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Enemy Combatants and Access to *Habeas Corpus*: Questioning the Validity of the Prisoner of War Analogy

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I. Introduction

The reason I oppose my chairman, for whom I have great respect, is because the habeas process is a doctrine that is normally associated with criminal law, and we are in a war. The Japanese and German prisoners we interred in World War II never had access to our Federal courts to bring lawsuits against the people who confined them—our own troops—for a reason: it was a right not given in international law to an enemy prisoner, and it was not a right we gave to any prisoner we have held in the history of our country consciously as Congress.¹

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1. 152 Cong. Rec. S10223, S10263-10267 (daily ed. Sept. 27, 2006)(statement of Sen.

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This quote by Senator Lindsay Graham made in relation to Senate deliberations on the Military Commission Act of 2006 reflects a common assertion by those opposed to allowing detainees access to any or even limited statutory *habeas corpus* review of enemy combatant designations and the accordant detention resulting from this designation. This opposition was instrumental in the limits imposed by Congress on the availability of statutory *habeas* access for these detainees in the amendments to the Detainee Treatment Act and the Military Commission Act. This same analogy is asserted as a justification for denial of all *habeas* access for review of other issues related to the treatment of detainees. The assertion rests on a basic premise –such review is both illogical and inconsistent with the tradition of warfare because prisoners of war (POWs) have never been provided analogous access to judicial review.² This view reflects a flawed assumption that the necessity for *habeas* access is equal for both POWs and other individuals detained as a result of their participation in armed conflict - individuals excluded from the benefits of the Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention).³ Accordingly, it is not only unjustified, but distorts the underlying questions at issue in the *habeas* debate. As will be explained below, there is no analogous necessity, because denying a captured enemy personnel POW status results in the inapplicability of the complex mechanism established by the Prisoner of War Convention to allow captured personnel the ability to challenge arbitrary actions by a detaining power, in the case of the current debate the United States.

This article will challenge the validity of this analogy by explaining this internal compliance mechanism of the Prisoner of War Convention, and exposing how designation as an “enemy combatant”⁴ deprives captured personnel of any legal

Graham), available at [http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all & page=S10263&dbname=2006_record](http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=S10263&dbname=2006_record).

2. This analogy was asserted by Justice Scalia as a consideration counseling against granting the requested relief in *Rasul v. Bush*, where he wrote: “Over the course of the last century, the United States has held millions of alien prisoners abroad. A great many of these prisoners would not doubt have complained about the circumstances of their capture and the terms of their confinement.” *Rasul v. Bush*, 542 U.S. 466, 498 (2004).
3. See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. 3364, at art. 2 [hereinafter Prisoner of War Convention].
4. The definition, significance, and legitimacy of the term “enemy combatant” is itself the subject of intense debate and uncertainty. Analysis of the multifarious and complicated aspects of this term is well beyond the scope of this article. Therefore, for purposes of this article, the term “enemy combatant” refers to any individual captured by the United States so designated with the consequence of exclusion from the benefits of the full corpus of the Prisoner of War Convention.

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remedy for arbitrary decisions by the detaining power, mainly the United States. It is this designation that produces the necessity for some alternate external modality to scrutinize compliance with standards related to detention and treatment. While *habeas* access is not necessarily the only feasible option to fill this void, it would provide a meaningful check to potential arbitrary actions related to detainees. Furthermore, as will be explained below, the fears of inherent inefficiency of such a review, suggested by the analogy to POWs, proves fundamentally misleading for it confuses the failure of the United States to legally commit to comply with a clear and logical criteria for enemy combatant status determinations with the ultimate issue of the feasibility of judicial oversight for the application of such a standard.

This article will first explain the internal compliance regime of the Prisoner of War Convention, and how this regime evolved to provide a mechanism for POWs to seek redress for alleged violations of the Convention itself. It will then briefly review why individuals captured in association with the Global War on Terror⁵ are unlikely to ever qualify for the benefits of this regime. It will then discuss why the analogy between enemy combatants and POWs is fundamentally invalid, but also why a total absence of oversight of the detaining power is inconsistent with the principle of humane treatment – a principle applicable to all captured and detained personnel. The article will then discuss why *habeas* access could be a potentially effective and efficient substitute to the internal compliance regime of the Prisoner of War Convention that would fully satisfy this humane treatment obligation, particularly if the United States commits to a legally binding standard for status determinations.

Before exploring this issue, a disclaimer seems necessary. This author is not so naive as to suggest that the internal compliance regime established by the Prisoner of War Convention has been historically effective. Indeed, any law of war practitioner or scholar would invariably concede that the record of application has been anything but effective. However, this is not a justification for ignoring the *purpose* of this regime when analyzing the legitimacy of providing detainees an alternate method to challenge alleged arbitrary detaining power action. Indeed, for a nation like the United States, the assumption underlying any analogy to POWs for purpose of engaging in such analysis must be that this regime would be fully

5. This term will be used throughout this article as a convenient reference for the variety of military operations conducted by the United States subsequent to September 11, 2001. Use of this term is not intended as a reflection on this author's position on the legitimacy of characterizing these operations as a "war." While the author acknowledges the hyperbolic nature of this term, it is intended to refer to combat military operations against armed and organized opposition groups.

implemented. Only such an assumption will facilitate a meaningful and legitimate analysis of this issue.

II. Analysis:

A. How the Prisoner of War Convention Safeguards the Interests of Prisoner of War

Assessing the propriety of *habeas* access for enemy combatants through analogy to POWs requires an understanding of the comprehensive framework created to protect the legally established rights of POWs. Unlike enemy combatants, designation as a POW results in application of the full corpus of the Prisoner of War Convention.⁶ This treaty, revised in 1949, ensured that captured personnel were effectively “respected and protected.”⁷ Although a predecessor version of this treaty was in force during the Second World War, the drafters of the 1949 version expanded the scope of regulation to include 143 articles, addressing virtually every aspect of capture, captivity, and repatriation.⁸ Most of these articles deal with specific substantive POW rights and obligations. However, in order to ensure compliance with the Convention, the treaty provides a mechanism for subjecting the conduct of the detaining power to external scrutiny, and allowing POWs to challenge what they believe is improper application of these legal obligations.⁹ This mechanism is built on three primary pillars that will be explained in this article: the Protecting Power concept; the Prisoners Representative; and access to impartial relief organizations.

The Protecting Power concept reveals a fundamental premise of the Geneva tradition: that the existence of armed conflict should not deprive individual victims of war the benefits of normal diplomatic safeguards.¹⁰ Developed prior to the international legal recognition of individual competence to assert violations of international law, the four Geneva Conventions implement a compliance

6. See Prisoner of War Convention, *supra* note 3.

7. See *id.* at arts. 13 -14.

8. See *id.* at art. 5. Article 5 includes, by reference, article 4 of the Convention (which defines prisoner of war) and states that the “present Convention shall apply to the persons” that fall under article 4, thereby incorporating all the protections of the Convention. *Id.*

9. See generally, Prisoner of War Convention, *supra* note 3, at Part VI: Execution of the Convention.

10. See JEAN DE PREUX ET AL, INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY: GENEVA CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 387 (Jean S. Pictet ed., A.P. de Henry trans., International Committee of the Red Cross 1960)(1958) [hereinafter ICRC COMMENTARY GPW].

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mechanism intended to operate within the traditional framework of state sponsorship of international protections for individuals.¹¹ This traditional framework did not envision a process whereby individuals would advance their own international rights against states.¹² Instead, individuals relied on their own state to advance their interests when they were victimized by the actions of another state, normally through the diplomatic process.¹³ However, because there were times when an individual's state was unable or unavailable to sponsor an individual grievance, international law developed a process whereby a neutral third state would fill this protection void on behalf of the aggrieved individual.¹⁴

It is axiomatic that diplomatic relations between states are normally one of the first casualties of war. As a result, this "normal" method of ensuring that a state's citizens are protected against the misconduct of another state is unavailable for POWs, whose detention is under the authority of a state at war with their own state. The Protecting Power concept evolved the legal means to fill this vacuum of diplomatic protection. The idea is simple and direct: at the commencement of armed conflict between states, a neutral state will be designated as a Protecting Power, and will essentially serve as the "replacement" state for purposes of asserting diplomatic protection for the Protected Persons, in the case of captured enemy personnel POWs.¹⁵ This concept is reflected in Article 8 of the Prisoner of War Convention:

The present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the

11. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 52, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. 3362, at art. 52 [hereinafter GWS]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members at Sea, art. 53, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. 3363, at art. 53 [hereinafter GWS Sea]; Prisoner of War Convention, *supra* note 3, at art. 132; Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, art. 149, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. 3365, at art. 149 [hereinafter GC]. Each of these Conventions includes the following identical language:

At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention. If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed. Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay.

