16, 2001). The military order applied to those individuals the President determined were members of al Qaeda, were involved in international terrorism, or who harbored any of these individuals. *See id.* at 57,834. The President instructed that such individuals be detained by the Department of Defense and “when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and . . . punished in accordance with the penalties provided under applicable law, including life imprisonment or death.” *Id.* The President tasked the Secretary of Defense with developing “rules for the conduct of the proceedings of military commissions, including pretrial, trial, and post trial procedures, modes of proof, issuance of process, and qualifications of attorneys.” *Id.* The order specifically provides that the Secretary of Defense did *not* have to develop procedural rules consistent with the “principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.” *Id.* at 57,833.

73. *See Hamdan*, 126 S. Ct. at 2772–98 (holding that the military commission structure is not authorized by the Court’s ruling in *Quirin* or any Congressional act, and that the Guantanamo Bay detainees must therefore be afforded process consistent with the Uniform Code of Military Justice and Common Article 3 of the Geneva Conventions).

74. *See id.* at 2795 (stating that the Court did not have to address the President’s argument that none of the Geneva Conventions applied because Common Article 3 applies to all armed conflicts).

### III. JUSTIFICATION FOR DENYING POW STATUS TO AL QAEDA AND TALIBAN DETAINEES

After consulting with his advisers, President Bush decided that although the Geneva Conventions apply somewhat to the conflicts in Afghanistan and Iraq, application of the GPW does not justify granting POW status to al Qaeda or Taliban detainees.<sup>75</sup> In a memorandum explaining his decision, the President stated that he chose to deny POW status to al Qaeda members because al Qaeda is a nonstate actor and the GPW therefore does not apply to the conflict between the organization and the United States.<sup>76</sup> Regarding the Taliban, President Bush wrote that although the GPW applies to the *conflict* with the Taliban, members of the Taliban themselves do not qualify as POWs.<sup>77</sup> This confusing result stems from the GPW's two-prong test governing classification of captured combatants.

The U.S. Army Judge Advocate General ("JAG") School instructs future Army lawyers to evaluate application of the GPW using the "Right Kind of Conflict/Right Kind of Person" inquiry.<sup>78</sup> This is essentially a two-prong test for determining a captured enemy's status. The first prong analyzes the nature of the conflict.<sup>79</sup> To pass the first prong of the test, the countries involved must be *parties* to the Geneva Conventions engaged in an *international armed conflict*.<sup>80</sup> Whether a combatant country is a party to the Geneva Conventions is a relatively simple yes or no determination. However, the definition of "armed conflict" has caused some disagreement as commentators and practitioners have debated where exactly the threshold to armed conflict is passed.<sup>81</sup> The JAG School teaches its

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75. See Sean D. Murphy, *Executive Branch Memoranda on Status and Permissible Treatment of Detainees*, 98 AM. J. INT'L L. 820, 822 (2004); *supra* notes 26–29 and accompanying text.

76. Memorandum from President George W. Bush to Vice President Richard Cheney et al. 2 (Feb. 7, 2002) [hereinafter Bush Memorandum], available at <http://www.washingtonpost.com/wp-dyn/articles/A62516-2004Jun22.html> ("I note that, because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as prisoners of war.").

77. See *id.* ("[T]he Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war . . .").

78. See LAW OF WAR DESKBOOK, *supra* note 39, at 73–78; Lt. Col. Paul E. Kantwill & Maj. Sean Watts, *Hostile Protected Persons or "Extra-Conventional Persons": How Unlawful Combatants in the War on Terrorism Posed Extraordinary Challenges for Military Attorneys and Commanders*, 28 FORDHAM INT'L L.J. 681, 722–31 (2005).

79. See LAW OF WAR DESKBOOK, *supra* note 39, at 73–76.

80. *Id.* at 74.

81. See, e.g., Kantwill & Watts, *supra* note 78, at 723–24 (stating that some commentators have argued for a higher threshold on the types of interstate hostilities that qualify as armed conflicts).

students to abide by a relatively low threshold.<sup>82</sup> It adopts the definition of the International Committee of the Red Cross Commentary to the GPW: an armed conflict is any conflict between two countries "leading to the intervention of members of the armed forces . . . even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces."<sup>83</sup> This definition seems to encompass what most would commonly consider to be a "war" or "armed conflict."

After a conflict meets the requirements of the first prong of the "Right Kind of Conflict/Right Kind of Person" inquiry, one must examine the requirements of the second prong. The "Right Kind of Person" prong requires gathering information about the groups or individuals in question and determining whether they meet the criteria specified in Article 4 of the GPW.<sup>84</sup> Article 4 provides four main categories of persons or groups who are entitled to POW status if captured during an armed conflict: (1) members of a party's regular armed forces (including reserve elements);<sup>85</sup> (2) members of militias or other volunteer groups who meet certain conditions;<sup>86</sup> (3) members of regular armed forces of a government not recognized by the detaining state;<sup>87</sup> and (4) inhabitants of an occupied territory who take up arms against their occupiers.<sup>88</sup>

Article 4(A)(2) provides that those in the second group—members of other militias and volunteer corps, including organized resistance movements—should be considered POWs if they fulfill the following four conditions: "(a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive

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82. *See id.* at 723–24 ("Currently our instruction to judge advocates retains the lower threshold . . . such that the law of war operates across an extremely broad range of interstate hostilities."). The JAG Corps LAW OF WAR DESKBOOK lists World War II and the conflicts in Korea, Vietnam, the Falklands, Grenada, Panama, and the Persian Gulf as definite examples of Article 2 conflicts. *See* LAW OF WAR DESKBOOK, *supra* note 39, at 74. It considers the conflicts in Bosnia and Kosovo as somewhat questionable examples of Article 2 conflicts. *See id.*

83. Kantwill & Watts, *supra* note 78, at 723 (quoting ICRC COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 50 (Jean S. Pictet ed., 1958)).

84. *See* LAW OF WAR DESKBOOK, *supra* note 39, at 76–78; Kantwill & Watts, *supra* note 78, at 724.

85. GPW, *supra* note 37, art. 4(A)(1).

86. *Id.* art. 4(A)(2).

87. *Id.* art. 4(A)(3).

