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From Enemy Combatant to American Citizen: Protecting Our Constitution, Not Our Enemy

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I. Introduction

September 11 was a watershed moment in history. Every American can remember the precise moment that “evil swept into America’s skies and onto American soil.” In seventy-seven short minutes, four airliners slammed into the Twin Towers, crashed into the Pentagon, and plunged into an empty field in Pennsylvania. Almost 3000 people from over ninety countries died at the hands of nineteen al Qaeda operatives.

Rather than crumbling, as the enemy had hoped, the United States responded swiftly and forcefully. Congress immediately passed a joint resolution, the Authorization for the Use of Military Force (AUMF), which empowered the executive branch to use “necessary and appropriate” military force against these acts of terrorism. President George W. Bush ordered armed forces to invade Afghanistan in order to attack and to capture al Qaeda operatives and the terrorist-supporting Taliban regime. The mission resulted in thousands of captured prisoners. Some of these prisoners are U.S. citizens, others are U.S. residents, but most are aliens.
Various legal issues have arisen in the context of these detainees, such as whether the U.S. Constitution or the Geneva Conventions apply to the detainees and whether the legal protections afforded to the detainees are adequate. Congress, the Supreme Court, and the executive branch have engaged in a political and legal tug of war over these issues. This Article advocates maintaining the use of Combatant Status Review Tribunals and military commissions in the framework that the executive and legislative branches have already established during the Bush administration, despite the Obama administration’s recent policy to try detainees in federal court. Part II will discuss the history and background of the most recent Supreme Court cases, congressional acts, and executive orders that outline the current legal framework for these detainees. Part III will then argue in favor of military commissions in its current framework, including the use of Combatant Status Review Tribunals to determine unlawful combatant status. Part III will then proceed to argue against the use of Article III criminal courts as an arena to prosecute unlawful enemy combatants.

II. History and Background of Recent Congressional Acts, Supreme Court Decisions, and Executive Orders Regarding Enemy Combatants

This Part will give the necessary historical background and positive law regarding enemy combatants, focusing primarily on the recent Supreme Court cases, congressional acts, and executive orders involving military detainees captured in the War on Terror. The cases, congressional acts, and orders described below provide the legal foundation for the current rules and procedures concerning military detainees in the War on Terror.

War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. Although the application of the Geneva Conventions to these prisoners is subject to debate, this Article reads the Geneva Conventions strictly, which says that POWs only fall into certain categories, such as members of armed forces and those who follow the law of war. Id. Finally, the terms *enemy combatants* or *unlawful enemy combatants* are unique to the War on Terror and are used for military detainees or prisoners who have undergone a Combatant Status Review Tribunal. See infra notes 23–25 and accompanying text.

9 JOHN YOO, WAR BY OTHER MEANS: AN INSIDER’S ACCOUNT OF THE WAR ON TERROR 131 (2006). Yoo makes it clear that the United States does not hold American citizens and permanent residents at its naval base in Guantanamo Bay, Cuba. Id.
A. Authorization for the Use of Military Force

The AUMF provides the necessary political backdrop for the executive branch’s power to capture and to detain military prisoners.\(^\text{10}\) After September 11, 2001, Congress explicitly empowered the President to use “both necessary and appropriate” force to protect the United States at home and abroad.\(^\text{11}\) After learning the source of the terrorist attacks, President Bush subsequently deployed troops to Afghanistan to attack the nerve center of the al Qaeda network.\(^\text{12}\)

The language of the AUMF favors a broad sweeping presidential power for two reasons. First, on its face, “necessary and appropriate” implies what is reasonable to achieve a desired end.\(^\text{13}\) This includes the detention of suspected terrorists.\(^\text{14}\) Second, “necessary and appropriate” parallels the “necessary and proper” clause in the Constitution.\(^\text{15}\) Courts have long interpreted the necessary and proper clause to broaden rather than to limit congressional power.\(^\text{16}\) Therefore, although it is unreasonable to conclude that Congress intended to give the executive branch a blank check for military power, it is reasonable to conclude that it did intend a broad “necessary” use of force.\(^\text{17}\) A part of this broad and necessary power is the authority to detain those whom the military feels is responsible for the events of September 11.\(^\text{18}\) Essentially, the AUMF is the foundation for every case and congressional act that follow because it is the original source of

\(^\text{10}\) AUMF § 2(a); Hamdan v. Rumsfeld, 548 U.S. 557, 557, 559–60 (2006).
\(^\text{11}\) AUMF § 2(a).
\(^\text{12}\) Hamdi, 542 U.S. at 510.
\(^\text{14}\) Id.
\(^\text{15}\) U.S. CONST. art. I, § 8 (stating that Congress has the power “[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers”).
\(^\text{17}\) It is important to note that the AUMF requires a nexus between the use of force and the events of September 11. See Bradley & Goldsmith, supra note 16, at 2078–79.
Without the AUMF, the president would not have had the authority to dispatch the military, which eventually captured and currently detains the prisoners.\textsuperscript{20}

B. Combatant Status Review Tribunals and the Detainee Treatment Act of 2005

Traditionally, after Congress authorizes the use of military force, such as with the AUMF, the President then directs the tactical aspects of the war, including prisoner capture and detention.\textsuperscript{21} However, because the Supreme Court effectively restricted the executive’s authority to detain suspected enemy combatants with the \textit{Rasul} decision, both political branches had to act.\textsuperscript{22}