12. See GWS, *supra* note 11, at art. 52.

13. *Id.*

14. See Leslie C. Green, THE CONTEMPORARY LAW OF ARMED CONFLICT, at 59-61 (2d Ed. 2000).

15. See Prisoner of War Convention, *supra* note 3, at art. 8.

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Parties to the conflict. For this purpose, the Protecting Powers may appoint, apart from their diplomatic or consular staff, delegates from amongst their own nationals or the nationals of other neutral Powers. The said delegates shall be subject to the approval of the Power with which they are to carry out their duties.¹⁶

The International Committee of the Red Cross Commentary provides an even more direct indication that this provision is intended to provide State “sponsorship” for POWs: “[a] Protecting Power is, of course, a State instructed by another State (known as the Power of Origin) to safeguard its interests and those of its nationals in relation to a third Power (known as the Detaining Power).”¹⁷

This Protecting Power concept represents a critical assumption that underpins the Prisoner of War Convention: compliance with obligations related to POWs must be subject to some third party oversight. Scrutiny is the key word in Article 8, for it suggests that the modalities of state relations will be invoked to address breaches of such obligations.¹⁸ Because determining status as a POW and the continued detention that flows from such status is among the rights and obligations established by the Prisoner of War Convention, this modality would obviously be available for any detainee who believed he was the subject of an improper status determination.¹⁹ While the Prisoner of War Convention provides virtually no guidance as to how such interventions would be effectuated, Article 8 reflects an apparent expectation on the part of the drafters that the diplomatic process would achieve an appropriate balance between the interests of the detaining power and the detainee.²⁰

By subjecting compliance with the obligations imposed upon a detaining power to the “scrutiny” of the Protecting Power, the drafters of the Prisoner of War Convention provided a means by which individual POWs would be ensured the same type of “diplomatic sponsorship” for their rights available in peacetime.²¹ Unfortunately, this Protecting Power concept has rarely been as effective as conceived. This is because Article 8 requires the States in conflict to agree upon the neutral State that will perform this function, a process that has been historically illusive.²² However, this has not rendered the Protecting Power concept hollow. Instead, as will be discussed below, the International Committee of the Red Cross

16. *Id.*

17. ICRC COMMENTARY GPW, *supra* note 10, at 93.

18. *See* Prisoner of War Convention, *supra* note 3, at art. 8.

19. *Id.* at art. 21.

20. *See* ICRC COMMENTARY GPW, *supra* note 10, at 99-100.

21. *See* Prisoner of War Convention, *supra* note 3, at art. 8.

22. *See* ICRC COMMENTARY GPW, *supra* note 10, at 94.

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(ICRC) has emerged as the *de facto* Protecting Power.

a. The Role of the International Committee of the Red Cross as the *de facto* Protecting Power

The post 1949 application of the Protecting Power concept did not produce the effects obviously intended by the drafters of the Prisoner of War Convention.²³ This was in large part attributable to the inability of States engaged in armed conflict to agree upon a Protecting Power.²⁴ Nonetheless, when the international community came together in 1974 to develop a new treaty to supplement the Geneva Conventions, one of the objectives was to not only reaffirm the Protecting Power concept, but to strengthen that concept by addressing this habitual impediment.²⁵ This ultimately manifested itself in the provisions of the 1977 Protocol I Additional to the Four Geneva Conventions of 1949, a treaty developed to improve the 1949 Geneva Conventions by supplementing them with necessary modifications and additions. According to the ICRC Commentary to Additional Protocol I (AP I):

The question of supervising the application of the rules, together with the question of the scope of application, was the subject that gave rise to most discussion in Part I. At all stages of the procedure of reaffirmation and

23. *See generally* the Preamble to Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), of 8 June 1977., pmb., 1125 U.N.T.S. 3 [hereinafter AP I].

24. According to the ICRC Commentary to Additional Protocol I: Various reasons had been advanced to explain the absence of Protecting Powers or of their substitutes in the majority of conflicts. Apart from the fact that many conflicts were not subjected to the system of Protecting Powers because their character was either exclusively or predominantly non-international, the following explanations are given amongst those which were put forward: -- the Parties to the conflict in some cases abstained from appointing Protecting Powers because they had not broken off diplomatic relations; -- in some cases States did not designate a Protecting Power for fear that this might be interpreted as a recognition of the statehood of an adversary which they refused to recognize as a State; -- the prohibition of the use of force contained in Article 2, paragraph 4, of the Charter of the United Nations means that States only rarely recognize the existence of an armed conflict; -- the relatively limited number of States acceptable to both Parties to the conflict concerned in each set of bilateral relations; the problem of directing the belligerents' attention to designating and accepting Protecting Powers at a time when hostilities are raging; the burden imposed on States called upon to act as Protecting Powers in terms of material and human resources, as well as the risk of political difficulties vis-à-vis the Parties to the conflict concerned.

See CLAUDE PILLOUD ET AL, INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 77 (Yves Sandoz et al eds., Tony Langham et al trans., Martinus Nijhoff, 1987)[hereinafter AP I COMMENTARY].

25. *Id.* at 76-77.

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development, the need not only for developing the rules of protection, but also for strengthening the already existing but under-used mechanisms for application and the supervision of application was recognized. The usefulness of Protecting Powers and their substitutes was not called into question. Nevertheless, it was to be noted that, since the conclusion of the Conventions, there had only been Protecting Powers in three conflicts, and even then it was not for all the Parties concerned, nor to carry out all the tasks provided for in the Conventions.²⁶

In response to the challenge of designating a state to act as Protecting Power, the drafters of AP I reaffirmed the obligation to utilize the Protecting Power mechanism during armed conflict.²⁷ However, in an obvious recognition that the *de facto* practice had and would likely continue to diverge from *de jure* obligation, the drafters also formally reinforced the use of the ICRC as a substitute for the Protecting Power.²⁸ Although the special role of the ICRC in facilitating compliance with the Geneva Conventions dates back to the Conventions themselves, the renewed emphasis on the ICRC role in Additional Protocol I (also reflected in Additional Protocol II, the treaty developed to supplement the rules applicable to non-international armed conflicts), reflected the pragmatic recognition that the inability to agree upon a Protecting Power necessitated a robust and reliable substitute mechanism to ensure scrutiny of detaining power compliance with applicable treaty obligations.

This pragmatism is reflected in Article 5 of AP I, which indicates that it is the duty of Parties to an international armed conflict to designate a Protecting Power and to work with the ICRC to reach agreement on a state to perform that function.²⁹ In addition, Article 5 provides that:

26. *Id.*

27. AP I, *supra* note 23, at art. 5.

28. *Id.*

29. Specifically, Article 5 indicates:

1. It is the duty of the Parties to a conflict from the beginning of that conflict to secure the supervision and implementation of the Conventions and of this Protocol by the application of the system of Protecting Powers, including 'inter alia' the designation and acceptance of those Powers, in accordance with the following paragraphs. Protecting Powers shall have the duty of safeguarding the interests of the Parties to the conflict.
2. From the beginning of a situation referred to in Article 1 [international armed conflict], each Party to the conflict shall without delay designate a Protecting Power for the purpose of applying the Conventions and this Protocol and shall, likewise without delay and for the same purpose, permit the activities of a Protecting Power which has been accepted by it as such after designation by the adverse Party.
3. If a Protecting Power has not been designated or accepted from the beginning of a situation referred to in Article 1, the International Committee of the Red Cross, without prejudice to the right of any other impartial humanitarian organization to do likewise,

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If, despite the foregoing, there is no Protecting Power, the Parties to the conflict shall accept without delay an offer which may be made by the International Committee of the Red Cross or by any other organization which offers all guarantees of impartiality and efficacy, after due consultations with the said Parties and taking into account the result of these consultations, to act as a substitute. The functioning of such a substitute is subject to the consent of the Parties to the conflict; every effort shall be made by the Parties to the conflict to facilitate the operations of the substitute in the performance of its tasks under the Conventions and this Protocol.³⁰

This provision, reaffirming the special responsibility of the ICRC to monitor compliance with the Geneva Conventions and their Additional Protocols, and to advocate the interests of individuals under the control of an adverse party, is further testament to the underlying premise of the Protecting Power concept. Indeed, the responsibility of the Protecting Power or the substitute organization is to advance the interests of individuals impacted by application of these treaties. This is highlighted in the ICRC Commentary to AP I:

[f]or their part, the Protecting Powers act simultaneously as messengers and guardians: they serve as an intermediary between the adverse Parties and supervise the application of the law. These two aspects of their function form the object of a number of special provisions of the Conventions and the Protocol, but they are not limited to these provisions . . . To supervise the application of the law undeniably entails the right to demand that violations shall cease . . .³¹

All individuals designated as POWs pursuant to the Prisoner of War Convention are “protected persons” within the meaning of the treaty.³² Accordingly, all such individuals are entitled to seek the assistance of the Protecting Power or

shall offer its good offices to the Parties to the conflict with a view to the designation without delay of a Protecting Power to which the Parties to the conflict consent. For that purpose it may, 'inter alia', ask each Party to provide it with a list of at least five States which that Party considers acceptable to act as Protecting Power on its behalf in relation to an adverse Party, and ask each adverse Party to provide a list of at least five States which it would accept as the Protecting Power of the first Party; these lists shall be communicated to the Committee within two weeks after the receipt of the request; it shall compare them and seek the agreement of any proposed State named on both lists. See AP I, *supra* note 23, at art. 5.