88. *Id.* art. 4(A)(6) (including as POWs "[i]nhabitants of a non-occupied territory, who on the approach of the enemy, spontaneously take up arms to resist the invading forces . . . provided they carry arms openly and respect the laws and customs of war").



sign recognizable at a distance; (c) that of carrying arms openly; [and] (d) that of conducting their operations in accordance with the laws and customs of war.”<sup>89</sup> Note that there is some debate as to whether these four Article 4(A)(2) criteria also apply to regular armed forces. As discussed *infra*, some argue that members of the regular armed forces qualify for POW status regardless of their adherence to the Article 4(A)(2) criteria, while others contend that these criteria must be met by all combatants, including members of “regular armed forces.”<sup>90</sup> The weight of authority supports this second interpretation. Most commentators and the courts agree that the Article 4(A)(2) criteria apply to regular armed forces, both under Article 4(A)(1) and 4(A)(3), in addition to militias or other volunteer groups.<sup>91</sup>

The President’s memorandum indicates that the Bush administration based its decision regarding al Qaeda and Taliban detainees on this “Right Kind of Conflict/Right Kind of Person” type of analysis.<sup>92</sup> This analysis is articulated in a Department of Justice memorandum drafted by Assistant Attorney General Jay S. Bybee, which detailed the arguments that helped form the basis of the administration’s policy.<sup>93</sup> These are, therefore, the arguments that future enemies could conceivably use to argue against a POW classification for captured U.S. service members.

The Bybee memorandum first uses the “Right Kind of Conflict” prong of the GPW analysis to address the classification of captured al Qaeda members.<sup>94</sup> It states that

[n]on-governmental organizations cannot be parties to any of the international agreements here governing the laws of war. Common article 2, which triggers the Geneva Convention provisions regulating detention conditions and procedures for trial of POWs, is limited to cases of declared war or armed conflict “between two or more of the High Contracting Parties.” Al Qaeda is not a High Contracting Party. As a result, the U.S. military’s treatment of al Qaeda members is not

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89. *Id.* art. 4(A)(2)(a)–(d).

90. *See infra* notes 120–30 and accompanying text (discussing and analyzing these arguments).

91. *See infra* notes 124–29 and accompanying text.

92. *See* Bush Memorandum, *supra* note 76, at 1–2.

93. *See* Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel of the Dep’t of Def. (Jan. 22, 2002) [hereinafter Bybee Memorandum], available at <http://washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf>.

94. *See id.* at 9.

governed by the bulk of the Geneva Conventions, specifically those provisions concerning POWs.<sup>95</sup>

The memorandum essentially argues that regardless of their activities on the battlefield, al Qaeda and its members cannot claim the protections of the GPW because al Qaeda is a nonstate, terrorist organization.<sup>96</sup> As a nonstate, it cannot be a contracting party to the Geneva Conventions, and therefore does not meet this requirement of Common Article 2.<sup>97</sup>

The memorandum then moves on to the “Right Kind of Person” prong of the analysis. Mr. Bybee argues that neither al Qaeda nor Taliban detainees are entitled to the protections of the GPW because of their conduct on the battlefield.<sup>98</sup> Regarding al Qaeda, the memorandum argues that even if the GPW did apply to the conflict with al Qaeda, it would not apply to al Qaeda’s members pursuant to Article 4(A).<sup>99</sup> Although al Qaeda personnel could arguably be considered members of a militia or volunteer corps, they still cannot qualify for classification as POWs due to their conduct on the battlefield. Rather than adhering to the four Article 4(A)(2) criteria governing classification as POWs for members of militias and volunteer corps, al Qaeda’s members

have clearly demonstrated that they will not follow [the] basic requirements of lawful warfare. They have attacked purely civilian targets of no military value; they refused to wear uniform or insignia or carry arms openly, but instead hijacked

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95. *Id.*

96. *See id.*

97. *See* GPW, *supra* note 37, art. 2 (stating that the Conventions apply only to international armed conflicts between two or more high contracting parties); GCP, *supra* note 38, art. 2 (stating the same).

98. *See* Bybee Memorandum, *supra* note 93, at 9–11.

99. *See id.* at 10. As one commentator has written regarding al Qaeda:

Al-Qaeda and aligned factions *en masse* have chosen to target, terrorize, and murder civilians unlawfully and deliberately. They have flown hijacked civilian airliners into two of the world’s largest civilian office buildings, kidnapped and then either shot or decapitated their civilian hostages, attacked and then murdered noncombatant United Nations peacekeeping forces in Somalia and Afghanistan, bombed a civilian oil tanker, and bombed the diplomatic embassies and consulates of numerous countries. They have also bombed, throughout the globe, numerous synagogues, churches, civilian airports, civilian oil-drilling, pipeline, and storage tank infrastructure, civilian train stations, civilian residential areas, hotels, restaurants, office buildings, markets, and nightclubs.

Lt. Col. Joseph P. “Dutch” Bialke, *Al Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict*, 55 A.F. L. REV. 1, 39–40 (2004).

civilian airliners, took hostages, and killed them; and they themselves do not obey the laws of war concerning the protection of the lives of civilians or the means of legitimate combat.<sup>100</sup>

This passage shows that al Qaeda members would only meet the first Article 4(A)(2) criteria for classification as a POW, which requires that the combatant have a defined chain of command.<sup>101</sup> They would not meet the other requirements, including displaying a fixed sign recognizable at a distance, carrying arms openly, and adhering to the laws and customs of war.<sup>102</sup>

The memorandum's "Right Kind of Person" argument regarding the Taliban detainees is much more tenuous than the argument regarding al Qaeda members. Taliban personnel could potentially qualify as POWs under Article 4(A)(3) of the GPW, which includes members of regular armed forces of a government not recognized by the detaining state.<sup>103</sup> But Mr. Bybee argues that Taliban members lost their POW status in part because "the Taliban leadership had become closely intertwined with, if not utterly dependent upon, al Qaeda. This would have rendered the Taliban more akin to a terrorist organization that used force . . . for terrorist purposes."<sup>104</sup> Mr. Bybee goes on to state numerous examples of potential Taliban violations of the Article 4(A)(2)(d) requirement that any combatant force must conduct its operations in accordance with the laws and customs of war.<sup>105</sup> These examples include: improper use of mosques; the placement of artillery pieces close to hospitals, schools, and residential areas; atrocities committed against prisoners and civilians; and failure to distinguish between combatants and noncombatants.<sup>106</sup> Mr. Bybee concludes that these facts provide the administration with grounds to suspend application of the GPW's protections to the Taliban due to the fact that the group refused to abide by the laws of armed conflict.<sup>107</sup>

This preceding analysis shows that the Bush administration based its decision to deny POW status to al Qaeda and Taliban detainees on

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100. Bybee Memorandum, *supra* note 93, at 10.

