

# The Dual U.S. Standard for the Treatment and Interrogation of Detainees: Unlawful and Unworkable

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## I. INTRODUCTION

The last six years have proven to be a period of exceptional frustration for many career United States government lawyers primarily engaged in the practice of international law. “Novel” legal arguments espoused by civilian political appointees within the current Administration, largely based on an extreme ideological theory regarding the Chief Executive’s commander-in-chief authority, have led to both mistrust and disdain on the part of the international community. Once considered to be the “gold standard” in terms of its adherence to and respect for the law of war, the U.S. has seen its actions taken over the past several years now viewed as, at best, hypocritical and, at worst, illegal.

This article will focus, briefly, on the major factors that have contributed to the United States’ departure from its traditional adherence to the rule of law. It will deal primarily, however, with the most egregious of these departures: the manner in which the Bush Administration has established two very distinct standards by which detainees held in the custody of the U.S. government are both treated and interrogated.

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## II. THE UNITARY EXECUTIVE CONCEPT AND THE EXPEDIENT “GLOBAL WAR ON TERRORISM”

While the concept of the Unitary Executive did not originate with the Bush Administration, it is this Administration’s interpretation and implementation of this concept that has served as the proximate cause for the majority of the intractable legal issues that have arisen in connection with the “Global War on Terrorism” (GWOT). At its core is the belief that when the Chief Executive exercises his constitutional authority as commander-in-chief, particularly during a time of war, he possesses the essentially unchecked ability to take any action he deems necessary to protect the security of the United States. This view, in turn, has given rise to the need for the Administration to convince both the United States Congress and the American public that the U.S. is now engaged in an ongoing armed conflict—an all-encompassing and indefinite “GWOT.”

### A. *The Unitary Executive Concept*

Reduced to its most basic terms, the “unitary executive concept,” as interpreted and implemented by the current Administration, rests on the premise that when the Chief Executive acts pursuant to his Article II constitutional authority as commander-in-chief, he may exercise this authority unfettered by either domestic or international law. In brief, when the president, as commander-in-chief, exercises his authority to protect the security of the United States, he is above the law.

This exceptionally broad interpretation of executive authority and power is not a post-9/11 invention. It was espoused twenty years ago by then-Congressman Dick Cheney in his dissent to the 1987 Congressional Iran-Contra Report. In his view, the president would “on occasion feel duty-bound to assert monarchical notions of prerogative that will permit him to exceed the laws.”<sup>1</sup> A more explicit recitation of this Commander-Above-the-Law theory<sup>2</sup> has been set forth in a series of recent opinions issued by the Justice Department’s Office of Legal Counsel (OLC). The line of reasoning contained in these OLC opinions is exemplified by the following passage:

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1. REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, WITH SUPPLEMENTAL, MINORITY, AND ADDITIONAL VIEWS, S. REP. NO. 100-216; H. REP. NO. 100-433, at 465 (1987).

2. The “Commander-Above-the-Law” is a term sometimes used to depict the current Administration’s interpretation and implementation of the unitary executive concept. See JORDAN J. PAUST, BEYOND THE LAW: THE BUSH ADMINISTRATION’S UNLAWFUL RESPONSES IN THE “WAR” ON TERROR 89-91 (2007).

The text, structure and history of the Constitution establish that the Founders entrusted the President with the primary responsibility, and therefore the power, to ensure the security of the United States in situations of grave and unforeseen emergencies. The decision to deploy military force in the defense of United States interests is expressly placed under Presidential authority by the Vesting Clause, U.S. Const. Art. 1, § 1, cl.1, and by the Commander-in-Chief Clause, *id.*, § 2, cl. 1. This Office has long understood the Commander-in-Chief Clause in particular as an affirmative grant of authority to the President. . . . In addition, the structure of the Constitution demonstrates that any power traditionally understood as pertaining to the executive—which includes the conduct of warfare and the defense of the nation—unless expressly assigned in the Constitution to Congress, is vested in the President. . . . The implications of constitutional text and structure are confirmed by the practical consideration that national security decisions require the unity in purpose and energy that characterize the Presidency rather than Congress.<sup>3</sup>

In terms of the specific application of this theory to the principal subject at hand—the treatment and interrogation of U.S.-held detainees—the OLC opinion notes that:

Even if an interrogation method arguably were to violate Section 2340A,<sup>4</sup> the statute would be unconstitutional if it impermissibly encroached on the President's constitutional power to conduct a military campaign.<sup>5</sup> As Commander-in-Chief, the President has the constitutional authority to order interrogations of enemy combatants. . . . Any effort to apply Section 2340A in a manner that interferes with the President's direction of such core war matters as the detention and interrogation of enemy combatants thus would be unconstitutional.<sup>6</sup>

In its simplest terms, then, the unitary executive concept, in the view of this Administration, stands for the proposition that, when exercising the constitutional grant as commander-in-chief, the president is possessed of the authority to vitiate any provision of U.S. or international law that he unilaterally deems an encroachment upon not only his “war-making authority,” but much more comprehensively, his power to conduct any “military campaign.”