First, the executive branch’s Department of Defense (DOD) established Combatant Status Review Tribunals (CSRTs) to determine whether detainees at GITMO were enemy combatants.\textsuperscript{23} The DOD sought to quell the Court’s holding in \textit{Rasul} that criticized the available procedures for determining and appealing enemy combatant status.\textsuperscript{24} The CSRTs required the following to classify detainees as enemy combatants: (1) a preponderance of the evidence to support enemy combatant determinations; (2) a consideration of the probative value of statements allegedly obtained through coercion; (3) a personal representative assigned to the

\textsuperscript{19} Symposium, \textit{War, Terrorism, and Torture: Limits on Presidential Power in the 21st Century Document: Legal Authorities Supporting the Activities of the National Security Agency Described by the President}, 81 IND. L.J. 1374, 1383 (2006) (discussing the AUMF and noting that, “in its first legislative response to the attacks of September 11th, Congress gave its express approval to the President's military campaign against al Qaeda and, in the process, confirmed the well-accepted understanding of the President's Article II powers”).

\textsuperscript{20} See Taylor, \textit{supra} note 13, at 236–38.

\textsuperscript{21} Taylor, \textit{supra} note 13, at 237. Compare the executive branch’s military power with that of the legislative branch: the “President shall be commander in Chief of the Army and Navy of the United States” but Congress has the power to “declare” war. U.S. CONST. art. II, § 2; \textit{id}. art. I, § 8. This can be construed to mean that, although Congress is vested with the power to start the war, the President is vested with the power to carry on and direct the war.

\textsuperscript{22} In \textit{Rasul}, the Supreme Court held that GITMO detainees had a statutory right to habeas corpus under the then-existing Military Commissions Act. \textit{Rasul}, 542 U.S. at 483. It is important to distinguish between a statutory and a constitutional right to the writ to habeas corpus. \textit{Rasul} concerns the former, stemming from the MCA in place at the time that Congress later removed, while \textit{Boumediene} concerned the latter. Taylor, \textit{supra} note 13, at 245.


detainee; (4) an official recorder; and (5) an opportunity for the detainee to present evidence and question witnesses.\(^{25}\) In conjunction with the CSRTs, the military also conducts Annual Review Boards (ARBs) that function as pseudo-parole hearings.\(^{26}\) If the CSRT or the ARB determines that the detainee is no longer a threat, the military paroles the detainee back to his home battlefield.\(^{27}\)

Second, Congress enacted the DTA to rectify the “mistake” of \textit{Rasul} by revoking federal jurisdiction over habeas claims brought by GITMO detainees.\(^{28}\) If a detainee wanted to appeal his unlawful enemy combatant status, he could do so only in the United States Court of Appeals for the District of Columbia and only if it were a final decision.\(^{29}\) The reviewing court is limited to assessing whether the CSRT obeyed its own standards and procedures and whether the use of those standards and procedures was consistent with the Constitution.\(^{30}\)

\textbf{C. The Military Commissions Act of 2006}

Some viewed the DTA as a weak congressional reply to terrorism while proclaiming that Americans needed stronger action.\(^{31}\) When the Supreme Court in \textit{Hamdan} so boldly struck down even this feeble attempt to combat global jihad,\(^{32}\) a reenergized Congress realized that it

\textsuperscript{25} Taylor, supra note 13, at 241–43.
\textsuperscript{26} Id. at 138.
\textsuperscript{27} Id. at 138–39. In total, the United States has already released almost 400 detainees after determining that they no longer posed a threat. \textit{See infra} note 101 and accompanying text.
\textsuperscript{29} DTA § 1005(e)(2)(A) (stating that “the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant”); Choper & Yoo, supra note 28, at 1244–45.
\textsuperscript{32} In \textit{Hamdan}, the military sought to try Hamdan, Osama bin Laden’s chauffeur, pursuant to the November 13 executive order that authorized military commissions for terrorists. Hamdan v. Rumsfeld, 548 U.S. 557, 567 (2006);
“could no longer remain on the sidelines in the War on Terror.”

In 2006, Congress amended the already existing MCA to directly reverse *Hamdan* by denying federal jurisdiction to all alien enemy combatants, including those still awaiting final determination of their status, who file writs of habeas corpus. The MCA also removed the geographical and the temporal restrictions that *Hamdan* had imposed. This congressional response was a “stinging rebuke” to the Supreme Court. “It [was] the first time since the New Deal that Congress had so completely divested the courts of power over a category of cases.” Essentially, the MCA reasserted the political branches as the supreme guiding hand in the War on Terror.

**D. Boumediene v. Bush**

In June 2008, the Supreme Court decided its most recent case concerning enemy combatants and the War on Terror. In *Boumediene*, the American military detained the alien petitioners abroad and transferred them to GITMO where they underwent CSRTs that separately determined that each was an enemy combatant. The petitioners then sought writs of habeas corpus in federal district court because they disputed their enemy combatant status. In response to these writs, the government argued that the review process set forth in the DTA was

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35 The MCA stripped the federal courts of jurisdiction over any alien that the military was holding as an enemy combatant. MCA § 2241(e). The MCA clearly applied to any case resulting from the September 11 attacks. MCA § 7(b). See also John Yoo, *Sending a Message: Congress to Courts: Get Out of the War on Terror*, WALL ST. J., Oct. 19, 2006, available at http://www.opinionjournal.com/editorial/feature.html?id=110009113.