101. See GPW, *supra* note 37, art. 4(A)(2)(a).

102. *Id.* art. 4(A)(2)(b)-(d).

103. *Id.* art. 4(A)(3).

104. See Bybee Memorandum, *supra* note 93, at 11.

105. GPW, *supra* note 37, art. 4(A)(2)(d).

106. See Bybee Memorandum, *supra* note 93, at 20. The memorandum cites to a State Department report indicating that in August 2000, the Taliban executed POWs in the streets of Herat. *Id.*

107. *Id.*

its analysis of the GPW provisions. Although the administration's decision is by no means a universally accepted interpretation of the Geneva Conventions,<sup>108</sup> the administration has not revisited, and its opponents have not successfully challenged, the enemy combatant designation. The question that remains, therefore, is whether this reasoning could potentially be used against U.S. forces in the future.

#### IV. EFFECTS OF THE ENEMY COMBATANT DESIGNATION ON U.S. FORCES IN THE FUTURE

##### A. *Nature of the Problem*

Since the enemy combatant policy was announced, commentators have discussed the risk of the reasoning behind the detainee policy being used against U.S. forces in future conflicts.<sup>109</sup> Even members of the Bush administration have debated this possibility. On January 26, 2002, Secretary of State Colin Powell sent a memorandum to then-White House Counsel Alberto Gonzales in response to Mr. Gonzales's recommendation to classify al Qaeda and Taliban detainees as enemy combatants.<sup>110</sup> Mr. Powell, a highly decorated veteran and former Chairman of the Joint Chiefs of Staff,<sup>111</sup> worried that a finding that the GPW did not apply to the detainees would "reverse over a century of U.S. policy and practice in supporting the Geneva conventions and undermine the protections of the law of war for our troops, both in this specific conflict and in general."<sup>112</sup> The memo also stated that the decision might provoke foreign prosecutors into prosecuting U.S. troops and officials.<sup>113</sup>

Mr. Gonzales's rebuttal to these arguments was less than encouraging. In a draft memorandum for the President, he wrote that

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108. See *supra* notes 5, 30 (discussing arguments from former Secretary of State Colin Powell and commentators that al Qaeda and Taliban detainees should be afforded POW status); see also Nicholas D. Kristof, Op-Ed., *Let Them Be P.O.W.'s*, N.Y. TIMES, Jan. 29, 2002, at A21 (arguing that the enemy combatant designation does not make sense from both a legal and practical perspective); John Mintz, *Debate Continues on Legal Status of Detainees*, WASH. POST, Jan. 28, 2002, at A15 (discussing the debate between those who advocate POW status for detainees and the Bush administration).

109. See generally Parks, *supra* note 9 (arguing that captured U.S. service members are entitled to POW status regardless of al Qaeda and Taliban detainees' designation as enemy combatants); Ragavan & Mireles, *supra* note 5 (arguing that the enemy combatant policy could endanger captured U.S. service members in future conflicts).

110. See Powell Memorandum, *supra* note 30, at 1.

111. See Dep't of State, Colin L. Powell Biography, <http://www.state.gov/secretary/former/40385.htm> (last visited Dec. 11, 2006).

112. See Powell Memorandum, *supra* note 30, at 1-2.

113. *Id.* at 3.

“it should be noted that your policy of providing humane treatment to enemy detainees gives us the credibility to insist on like treatment for our soldiers. Moreover, even if GPW is not applicable, we can still bring war crimes charges against anyone who mistreats U.S. personnel.”<sup>114</sup> He further noted that U.S. adversaries in recent conflicts had violated the requirements of the GPW by mistreating captured U.S. troops and that there was little reason to suspect that terrorists would not do the same in the present conflict.<sup>115</sup>

Both of these evaluations over simplify the nature of the possible threat against U.S. forces. A thorough analysis of this threat should take into account the different natures and missions of U.S. military forces. At one end of the spectrum are conventional forces, which operate as part of larger units and under a unified command structure.<sup>116</sup> On the other end are the special operations forces that generally operate in small teams and are specifically designed to take on unconventional missions.<sup>117</sup> It is these unconventional forces that would be most at risk of being denied POW status. The following Sections will analyze the possibility of denial of POW status for both conventional and unconventional U.S. military forces.

#### *B. Effect of the Detainee Designation on Conventional Forces*

Regardless of whether a force is conventional or unconventional, they must both meet the requirements of Article 4 of the GPW to qualify for POW status.<sup>118</sup> Recall that Article 4(A)(1) mandates POW status for all captured members of a party's regular armed forces.<sup>119</sup> The GPW's language regarding militia members or other volunteer combatants is not as sweeping as Article 4(A)(1). Article 4(A)(2) provides four criteria that the captured militia or volunteer corps member and/or his unit must meet to qualify for POW status.<sup>120</sup>

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114. Draft Memorandum from Alberto R. Gonzales, Counsel to the President, to President George W. Bush 3 (Jan. 25, 2002), available at <http://www.msnbc.msn.com/id/4999148/site/newsweek/>.

115. *Id.*

116. See U.S. Army Forces Command, U.S. Army Forces Command Mission, [http://www.forscom.army.mil/pao/Fact\\_Sheet/FactSheetFORSCOMMission.pdf](http://www.forscom.army.mil/pao/Fact_Sheet/FactSheetFORSCOMMission.pdf) (last visited Dec. 11, 2006) (noting that the U.S. Army active component is composed of 200,000 soldiers spread across three corps and eight divisions).

117. See DEP'T OF DEF., JOINT PUBL'N 3-05, DOCTRINE FOR JOINT SPECIAL OPERATIONS vii–viii, III-1 to III-4 (2003) (discussing the small size, unique missions and capabilities, and flexible command and control structure of special operations elements).

118. See GPW, *supra* note 37, art. 4 (noting no distinction in its application to conventional as opposed to unconventional forces).

119. *Id.* art. 4(A)(1).