This unprecedented claim of absolute authority in a Chief Executive's exercise of his constitutional commander-in-chief responsibility flies in the face of the language and history of the Constitution's care-

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3. Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President, *Re: Standards of Conduct for Interrogation Under 18 U.S.C., Sections 2340-2340A* (Aug. 1, 2002), reprinted in MARK DANNER, *TORTURE AND TRUTH, ABU GHRAIB, AND THE WAR ON TERROR* 147-48 (2004) (footnote omitted).

4. This reference is to § 2340A of the Torture Statute, codified at 18 U.S.C. §§ 2340-2340A (LexisNexis 1994 & Supp. 2001), the U.S. statutory implementation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85.

5. Note, here, the contention that a U.S. statute would be unconstitutional if it impermissibly encroached upon the president's constitutional power to conduct not only a “war,” but any “military campaign.” This assertion represents an even further expansion of the view that the president possesses the unilateral authority to engage U.S. forces in combatant activities, absent congressional involvement.

6. DANNER, *supra* note 3, at 142.

fully crafted checks and balances system, as well as numerous United States Supreme Court decisions speaking directly to this issue.<sup>7</sup> It is not, however, the purpose of this article to demonstrate this concept's lack of credibility. The case against such an excessive claim of presidential power has been persuasively made by a vast majority of commentators and scholars.<sup>8</sup>

### B. *The Expedient "GWOT"*

Following the events of 9/11, the Bush Administration, sensing the physical and emotional fear of the American public, as well as the demonstrated political timidity of Congress, moved quickly to implement its theory of the unitary executive. Essential to its successful implementation of this concept, of course, was the Administration's ability to convince both the American public and its elected representatives that, given the events of 9/11, the United States was now at "war," not only with al Qaeda, but with "terrorism" writ large. Having made the case for "war," the President would then be free to exercise his full range of Article II "war making" powers—unfettered by Congress, the courts, or international law.

Post-9/11 an almost universal consensus existed that, though launched by a non-state entity, these al Qaeda strikes constituted an "armed attack" against the United States. It was reasoned that such acts represented the latest al Qaeda activities in what amounted to an "ongoing armed attack" against U.S. interests—one dating back to the initial bombing of the New York World Trade Center in 1993, and including the 1998 bombing of the U.S. Embassies in Kenya and Tanzania, and the 2000 attack on the *U.S.S. Cole* in Yemen. Importantly, however, a very distinct difference of opinion formed as to whether these latest al Qaeda strikes, even given their scope and destructiveness, served to signal the initiation of a "war" or "armed conflict" between a transnational terrorist organization and the United States.

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7. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006) ("Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers . . . . The Government does not argue otherwise."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 644 (1952) (Jackson, J., concurring) ("He has no monopoly of 'war powers,' whatever they are . . . [Congress] is also empowered to make rules for the 'Government and Regulation of land and naval Forces,' by which it may to some unknown extent impinge upon even command functions."); *Ex parte Quirin*, 317 U.S. 1, 25 (1942) ("[D]etention and trial . . . ordered by the President in the declared exercise of his powers as Commander-in-Chief of the Army in time of war . . . are not to be set aside by the courts without the clear conviction that they are in conflict with [for example,] laws of Congress constitutionally enacted."); *Ex parte Milligan*, 71 U.S. (1 Wall.) 2, 121 (1866) (during war, "the President . . . is controlled by law, and has his appropriate sphere of duty, which is to execute [and not violate] the laws").

8. See FREDERICK A.O. SCHWARTZ, JR. & AZIZ Z. HUQ, *UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR* (2007); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008); LOUIS FISHER, *PRESIDENTIAL WAR POWER* (2d ed. 2004).

The United Nations Security Council, on September 12, 2001, unanimously adopted a resolution condemning “the . . . terrorist attacks” of 9/11, which the Council regarded, “like any act of international terrorism, as a threat to international peace and security . . . .”<sup>9</sup> Following this, on September 28, 2001, the Council also unanimously adopted, under Chapter VII of the U.N. Charter, a U.S.-sponsored resolution obligating all member states to deny financing, support, and safe haven to terrorists.<sup>10</sup> Additionally, each of these resolutions affirmed, in the context of the events of 9/11, the inherent right of both individual and collective self-defense, as well as the need “to combat by all means” the “threats to international peace and security caused by terrorist acts . . . .”<sup>11</sup> Importantly, however, while these resolutions made repeated references to “terrorist attacks” and “international terrorism,” conspicuously absent was any U.N. recognition of the existence of a “war” or “armed conflict” between al Qaeda and the U.S., triggered by the 9/11 attacks.