36 Yoo, *supra* note 35.

37 *Id.*

38 *Id.*

39 *Id.*
an adequate substitute for habeas corpus and that the federal courts had no jurisdiction over this issue because of the MCA.\textsuperscript{40}

The historical position is that habeas corpus only extends to territories over which there is sovereign control. However, the Supreme Court did not apply this bright-line, objective test but rather formulated a complicated, subjective test to determine sovereignty.\textsuperscript{41} The Court held that the writ of habeas corpus extends to GITMO due to a hypertechnicality—even though the military base is located abroad in Cuba, the United States has ultimate control over the land because the lease can only be broken via mutual consent.\textsuperscript{42}

Therefore, according to \textit{Boumediene}, these petitioners have the right to file writs of habeas corpus in any federal court, a determination that rendered parts of the MCA unconstitutional.\textsuperscript{43} This right does not vest the moment that the enemy combatant arrives at GITMO, but rather after the government has had a “reasonable period of time” to determine the detainee’s status.\textsuperscript{44} The Court made it very clear that the DTA and the CSRT process both remained intact.\textsuperscript{45}

\textbf{E. President Obama’s Executive Orders}

\textsuperscript{40} \textit{Id.}
\textsuperscript{41} The Court stated its concerns with an objective sovereignty test, “A constricted reading of \textit{Eisentrager} overlooks what we see as a common thread . . . the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism.” \textit{Boumediene v. Bush}, 128 S. Ct. 2229, 2258 (2008). The Court then set forth a subjective roadmap to determine sovereignty:

\begin{quote}
Based on this language from \textit{Eisentrager}, and the reasoning in our other extraterritoriality opinions, we conclude that at least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.
\end{quote}

\textit{Id. at} 2251–52, 2259.
\textsuperscript{42} \textit{See id. at} 2251–62.
\textsuperscript{43} The Court specifically stated that it was only striking down MCA § 2241(e). \textit{Id. at} 2275.
\textsuperscript{44} \textit{Id. at} 2275–76.
\textsuperscript{45} \textit{Id. at} 2275.
On his third day in office, President Obama signed three executive orders that have changed the way that the United States combats global terrorism. These orders mandate that GITMO shut down by January 22, 2010; require all U.S. interrogators in all agencies to adhere to rules in the Army Field Manual; establish a taskforce to determine what to do with the then-remaining 248 detainees at GITMO; demand that the U.S. treats detainees in accordance with the Geneva Conventions; and close all CIA detention centers—“black prisons”—worldwide.

President Obama was careful to leave a small loophole: under these executive orders, the CIA still has the authority to conduct renditions, which are secret abductions and transfers of prisoners to countries that cooperate with the United States.

On November 14, 2009, Attorney General Eric Holder announced that the U.S. government would be prosecuting five key military detainees in a federal district court in New York City. This group includes Khalid Shaikh Mohammed, the self-proclaimed mastermind of the September 11 attacks.

III. Analysis of the Current Framework

A. How to Determine and Review Unlawful Enemy Combatant Status: Adequacy of the Combatant Status Review Tribunal Process

As noted above, the DOD set up CSRTs after Rasul. In Rasul, the Supreme Court balked at the available procedures for military detainees, and the political branches responded by setting

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47 This date has now been moved to January 22, 2013.


up a system to determine and review enemy combatant status. The most basic question facing this area of the law is whether or not the CSRT process, combined with a right to seek review in the United States Court of Appeals for the District of Columbia, is an adequate substitute for habeas corpus. Three key points support the idea that CSRTs provide more than adequate procedures. First, a brief comparison of current to past military tribunals shows that the CSRTs give alien detainees more rights than traditionally available in the military tribunal context. Second, the CSRTs and the available review process meet the requirements set forth in recent Supreme Court decisions, specifically in *Hamdi*. Third, the War on Terror is unlike any war that any country has ever fought, making certain new procedural implementations necessary.

1. Comparing Past to Current Military Tribunals

American presidents, including George Washington, Abraham Lincoln, and Franklin D. Roosevelt, have used military tribunals throughout this country’s history. Prior to the War on Terror, the most recent example occurred during World War II under President Roosevelt’s administration. In 1942, the federal government captured eight Nazis who had entered the

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52 Bradley, *supra* note 30, at 325.
53 *Id.* at 335.
55 ROTUNDA, *supra* note 24, at 132–33.
56 Bradley & Goldsmith, *supra* note 16, at 2048–49 (describing the War on Terror as lacking “many of the usual features that define, justify, and limit the conduct of war”). Brigadier General Thomas L. Hemingway also eloquently discussed the difficult aspects of fighting terrorism:

The new emerging role of non-state actors as organized and trained terrorists is an incalculable threat to the citizens of the United States and the world. There is no international court empowered to address the horrific violations of the laws of war committed by terrorists against the United States on September 11th. We, as Americans, cannot turn our backs on our duty to bring international criminals to justice merely because there is no system in place to address these wrongs. It is our duty to establish a court of law that meets the international norms of a fair trial . . . . Thus, our procedures must be consistent with our national security requirements.