120. See *id.* art. 4(A)(2); *supra* note 89 and accompanying text.

It is unclear from reading the GPW itself whether these four criteria are limited to Article 4(A)(2) combatants, or whether they apply both to these individuals and to members of the regular armed forces.<sup>121</sup> This is a significant distinction, as regular armed forces would technically be able to qualify as POWs even if they conducted their combat activities in civilian clothing, concealed weapons, and acted with complete disregard for the law of war, if the four conditions were deemed not to apply to Article 4(A)(1) forces.

A strict or literal reading of the text indicates that the four conditions do not apply to Article 4(A)(1). Article 4(A)(1) itself does not include any limiting criteria; rather, it only states that members of a party's armed forces and members of militias or volunteer corps forming such armed forces are entitled to classification as POWs.<sup>122</sup> Furthermore, Article 4(A)(2) only specifies that its four criteria apply to members of certain militias or volunteer corps and organized resistance movements.<sup>123</sup> This language does seem to indicate that the four Article 4(A)(2) conditions are limited to members of other militias and volunteer corps. Under this strict reading of Article 4, any service member of the U.S. Armed Forces would be considered a lawful combatant and subject to POW designation if captured because he is part of the regular armed forces of the United States.

But most—the author included—consider this reading of the GPW to be an overly simplistic view of the issue. One commentator argues at length that the four Article 4(A)(2) conditions apply “‘of the strictest right or law,’ to every unit or group within a state's regular armed forces as a matter of customary international law.”<sup>124</sup> He further argues that any combatants who do not abide by these four conditions, regardless of whether they are part of the party's regular armed forces or members of a militia or volunteer corps, are acting in an illegal manner and are therefore unlawful combatants.<sup>125</sup>

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121. See GPW, *supra* note 37, art. 4(A)(2) (stating no complete list of elements to which Article 4(A)(2) applies).

122. See *id.* art. 4(A)(1).

123. *Id.* art. 4(A)(2). In fact, Article 4(A)(2) mentions these three groups two times, to the exclusion of any others. *Id.*

124. Bialke, *supra* note 99, at 20; see also John C. Yoo & James C. Ho, *The Status of Terrorists*, 44 VA. J. INT'L L. 207, 219–20 (2004) (“It has long been understood . . . that regular, professional ‘armed forces’ must comply with the four traditional conditions of lawful combat under the customary laws of war, and that the terms of articles 4(A)(1) and (3) of GPW do not abrogate customary law.”).

125. Bialke, *supra* note 99, at 21–23.

This argument finds support in *United States v. Lindh*,<sup>126</sup> where the district court rejected John Walker Lindh's arguments that the Article 4(A)(2) conditions did not apply to him because he was a member of a regular armed force.<sup>127</sup> The court responded by stating that the argument ignored customary practice under the GPW and that it would lead to an "absurd result" if accepted.<sup>128</sup> The court went on to write that

all armed forces or militias, regular and irregular, must meet the four criteria if their members are to receive combatant immunity. Were this not so, the anomalous result that would follow is that members of an armed force that met none of the criteria could still claim lawful combatant immunity merely on the basis that the organization calls itself a "regular armed force."<sup>129</sup>

These statements indicate broad support for the argument that the Article 4(A)(2) conditions also apply to Article 4(A)(1) regular forces. Note that this same analysis applies to Article 4(A)(3), which includes regular armed forces of a government not recognized by the detaining state.<sup>130</sup>

Regardless of which of these arguments an individual subscribes to, the conventional forces of the U.S. military would be protected by the terms of Article 4 of the GPW. Article 4(A)(1) provides that members of a combatant country's regular armed forces are to be considered POWs if captured.<sup>131</sup> This category would certainly include the regular armed forces of the United States. But in accordance with the *Lindh* holding, such armed forces must also meet the four criteria set forth in Article 4(A)(2).<sup>132</sup> The conventional forces of the U.S. military would easily meet these requirements.

Article 4(A)(2)(a) mandates that members of a combatant force must be commanded by a person responsible for his or her

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126. 212 F. Supp. 2d 541 (E.D. Va. 2002).

127. See *id.* at 557 n.35.

128. *Id.*

129. *Id.*

130. GPW, *supra* note 37, art. 4(A)(3). The only distinction between Article 4(A)(1) and 4(A)(3) regular armed forces is that Article 4(A)(1) discusses the regular armed forces of a party to the conflict, *id.* art. 4(A)(1), while 4(A)(3) discusses the regular armed forces of a government not recognized by the detaining state, *id.* art. 4(A)(3). The arguments regarding application of the Article 4(A)(2) conditions to regular armed forces should apply with equal force regardless of whether or not the forces' government is recognized.

131. *Id.* art. 4(A)(1).

132. See *Lindh*, 212 F. Supp. 2d at 557.

subordinates.<sup>133</sup> This criterion essentially requires that the combatant must be supervised by some type of chain of command. The hierarchy of U.S. conventional forces illustrates the established and thorough command structure of the conventional military.<sup>134</sup> All service members in the conventional U.S. military have a hierarchical chain of command that extends from their individual commands to the chief of their military service and finally to the President of the United States acting as the Commander in Chief.<sup>135</sup> In short, all U.S. service members in conventional military units have a hierarchy of supervisors responsible for their conduct, and therefore all such conventional service members and their units meet the Article 4(A)(2)(a) criterion.

The second condition under Article 4(A)(2) requires that military forces must have a fixed distinctive sign recognizable at a distance.<sup>136</sup> This requirement is designed to ensure that combatant forces can easily differentiate between belligerents and civilians.<sup>137</sup> Although there is no rule requiring that combatants wear uniforms in battle, this has been the predominant means by which military personnel have distinguished themselves from an area's civilian population.<sup>138</sup>

The strict uniform requirements for U.S. conventional forces ensure that U.S. service members easily meet the requirements of this condition. All U.S. service members in conventional units must wear standard U.S. military uniforms while on duty, including while deployed on any expeditionary or combat missions.<sup>139</sup> These uniform

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133. GPW, *supra* note 37, art. 4(A)(2)(a).

134. See Dep't of Def., Department of Defense Organization Chart, <http://www.dod.mil/odam/omp/pubs/GuideBook/Pdf/DoD.PDF> (last visited Dec. 16, 2006).