30. *Id.*

31. See AP I COMMENTARY, *supra* note 24, at 79-80 [emphasis added].

32. See Prisoner of War Convention, *supra* note 3, at art. 4; see also ICRC COMMENTARY GPW, *supra* note 10, at 44.

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appropriate substitute organization, to demand that any violation of the Conventions be terminated and potentially redressed.³³ It is therefore apparent that with regard to POWs, reliance on the intervention of *de facto* diplomatic protection was regarded as an appropriate and effective modality for guaranteeing the interests of detained individuals.

Reliance on substitute diplomatic sponsorship is not, however, the only remedy made available to POWs who believe they are being treated in a manner inconsistent with treaty obligations. POWs are also provided a more direct mechanism to raise concerns regarding appropriate application of the Prisoner of War Convention. Pursuant to Article 79 of the Convention, POWs are entitled to organize within a detention facility and elect a “Prisoners Representative.”³⁴ The function of the individual POW designated as the Prisoners Representative is to speak on behalf of other POWs, and represent their interests to the detaining power, the ICRC, the Protecting Power, and any other organization involved with the execution of the Convention. According to the ICRC Commentary:

In electing prisoners’ representatives ‘entrusted with representing them,’ prisoners of war appoint their spokesman before the authorities and agencies listed. This is confirmed by Article 126, which states that delegates of the Protecting Powers and of the International Committee of the Red Cross have the right to interview prisoners’ representatives without witnesses. The prisoners’ representative also represents his fellow-prisoners before ‘any other organization which may assist them.’³⁵

Although this appears to be a somewhat antiquated concept, and has in practice been rarely used since the Second World War, the import is more relevant than the actual practice. This provision, like the Protecting Power mechanism, is intended to provide POWs with access – guaranteed by treaty – for addressing concerns related to Convention compliance. Thus, the Prisoner of War Convention provides a “bottom up” framework for POWs to address perceived violations of the treaty. Starting with individual prisoners, through the Prisoners Representative, and ultimately by seeking the intervention of a Protecting Power or appropriate substitute, POWs are empowered to demand treaty compliance by their captors. By consolidating concerns through the Prisoners Representative, the Convention addresses the pragmatic constraints resulting from large numbers of detainees.

There is no question that this framework has been far less effective in practice

33. See Prisoner of War Convention, *supra* note 3, at art. 78.

34. *Id.* at art. 79.

35. ICRC COMMENTARY GPW, *supra* note 10, at 390.

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than in theory. However, the purpose of outlining the modalities provided for POWs to raise compliance concerns, is not to suggest that this system is perfect. Instead, it is to expose why it is invalid to analogize POWs to enemy combatants for purposes of assessing access to judicial review of status determinations. Unlike POWs, enemy combatants are not provided a legally guaranteed right to organize within their community for purposes of addressing concerns related to treaty compliance.³⁶ Nor are they provided legally guaranteed access to the assistance of the ICRC.³⁷ Any such organization/representation is purely gratuitous on the part of the United States, which obviously degrades whatever limited effectiveness it might have for POWs.³⁸ In addition, this prisoner representative concept cannot be considered in isolation, but must be considered as a component of the broader self-contained Prisoner of War Convention compliance structure. For example, the relationship between the prisoner's representative and the Protecting Power (or ICRC substitute) facilitates the efficiency of the Protecting Power by weeding out unfounded or easily resolved issues, allowing the Protecting Power to maximize emphasis on those issues incapable of resolution at this lower level.

Another, albeit more subtle, internal compliance mechanism provided for POWs is the right to communicate with the "outside world."³⁹ From the inception of detention and continuing throughout the internment period, the Prisoner of War Convention provides for a certain degree of transparency through notice of detention and access to postal communication.⁴⁰ At the inception of detention, personnel qualifying (or presumed to qualify) for POW status are entitled to submit a "capture card," which is the simple but critical notification to family members

36. See Prisoner of War Convention, *supra* note 3, at art. 3. Article 3 of the Convention is a self-inclusive article that provides minimum protections for any combatants under control of a contracting party, regardless of their POW status. It does not entitle such combatants to the full scope of the Convention, but rather sets a minimum standard of treatment of such individuals; hence, its self-inclusive character.

37. It may be asserted that a "substitute" for diplomatic protection for enemy combatants is unnecessary because, unlike POWs, the diplomatic ties between their national authorities and the United States remain intact. However, the existence of continuing diplomatic relations does not appear to have been particularly beneficial for individuals designated as enemy combatants by the United States, for the obvious reason that this designation carries with it an implication of acting outside acceptable bounds of conduct. It is therefore not surprising that these individuals do not appear to have benefited from robust diplomatic efforts of protective intervention, but instead have been treated in many ways as having divested their entitlement to such protective sponsorship.

38. See *United States v. Noriega*, 746 F.Supp. 1506 (S.D.Fla.1990) (emphasizing the limited protection afforded by policy based application of law of war principles because of the ability of the government to modify such policy at will).

39. See Prisoner of War Convention, *supra* note 3, at arts. 69-77.

40. *Id.*

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and/or their government authorities of their detained status.⁴¹ In addition, the detaining power is obligated to provide notice of the internment to the POW national authority through the Prisoner Registration Bureau.⁴² Thus, from the inception of detention, the *existence* of detention is made a matter of record with the POWs state authorities and the international community, facilitating the efforts by the state of nationality to seek the intervention of the Protecting Power to safeguard the rights of its captured nationals. This transparency also operates to protect POWs by foreclosing the ability of the detaining power to disavow the existence of detention, at the point when repatriation is required. In short, the opportunity for a captured individual to communicate the mere existence of detention serves as a powerful check on potential arbitrary and abusive treatment by a detaining power by placing that power on notice that accountability – either during or after the period of detention – will be demanded.

Access to such communication, as described above, does not terminate after initial notice of detention.⁴³ Instead, the Prisoner of War Convention provides POWs with access to postal communication with individuals and institutions in their country of origin.⁴⁴ While certain provisions protect the detaining power's legitimate security interests, a total denial of such access is not permitted and would invariably lead to a complaint by the Protecting Power.⁴⁵ Thus, POWs are afforded the opportunity to bring treatment complaints to the attention of their own governments directly, thereby enabling their government to press the Protecting Power to intervene to address such complaints.

Collectively, these internal compliance mechanisms are intended to augment the expectation that detaining powers will execute the obligations established by the Prisoner of War Convention in good faith.⁴⁶ They reflect the principle that POWs remain under the protection of the international community, and the assumption that detention must not terminate access to the normal process of state sponsorship of individual rights, established by international law. While these mechanisms have rarely been fully effective since 1949, they do illuminate why access to the detaining power's municipal judicial process is not the norm for POWs. Such access would seem to offer a hollow benefit in the arsenal of protection, if the

41. *Id.* at art. 70.

42. *Id.* at art. 122.

43. *See id.* at arts. 71-77.

44. *See* Prisoner of War Convention, *supra* note 3, at arts. 71-73.

45. *See id.* at arts. 71 and 76.

46. *See generally id.* at arts. 69-77; *see also* ICRC COMMENTARY GPW, *supra* note 10, at 339-380.

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detaining power was unwilling to comply with the already established internal compliance procedures.

B. Why Enemy Combatants Are Not Prisoners of War

It is not the purpose of this article to provide an extensive critique of the decision by the United States to exclude individuals captured in association with the Global War on Terror from status as POWs. Such a critique is not only beyond the scope of this article, but would also cover ground that has been repeatedly plowed by scholarship and litigation since the terrorist attacks of 9/11. Instead, it is sufficient for purposes of this article to acknowledge this denial of status, and briefly explain the underlying rationale relied upon by the United States in support of this decision in order to highlight the reality that individuals designated as enemy combatants will invariably be deprived of the benefits of the Prisoner of War Convention.