United States.\(^{59}\) Two of these prisoners were naturalized American citizens.\(^{60}\) Upon the announcement of these captures, the public overwhelmingly called for death sentences.\(^{61}\) To try the eight prisoners, President Roosevelt immediately established a military commission that denied judicial review of the commission’s decisions.\(^{62}\) The trials took place in almost complete secrecy, but the press and the public accepted this secrecy as necessary due to the sensitive information involved.\(^{63}\) All eight prisoners were convicted, and six were eventually executed, but not before they sought habeas corpus before the Supreme Court.\(^{64}\) The public, including the media, was outraged that the Supreme Court had “been dragged into this wartime military matter.”\(^{65}\) Upon review, the Court approved of the military commission and its review process, which was limited to strictly jurisdictional questions and did not examine the sufficiency of the evidence or the guilt of the petitioner.\(^{66}\) Until recently, the Supreme Court had repeatedly held that only military authorities could review decisions of military commissions.\(^{67}\)

Current military tribunals offer detainees more protections than in the past, yet they are widely unpopular and vehemently opposed, compared to the public’s welcoming attitude in response to the World War II commissions.\(^{68}\) Before the detainees are even charged with crimes, the military determines whether their detention is appropriate in the first place through the use of CSRTs. The CSRT must establish that the detainee is an unlawful enemy combatant, a safeguard that past military tribunals never employed. In determining enemy combatant status,

\(^{59}\) ROTUNDA, supra note 24, at 148.
\(^{61}\) Id.
\(^{62}\) Id. at 265.
\(^{63}\) Id. at 266.
\(^{64}\) Id. at 269. See Ex Parte Quirin, 317 U.S. 1 (1942).
\(^{65}\) Goldsmith & Sunstein, supra note 60, at 266–67.
\(^{66}\) Id. at 267–68; CSRT Process 5–6.
\(^{68}\) Goldsmith & Sunstein, supra note 60, at 264.
the military gives each detainee an unclassified description of the factual basis for his
classification as a combatant. 69 In addition, each detainee may challenge his enemy combatant
classification before a panel of three neutral military officers. 70 When evaluating the evidence,
the tribunal uses a preponderance of the evidence standard, which is identical to the standard
used in American civil cases. 71

The major shortfalls of the CSRT process concern the types of admissible evidence, the
access to legal counsel, and the review process. 72 The government may admit “any information
it deems relevant and helpful to a resolution of the issues before it,” which can include evidence
that is often inadmissible in civilian Article III courts, such as hearsay and statements obtained
through coercion or psychological tactics. 73 The detainee is assigned a personal representative
but this representative does not function as legal counsel. 74 Although at first glance these
evidentiary and legal assistance hurdles may seem insurmountable, it is important to note that the
detainee may also present his own evidence during the CSRT as well as take full advantage of
legal counsel during the review process. 75

The most controversial aspect of the CSRT is the review process. Even supporters of the
process take issue with the fact that enemy combatants can appeal their status in an Article III
civilian court. 76 Critics argue that the review process is an inadequate substitute for habeas
corpus, and it does not make up for the evidentiary pitfalls prevalent in the initial determination

69 Bradley, supra note 30, at 335.
70 Id. The panel must not have been “involved in the apprehension, detention, interrogation, or previous
determination of that detainee’s status.” Id.
71 Id.; RICHARD D. FREER & WENDY COLLINS PERDUE, CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS 2
(4th ed. 2005). The preponderance of the evidence standard is described as “the existence of a fact be more
probable than its nonexistence.” Scott M. Brennan, Due Process Comes: An Argument for the Clear and
72 Bradley, supra 30, at 335–36.
73 Id. at 335; Arik, supra note 24, at 666, 696–97.
74 Bradley, supra note 30, at 335.
75 Id.
76 See Choper & Yoo, supra note 28, at 1254 (expressing disdain that, until this point, individuals convicted of
violations of the laws of war were not allowed civilian court appeals).
phase. Until Boumediene, the government had required detainees to exhaust all available procedural remedies before appealing to the United States Court of Appeals for the District of Columbia. This court could only review the following: (1) whether the CSRT had followed the standards and procedures specified by the DOD; (2) whether the facts sufficiently supported a preponderance of the evidence; and (3) whether the CSRT procedures are consistent with the Constitution and the laws of the United States. Compared to the World War II tribunals, the petitioner already has an advantage because the court may review the sufficiency of the military's determination of enemy combatant status, rather than simply reviewing jurisdictional issues. Allowing the court to review the sufficiency of evidence is a monumental step for military prisoners, and it compensates for any alleged evidentiary weaknesses in the CSRT process. Critics argue that a review process that can only assess whether the CSRT followed

77 Critics of the review process include both the Supreme Court and members of the public. See Boumediene v. Bush, 128 S. Ct. 2229, 2274 (2008) (stating that the detainees “have met their burden of establishing that the DTA review process is, on its face, an inadequate substitute for habeas corpus”). See also Kristine A. Huskey, Standards and Procedures for Classifying “Enemy Combatants:” Congress, What Have you Done?, 43 Tex. Int'l L.J. 41, 46, 54 (2007), for a critique on the military’s procedures:

All [detainees] were subject to a CSRT that, when all was said and done, merely confirmed that it was a wholly inadequate procedure for determining who these men really were . . . . Given the circumstances surrounding how these individuals came to be at Guantánamo and the fact that the CSRTs and the ARBs potentially mean a lifelong sentence in extremely harsh conditions for many, shouldn’t these procedures and proceedings be of the highest standards? Shouldn’t they be chock full of due process guarantees to ensure that we have separated the real combatants from innocent civilians and that we are holding our real enemies?