135. See *id.*

136. GPW, *supra* note 37, art. 4(A)(2)(b).

137. See Parks, *supra* note 9, at 513–14 (“[M]ilitary forces are obligated to take reasonable measures to separate themselves from the civilian population and civilian objects . . . and to distinguish themselves from the civilian population so as not to place the civilian population at undue risk. This includes not only physical separation of military forces . . . but also other actions, such as wearing uniforms.”).

138. See *id.* at 515.

139. See DEP'T OF THE AIR FORCE, AIR FORCE INSTRUCTION 36-2903, DRESS AND PERSONAL APPEARANCE OF AIR FORCE PERSONNEL (2006), available at <http://www.e-publishing.af.mil/pubfiles/af/36/afi36-2903/afi36-2903.pdf> (establishing duty uniform standards for the U.S. Air Force); DEP'T OF THE ARMY, ARMY REGULATION 670-1, WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA (2005), available at [http://www.apd.army.mil/pdffiles/r670\\_1.pdf](http://www.apd.army.mil/pdffiles/r670_1.pdf) (establishing duty uniform standards for the U.S. Army); DEP'T OF THE NAVY, NAVPERS 15665I, NAVY UNIFORM REGULATIONS (2005), available at [http://buperscd.technology.navy.mil/bup\\_updt/upd\\_CD/BUPERS/Unireg/tabcon.pdf](http://buperscd.technology.navy.mil/bup_updt/upd_CD/BUPERS/Unireg/tabcon.pdf) (establishing duty uniform standards for the U.S. Navy).



requirements ensure that all U.S. conventional service members will display a fixed sign recognizable at a distance while deployed (they will, in fact, be wearing their identifying sign) and that they will be sufficiently distinguishable from the local civilian population. Additionally, individual military services can and often do impose extra requirements that further ensure their soldiers are readily identifiable as U.S. military personnel.<sup>140</sup>

U.S. conventional forces will also easily meet the third condition, which requires that combatants openly carry their weapons.<sup>141</sup> Part of a service member's training is to teach him the necessity of always carrying his assigned weapon. The armed services instruct soldiers, sailors, and airmen that they are required to openly carry weapons in law of war training sessions.<sup>142</sup> But while it is policy to visibly carry arms, whether or not a service member does so in a particular circumstance is a case-by-case issue. A service member who chooses not to openly carry his weapon will be in violation of Article 4(A)(2)(c) and will therefore be unprotected by the GPW.

The fourth condition is similar to the third with respect to the case-by-case nature of the determination. Article 4(A)(2)(d) requires that service members must conduct "their operations in accordance with the laws and customs of war."<sup>143</sup> Although it is U.S. policy to adhere to the laws and customs of war,<sup>144</sup> whether or not a service

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140. See DEP'T OF THE ARMY, ARMY REGULATION 670-1, *supra* note 139, at 240-41 (providing that all members of the U.S. Army must wear a small U.S. flag on their upper right sleeve at all times, even when not deployed); THIRD U.S. ARMY, ARMY FORCES CENT. COMMAND (ARCENT), COALITION FORCES LAND COMPONENT COMMAND (CFLCC), SOLDIER'S STANDARDS BOOK 8 (2006), *available at* [http://www.arcent.army.mil/images/soldiers\\_standards/CFLCC\\_Soldiers\\_Standards\\_Book\\_2006.pdf](http://www.arcent.army.mil/images/soldiers_standards/CFLCC_Soldiers_Standards_Book_2006.pdf) (stating that all Army personnel in the Iraq and Afghanistan areas must wear a full-color U.S. flag on their upper right sleeve while deployed in the area).

141. GPW, *supra* note 37, art. 4(A)(2)(c).

142. See INT'L & OPERATIONAL LAW DEP'T, U.S. ARMY JUDGE ADVOCATE GEN. LEGAL CTR. & SCH., DEP'T OF THE ARMY, OPERATIONAL LAW HANDBOOK 34, 37 (Major Derek I. Grimes et al., eds., 2004) [hereinafter OPERATIONAL LAW HANDBOOK], *available at* <https://www.jagcnet.army.mil/JAGCNETInternet/Hompages/AC/CLAMO-Public.nsf/0/34e18df949286a4c85256da400507739/Body/M2/OLH2004.pdf?OpenElement> (stating that commanders should brief subordinate commanders and troops on the law of war provisions regarding weapons).

143. GPW, *supra* note 37, art. 4(A)(2)(d).

144. See DEP'T OF DEF., DEP'T OF DEF. DIRECTIVE NO. 5100.77, DOD LAW OF WAR PROGRAM 2 (Dec. 9, 1998), *available at* [http://justicescholars.org/pegc/archive/DoD/docs/DoD\\_Dir\\_5100.77.pdf](http://justicescholars.org/pegc/archive/DoD/docs/DoD_Dir_5100.77.pdf) ("It is [Department of Defense] policy to ensure that . . . law of war obligations of the United States are observed and enforced by the [Department of Defense] Components."); JOINT CHIEFS OF STAFF, CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 5810.01B, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM 1-2 (Mar. 25, 2002), *available at* [http://www.dtic.mil/cjcs\\_directives/cdata/](http://www.dtic.mil/cjcs_directives/cdata/)

member does so in a particular situation is a case-by-case analysis. Although military training and policy dictate that all service members must abide by this GPW requirement, if an individual chooses to commit a war crime, he would no longer meet the requirements of the four Article 4(A)(2) criteria and would therefore not be entitled to POW status if captured.

The foregoing analysis indicates that U.S. service members in conventional military units should easily qualify as POWs pursuant to the GPW if captured in the course of an international armed conflict as long as they adhere to U.S. military training and policy directives. However, if the individual does not comply with any of the four Article 4(A)(2) criteria at the time of capture, he would not be entitled to POW status pursuant to the GPW.