Pursuant to the Prisoner of War Convention, entitlement to POW status is contingent upon meeting the qualification criteria for such status as established in the Prisoner of War Convention.⁴⁷ This qualification equation is often simplified through the concept of “right kind of conflict/right kind of person.”⁴⁸ This simplification emphasizes the two fundamental requirements for entitlement to POW status. The first is that the individual combatant is captured in association with an international armed conflict, or more precisely, an inter-state armed conflict.⁴⁹ Nothing is more apparent in the structure of the Geneva Conventions than this requirement.⁵⁰ Without even considering the theoretical underpinnings of this inter-state triggering requirement, the plain structure of the Prisoner of War Convention bears this out.⁵¹ POW status qualification criteria are established in Article 4 of the Convention. However, it is only possible to “reach” Article 4 by passing through Article 2, the provision that defines the situations where the subsequent articles apply.⁵² These situations are exclusively limited to inter-state disputes involving the intervention of armed forces.⁵³ Accordingly, Article 4 is never applicable in any *other* kind of armed conflict.

47. See Prisoner of War Convention, *supra* note 3, at arts. 2 and 4.

48. See, e.g., Int'l & Operatoinal Law Dep't, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, THE LAW OF WAR DESKBOOK, at Ch. 6 (2006).

49. See Prisoner of War Convention, *supra* note 3, at art. 2.

50. See ICRC COMMENTARY GPW, *supra* note 10, at 19-27.

51. See Prisoner of War Convention, *supra* note 3, at art. 2.

52. *Id.*

53. *Id.*

This is the principal basis for the United States' determination that captured *al Qaeda* warriors are conclusively presumed to be excluded from POW status.⁵⁴ Although the armed conflict that the United States asserts exists between this transnational organization and the United States is international in scope, there is not even a credible argument that *al Qaeda* satisfies the requirements necessary to be considered a state.⁵⁵ While it is plausible that such personnel might have been associated with the armed conflict between the United States and Afghanistan during the initial phases of Operation Enduring Freedom,⁵⁶ so long as the United States persists in treating the armed conflict with *al Qaeda* as distinct from armed conflicts with sponsoring states,⁵⁷ the predicate requirement of "right kind of

54. See Memorandum from Jay S. Bybee, Assistant Attorney General, United States Department of Justice, for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense (Jan. 22, 2002), available at: <http://news.findlaw.com/hdocs/docs/doj/bybee12202mem.pdf> (last visited Apr. 11, 2007).
55. See Prisoner of War Convention, *supra* note 3, at art. 2; see also ICRC COMMENTARY GPW, *supra* note 10, at 19-27.
56. See Geoffrey S. Corn, Eric Tablot Jensen, and Sean Watts, *Combatant Status Review Tribunals, a Response to Flawed Answers* (on file with author) (critiquing Joseph Blocher, *Combatant Status Review Tribunals: Flawed Answers to the Wrong Question*, 116 YALE L.J. 667 (2006)).
57. As noted by the United States Supreme Court in *Hamdan v. Rumsfeld*, the law applicable to non-international armed conflicts contrasts with that applicable to international armed conflicts in that it "affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory 'Power' who are involved in a conflict 'in the territory of' a signatory." See *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2796 (2006). From the outset of the combat operations initiated by the United States in Afghanistan in response to the attacks of September 11, 2001, the Bush administration characterized the conflict with *al Qaeda* as distinct from the conflict with the Taliban. The rationale for this theory is summarized as follows:

United States forces began operations in Afghanistan on 7 October 2001. US forces were in conflict with armed forces professing allegiance to the Taliban, an organization asserting control of limited government functions in limited parts of the country (it is not clear whether the Taliban represented the State, or were one of many dissident groups vying for control of a failed State). Operations were also directed against members of the *al Qaeda* terrorist organization. Based on the assumption that the Taliban regime represented the *de facto* government of Afghanistan, the official US position was that an international armed conflict within the meaning of Common Article 2 existed between the military forces of two states – the United States and Afghanistan. Therefore, with regard to operations against the Taliban, the full body of the law of war became applicable. Simultaneously, US forces engaged in armed conflict with *al Qaeda*, a transnational, well organized and equipped non-governmental terrorist organization that had "declared war" against the United States. This group was operating from sanctuaries inside the territory of Afghanistan, and was composed of members from many nations, both in Afghanistan and elsewhere in the world. Because *al Qaeda* did not then, nor arguably ever will, satisfy the criteria of "Statehood" for purposes of analyzing applicability of the law of war, the US determined that the conflict against *al Qaeda* was not an international armed conflict. In December 2001, US operations resulted in the

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conflict” cannot be satisfied. Accordingly, personnel captured in association with this armed conflict do not benefit from the provision of the Prisoner of War Convention.

Assuming, however, that the initial “right kind of conflict” requirement is satisfied, the second requirement that individuals captured during such a conflict meet the Article 4 POW qualification criteria, or that the individual detainee is the “right kind of person,” still must be met.⁵⁸ Article 4 of the Prisoner of War Convention establishes who is entitled to POW status upon capture. The United States has taken the position that the *sine qua non* for qualifying for status pursuant to this article is satisfaction of the “four conditions” of lawful belligerent status.⁵⁹

downfall of the Taliban regime. An interim government, with the support of the international community, replaced the Taliban government in January 2002. This was the *de facto* termination of the international armed conflict between the US and Afghanistan. However, this did not terminate the armed conflict between the United States and al Qaeda.

See Memorandum from Jay S. Bybee, Assistant Attorney General, United States Department of Justice, for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense (Jan. 22, 2002), *available at*: <http://news.findlaw.com/hdocs/docs/doj/bybee12202mem.pdf> (last visited Apr. 11, 2007). From the outset of these operations, most experts endorsed this view that the armed conflict in Afghanistan was “international” within the meaning of common article 2. However, the conflict segregation theory adopted by the United States proved far more controversial, with many experts and governments asserting that the conflict with al Qaeda was conflated with the broader conflict with the Taliban. Nonetheless, this conflict segregation interpretation is critical to understand why al Qaeda detainees have been excluded from possible POW status. It is this classification as “non-international” that removes these detainees from the possible application of the provisions of the Prisoner of War Convention pursuant to which militia groups or other volunteer corps qualify for POW status, because these provisions are wholly inapplicable to non-international armed conflicts. The Supreme Court effectively endorsed this conclusion in *Hamdan v. Rumsfeld*. No part of the decision suggested that Hamdan, by virtue of being captured in Afghanistan, was subject to the full corpus of the Prisoner of War Convention. Instead, the Court restricted its decision to the baseline humane treatment protections of Common Article 3.

58. *See* Prisoner of War Convention, *supra* note 3, at art. 4; *see also* ICRC COMMENTARY GPW, *supra* note 10, at 47-61.

59. Article 4(A)(2) extends prisoner of war status beyond traditional members of the armed forces to members of militia and organized resistance groups. Prisoner of War Convention, *supra* note 10, at art. 4(A)(2). Article 4 states in relevant part: “Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy: . . . (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

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These four conditions are explicitly imposed upon members of militia and volunteer corps forming part of the regular armed forces; and, according to U.S. interpretation of the Convention, they are implicitly imposed upon members of the regular armed forces.⁶⁰ Accordingly, even combatants associated with a state fighting in the context of an international armed conflict are not automatically qualified as POWs. Instead, non-compliance with these four conditions provides a basis for presumptive disqualification.⁶¹

This is the basis relied upon by the United States to exclude captured Taliban warriors from POW status.⁶² According to the United States, the systematic

(c)that of carrying arms openly;

(d)that of conducting their operations in accordance with the laws and customs of war.

Id.

These four criteria are considered by the United States and many other states to apply *a fortiori* to members of the regular armed forces of a state. Failure to comply with these criteria was relied on by the United States as the basis to exclude from potential prisoner of war status captured members of the Taliban armed forces in Afghanistan. See Jay S. Bybee, Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the DoD (Jan. 22, 2002), available at: <http://news.findlaw.com/hdocs/docs/doj/bybee12202mem.pdf> (last visited Apr. 11, 2007).