In the following week, President Bush declared a “national emergency”<sup>12</sup> and called to active duty the reserves of the U.S. Armed Forces.<sup>13</sup> On September 18, he also signed into law a congressional joint resolution that was later to become a pivotal aspect of the debate over the President’s contention of his right to resort to his constitutional “war making” authority. The resolution addressed the manner in which the government would choose to classify, treat, interrogate, and bring to trial detainees seized in Afghanistan and elsewhere as it waged the “GWOT.” This resolution authorized the president

to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.<sup>14</sup>

Again, however, this resolution contained no congressional recognition—or declaration—of the existence of an ongoing “war” or “armed conflict” with al Qaeda, in particular, or with the phenomenon of terrorism, in general. The resolution speaks solely to the authorization of the use of force required to prevent future acts of “international terrorism,” and the use of the authorized force was limited to those individuals or entities linked specifically to the 9/11 attacks.

Despite the absence of either a congressional or U.N. recognition of the existence of a “war” or “armed conflict,” triggered by the events

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9. S.C. Res. 1368, ¶ 1, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

10. S.C. Res. 1373, ¶¶ 1-2, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

11. S.C. Res. 1368, *supra* note 9, at pmb1; S.C. Res.1373, *supra* note 10, at pmb1.

12. Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 18, 2001).

13. Exec. Order No. 13,223, 66 Fed. Reg. 48,201 (Sept. 18, 2001).

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

of 9/11, it soon became evident that the Administration had already made the decision to frame all future executive branch actions taken in relation to 9/11 in the context of the president's unfettered "war making" powers. And, in order to implement this unitary executive concept of the commander-in-chief, an expedient "war" was obviously required. Accordingly, on September 20, 2001, in a speech before a joint session of Congress, President Bush simply declared: "On September 11th, enemies of freedom committed an act of war against our country."<sup>15</sup> From this point on, it was the view of the Administration that the "war time" unitary executive concept was no longer a theory; it was a fact.

The Administration's intent to exercise its unitary executive "war making" powers through the self-serving mechanism of an executive-declared "war" was further evidenced by a November 13, 2001 Presidential Order establishing military commissions entitled, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism."<sup>16</sup> The title of this Order reflects perhaps the earliest use of the term "War on Terrorism," and in keeping with the Administration's decision to frame its post-9/11 counter-terrorism activities in the context of a "war," the Order went on to state:

International terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a *state of armed conflict* that requires the use of the United States Armed Forces.<sup>17</sup>

Note that the reference to "international terrorists" in this order is all-encompassing; that is, the terrorists with whom the U.S. is said to have now supposedly entered into a state of "armed conflict" includes not only members of al Qaeda, but terrorists worldwide. This intent to expand the scope of the Administration's "war against terrorism" to one that was to be global in nature was further reflected in Article 2 of the Order. Article 2 broadly defines an "individual subject to this Order" as not only members of al Qaeda, but any person, anywhere, who

has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or has knowingly harbored one or more [of these] individuals . . . .<sup>18</sup>

Clearly, it was now the Administration's contention that the U.S. was not only engaged in a "war" with al Qaeda, the perpetrators of 9/11, but

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15. Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1347, 1347 (Sept. 20, 2001).

16. Military Order—Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

17. *Id.* at 57,833 § 1(a) (emphasis added).

18. *Id.* at 57,834 § 2(a)(1)(ii)-(iii).

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had elected to wage a global “armed conflict” against all individuals unilaterally deemed by the Administration to be terrorists posing a threat to the interests of the United States.

With this executive “declaration of global war” against terrorism, an action noticeably unchallenged by Congress, the Administration was now positioned to draw upon and exercise the full panoply of the commander-in-chief’s “war making” powers. In brief, the President, acting in his capacity as a “war time” unitary executive, was to be the sole “decider” regarding all issues associated with the conduct of this worldwide “war” against terrorists.

Essential to an understanding of the Administration’s need to sell the concept of a “global war on terrorism” to the American public and to Congress is an appreciation for the fact that it chose to frame the later U.S. use of force against the Taliban government of Afghanistan— a legitimate exercise of the right of self-defense— as simply a component of the larger “GWOT.” In doing so, the Administration would then contend that the President—functioning as a unitary executive and acting in his capacity as commander-in-chief of the U.S. forces engaged in this global “war”—was empowered to unilaterally determine the international law that did, and did *not*, apply to the Afghan portion of this more comprehensive conflict.