### *C. Effect of the Detainee Designation on Special Operations Forces*

Although conventional forces are not at a significant risk of being designated as anything other than POWs if captured by enemy forces, the same cannot easily be said regarding special operations forces ("SOF"). A special operations unit is an inherently unconventional military unit, and the analysis as to whether the GPW applies to SOF is therefore more complicated. The Department of Defense defines special operations as "[o]perations conducted in hostile, denied, or politically sensitive environments to achieve military, diplomatic, informational, and/or economic objectives employing military capabilities for which there is no broad conventional force requirement."<sup>145</sup> Special operations are distinguishable from conventional military operations by "degree of physical and political risk, operational techniques, and mode of employment among other factors. [Department of Defense] special operations are frequently clandestine—designed in such a way as to

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unlimit/5810\_01.pdf ("The Armed Forces of the United States will comply with the law of war during all armed conflicts . . . . The law of war obligations of the US Government are observed and enforced by the US Armed Forces."); see also *id.* at A-2 to A-4 (stating that commanders in the U.S. Armed Forces must ensure that their personnel receive appropriate law of war training, and that law of war scenarios are included in unit training exercises); DEPT OF THE ARMY, ARMY REGULATION 350-1, ARMY TRAINING AND LEADER DEVELOPMENT 113 (2006), available at [http://www.apd.army.mil/pdf/AR350\\_1.pdf](http://www.apd.army.mil/pdf/AR350_1.pdf) (stating that all members of the U.S. Army are required to undergo training in the law of war prior to any deployment).

145. DEPT OF DEF., JOINT PUBL'N 1-02, *supra* note 9, at 499.

ensure concealment.”<sup>146</sup> These definitions indicate that SOF operates in a less clearly defined environment than conventional forces, and that they must therefore behave in a manner befitting their unconventional mission. It is this behavior that puts the SOF elements at greater risk when they are captured by their adversaries.

SOF conduct during OEF illustrates their unconventional behavior. Perhaps the most visibly unconventional aspect of SOF behavior, and the most problematic under the GPW, was SOF wear of nonstandard uniforms in the early stages of the conflict. News reports featured images of “forward-operating SOF on horseback, bearded, robed and turbaned to blend in with local ‘friendlies,’ using state-of-the-art technology—laser designators, laptop computers, satellite dishes, [ultra-high frequency] radios, sophisticated navigation equipment—to guide devastating airstrikes on Taliban positions.”<sup>147</sup> During the early phases of OEF, SOF worked extensively with Afghan resistance groups, especially the Northern Alliance, which insisted that U.S. SOF elements don the customary attire of their group.<sup>148</sup> This attire included the Massoud pakol (a round tan or gray wool cap) and the Massoud checkered scarf; it specifically did not include the U.S. desert camouflage uniform worn by all U.S. service members deployed to a desert environment.<sup>149</sup>

It is this type of behavior by SOF elements that make them particularly vulnerable to arguments that they should not be classified as POWs in accordance with the GPW. One military judge advocate general has recognized four possibilities as to the classification of SOF operators.<sup>150</sup> The first is that of a lawful combatant, who would be entitled to POW status if captured.<sup>151</sup> The second possible status is that of a common criminal, who would be subject to the internal laws

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146. RICHARD A. BEST, JR. & ANDREW FEICKERT, CONG. RESEARCH SERV., NO. RS22017, SPECIAL OPERATIONS FORCES (SOF) AND CIA PARAMILITARY OPERATIONS: ISSUES FOR CONGRESS (2005), available at <http://www.fas.org/man/crs/RS22017.pdf>.

147. Grant McLoone, *Sledgehammers, Scalpels and Software: Special Operations and the Law of War in the 21st Century*, 12 U.S.A.F. ACAD. J. LEGAL STUD. 139, 139 (2002–03).

148. See Parks, *supra* note 9, at 496–97 (describing the integration of U.S. special operations service members into the ranks of the Northern Alliance).

149. See *id.* These items were named after Ahmad Shah Massoud, the leader of the Northern Alliance who was killed by al Qaeda operatives just days before September 11, 2001. See *id.* at 497.

150. See McLoone, *supra* note 147, at 148–50.

151. *Id.* at 148. If classified as a lawful combatant, an individual would be entitled to combatant immunity, which would protect him from punishment for his belligerent actions before capture. See *id.* at 148–49.

of the detaining state.<sup>152</sup> The detaining state could then treat the captured service member as a foreign citizen caught committing a crime, and would therefore be able to prosecute the service member for treason, sedition, sabotage, plotting to overthrow the government, and other crimes that could possibly be punishable by death.<sup>153</sup> The third possible status that a detaining state could give a captured SOF operator is that of a spy.<sup>154</sup> A spy would be considered a legal combatant, but he would also be subject to trial and possible execution pursuant to the capturing country's laws.<sup>155</sup> The captured service member would probably only receive the same due process protections afforded to common criminals in the capturing country.<sup>156</sup> The final and least favorable status that could be afforded to captured SOF operators is that of unlawful combatant.<sup>157</sup>

Determining which category the SOF personnel would fall under requires an analysis of the Article 4 requirements of the GPW. Even though SOF elements are members of the regular armed forces of the United States,<sup>158</sup> they still must meet the four conditions listed under Article 4(A)(2).<sup>159</sup> As a group, the only condition that would be problematic for SOF elements is the Article 4(A)(2)(b) distinctive sign requirement. The remaining criteria are satisfied for reasons similar to those for conventional military elements. Article 4(A)(2)(a), which requires "being commanded by a person responsible for his subordinates,"<sup>160</sup> is established by the command structure that exists for SOF and all other U.S. military forces.<sup>161</sup> Articles 4(A)(2)(c) and (d), which require that combatants carry arms openly<sup>162</sup> and conduct operations in accordance with the laws and customs of war,<sup>163</sup> respectively, are also subject to the same analysis as conventional U.S. military forces. Military training and common

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152. *Id.* at 149.

153. *See id.*

154. *Id.*

155. *See id.*

156. *Id.*

157. *See id.*

158. *See* Dep't of Def., Department of Defense Organization Chart, *supra* note 134 (showing that the Special Operations Command is part of the regular U.S. military hierarchy).

159. *See supra* notes 121–30 and accompanying text (establishing that it is common understanding that the four Article 4(A)(2) conditions apply equally to Article 4(A)(1) regular armed forces).

160. GPW, *supra* note 37, art. 4(A)(2)(a).

161. *See* Dep't of Def., Department of Defense Organization Chart, *supra* note 134 (noting that Special Operations Command falls within the U.S. military hierarchy).