60. There are some legal scholars who assert that the omission of these four criteria as a condition for POW status for members of the regular armed forces indicates that they are irrelevant to qualification for status for such personnel. See, e.g. Comment by Deborah Pearlstein, available at <http://www.opiniojuris.org/posts/1169560335.shtml#2962> ("being a member of the state's armed forces is status enough to qualify for POW protection."). However, such an interpretation is questionable based on the history and Commentary to the Third Convention. As the Commentary indicates, the drafters were in *unanimous* agreement that the new status provisions were to be in "harmony" with the Hague Regulations of 1907. That treaty clearly indicated that compliance with the "four criteria" was necessary for qualification as a belligerent for both members of the armed forces and militia/volunteers ("The qualification of belligerent is subject to these four conditions being fulfilled."). The Commentary also explains that the drafters considered it unnecessary to explicitly impose these criteria on "members of the armed forces" for the same reason they were not included in the 1907 Hague Regulations: the assumption that states would always require compliance with such criteria as a condition for becoming a member of the armed forces ("The drafters of the 1949 Convention, like those of the Hague Convention, considered that it was unnecessary to specify the sign which members of armed forces should have for purposes of recognition. It is the duty of each State to take steps so that members of its armed forces can be immediately recognized as such and to see to it that they are easily distinguishable from members of the enemy armed forces or from civilians."). See E-mail posting from Geoffrey S. Corn in response to the Pearlstein Commentary (Jan. 23, 2007, 11:42) (last visited Mar. 11, 2007).
61. See Geoffrey S. Corn, Eric Tablot Jensen, and Sean Watts, *Combatant Status Review Tribunals, a Response to Flawed Answers* (on file with author) (critiquing Joseph Blocher, *Combatant Status Review Tribunals: Flawed Answers to the Wrong Question*, 116 Yale L.J. 667 (2006)).
62. Memorandum from Jay S. Bybee, Assistant Attorney General, United States Department of

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disregard for the laws and customs of war manifested by the battlefield conduct of these warriors, coupled with their failure to operate in any distinguishing “uniform,” resulted in a conclusive presumption that these warriors could not meet the requirements of Article 4. While this interpretation of both Article 4 and the sufficiency of Taliban “uniforms” is certainly more susceptible to criticism than the basis for excluding *al Qaeda* personnel from this POW status, it does reflect the significance of the “right kind of person” component of the POW qualification equation.⁶³

Although these interpretations of the Prisoner of War Convention have been the subject of widespread criticism,⁶⁴ there is no reasonable expectation that they will be modified by the United States. As a result, it is appropriate to assume that individuals that have been, and will in the future be, captured by the United States in connection with the Global War on Terror will *not* be able to avail themselves of the benefits of POW status. Instead, they will continue to be classified as enemy combatants.

C. Why Enemy Combatants Cannot be Analogized to Prisoners of War

“Enemy combatant” is not a term derived from a specific treaty provision of the law of war. Instead, it is best understood as a term of convenience coined by the United States to designate individuals who have operated as warriors against U.S. forces, but fail to satisfy the lawful belligerent requirements established by the Prisoner of War Convention.⁶⁵ While the term *enemy combatant* is therefore not a legal term of art, it nonetheless has profound legal consequences, for it indicates that an individual is subject to indefinite deprivation of liberty for participation in or association with armed conflict,⁶⁶ yet is outside the protections of the Prisoner

Justice, for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense (Jan. 22, 2002), *available at* <http://news.findlaw.com/hdocs/docs/doj/bybee12202mem.pdf> (last visited Apr. 11, 2007).

63. *Id.*

64. *See, e.g.*, Letter from Kenneth Roth, Executive Director Human Rights Watch, U.S. Officials Misstate Geneva Convention Requirements, Human Rights Watch, Jan. 28, 2002, *available at* <http://hrw.org/press/2002/01/us012802-ltr.htm> (last visited Apr. 10, 2007).

65. *See* Memorandum from Jay S. Bybee, Assistant Attorney General, United States Department of Justice, for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense (Jan. 22, 2002), *available at*: <http://news.findlaw.com/hdocs/docs/doj/bybee12202mem.pdf> (last visited Apr. 11, 2007).

66. The duration of the detention is coextensive with the duration of the armed conflict in which the individual participated. *See* *Hamdi v. Rumsfeld*, 542 U.S. 507, 517 (2004). Although it is concededly impossible to predict the end date of any war, because anticipating a termination date for the Global War on Terror is particularly difficult, the

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of War Convention. Originally, the United States took the position that because such detainees were not captured in association with *either* an international or internal armed conflict, they fell into a proverbial legal “black hole.” Pursuant to this interpretation of the law of war, there were simply no international legal protections applicable to such detainees. However, this interpretation of the law of war was categorically rejected by the Supreme Court of the United States in *Hamdan v. Rumsfeld* when it held that the human treatment mandate of Common Article 3 applied in “contradistinction” with the law applicable to international armed conflicts.⁶⁷

Nothing in this decision, or the subsequent executive branch policy shift which it triggered,⁶⁸ eliminated the category of enemy combatants or the reality that these individuals would continue to be subject to detention for the duration of the Global War on Terror. Perhaps more importantly for purposes of this article, nothing in this decision results in a legitimate analogy between enemy combatants and POWs for the purpose of assessing access to rights and compliance mechanisms. While the determination that the United States is bound to comply with the humane treatment mandate of Common Article 3 was unquestionably a significant rebuke for the Bush administration’s “black hole” interpretation of the applicability of the law of war to the Global War on Terror, it did not materially alter the actual treatment standards for these detainees. Instead, it solidified as a legal obligation the humane treatment standards that the Department of Defense had imposed as a matter of policy.⁶⁹

The treatment requirements imposed by this “policy turned legal obligation” are implemented principally through rules protecting detainees from physical or mental abuse.⁷⁰ However, the treatment rules derived from this obligation provide

detention associated with this conflict is often characterized as “indefinite”.

67. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, at 2798 (2006).

68. See Press Release, Human Rights Watch, U.S.: Pentagon Applies Geneva Rules to Guantanamo Detainees (Jul. 11, 2006), available at <http://hrw.org/english/docs/2006/07/11/usdom13727.htm> (last visited Mar. 11, 2007).

69. Even after the *Hamdan* decision, Deputy Secretary of Defense Gordon England released a memo re-iterating the DoD’s standard of humane treatment for prisoners of armed conflict. Highlights of the memo available at <http://www.defenselink.mil/home/dodupdate/For-the-record/documents/20060711.html>, which states, in part:

As a practical matter, the England memorandum does not change the way in which individual service members are expected to carry out their duties and responsibilities with detention operations or interrogation operations because the doctrine, policies, instructions and procedures that have been in effect have always had humane treatment as their standard.

70. See Prisoner of War Convention, *supra* note 3, at art. 3.

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nothing comparable to the internal compliance framework established by the Prisoner of War Convention. Accordingly, nothing in the *Hamdan* decision or the subsequent executive branch response facilitated the ability of enemy combatants to challenge perceived arbitrary treatment by the United States. Even public acknowledgment of the existence of detention, a right arguably encompassed in the humane treatment mandate, has not always been accorded to enemy combatants.⁷¹ Rather, these individuals have no legally recognized protecting power; they are afforded access to the ICRC purely as a matter of policy. They are not permitted to organize and select a detainee representative, and they are afforded limited access to communication with the outside world.⁷² Enemy combatants have been afforded limited access to legal representation. However, this access in no way supports the restriction on future *habeas* access. On the contrary, this access is ironically the result of the exact type of judicial review of assertions of plenary executive authority detainees seek to raise through *habeas* challenge. The fact that the executive branch has been forced to permit such access cannot be asserted as an adequate substitute for the oversight mechanisms available for POWs.

One protection provided for enemy combatants that pre-dated the *Hamdan* decision is a procedure for reviewing initial status determinations and periodic review of the necessity for continued detention. These Combatant Status Review Tribunals (CSRT) were ostensibly established in response to the Supreme Court decision in *Hamdi v. Rumsfeld*.⁷³ That case held that the designation of a United States citizen as an enemy combatant did not deprive that citizen of *habeas* access, and that the right to that *habeas* access implied a right to some meaningful procedure to review a challenge to enemy combatant designation.⁷⁴ However, the Court also essentially invited the executive to develop such a procedure as a substitute for judicial review of such designations.⁷⁵ It is true that this case dealt with the narrow question of the procedural rights available to a U.S. citizen designated as an enemy combatant and held in the United States. Nonetheless, it appears that the executive branch perceived a broader message: that even

71. See Josh White, *Army, CIA Agreed on "Ghost" Prisoners*, WASH. POST, Mar. 11, 2005, at A16.

72. See Prisoner of War Convention, *supra* note 3, at arts. 2-4. Because an enemy combatant does not fall within the "right type of person/right type of conflict" requirements, they are restricted to the minimal protections of Article 3 and are consequently barred from enjoying the protections of the other articles of the Prisoner of War Convention, including those mentioned here.

73. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

74. *Id.* at 533-534.

75. *Id.* at 538-539.