The dual factors of the unitary executive concept and the “GWOT,” an expedient implementing facilitator, stand as the root causes for the abject U.S. departure from the rule of law over the past seven years. The Administration’s very calculated decision to frame its post-9/11 actions taken to counter the threat of terrorism in the context of a “war” or an “armed conflict” has resulted in the selective misapplication of the very specialized legal regime of the law of war, or law of armed conflict. As in the case of Afghanistan, the result has often been akin to pounding square pegs into round holes. The Administration’s decision to view the U.S. military action in Afghanistan as simply an extension of its “GWOT,” as opposed to a conventional armed conflict, led to a confusing and unprecedented interpretation of the law of war applicable to that conflict. Disregarded by the Administration was the fact that the law of war does not—and was never intended to—lend itself to dealing with legal issues associated with acts of terrorism. Indeed, “armed conflict” and “terrorism” are two very distinct phenomena, each possessed of an applicable body of law. Yet, in its determined effort to make the law of war “fit” its “war on terrorism,” this Administration has stretched, then broken, this law both figuratively and literally. The result has been the creation of a hybrid form of U.S. and international law, including the law of war—a “GWOT law” that has proven to be not only wholly self-serving, but transparently devoid of

legitimacy. This flawed legal reasoning has created a dual U.S. standard for both the treatment and interrogation of U.S.-held detainees.

### III. THE PRE-9/11 LEGAL REGIME FOR DETAINEES

Prior to the events of September 11, 2001, there existed a well-established and practiced legal regime dictating the manner in which all detainees held by the U.S. Armed Forces would be both treated and interrogated. It was this legal regime with which all members of the military had long been trained to comply.

#### A. *Treatment of Detainees*

The term “detainees” is quite often used as a generic reference for all individuals captured and detained by the U.S. Armed Forces. From both a legal and regulatory perspective, however, this term speaks to a very distinct category of seized and confined personnel. This is evidenced in two Department of Defense documents: Army Regulation (AR) 190-8 entitled, “Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees,” and Army Field Manual (FM) 34-52 entitled, “Intelligence Interrogation.”<sup>19</sup>

The very title of AR 190-8 clearly reflects the fact that the category of “Other Detainees” is distinguishable from the other named categories of individuals to whom the terms of the regulation apply. This is reinforced by the language of paragraph 1-1a: “This regulation provides policy, procedures, and responsibilities for the administration [and] treatment . . . of enemy prisoners of war (EPW), retained personnel (RP), civilian internees (CI) and other detainees (OD) in the custody of the U.S. Armed Forces.”<sup>20</sup> And, in terms of the substantive importance of this distinction, paragraph 1-1b notes that “[t]his regulation implements international law, both customary and codified, relating to EPW, RP, CI, and ODs . . . .” That is, AR 190-8 reflects the existing international law requirements for the treatment of all categories of personnel captured and confined by U.S. Armed Forces.

It is important to note, as well, that individuals deemed to be “unlawful combatants” (unprivileged belligerents) are said to fall within the category of ODs. “Unprivileged belligerents” are most commonly defined as “spies, saboteurs, or civilians who [participate in] hostilities or who otherwise engage in unauthorized attacks or other combatant

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19. U.S. ARMY REG. (AR) 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES (1997); U.S. ARMY FIELD MANUAL (FM) 34-52, INTELLIGENCE INTERROGATION (1992). The U.S. Army is the Department of Defense (DOD) Executive Agent for POW/Detainee matters. Accordingly, AR 190-8 represents a multi-service regulation that sets forth DOD-wide policy and guidance on this subject.

20. AR 190-8, *supra* note 19, ¶ 1-1a.

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acts” against a sovereign state.<sup>21</sup> Such individuals “are not entitled to prisoner of war [(POW)] status and may be prosecuted under the domestic law of the [capturing state].”<sup>22</sup>

Regardless of their lack of POW status, however, these captured personnel are, nevertheless, ODs, and are to be treated accordingly while in the custody of the U.S. Armed Forces. This applicable standard of treatment is driven by the fact that ODs are encompassed within the protective provisions of AR 190-8, provisions dictated by international law. The more relevant of these are contained in paragraph 1-5:

1-5a.

(1) All persons captured, detained, interned, or otherwise held in U.S. Armed Forces custody during the course of conflict will be given humanitarian care and treatment from the moment they fall into the hands of U.S. forces until final release or repatriation.

(2) All persons taken into custody by U.S. forces will be provided with the protections of the GPW [(1949 Geneva Convention Relative to the Treatment of Prisoners of War)] until some other legal status is determined by competent authority.

*b.* All prisoners will receive humane treatment without regard to race, nationality, religion, political opinion, sex, or other criteria. The following acts are prohibited: murder, torture, corporal punishment, mutilation, the taking of hostages, sensory deprivation, collective punishments, execution without trial by proper authority, and all cruel and degrading treatment.

*c.* All persons will be respected as human beings. They will be protected against all acts of violence to include rape, forced prostitution, assault and thefts, insults, public curiosity, bodily injury, and reprisals of any kind. . . . This list is not exclusive.<sup>23</sup>

In summary, prior to 9/11, the guidance regarding the manner in which all categories of detainees held by the U.S. Armed Forces were to be treated was both clear and precise.