162. GPW, *supra* note 37, art. 4(A)(2)(c).

163. *Id.* art. 4(A)(2)(d).

practice dictate that U.S. forces, including SOF, must carry their weapons openly.<sup>164</sup> Furthermore, U.S. military policy is to always abide by the laws and customs of war.<sup>165</sup> All U.S. service members, including those in the special operations community, are trained to abide by military regulations and policies governing the laws of war and armed conflict.<sup>166</sup> Therefore, SOF elements as a whole do meet the Article 4(A)(2)(c) and (d) conditions.<sup>167</sup>

This leaves only the Article 4(A)(2)(b) condition of “having a fixed distinctive sign recognizable at a distance.”<sup>168</sup> Of the four Article 4(A)(2) criteria, this is the one in which SOF behavior differs most from standard military practice. The wearing of nonstandard uniforms in the early parts of OEF<sup>169</sup> is the type of behavior that puts SOF elements at risk of running afoul of this condition. Considering the SOF mission and emphasis on building strong relations with indigenous forces,<sup>170</sup> it is likely that this behavior will continue to be a problem in future conflicts. This behavior is problematic because the law of war considers the uniform to be the primary manner by which lawful military combatants engaged in an international armed conflict distinguish themselves from the local civilian population.<sup>171</sup>

Although this seems to indicate that standard uniforms are required to designate a party as a combatant, there is no rule requiring that combatants wear a complete, standard uniform to distinguish themselves from the civilian population.<sup>172</sup> Indeed, the

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164. See OPERATIONAL LAW HANDBOOK, *supra* note 142, at 34, 37 (stating that service members, including SOF, should be trained to carry their weapons openly in their law of war classes).

165. See DEP'T OF DEF., DEP'T OF DEF. DIRECTIVE NO. 5100.77, *supra* note 144, at 2 (noting that it is Department of Defense policy to ensure that U.S. Armed Forces observe and enforce the law of war).

166. See *supra* note 144 and accompanying text (describing the Department of Defense's emphasis on training individual service members on the United States' law of war obligations).

167. But note that an individual service member who chooses not to carry his weapon openly or who in some way violates the laws or customs of war would not individually meet the Article 4(A)(2)(c) or (d) conditions and would consequently not qualify for POW status.

168. GPW, *supra* note 37, art. 4(A)(2)(b).

169. See *supra* notes 147–49 and accompanying text.

170. See DEP'T OF DEF., JOINT PUBL'N 3-05, *supra* note 117, at II-7 to II-8 (discussing SOF elements' close working relationship with host nation or indigenous forces in missions where SOF supports foreign internal defense and during unconventional warfare). “[SOF units] advise, train, and assist indigenous resistance movements already in existence to conduct [unconventional warfare] and when required, accompany them into combat.” *Id.* at II-8.

171. Parks, *supra* note 9, at 541.

172. *Id.* at 516.

Red Cross commentary to the diplomatic conference that developed Additional Protocol 1 of the Geneva Conventions<sup>173</sup> stated that any customary uniform that distinguished the combatant from nearby noncombatants would be sufficient.<sup>174</sup> These statements indicate that “any device recognizable in daylight with unenhanced vision at a reasonable distance would meet the law of war obligation to be distinguishable from the civilian population.”<sup>175</sup> This distinguishing item could include common items such as a hat, scarf, or armband that have a distinctive meaning in the area of the conflict.<sup>176</sup>

SOF members went to great effort to blend in with their Northern Alliance and other indigenous allies, rather than with the civilian population.<sup>177</sup> For example, SOF elements operating with the Northern Alliance wore the distinctive Massoud pakol and scarf to identify themselves as part of the Northern Alliance forces they accompanied.<sup>178</sup> This would not be problematic because reports indicated that al Qaeda and Taliban forces could easily distinguish the Northern Alliance troops from the local civilian populations.<sup>179</sup> As long as the SOF elements effectively distinguished themselves from the civilian population, they would easily meet the requirements of Article 4(a)(2)(b). Proper identification as combatants rather than the wearing of a complete uniform is, after all, the primary concern of this criterion.

There were several valid justifications for the SOF efforts to try to blend in with their indigenous allies. Perhaps the most important was simply to lower the profile of the SOF operators.<sup>180</sup> Al Qaeda and the Taliban had announced a \$25,000 bounty for each uniformed U.S. service member operating in Afghanistan.<sup>181</sup> Considering this bounty, placing uniformed SOF operators in the midst of the Northern Alliance ranks would have greatly increased their visibility and would therefore constitute an undue risk that they would be

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173. Note that the United States is not a party to Additional Protocol I, but the background of Additional Protocol I is still relevant to the definition of what constitutes a proper fixed sign as required by Article 4(A)(2)(b) of the GPW.

174. See INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 468 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987).

175. Parks, *supra* note 9, at 517.

176. *Id.*

177. See *supra* notes 147–49 and accompanying text.

178. See Parks, *supra* note 9, at 496–97.

179. See *id.* at 498.

180. See *id.* at 497.

181. *Id.*

disproportionately targeted.<sup>182</sup> This was an especially significant risk for SOF elements because they operate in such small numbers.<sup>183</sup>

Another justification for the wearing of the nonstandard uniforms was to gain the trust of Afghan militia allies, some of whom specifically requested that the SOF elements attached to their forces don the traditional dress of their organizations.<sup>184</sup> Regardless of which of these was the prevalent motivation, the record indicates that SOF elements' primary concern was blending in with their Afghan allies, rather than the Afghan civilian population. These personnel were merely exchanging their own combatant uniforms for those of their allies. Such wear of the nonstandard uniform of an ally would not be a violation of Article 4(A)(2)(b) because the SOF member wearing the uniform would still be showing a fixed distinctive sign that distinguished him from the local civilian population.<sup>185</sup>

The preceding analysis indicates that there is no legitimate argument that the Bush administration's justifications for designating detainees as enemy combatants can be used against elements of the U.S. military in future conflicts. There is simply no basis in Article 4 for an enemy to conclude that the GPW does not apply to a captured U.S. service member unless that service member has somehow individually violated one of the Article 4(A)(2) conditions.<sup>186</sup> Unfortunately, many potential enemies likely would not let this fact interfere with their desire to mistreat captured U.S. service members.

### CONCLUSION

Although there is little legal justification to support a claim that captured U.S. service members be designated anything other than POWs, the United States should do all it can to ensure that such a claim is never justifiable. An easy first step would be to mandate the

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182. *See id.*

183. *See* DEP'T OF DEF., JOINT PUBL'N 3-05, *supra* note 117, at I-2.