78 Boumediene, 128 S. Ct. at 2274. Although Boumediene holds that the detainee no longer has to exhaust his review procedures before filing a writ of habeas corpus in federal court, the majority clearly states that the detainee cannot file a writ immediately upon detention—he must allow the government a reasonable amount of time to determine the detainee’s status. Id. at 2275–76.

79 Bradley, supra note 30, at 325.

80 See generally CSRT Process (DOD document comparing the traditional POW military tribunal to the CSRT process).

81 See CSRT Process 5–6. The report states that:

[T]he MCA and DTA provide alien detainees with greater rights than that traditionally available in the military tribunal context. The Supreme Court has held that the habeas review traditionally afforded in the context of military tribunals does not examine the guilt or innocence of the defendant, nor does it examine the sufficiency of the evidence. Rather, it is limited to the question of whether the military tribunal had jurisdiction over the charged offender and offense.

Id.
standards and procedures set forth by its own department, the DOD, is not adequate. However, this argument overlooks the third factor available for judicial review—whether the procedures are consistent with the Constitution and the laws of the United States. By allowing this catchall provision, the court can step back and review the overall fairness of the procedure by using the same protections that guard American citizens—the Constitution and federal laws.

2. Comparing Combatant Status Review Tribunals to Requirements Set Forth by the Supreme Court

In the ongoing tug of war between the judicial and the political branches, the Supreme Court has used dicta to offer suggestions about adequate rules and procedures for the existing military framework. The political branches have taken steps to heed the judicial branch’s advice as well as taken additional steps to rectify any weaknesses in the available procedures, which further illustrates that the CSRT process is adequate.

In Hamdi, the Supreme Court held that “due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.” Although Hamdi only applies to American citizens and not to alien enemy combatants, Congress took measures to ensure that these standards were readily available for all military detainees, regardless of citizenship. In other words, Congress took into account the Constitution, even though most petitioners cannot

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82 Arik, supra note 24, at 659–60.
84 Hamdi, 542 U.S. at 509.
85 Id.
avail themselves of this document because they are not American citizens and are not being held on American territory.  

In *Hamdan*, the Supreme Court held that the military commissions were not justified because Congress did not explicitly authorize them. In *Hamdi*, the Court also stated, “There remains the possibility that the standards [regarding a neutral decisionmaker] we have articulated could be met by an appropriately authorized and properly constituted military tribunal.” When these statements are read in conjunction, it is clear that the Supreme Court is not opposed to the military’s role as long as the source of its power is legitimate. Congress quickly quelled the Court’s qualms by passing the MCA. Congress ensured that it did not use ambiguous language and clearly authorized the use of military commissions when it enacted the MCA. The MCA in turn relies on the CSRT process, which has already been shown to supply adequate procedures for military detainees.

The government has taken many other steps to ensure fair and accurate classifications of enemy combatants. First, it gives the detainee advance notice concerning the factual basis for his detention. At the CSRT itself, the detainee may present both testimonial and written evidence to contest his detention. The tribunal’s panel is composed of three neutral commissioned military officers who were not involved in the capture, detention, or interrogation of the detainee. The determination of enemy combatant status is then achieved by a preponderance of

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87 Solomon, supra note 83, at 5175.
88 *Hamdi*, 542 U.S. at 538.
89 See Arik, supra note 24, at 671–74 (stating that “Congress responded to the Court's ruling in *Hamdan* that the DTA did not apply to pending cases by passing the Military Commissions Act of 2006” and describing Congress’s motive behind the DTA and the MCA as an attempt “to act with sufficient intent to quell future challenges”).
91 Bradley, supra note 30, at 325.
92 Id.; CSRT Process 4. The witness must be reasonably available. Id.
93 CSRT Process 2.
the evidence and a majority vote. Although statements obtained through alleged coercion are
admissible, the DTA mandates that the panel weighs this factor when considering the evidence.
If the enemy combatant is dissatisfied with his classification, he may then appeal to an Article III
court. Therefore, even if the classification were somehow biased, the neutral Article III judge
can rectify the mistake. GITMO has also established ARBs that annually review all detainees
to determine if the facts support continued detention. If the facts are insufficient, the detainee
is either transferred to another country’s custody or released. Over 550 detainees have
undergone this CSRT process. As of March 2007, the military had released almost 400
GITMO detainees, illustrating that the process is not a ceremonial barrier to indefinitely
detaining dangerous terrorists.