### *B. Interrogation of Detainees*

FM 34-52, “Intelligence Interrogation,”<sup>24</sup> in force until suspended by FM 2-22.3, “Human Intelligence Collector Operations,”<sup>25</sup> spoke to the fact that intelligence is gathered through the interrogation of, once again, distinctive categories of individuals: EPWs; captured insurgents; civilian internees; other captured, detained, or retained persons; and foreign deserters or other persons of intelligence interest. This FM reaffirmed that “detained” personnel whose status was not clear were enti-

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21. U.S. ARMY JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, OPERATIONAL LAW HANDBOOK 16 (2008).

22. *Id.*

23. AR 190-8, *supra* note 19, ¶ 1-5.

24. FM 34-52, *supra* note 19.

25. U.S. ARMY FIELD MANUAL 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS, at i (2006).

tled to EPW protection until their status was determined by a competent authority. And, as in the case of AR 190-8, FM 34-52 specifically noted a prohibition against the use of force against all categories of personnel captured by U.S. forces, including “detainees.” In part, it provided:

The [Geneva Conventions] and US policy expressly prohibit acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation.

Such illegal acts are not authorized and will not be condoned by the US Army. Acts in violation of these prohibitions are criminal acts punishable under the [Uniform Code of Military Justice (UCMJ)]. If there is [any] doubt as to the legality of a proposed form of interrogation not specifically authorized in this [M]anual, the advice of the command judge advocate should be sought before using the method in question. Experience indicates that the use of prohibited techniques is not necessary to gain the cooperation of interrogation sources. Use of torture and other illegal methods is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the interrogator wants to hear.

Revelation of use of torture by US personnel will bring discredit upon the US and its armed forces while undermining domestic and international support for the war effort. It may also place US and allied personnel in enemy hands at greater risk of abuse by their captors. Conversely, knowing the enemy has abused US and allied PWs does not justify using methods of interrogation specifically prohibited by the [Geneva Conventions] and US policy.

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Physical or mental torture and coercion revolve around eliminating the source’s free will . . . .

Examples of physical torture include—

- Electric shock.
- Infliction of pain through chemicals or bondage . . . .
- Forcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time.
- Food deprivation.
- Any form of beating.

Examples of mental torture include—

- Mock executions.
- Abnormal sleep deprivation.
- Chemically induced psychosis.

Coercion is defined as actions designed to unlawfully induce another to compel an act against one’s will. Examples of coercion include—

- Threatening or implying physical or mental torture to the subject, his family, or others to whom he owes loyalty.
- Intentionally denying medical assistance or care in exchange for

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the information sought or other cooperation.

- Threatening or implying that other rights guaranteed by the [Geneva Conventions] will not be provided unless cooperation is forthcoming.

Specific acts committed by US Army personnel may subject them to prosecution under one or more . . . punitive provisions of the UCMJ.<sup>26</sup>

So, then, the pre-9/11 legal regime applicable to detainees held by U.S. Armed Forces—including those “unlawful combatants” designated as ODs—clearly reflected that these ODs were to be considered a category of captured personnel distinct from the several other categories of individuals who might be captured and confined by U.S. forces. Equally clear is the fact that the Department of Defense (DOD) regulatory and doctrinal guidance applicable to detainees was explicit in detailing the manner in which such individuals were to be both treated and interrogated. Finally, as specifically noted in this guidance, the requirements contained therein were mandated by both international law and U.S. policy.

#### IV. POST-9/11: ESTABLISHING A SECOND U.S. LEGAL REGIME FOR “UNLAWFUL COMBATANT” DETAINEES

The Administration’s decision to validate all future 9/11-related policy and legal decisions in the context of a unitary executive’s “war making” powers was one that would ultimately result in the creation of a second, very distinct U.S. legal regime that would be applied specifically to individuals seized and detained during the course of the executive-declared “war” against terrorism. In essence, this meant that the U.S. would now deal with al Qaeda members—as well as all other individuals suspected of conducting or planning acts of terrorism that threatened U.S. interests, including those suspected of aiding or harboring such individuals—not as “terrorists,” but as “combatant” participants in an ongoing “armed conflict” being waged against the U.S.

This decision, in turn, resulted in the fact that the U.S. would no longer apply either the domestic or international law relevant to “terrorism” or “terrorists” to these personnel. Instead, the Administration would attempt to craft a status for these “combatants” in the context of what it deemed, unilaterally, to be the relevant provisions of the law of war. It was this novel approach that would serve as the critical basis for the manner in which the U.S. government would ultimately categorize, treat, and interrogate what was to become a very distinct classification of “detainees.”

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26. FM 34-52, *supra* note 19, at 1-8.