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individuals not qualified for POW status in accordance with the Prisoner of War Convention must be afforded some minimal procedural safeguards against arbitrary deprivation of liberty, when detained outside the immediate zone of combat operations. Accordingly, the executive created what can best be described as a modified⁷⁶ version of an Article 5 Tribunal – the status review modality provided for in the Prisoner of War Convention.⁷⁷

Critics of detainee *habeas* access assert that the CSRT, because it performs a function analogous to that of the Article 5 tribunal, is sufficient to guard against arbitrary detaining power decisions regarding enemy combatant designations. While use of the CSRT to validate initial designations is a positive development, even assuming *arguendo* that analogizing CSRTs to Article 5 Tribunals is an accurate premise (an assertion that has been the subject of substantial criticism), it does not justify this assertion. While it may be true that Article 5 of the Prisoner of War Convention was intended to provide captured personnel a viable modality to challenge the status determination made by the detaining power, it was also intended to serve the interests of the detaining power by validating the basis for continued detention.⁷⁸ However, unlike the CSRT, a determination by an Article 5 Tribunal that an individual is a POW would trigger the full corpus of the Prisoner of War Convention, including the internal compliance mechanisms outlined above. Accordingly, the determination would produce subsequent treaty-based opportunities to challenge the status determination and continued detention. No such alternate modality exists in relation to the CSRT. As a result, while these Tribunals undoubtedly serve an important role in critiquing status determinations made in the zone of combat operations, they do not produce the same balanced affect that results from a status determination by an Article 5 Tribunal.

The limits to the protective value of the CSRT process – and judicial review of issues associated with that process - remains uncertain. It is clear, however, that Congress has attempted to circumscribe the role of federal courts to oversee this process.⁷⁹ In a response to what was asserted to be an unjustifiable deluge of *habeas* challenges to continuing detention, Congress limited federal judicial review of detainee challenges to final determinations by the CSRT, and even limited the

76. See Department of Defense Fact Sheet, “Combatant Status Review Tribunals,” available at <http://www.defenselink.mil/news/Jul2004/d20040707factsheet.pdf> (last visited March 29, 2007).

77. See Prisoner of War Convention, *supra* note 3, at art. 5.

78. See ICRC Commentary GPW, *supra* note 10, at 73-78.

79. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 [hereinafter MCA].

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scope of that review. This was accomplished in October of 2006 with the passage of the Military Commission Act.⁸⁰ This Act explicitly deprived federal courts of jurisdiction to hear any detainee claim asserting a breach of an asserted treatment obligation, a limitation emphasized in the recent United States' pleadings before the Supreme Court in response to a request for extraordinary relief by an enemy combatant detainee:

Pursuant to the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (MCA), which became law on October 17, 2006, neither the district court nor the court of appeals has jurisdiction over petitioner's claim challenging his conditions of confinement. The MCA amends 28 U.S.C. 2241 to provide that '[n]o court, justice, or judge shall have jurisdiction' to consider any action 'relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement' of aliens detained by the United States as enemy combatants. See MCA § 7(a). This amendment to Section 2241 took effect on the date of enactment and applies specifically 'to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.' MCA § 7(B).⁸¹

Furthermore, even though the Act confirms the original jurisdiction in the United States Court of Appeals for the District of Columbia to hear *habeas* challenges by enemy combatants, this jurisdiction is limited to review of CSRT compliance with its own rules and procedures.⁸²

80. *Id.*

81. Brief for Respondents in Opposition at 12, *Paracha v. Gates*, Nos. 06-8447, 06-8448, 06-8449 (S.Ct. Jan. 22, 2007), *cert.*, *mandamus*, and *habeas corpus denied*, 127 S. Ct. 1298 (2007).

82. The Military Commission Act produces this effect by "stripping" federal courts of jurisdiction to hear habeas challenges by individuals detained at Guantanamo Bay, with the limited exception of original habeas jurisdiction established by the Detainee Treatment Act of 2005 (Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2680, 2739-2745) (hereinafter DTA). It is true that the DTA provides that the District of Columbia Circuit has exclusive jurisdiction to review the validity of any final decision of a CSRT. However, the jurisdiction provided by this law is limited to review of alleged violation of the *procedures* established for the CSRT process, and not the *judgment* resulting from that process:

The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on any claims with respect to an alien under this paragraph shall be limited to the consideration of—

(i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence);

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This review authority arguably extends to federal court critique of enemy combatant determinations by the CSRT, assuming the authority permits a court to assess whether determinations are consistent with the policy definition of enemy combatant. Even this limited jurisdiction has been criticized on the theory that POWs have no right to an analogous review mechanism.⁸³ But such an assertion fails to adequately consider several fundamental differences between unreviewable POW determinations by an Article 5 Tribunal and enemy combatant determinations by the CSRT. These considerations bolster the invalidity of the enemy combatant/POW analogy and the justification of continued enemy combatant access to judicial review of CSRT determinations.

First, unlike the criteria that dictates POW status determinations, the criteria for making enemy combatant determinations is not an internationally – nor even a domestically—established legal standard. Instead, it is wholly a product of Department of Defense policy.⁸⁴ While this policy standard appears logical at its core, judicial review of both definition and application is an important method of monitoring application and ensuring the standard is not arbitrarily applied or modified in a way that invites arbitrary deprivation of liberty. In contrast, the standard for determining POW status is established in the Prisoner of War Convention, a treaty of universal acceptance.⁸⁵ Accordingly, this standard is not only effectively immutable, but also well understood. These attributes facilitate Protecting Power and/or ICRC monitoring of implementation and demands for compliance.

An even more significant distinction between the role of the CSRT and that of the Article 5 Tribunal that undermines the enemy combatant/POW analogy is the

Id. §1005e.2.(c)(i).

83. *See* *Rasul v. Bush*, 542 U.S. 466. According to Justice Scalia:

Departure from our rule of *stare decisis* in statutory cases is always extraordinary; it ought to be unthinkable when the departure has a potentially harmful effect upon the Nation's conduct of a war. The Commander in Chief and his subordinates had every reason to expect that the internment of combatants at Guantanamo Bay would not have the consequence of bringing the cumbersome machinery of our domestic courts into military affairs.

Id. at 506 (Scalia, J., dissenting).

84. *See* Memorandum for Secretaries of the Military Departments Chairman of the Joint Chiefs of Staff Under Secretary of Defense for Policy, *available at* <http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf>.

85. *See* Press Release, International Committee of the Red Cross, Geneva Conventions of 1949 Achieve Universal Acceptance (Aug. 21, 2006), *available at* <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/geneva-conventions-news-210806?opendocument> (last visited Apr. 11, 2007).

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operative presumptions related to status determinations. POW status evolved as what is best understood as a “protective presumption.”⁸⁶ Warriors captured in relation to armed conflict were presumed to be subject to detention by the capturing force, and POW status was imposed by international law in order to cloak these captured individuals with international protection.⁸⁷ Indeed, even Article 5 of the Prisoner of War Convention – the provision of the treaty establishing the method to resolve doubt regarding the status of a captured individual – requires the detaining power to “presume” the individual is entitled to POW status and accordant protections until that presumption is rebutted by the findings of a competent tribunal.⁸⁸ Thus, the somewhat ironic and certainly not well understood underlying philosophy of the Convention is that captured personnel *will want* to be classified as POWs, because such classification results in internationally guaranteed protections. This perspective is emphasized in the ICRC Commentary to Article 5, which discusses the why the presumption of POW status was necessary to prevent the type of mass or individual denial of this status to combatants captured during the second world war.⁸⁹ This was particularly significant in relation to individuals who were suspected of having violated the laws of war, and were accordingly denied POW status, as noted by the Commentary:

The second category of military personnel who were deprived of the status of prisoner of war comprised those charged with breaches of the laws of war (7). The “principal war criminals”, such as were tried at Nuremberg, mostly enjoyed procedural guarantees and received treatment which was at least equivalent to that accorded to detainees under common law. On the other hand, a large number of military personnel accused of lesser crimes were deprived of these advantages and did not receive the treatment specified in the Convention, and their situation was thus considerably worsened. The new Convention opposes any such withdrawal of benefits and provides, in Article 85, that “Prisoners of war prosecuted . . . for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention”⁹⁰

Thus, the operative presumption underlying Article 5 is that an individual has been detained because of a belief the individual is participating in hostilities.

86. See ICRC Commentary GPW, *supra* note 10, at 73-75.

87. See *id.*

88. See Prisoner of War Convention, *supra* note 3, at art. 5.

89. See ICRC Commentary GPW, *supra* note 10, at 73.

90. See *id.* at 76.

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Accordingly, the detainee will desire POW designation in order to obtain the benefit of combatant immunity for that very participation, and therefore it is the *denial* of application of the legal standard to the captured individual – the exception and not the norm – that would be subject to dispute.

In contrast, the CSRT is based on a very different operative presumption. Captured individuals subject to this proceeding have already been excluded from the presumptive status of POW.⁹¹ Accordingly, the role of the CSRT is to determine whether sufficient evidence exists to rebut the presumptive *civilian* status of captured and detained personnel. Because civilians are presumed to be non-participants in armed conflict, they also benefit from a presumption of freedom from detention. Thus, a finding by the CSRT that an individual is an enemy combatant actually results in an exception to this presumption in the form of continued detention. It is this exceptional outcome resulting from application of the enemy combatant criteria by the CSRT that distinguishes the function of this entity from any analogy to the POW determination process. This distinguishing characteristic of CSRTs, combined with the reality that such determinations will be made through application of criteria developed by the detaining power itself and not by the international community through the treaty development process, suggests justification of a greater degree of impartial oversight.