3. Comparing the War on Terror to Past Wars

Traditional warfare is between two sovereign nations. Usually, one nation attacks the
second nation, which then declares war on the first. However, over sixty years after the last

94 Id. at 3. It is important to note that there is a rebuttable presumption that the government evidence submitted by
the Recorder is genuine and accurate. Id. at 4. Although this appears to favor the government’s case, “[r]ebutable
presumptions are certainly not novel; indeed, courts often use them when direct proof is impractical or difficult to
obtain.” Arik, supra note 24, at 699.
95 CSRT Process 4; DTA § 1005(b). This Article is not purporting that the military tortures detainees at GITMO.
96 DTA § 1005(e) (stating that “the United States Court of Appeals for the District of Columbia Circuit shall have
exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an
alien is properly detained as an enemy combatant”).
97 See John Yoo, The Great Writ: Developments in the Law of Habeas Corpus, 91 CORNELL L. REV. 573, 591
(2006). Yoo writes, “Federal courts are designed to be independent from politics, to passively allow parties to drive
the litigation, and to receive information in highly formal ways through litigation. These characteristics may make
courts more neutral in their decisionmaking and fairer in their attitude toward defendants or detainees . . . .” Id.
98 Bradley, supra note 30, at 325.
99 Id.
101 Bradley, supra note 30, at 325; ROTUNDA, supra note 24, at 142.
102 ROTUNDA, supra note 24, at 29–30; Bradley & Goldsmith, supra note 16, at 2048–49.
103 See Matthew C. Waxman, Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists,
note 24, at 29–30 (discussing the traditional laws of war). For example, in World War II, the Japanese launched a
deadly attack against the American naval base in Pearl Harbor, Hawaii. Hearings before the Joint Committee on the
traditional hostilities, warfare has changed dramatically. American freedom and liberty began to foster resentment around the world.\textsuperscript{104} Using sophisticated technological advancements, terrorist groups who target American principles, such as al Qaeda, were able to form a network that has permeated crevices throughout the world.\textsuperscript{105} Al Qaeda does not pledge allegiance to any country, and its members are certainly not military from a recognized nation.\textsuperscript{106} Fighting an enemy that is not a country is comparable to finding a violent and well-armed needle in a global haystack.

With these differences in mind, the United States had to adapt its military procedures to suit the new enemy.\textsuperscript{107} Changes were not limited to military tactics but also included enemy detention.\textsuperscript{108} A traditional military prisoner was subject to the Geneva Conventions, but these are inapplicable to al Qaeda because they are not members of a foreign nation’s military.\textsuperscript{109} Therefore, when the War on Terror officially began on September 11, the United States had to

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involved about 360 aircraft that, \textit{inter alia}, sank multiple Navy battleships and killed 2086 American servicemen. \textit{Id.} at 56–64. The United States declared war on Japan the very next day, December 8, 1941, and thus entered World War II. Declaration of State of War with Japan, S.J. Res. 116, 77th Cong. (1941) (enacted). This war primarily consisted of land armies and naval fleets attacking each other. See \textsc{Basil Collier}, \textsc{The Second World War: A Military History} 553–57 (1967) (listing the Allied powers’ total naval forces); \textit{see also} Yoo, \textit{supra} note 97, at 576–77. It ended with a clear victory for the Allied powers when the Germans and the Japanese surrendered in 1945 after Adolf Hitler committed suicide and the Americans dropped two atomic bombs on Japan. \textit{Id.} at 473.\textsuperscript{102}


\textit{Rotunda, supra} note 24, at 29–30.

\textit{Yoo, supra} note 97, at 290 (remarking that the “Pentagon could easily adapt its existing review process for [GITMO] prisoners”).

\textit{See} \textit{id.} at 587 (discussing the difficult nature of fighting al Qaeda).

\textit{Taylor, supra} note 13, at 239.
develop a new framework for a new type of war.\textsuperscript{110} Considering the imminence of widespread death and destruction, the American public should give the federal government flexibility as it determines the most appropriate manner in which to deal with this crisis.

B. How to Try Enemy Combatants: Employing Military Commissions

After an unlawful enemy combatant status is determined through the CSRT process, then the military may charge him with crimes and then try him in a military commission. However, some argue that unlawful enemy combatants should be tried in civilian criminal courts.

1. Military Commissions

Many reasons support the use of military commissions in trying enemy combatants detained during the War on Terror. First, the trial of enemy combatants is a matter of national security, and it is inappropriate to expose these matters to a civilian forum. These cases involve sensitive and classified information, and as discussed above, Article III courts are open to the public. Military commissions strike a balance between national security and providing the defendant with a fair trial.\textsuperscript{111} Military commissions can even open nonclassified parts of the proceedings to the public.\textsuperscript{112} Although such secrecy of national security issues may foster criticism, it will ultimately protect Americans due to the “nebulous” nature of the War on Terror.\textsuperscript{113} Al Qaeda and other terrorist organizations will gain access to any intelligence information that is released during Article III trials, and they will use it to plan future attacks against innocent civilians and to evade capture.\textsuperscript{114}

\textsuperscript{110} See Sulmasy & Yoo, supra note 104, at 1835–36.
\textsuperscript{111} Hemingway, supra note 1, at 10.
\textsuperscript{112} Id. at 11.
\textsuperscript{113} Id. at 9.
\textsuperscript{114} Id. at 9.
Second, as discussed above, military commissions have been used repeatedly throughout American history. They are time-tested and reliable, especially for nonconventional enemies. In addition to the World War II example discussed above, other notable military commissions include those during the Revolutionary War and the Civil War. In 1780, George Washington established a military commission—called the “Board of General Officers”—to try Major John Andre, a British spy who had worked in conjunction with Benedict Arnold. The Board sentenced Major Andre to death and he was hanged. A total of three days passed between the commencement of his trial and his execution. In 1862, President Lincoln authorized the use of military commissions, while simultaneously suspending the writ of habeas corpus for those convicted and sentenced by military commissions. Critics argue that military commissions such as these overly favor the government, making it nearly impossible for the tribunal to find the detainee not guilty. However, World War II military commissions returned many acquittals, and the commissions only issued twelve death sentences out of 177 Nazi officials who were found guilty. American history shows that military commissions have been the favored forum for trying war criminals, especially nonconventional ones:

The . . . enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are

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115 Iraola, supra note 5, at 572 n.36.
116 Hemingway, supra note 1, at 9; Taylor, supra note 13, at 227.
117 Hemingway, supra note 1, at 9; Iraola, supra note 5, at 572 n.36.
118 Ex Parte Quirin, 317 U.S. 1,12–13 n.9 (1942); Iraola, supra note 5, at 565 n.36.
119 Quirin, 317 U.S. at 12–13 n.9.
120 Id.
123 Dean, infra note 133.
generally deemed to be offenders against the law of war subject to trial and punishment by military tribunals.\footnote{Quirin, 317 U.S. at 12; Hemingway, supra note 1, at 9.}

The War on Terror is different from traditional wars, but this does not mean that the government should abandon all of its standard practices. The War on Terror requires some creative thinking to adapt the procedural protections available to enemy combatants, but it does not involve overhauling hundreds of years of military commissions.

Although the first two reasons deal with the more practical aspects of military commissions, the third reason for favoring military commissions over other venues is that the U.S. government needs to send a symbolic message to al Qaeda.\footnote{Press Release, President George W. Bush Signs Military Commissions Act of 2006, available at http://www.whitehouse.gov/news/releases/2006/10/20061017-1.html. President Bush voiced his concerns over al Qaeda and the necessity of military commissions: When I sign this bill into law, we will use these commissions to bring justice to the men believed to have planned the attacks of September the 11th, 2001. . . . With our actions, we will send a clear message to those who kill Americans: We will find you and we will bring you to justice. Id.} September 11 was the deadliest terrorist attack in American history.\footnote{See H.J. Res. 61, 107th Cong. (2001) (enacted), which described the events of September 11 as “by far the deadliest terrorist attacks ever launched against the United States, and, by targeting symbols of American strength and success, clearly were intended to intimidate our Nation and weaken its resolve.” Id.} Al Qaeda has waged an ideological war on the fundamental building blocks of American philosophies—freedom and liberty.\footnote{James F. Hoge & Gideon Rose, How Did This Happen? Terrorism and the New War x, 10–11 (2001).} Terrorist operatives infiltrated American civilian life and used American commercial machinery against its own citizens.\footnote{Id. at 2, 7.} Although symbolism may seem the weakest and the least legally supportable argument, it is fundamentally the most important.\footnote{See Joshua Filler, Justice Seems to Have Forgotten One Crucial Point: We’re at War, USA Today, Nov. 19, 2009, at 10A (arguing that the September 11 terrorist attacks were far from an everyday crime and should therefore not be treated as one by prosecuting the perpetrators in everyday courts).} Al Qaeda based most of its operative decisions on symbolism—the World Trade Centers symbolized America’s financial dominance and the Pentagon symbolized its military dominance. In return, the United States needs to show al Qaeda that it takes terrorism very seriously. It should subject those who are suspected of
fostering and promoting terrorism to a rigid military tribunal, rather than placing them in a civilian court reserved for everyday criminals.

There is also a political argument to address. The public has not strongly objected to previous American military commissions, while many vehemently oppose the Bush administration’s use of tribunals in the War on Terror. Some have suggested that the American public and global communities objected to Bush’s commissions simply because he proposed them. Although this is a likely result of the Bush administration’s bold policies, the effect has certainly permeated every crevice of the entire party, making advocating for certain issues very difficult. During World War II, President Roosevelt established military commissions to try Nazis who had arrived on American soil, including two naturalized citizens. The American public not only cheered on the military’s prosecution of the Nazis, but it practically called for death sentences. If President Bush had not proposed the military commissions, but perhaps a more centrist official in Congress had done so, the public may not have been so quick to oppose the idea.

2. Criminal Courts

President Obama’s decision to try five key military detainees in civilian courts will negatively impact the War on Terror. There are many reasons why American civilian criminal courts are the wrong option to pursue.

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130 David Brooks, *The Betrayal of True Conservatism: Edmund Burke, the Intellectual Keystone*, Would not be Amused by the Bush/Cheney White House, Pittsburgh Post-Gazette, Oct. 9, 2007 (noting so eloquently that, “[t]o put it bluntly, over the past several years, the GOP has made ideological choices that offend conservatism’s Burkean roots”). Although this is ideologically a center-right country, the Democrats swept the Republicans in the 2008 elections, which can arguably be blamed on President Bush’s bold policies. David Winston, *GOP Proves You Can't Win Without Running A Campaign on Issues*, Roll Call, Nov. 10, 2008.