*A. The Status and Treatment of Personnel Captured in Afghanistan*

In response to the sanctuary and support afforded the al Qaeda terrorist organization by the Taliban government of Afghanistan, the U.S. and a number of coalition states initiated military action against Afghanistan, and the al Qaeda personnel present there, on October 7, 2001. While the U.S. had never recognized the legitimacy of the Taliban government, those planning and conducting this military operation acted on the assumption that this conflict was international in nature—one to which the full range of both the codified and customary law of war would apply. This relevant law would thus include, as a matter of course, the 1949 Geneva Conventions and, specifically, the Third Geneva Convention Relative to the Treatment of Prisoners of War (GPW).<sup>27</sup> Acting on this premise, the U.S. military was prepared to apply the pertinent provisions of the Third Convention to all personnel captured during the course of the conflict, to include, when necessary, conducting “Article 5 tribunals” in order to determine whether certain individuals should be accorded POW status.<sup>28</sup> This would not prove to be the case.

As the U.S. began taking captives in Afghanistan, the status and treatment to be afforded captured Taliban and al Qaeda personnel became, surprisingly, an unsettled and difficult issue. While military Judge Advocates on the ground were prepared to apply the relevant provisions of the 1949 Conventions, and had sought a reaffirmation of this approach through command channels, they were provided with no clear guidance. As a result, these attorneys advised commanders that, in the absence of definitive guidance on this matter, all captured personnel were to be treated in a manner “consistent” with both the GPW and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.<sup>29</sup>

*B. Presidential Determinations Regarding Detainee Status and Treatment*

Entering into what had become a prolonged void concerning the

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

28. Article 5 of the Third Geneva Convention states, in part:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 [persons entitled to POW status], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

*Id.* art. 5.

29. U.S. ARMY JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, CENTER FOR LAW AND MILITARY OPERATIONS, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ 53 (2004).

status of captives seized in Afghanistan, the Bush Administration made the first in a series of decisions that would evidence its abandonment of the pre-9/11 detainee legal regime concerning the manner in which it would categorize and treat captured individuals, not only in Afghanistan, but anywhere in the world, during the course of its recently declared “war on terrorism.”

### 1. Status Determination

Acting on advice contained in a January 22, 2002 Department of Justice (DOJ) opinion, the President indicated initially that the U.S. would neither apply the Geneva Conventions to the conflict in Afghanistan, in general, nor apply the GPW to Taliban and al Qaeda captives, in particular.<sup>30</sup> In its opinion, the DOJ had reasoned that, as a non-state actor, al Qaeda was incapable of signing and, thus, becoming a party to international conventions. Accordingly, it followed that al Qaeda personnel were entitled to no rights or privileges conveyed by the 1949 Geneva Conventions, particularly the GPW. Additionally, as private individuals, al Qaeda members who had taken up arms against a sovereign state, for example the U.S., had become “unlawful combatants” and, as such, were entitled to no protections under the law of war, including those of the GPW. In summary, al Qaeda personnel captured in Afghanistan were not entitled to POW status; they were to be classified as “unlawful combatant” detainees.<sup>31</sup>

Speaking to the status of the captured Taliban, the DOJ opined that, given the ongoing “global war against terrorism,” the President could, acting under his Article II constitutional authority as a “war time” commander-in-chief, suspend any part, or all of, any international agreement relative to the conduct of this “war.” Accordingly, the President was free simply to suspend the applicability of the Geneva Conventions to the conflict in Afghanistan, as a whole, and more specifically, the applicability of the GPW to Taliban personnel.<sup>32</sup> In noting this course of action, the DOJ spoke to what it viewed as several supporting factors: that Afghanistan was a “failed State,” possessed of no functioning central government; that it had demonstrated an inability or unwillingness to fulfill its international obligations; and that it enjoyed minimal international recognition as the legitimate Afghan government.<sup>33</sup>

The DOJ went on to note that the President might also pursue an alternative approach toward this issue, stating that he could choose to

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30. See Memorandum from Jay S. Bybee, Assistant Attorney General, U.S. Dep’t of Justice, to Alberto Gonzales, Counsel to the President, and William J. Haynes II, General Counsel, Dep’t of Defense, at 1 (Jan. 22, 2002).

31. See *id.* at 9-10.

32. See *id.* at 10-11, 24-25.

33. See *id.* at 18-22.

apply the Geneva Conventions to the Afghan conflict as a matter of policy, rather than as a matter of law. Having applied the GPW to the captured Taliban personnel, however, he might then make the determination that these individuals failed to qualify for POW status under the specific requirements of this Convention.<sup>34</sup> In essence, either approach would produce the same result: Taliban personnel held by the U.S. would not be entitled to POW status. As in the case of the members of al Qaeda, Taliban captives would be viewed simply as “unlawful combatant” detainees.