In short, enemy combatants enjoy limited substantive rights derived from the laws of war beyond the protection against cruel, inhumane, or degrading treatment. Because of this, it is invalid to analogize these detainees with POWs for purposes of critiquing access to the domestic judicial review as a means to challenge their status and the legitimacy of continued detention; nor is there a legitimate pragmatic justification for such an analogy. Contrary to the image painted by opponents of *habeas* access, that such access would overwhelm our domestic courts⁹², there is no reasonable expectation that the population of detained enemy combatants would come close to that of POWs experienced in previous inter-state armed conflicts. Indeed, the very limited number of individuals detained by the United States since 9/11 based on this designation bears out this fact.⁹³ After the initial surge in

91. See MCA, *supra* note 79, §948b(g).

92. For a discussion of the “floodgate litigation” argument proffered by Senator Graham during DTA deliberations, including excerpts from letters the Senator used in his argument, see Ian Wallach’s “No Habeas at Guantanamo? The Executive and the Dubious Tale of the DTA,” available at <http://jurist.law.pitt.edu/forumy/2006/03/no-habeas-at-guantanamo-executive-and.php> (last visited March 29, 2007).

93. See the U.S. Department of Defense’s March 6, 2006 news release, available at <http://www.defenselink.mil/releases/release.aspx?releaseid=10582> (last visited March 29, 2007).

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detainee population, it became quickly apparent that the preferred method of dealing with most battlefield detainees was to transfer them to local authorities, and *not* to hold them in a U.S. facility.⁹⁴ Even the population of detainees held in Guantanamo has decreased as the result of release or transfer decisions by the United States.⁹⁵

D. Why Geneva Convention Principles Support Access to Alternate Safeguard Mechanisms

It is not the purpose of this article to assert that access to *habeas* review of status determinations by the CSRTs is the only feasible substitute for the scheme of internal checks established by the Prisoner of War Convention to guard against arbitrary action by a detaining power. Instead, the discussion above is intended to highlight the invalidity of analogy to the non-feasibility of affording such access to POWs. Such analogy distorts the fundamental interest underlying the debate over such access: whether denial of *any* opportunity for meaningful challenge to status decisions – other than internal appeal to the detaining authority – is consistent with the humane treatment obligation owed to any person captured and detained in connection with *any* armed conflict. Pursuant to the holding of *Hamdan v. Rumsfeld*,⁹⁶ the applicability of this humane treatment mandate to *all* personnel detained by the United States in the context of armed conflict is no longer subject to dispute. Accordingly, *if* such an opportunity is encompassed within this mandate, denial of access to *habeas* review *without* providing some meaningful substitute for the internal compliance regime provided to POWs, as a matter of law, would be inconsistent with this mandate.

Although providing an opportunity for meaningful challenge to status determinations is not expressly included within Common Article 3 of the four Geneva Conventions⁹⁷ (the source of the humane treatment mandate analyzed in *Hamdan*), this does not mean that the opportunity fails to fall within the definition of humane treatment. Instead, it would seem that a total denial of such an opportunity would subject captured personnel to long term deprivation of liberty as

94. *Id.*

95. For a chart illustrating the nearly fifty percent decrease from the original detainee population, see <http://www.defenselink.mil/dodcmssshare/briefingslide/297/070306-D-6570C-001.jpg> (last visited March 29, 2007).

96. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, at 2798 (2006).

97. See Prisoner of War Convention, *supra* note 3, at art. 3. This article is identical in all four Geneva Conventions of 1949 (hence the designation as a “common” article), and establishes the obligation to treat all persons no longer taking part in hostilities humanely.

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the result of potentially arbitrary decisions by the detaining power, the exact assertion made by current detainees. As indicated in the Restatement of Foreign Relations Law of the United States, the prohibition against long-term *arbitrary* detention is considered a fundamental human rights norm.⁹⁸ While this article will presume, *arguendo*, the validity of the U.S. position that issues related to the treatment of enemy combatants are governed by the law of armed conflict and not human rights norms (an interpretation of international law that triggers substantial criticism), analogy to fundamental human rights norms is nonetheless a legitimate method of interpretation of the scope of law of armed conflict obligations.⁹⁹ When combined with the extensive mechanism established by the Prisoner of War Convention to protect combatants from arbitrary detaining power decisions, this seems sufficient to indicate that it is generally accepted that arbitrary long-term deprivation of liberty would be inhumane, providing a legal framework to prevent such arbitrary state action is indelibly linked to the concept of humane treatment. For POWs, legally guaranteed access to, and the ultimate intervention of the Protecting Power is the principal modality provided to achieve this purpose. Because no analogous modality is provided for individuals excluded from this category, some alternate method is arguably necessary to comply with the humane treatment obligation. While *habeas* access is certainly not the only modality that might adequately satisfy this obligation, arguing that it should be unavailable to enemy combatants because it is presumptively unavailable to POWs is simply unjustified.

This proposition, that some check upon a state's power to engage in arbitrary detention is an aspect of the humane treatment obligation, is bolstered by considering the law developed to regulate conflicts in which POW status would be almost conclusively inapplicable: Additional Protocol II to the Geneva Conventions (AP II).¹⁰⁰ This treaty, developed to supplement the very limited positive humanitarian law applicable to non-international armed conflicts, necessarily addressed the detention of personnel captured during armed conflict who could not qualify for POW status, because of the non-international nature of

98. See Restatement (Third) of the Foreign Relations Law of the United States, § 701.

99. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, at 2797, n.66 (2006) (citing the International Covenant of Civil and Political Rights when interpreting Common Article 3 of the Geneva Conventions).

100. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977, The 1977 Protocol II Additional to the Geneva Conventions, December 12, 1977, *reprinted in* 16 I.L.M. 1391 [hereinafter AP II].

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the conflicts to which the treaty would apply.¹⁰¹ Although the scope of this treaty is expressly limited to purely internal armed conflicts, indicating the drafters did not contemplate the type of “transnational” armed conflict exemplified by the U.S. - *al Qaeda* struggle,¹⁰² the treatment of this issue provides additional insight into the overall question of whether the humane treatment obligation extends to providing some mechanism for scrutinizing assertions of detention power by a state.¹⁰³ Indeed, the fact that this treaty addressed one of the most sensitive issues related to state sovereignty, the ability to suppress internal armed dissident movements, bolsters the significance of this treaty for illuminating the scope of the humane treatment obligation.¹⁰⁴

While AP II expressly acknowledges the authority of a state to detain and prosecute captured opposition personnel outside of the normal municipal criminal justice system, it balances this authority by imposing protections for individuals subjected to such detention and prosecution.¹⁰⁵ Even thirty years ago, when contemplating internal armed conflicts which challenged the very existence of governments, the international community required fundamental procedural protections for any detainee subject to criminal sanctions (even through the use of extraordinary tribunals).¹⁰⁶ They also provided a legally guaranteed role for the national relief societies to fulfill functions similar to the ICRC in relation to international armed conflicts, by acting to protect the interests of victims of such conflicts¹⁰⁷

As noted above, reference to the AP II provisions related to detention and prosecution of opposition personnel is not intended to suggest that these provisions are binding outside the context of a purely internal armed conflict. Instead, it reflects the broader principal that providing some *legally mandated* check on plenary detention power of a state – even for individuals not entitled to the protections of the Prisoner of War Convention – is an essential component of the

101. *Id.* at art. 5.

102. See Geoffrey S. Corn, *Hamdan, Lebanon, and the Regulation of Armed Conflict: The Need to Recognize a Hybrid Category of Armed Conflict*, VANDERBILT J. TRANSNAT'L L., (forthcoming) (copy on file with author).

103. See AP II, *supra* note 100, at art. 1.

104. See *id.*

105. See *id.* at art. 6.

106. See Geoffrey S. Corn, *Hamdan, Fundamental Fairness, and the Significance of Additional Protocol II*, THE ARMY LAWYER, Department of the Army Pamphlet 27-50-399 (August 2006) at 1.

107. See AP II, *supra* note 100, at art. 18. In addition to the role of national relief societies, the ICRC has also traditionally acted in its international capacity on behalf of individuals detained during non-international armed conflicts.

humane treatment mandate. When coupled with the recent U.S. acknowledgment that this mandate is applicable to *all* individuals captured during the course of military operations associated with the Global War on Terror,¹⁰⁸ this principle necessitates some meaningful substitute for the internal checks provided to POWs by the Convention.