184. *See* Parks, *supra* note 9, at 497 n.7. U.S. Army Special Forces wore Northern Alliance attire at the request of Northern Alliance General Abdul Rashid Dostum. *See id.*

185. There are other aspects of SOF behavior that would likely make them recognizable as combatants. The mere fact that a person carries U.S. military weaponry would likely serve as a sufficient signal. This is especially the case in countries like Afghanistan, where the enemy is very likely to know the types of weapons that are prevalent in the area and would therefore readily recognize the weaponry of a foreign military. The fact that these same soldiers are carrying high-technology radios, laptop computers, laser designators, and other such equipment, would further serve to distinguish the U.S. SOF elements from ordinary civilians.

186. For example, a U.S. soldier who decided to put on civilian clothes, sneak behind enemy lines with concealed explosives, and detonate a bomb in a church, would not be protected merely because his unit as a whole has met the Article 4 requirements.

wearing of a small U.S. flag, visibly affixed to the uniform of all U.S. service members at all times while on a combat deployment. This requirement would apply to both conventional and SOF elements. The Article 4(A)(2)(b) display of a fixed symbol requirement seems to be the criterion that would be most problematic for certain service members and units, particularly the SOF forces. Requiring the attachment of a small U.S. flag on whatever type of uniform the individual combatant is wearing would preclude any capturing party from legitimately claiming that a captured U.S. service member should not be treated as a POW because of a violation of the fixed symbol criterion.

In addition, the U.S. military should strive to ensure that all members of the armed forces, as individuals, understand and abide by the last three conditions listed in Article 4(A)(2). Note that as Article 4(A)(2)(a) merely requires a defined chain of command for each service member, which is not within the control of the individual combatant, there is no pressing need to ensure that service members understand this requirement. The final three criteria, however, are within the individual service member's control. Although U.S. service members are already trained in the law of war, including the Article 4(A)(2) criteria, both on a regular basis and prior to any deployment,<sup>187</sup> the military should strive to ensure that all soldiers, sailors, and airmen understand the repercussions of failing to abide by these criteria. Additionally, senior leaders should ensure that junior officers and noncommissioned officers vigilantly enforce the requirements of Article 4(A)(2)(b)–(d) on the ground. A violation of any of these conditions by an individual service member could potentially strip that soldier of his POW protections if captured.

A potentially more difficult step would be to review the decision to designate some of the detainees captured in Afghanistan and Iraq as enemy combatants, or at least give these detainees the proper means to challenge the basis of their detention. The analysis in Part IV of this Comment establishes that U.S. service members captured during an international armed conflict should be entitled to POW status as long as they abide by accepted military regulations and practices;<sup>188</sup> therefore, the Bush administration's justifications for its enemy combatant policy will not place U.S. personnel at any legitimate *legal* risk. But the mere fact that the administration's decision to deny POW status to al Qaeda and Taliban detainees is not

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187. See *supra* note 144 and accompanying text.

188. See *supra* Part IV.



legally risky does not make it a wise or proper thing to do. The administration's decision could possibly give future adversaries some precedent to support their decisions to deny POW protections to captured U.S. service members in murky situations.

In this context, the administration's decision could be dangerous in practice for captured U.S. service members in several different situations. For example, the United States would now have a significantly more difficult task arguing that a captured service member who was not adhering to the Article 4(A)(2) requirements should nonetheless receive the protections given to a POW. An enemy state would likely be less willing to make such a concession in light of a U.S. policy that refuses to make any concessions in the designation of individual Guantanamo detainees. Another situation where the enemy combatant policy could be harmful is one in which the applicability of the GPW to a particular individual or group of individuals is a very close call. In such a situation, the enemy state might be reluctant to err on the side of caution and afford the captured individuals POW status in light of the administration's conduct. Finally, in a conflict involving the United States that does not actually rise to the level of an international armed conflict between parties to the Geneva Conventions and therefore does not trigger application of the GPW,<sup>189</sup> the United States would no longer be able to strongly argue that captured service members should be afforded POW status merely because it is the "right" or accepted thing to do. These are apparently concerns that former Secretary of State Powell also considered. In advocating application of the GPW to the conflict with al Qaeda and the Taliban, he wrote that such a determination "presents a positive international posture, *preserves U.S. credibility and moral authority by taking the high ground*, and puts us in a better position to demand and receive international support."<sup>190</sup>

Another problem with the present policy is that future adversaries could point to the Bush administration's reluctance to give Guantanamo detainees a reasonable degree of due process to challenge their enemy combatant classification and their continued detention.<sup>191</sup> In much the same way, an adversary could classify a captured U.S. service member—who actually has abided by the requirements of the GPW—as an enemy combatant, and

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189. See *supra* notes 39–41 and accompanying text.

190. Powell Memorandum, *supra* note 30, at 3 (emphasis added).

191. See *supra* Part II.B (discussing Supreme Court rulings in detainees' attempts to secure due process for their claims of improper classification as enemy combatants).

subsequently refuse to provide that service member with any reasonable basis to challenge the grounds of the classification. In response to U.S. protests, the detaining party could merely point to the fact that the Bush administration itself was reluctant to give detainees a means to challenge the basis of their detention. In short, the classification process and the administration's defense of the process set a bad example from a country that has always prided itself on strict adherence to, and respect for, the laws of war.

Although it would be inadvisable to classify al Qaeda terrorists as POWs, granting POW status to Taliban detainees who have no association with terrorist activity may be a good way to gain some goodwill in the international community and among potential future adversaries. At the least, it would set a more positive precedent. By setting an example of erring on the side of greater protections for nonterrorist detainees, the United States could potentially strengthen its moral claim that all captured U.S. service members should be classified as POWs. Although this would do little to help U.S. service members captured by terrorists or other individuals who regularly disregard the law of war, it may help those service members captured by the armed forces of somewhat more reputable countries.

The issues raised in this Comment will likely recur. Al Qaeda and similar groups continue to exist and are probably plotting more attacks against the United States. Combating such an irregular force requires flexibility and versatility from the U.S. Armed Forces. These forces must constantly adapt their behavior and tactics to effectively counter their enemies. But in adapting to fight these groups in their type of battle and on their terrain, these forces must ensure that they individually continue to retain their identity as combatant U.S. service members by adhering to the provisions of the Geneva Conventions. The Geneva Conventions will protect them if captured, but only if they abide by its stipulated conditions.

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