131 Goldsmith & Sunstein, *supra* note 60, at 263–64.

132 *Id.* at 264.
First, the American criminal justice system was not designed for nonconventional criminals, such as enemy combatants.\textsuperscript{133} Certain safeguards are needed that Article III courts do not provide.\textsuperscript{134} Theoretically, jurors are anonymous, but in practice, most are not; many may vote not guilty for fear of terrorist retaliation.\textsuperscript{135} Most importantly, enemy combatant cases involve issues of national security with the government’s case frequently hinging on highly classified information.\textsuperscript{136} The terrorist criminal defendant “can demand that the government turn over all of its information on him and tell him how it was acquired or it risks a mistrial or acquittal.”\textsuperscript{137} Moreover, because Article III proceedings are open to the public, this can jeopardize national security.\textsuperscript{138} Lastly, the American legal system does not have a reputation for efficiency; even criminal litigation requires immense resources.\textsuperscript{139} Only a small percentage of cases go to trial because of these inefficiencies.\textsuperscript{140} A preexisting legal arena designed solely to try enemy combatants is the safer and more efficient option.


\textsuperscript{134} Dean, \textit{supra} note 133. See also Joanne Mariner, \textit{A Fair Trial for Zacarias Moussaoui}, Findlaw.com, Feb.3, 2003, available at www.cnn.com/2003/LAW/02/03/findlaw.analysis.mariner.moussaoui/index.html, for a discussion of 9-11 terrorist Zacarias Moussaoui’s trial judge, who allowed him to have access to another terrorist named Ramzi bin al-Shibh because Moussaoui claimed that he could exonerate him.\textsuperscript{135} Dean, \textit{supra} note 133.


\textsuperscript{137} John Yoo, \textit{Closing Arguments: No Clear Benefit to Holding 9/11 Trial in New York}, \textit{PHILA. INQUIRER}, Nov. 22, 2009, at C03. Yoo notes that Soviet moles from the Cold War era used this tactic to avoid the death penalty. \textit{Id.} However, these terrorists do not fear death as our past enemies have.

\textsuperscript{138} U.S. CONST. amend. VI.


\textsuperscript{140} See Gross, \textit{supra} note 139, at 752–53.
Second, the Constitution applies to Article III criminal courts. This means that enemy combatants could potentially avail themselves of full constitutional protections, including the rights to Miranda warnings, a speedy trial, and due process:

Federal and military courts are much more protective of a defendant's rights than the military commissions operating at Guantanamo. In a federal court, an Al Qaeda defendant held for years at a secret CIA site could complain that his right to a speedy trial was violated, that he was never read his Miranda rights, that the evidence against him did not go through a proper chain of custody and that confessions were gleaned through coercive interrogations. The result will be a severe chilling effect on intelligence gathering operations and military detention, “Soldiers and intelligence agents in the field will have to follow law enforcement rules for catching criminals, not the laws of war, if they believe al-Qaeda operatives will be tried in civilian courts.” In addition to these constitutional rights precluding any possibility of a conviction, the government will also have to overcome a notoriously rigorous burden of persuasion—proof beyond a reasonable doubt. The American federal criminal justice system errs on the side of letting the defendant go free rather than convicting the innocent. Several problems stem from the release of an enemy combatant. Besides the most obvious point that a terrorist is now free on American streets, there is the potential of a mob mentality that could result in the public reacting violently, similar to the lynchings that took place in the south. Moreover, when the threat of future terrorist attacks hover on the horizon, the government cannot appear to reduce the seriousness of these crimes by allowing suspected terrorists to use the same court system as common criminals. By purposefully violating the laws of war, terrorists have earned a special tribunal governed by the military.

142 Yoo, supra note 137.
143 Dean, supra note 133.
144 Id.
Third, if the government decides to pursue trials in criminal courts, it will face serious political problems. Article III trials would mean that the government would have to relocate the detainees to holding facilities within the United States. The most discussed options for future civilian trials after the first five in New York include Fort Leavenworth in Kansas, Camp Pendleton near San Diego, and a federal penitentiary in Illinois. Citizens from these areas of the country have already voiced vehement opposition to this idea because of their fear of having suspected terrorists in their neighborhoods. In addition, these military bases are secure enough for their current purposes, but they are not secure enough to house multiple suspected terrorists. It would be costly and time-consuming to reinforce the bases to accommodate enemy combatants. Thus, criminal courts are not the best idea due to inefficiency, safety concerns, constitutional hurdles, and relocation issues.

IV. Conclusion

America changed on September 11 when an unprovoked attack slaughtered thousands of innocent civilians. In the wake of this terrorist attack, the U.S. military captured hundreds of alien enemy combatants, resulting in a myriad of legal issues concerning detention and procedural remedies. This paper advocates that the CSRT determination and review processes established under the Bush administration are adequate substitutes for habeas corpus rights. Military commissions are the best method to try enemy combatants because they are the safest, the most reliable, and the most efficient. The use of criminal courts is dangerous, unreliable, and inefficient. President Obama’s recent decision to try five key military detainees in a New York civilian court is going to set a dangerous precedent for how the United States handles the War on

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146 Ephron, supra note 141.
147 Id.
148 Id.
149 Id.
150 Id.
Terror. Moreover, it will adversely affect current U.S. intelligence and military operations. If the Obama administration is not careful in considering its policies on the War on Terror when it makes further decisions regarding the remaining detainees at GITMO, then the United States will only be more susceptible to further acts of terror.