E. Judicial Access as an Adequate Substitute

One method of providing an effective and efficient substitute for the Prisoner of War Convention's internal checks against arbitrary treatment of detainees in the custody of the United States is by allowing limited judicial oversight of executive branch status determinations. Of course, both the effectiveness and the efficiency of this method are contingent on the executive branch making status determinations based upon defined criteria. Providing such criteria is an essential predicate to the review and challenge of any status determination. This reality is clearly reflected in the Prisoner of War Convention, which establishes relatively clear and comprehensive criteria for status determinations, and then makes these criteria the basis for resolving any challenge made to such a determination.¹⁰⁹ The efficiency and effectiveness of both the Article 5 Tribunal process and the intervention of a Protecting Power are wholly contingent on these established status determination criteria.

Not surprisingly, the absence of a clear legal standard upon which to justify detention has created inefficiency in the judicial review of status determinations.¹¹⁰

108. On July 11, 2006, the Under Secretary of Defense issued a Memorandum applicable to the Department of Defense and all of the armed services indicating that pursuant to the decision in *Hamdan v. Rumsfeld*, the principle of humane treatment would apply to all detainees not simply as a matter of policy, but as a matter of law. *See* <http://www.defenselink.mil/home/dodupdate/For-the-record/documents/20060711.html> (last visited March 29, 2007).

109. *See* Prisoner of War Convention, *supra* note 3, at arts. 4-5.

110. The uncertainty related to the potential scope of this characterization was noted by the Supreme Court in *Hamdi v. Rumsfeld*. Although the Court validated a definition of enemy combatant that extended to taking up arms against U.S. or Coalition forces and conducting active hostilities in a theater of combat operations, the Court recognized that this was only the core of a potentially much broader definition:

The threshold question before us is whether the Executive has the authority to detain citizens who qualify as "enemy combatants." There is some debate as to the proper scope of this term, and the Government has never provided any court with the full criteria that it uses in classifying individuals as such. It has made clear, however, that, for purposes of this case, the "enemy combatant" that it is seeking to detain is an individual who, it alleges, was "part of or supporting forces hostile to the United States or coalition partners" in Afghanistan and who "engaged in an armed conflict against

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However, it is the absence of such a standard, and not the judicial review process *per se*, that produces this inefficiency. It is therefore completely invalid to criticize the utility of this judicial oversight method of checking arbitrary executive action by citing the varying results of such oversight when the courts are not able to discern such a criteria, a situation which appears to have dominated judicial review to date. And, although the Supreme Court in *Hamdi v. Rumsfeld* indicated a set of criteria that would clearly justify detention as an “enemy combatant,” the opinion did not attempt to provide a comprehensive definition;¹¹¹ nor has the executive branch enunciated a clear and consistent standard for determining this status.

If executive branch status determinations were based on criteria analogous in clarity to those established in the Prisoner of War Convention – for example a definition of enemy combatant limited to that validated in the *Hamdi* decision - judicial review of *compliance* with those criteria would be manageable and efficient.¹¹² Indeed, this seems to be the underlying logic for vesting the District of Columbia Circuit with jurisdiction to review CSRT determinations.¹¹³ Determining whether the CSRT properly applied this standard would appear to be a relatively efficient review process, analogous to a *Gerstein* review of probable cause to arrest an individual.¹¹⁴ Furthermore, unlike proceedings of an Article 5 Tribunal, which will almost invariably be conducted in the zone of active operations with minimal record, proceedings of the CSRT are conducted far from the zone of operations with ample opportunities to create a meaningful record. The maturity of these proceedings should result in a more effective basis for efficient judicial review, a clear distinction from POW determinations.

Of course, manipulation of this policy based definition of enemy combatant – a constant possibility resulting from the lack of a controlling *legal* standard – could indeed produce inefficiencies in judicial review. Such potential inefficiency

the United States’ ” there. Brief for Respondents 3. We therefore answer only the narrow question before us: whether the detention of citizens falling within that definition is authorized.

See Hamdi v. Rumsfeld, 542 U.S. 507, 517 (2004).

111. *Id.*

112. For example, the Fourth Circuit relied on the *Hamdi* definition of enemy combatant to efficiently resolve the question of whether Jose Padilla was also properly designated as an enemy combatant. *See Padilla v. Hanft*, 423 F. 3d 386, (4th Cir. (2005)), cert. denied, 126 S. Ct. 1649 (2006). While this conclusion is subject to criticism due to the fact that unlike *Hamdi*, Padilla was “captured” in the United States, the case does represent an example of the efficiency that derives from establishing an accepted and limited legal definition of enemy combatant.

113. *See DTA*, *supra* note 82, §1005 (e)(2).

114. *See Gerstein v. Pugh*, 420 U.S. 103 (1975).

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would, however, be the result of the lack of an immutable controlling decisional standard, and not the result of the judicial review process *per se*. It is therefore wholly invalid to criticize the utility of judicial oversight as a method of checking arbitrary Executive action by citing the varying results of such oversight when the courts are not able to discern such a criteria – a situation which appears to have dominated judicial review to date. And, although the Supreme Court in *Hamdi v. Rumsfeld* indicated a set of criteria that would clearly justify detention as an “enemy combatant,” the opinion did not attempt to provide a comprehensive definition.¹¹⁵ Nor has Congress established a clear and consistent *legal* standard for determining this status.

Furthermore, the combined effect of the limited number of individuals likely to be subject to such status determinations with the precedential effect of initial adjudications, would enhance the efficiency of judicial review. Traditional prudential doctrines of judicial restraint, such as standing and ripeness, would add to the efficiency of this process by ensuring that only properly presented challenges would receive review. Such a process would provide a meaningful check on arbitrary decisions made by the executive branch, in its capacity as the representative of the detaining power. And, while judicial review is fundamentally different than the diplomatic modality emphasized in the Prisoner of War Convention, this does not justify allowing the *modality* to take precedence over the *interest* ultimately served: the deterrence, and when necessary reversal, of arbitrary action by the detaining power.

III. Conclusion

When the United States chose to invoke the authorities of armed conflict in relation to the struggle against transnational terrorist organizations, it opened a proverbial Pandora’s Box of legal issues. One of the most complex and controversial of these has been the status of individuals captured and subsequently detained in association with this conflict. Nothing suggests that the United States is likely to abandon or modify this armed conflict paradigm, nor alter the basic proposition that such detentions are justified by the exigencies of armed conflict. Accordingly, the question of detainee status will continue to be prominent among the complex legal issues associated with this conflict, the resolution of which is of profound consequence for individuals deprived of their liberty and the security of the United States.

115. *See Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

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Although progress has been made in the process of detainee classification – primarily as the result of judicial intervention into this legal and policy milieu – recent developments have substantially foreclosed future access to such judicial intervention as by limiting detainee access to *habeas corpus*. Proponents of these limits routinely cite the illogic of providing such access to individuals captured in association with military conflict, bolstering this assertion through analogy to the historic unavailability of such access for POWs. This analogy is both invalid and dangerously misleading, for it fails to acknowledge that such unavailability is justified primarily by the fact that POWs are provided alternate legal modalities to demand compliance with the standards established by the Prisoner of War Convention through standards for status determinations.

The underlying purpose of this internal compliance framework reflects the broader principle that, although the authority of a detaining power is indeed expansive, it cannot be so unlimited as to invite arbitrary action. Instead, this power is constrained by both meaningful decision-making standards and the opportunity for POWs to seek external intervention and challenge to perceived violations of these standards. By excluding enemy combatants from this legally established compliance framework, the United States has actually created a necessity to provide some alternate modality for scrutinizing its actions as a detaining power and challenging arbitrary exercise of this broad detention authority. While access to *habeas corpus* and the accompanying judicial review of executive branch status determinations is not the only conceivable modality to achieve this purpose, asserting that such access is illegitimate by equating enemy combatants to POWs ignores the complex relationship between POW status and the benefits provided by the Prisoner of War Convention.

In short, this argument seeks to exploit the “sweet” of the law of war, the authority to indefinitely detain captured personnel outside the normal criminal justice system – without accepting the “bitter” of that same law – the need to provide some meaningful check against the arbitrary exercise of this authority. This is particularly troubling in relation to enemy combatants, because unlike the protective effect of designation as a POW, the enemy combatant designation actually deprives individuals of the protective benefits accorded to civilians caught up in armed conflict. Such an approach to issues related to detention is inconsistent with the underlying balance of the law of war and easily cured by allowing limited judicial review through the writ of *habeas corpus*, based on defined and logical status determination standards, for individuals otherwise deprived of the compliance framework of the Prisoner of War Convention. Such

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review, if based on a defined standard, can ultimately serve the interests of the United States by providing the type of “scrutiny” necessary to balance the authorities derived from the armed conflict paradigm with the limits derived from the principle of humane treatment – a balance essential to the legitimate invocation of the authorities of war.