The President’s initial indication that the U.S. would choose not to apply the Geneva Conventions to the Afghan conflict—or to those seized in the course of this conflict—met with substantial domestic and international criticism. Indeed, much of this criticism originated with career U.S. government attorneys who viewed the conflict in Afghanistan as clearly international in nature, and one to which the full range of the law of war, including the Geneva Conventions, applied. Following several weeks of internal debate on this matter,<sup>35</sup> the President issued a February 7, 2002 memorandum which formally set forth the government’s position regarding the status that would be afforded captured Taliban and al Qaeda personnel, the manner in which they would be treated, and the legal rationale for these decisions.<sup>36</sup>

Citing both the January 22, 2002 DOJ opinion and a February 1, 2002 letter from the Attorney General,<sup>37</sup> the President, in his February 7 memorandum, issued a formal decision that the Geneva Conventions did not apply to the “conflict” with al Qaeda in Afghanistan or elsewhere in the world, citing the fact that al Qaeda was not a High Contracting Party to these Conventions. Accordingly, he noted, al Qaeda personnel did not qualify for POW status. This determination, in effect, resulted in al Qaeda captives formally taking on the status of “unlawful combatant” detainees.

The President additionally determined that, though he possessed the constitutional authority as a “war time” commander-in-chief to suspend the applicability of the Conventions as a whole to the conflict in Afghanistan, he would not do so. Instead, as a matter of policy—vice law—he would apply these Conventions to the U.S. conflict with the

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34. *See id.* at 25, 28.

35. *See* Draft Memorandum from Alberto R. Gonzales, Counsel to the President, to President George W. Bush (Jan. 25, 2002); Memorandum from Colin L. Powell, Secretary of State, to Alberto R. Gonzales, Counsel to the President (Jan. 25, 2002); Letter from John Ashcroft, Attorney General, to President George W. Bush (Feb. 1, 2002); Memorandum from William H. Taft, IV, Legal Advisor, Dep’t of State, to Alberto R. Gonzales, Counsel to the President (Feb. 2, 2002); Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President (Feb. 7, 2002). All of the above correspondence has been reprinted in DANNER, *supra* note 3, at 83-104.

36. Memorandum from President George W. Bush to Secretary of State et al. (Feb. 7, 2002), reprinted in DANNER, *supra* note 3, at 105.

37. Ashcroft Letter, *supra* note 35.

Taliban. Acting on facts provided to him by the DOD and upon the recommendation of the DOJ,<sup>38</sup> however, the President concluded that, under the relevant provisions of GPW Article 4, Taliban personnel did not qualify for POW status. They, too, would be classified as “unlawful combatant” detainees.

An appreciation for the DOJ legal analysis resulting in this very significant Presidential memorandum—a document that was to set the stage for the formulation of dual U.S. detainee treatment and interrogation standards—requires a brief assessment of the relevant provisions of GPW Article 4. This is particularly true in terms of the DOJ’s assessment of the status of captured members of the Taliban:

Article 4: Prisoners of War

A. Prisoners of War, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

- (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict . . . provided that such militias or volunteer corps, including such organized resistance movements, fulfil [sic] 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;
  - (c) that of carrying arms openly;
  - (d) that of conducting their operations in accordance with the Laws and customs of war.<sup>39</sup>

Article 4(A)(1) deals with the regular armed forces of a state and militia and volunteer corps members who are incorporated into, and become an integral part of, such armed forces. Article 4(A)(2) speaks to militia and volunteer corps members, as well as members of resistance groups, who may fight on the side of a party to a conflict, but who are not incorporated into the armed forces of that party. While the militia and volunteer corps members identified in Article 4(A)(1) automatically qualify for POW status, those referenced in 4(A)(2) must meet the four additional requirements of this provision.

In its analysis, the DOJ summarily dismissed any consideration that captured Taliban personnel would qualify for POW status as members of the Afghan armed forces, focusing, instead, on whether these Taliban fighters qualified for such status under the additional requirements of 4(A)(2). The DOJ concluded that the Taliban forces did not meet the additional requirements and would be classified as “unlawful combat-

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38. Bybee Memorandum, *supra* note 35.

39. GPW, *supra* note 27, art. 4.

ant” detainees.<sup>40</sup> While this legal analysis concerning the status of Taliban captives is highly debatable, it was, nevertheless, accepted and acted upon by the President.

The presidential determination to designate both al Qaeda and Taliban detainees as “unlawful combatants,” purportedly under the applicable provisions of the law of war, was essential to the Administration’s evolving decision to formulate a second U.S. legal regime applicable exclusively to such detainees. This new regime would differ substantially from the pre-9/11 detainee legal regime in terms of the manner in which these “unlawful combatant” detainees would be treated and interrogated. In a related matter of significant legal importance, this presidential decision also served as the basis for the selection of the judicial forum in which these detainees were to be tried for alleged crimes. Had the detainees been accorded POW status, specific provisions of the GPW would have dictated their trial by military court-martial, pursuant to the procedures of the UCMJ.<sup>41</sup> As “unlawful combatants,” however, these individuals could now be tried, instead, in a U.S. judicial forum of choice: in this case, the Military Commissions specifically constituted under the previously referenced Presidential Order of November 13, 2001.<sup>42</sup>

Finally, having articulated his reasoning for declaring both al Qaeda and Taliban captured personnel to be “unlawful combatants,” the President addressed a lingering contention on the part of a number of international lawyers that Common Article 3 of the Geneva Conventions should be deemed applicable to the ongoing U.S. “armed conflict” with al Qaeda. Drawing once again upon the advice of the DOJ, the President stated that Common Article 3 applied to neither al Qaeda nor Taliban detainees, as the “relevant conflicts”<sup>43</sup> were international both in nature and scope, and Common Article 3 applied only to “armed conflicts not of an international character.”<sup>44</sup>

## 2. Presidential Memorandum: Detainee Treatment

Turning from the issue of the status that was to be accorded captured al Qaeda and Taliban personnel, the President next addressed the manner in which these individuals were to be treated: “As a matter of

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40. *See id.* § 2.

41. Uniform Code of Military Justice, 10 U.S.C. §§ 801-946 (2006).

42. Military Order, *supra* note 16.

43. Memorandum from President, *supra* note 36, at 2. Note the President’s use of the term, “relevant conflicts.” This was consistent with the government’s position that two distinct conflicts were at issue—one that had been waged with the Taliban government of Afghanistan, and a second, ongoing conflict with “international terrorists,” including al Qaeda, worldwide.

44. The Supreme Court later rejected the government’s contention that Common Article 3 did not apply to al Qaeda personnel captured and detained by the United States. *Hamdan v. Rumsfeld*, 548 U.S. 557, 631-32 (2006).

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policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.”<sup>45</sup>

Note that the President characterized his decision to afford “humane” treatment to the detainees in issue as one of “policy” rather than as one mandated by either domestic or international law. Note, as well, the significant caveats placed on this “policy” determination. The treatment afforded these individuals needed only to be “consistent,” rather than in accordance, with the principles of the Geneva Conventions. Even this level of treatment was not mandatory; it was to be provided to these detainees only to the “extent appropriate and consistent with military necessity.” That is, if it was determined that “military necessity” demanded otherwise, detainees need not be accorded even this qualified level of “humane” treatment.<sup>46</sup>

Clearly, this largely ambiguous “standard” of treatment deemed applicable to captured al Qaeda and Taliban personnel represented a significant departure from that set forth in the pre-9/11 detainee legal regime. Even more importantly, as revealed by later events, it was this presidential language that served as the executive proximate cause for the abusive treatment and interrogation of U.S.-held detainees that was to occur in the months that followed.

In summary, the President had determined that the al Qaeda and Taliban captives held by the U.S. were not POWs; they were, instead, “detainees.” And they were not simply categorized as detainees, but “unlawful combatant” detainees—a newly evolved category of detainees to whom a very novel and ambiguous standard of treatment would apparently now be applied.

#### V. GUANTANAMO BAY: IMPLEMENTING A NEW STANDARD FOR THE TREATMENT AND INTERROGATION OF “UNLAWFUL COMBATANT” DETAINEES

Following the military operation in Afghanistan, hundreds of captured al Qaeda and Taliban personnel were transported to the U.S. Naval Base at Guantanamo Bay, Cuba, a site that U.S. courts had consistently viewed as beyond the reach of their jurisdiction. An immediate question arose: If declared to be “unlawful combatant” detainees, devoid of any Geneva Convention rights and protections, what legal principles dictated the manner in which these individuals were to be treated and interrogated? The U.S. regulatory and policy guidance comprising the pre-9/11 legal regime for detainees—set forth in AR 190-8 and FM

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45. Memorandum from President, *supra* note 36, at 3.

46. *Id.* at 5.

34-52—was still in place.<sup>47</sup> Although these precepts were initially applied, the adherence to this established legal regime would be short lived.

On October 25, 2002, the Commander, United States Southern Command, forwarded a memorandum to the Chairman of the Joint Chiefs of Staff, in which he noted, “[D]espite our best efforts, some detainees have tenaciously resisted our current interrogation methods” as set out in FM 34-52.<sup>48</sup> Accordingly, he forwarded a number of proposed “counter-resistance” techniques for DOD and DOJ review and approval, as, in his words, he was “uncertain whether all the techniques . . . are legal under US law, given the absence of judicial interpretation of the US [T]orture [S]tatute.”<sup>49</sup>

The exclusive reference to the U.S. Torture Statute<sup>50</sup> appeared to reflect a legal analysis based on the following reasoning. The President had determined that, as “unlawful combatants,” the detainees held at Guantanamo were not entitled to Geneva Convention protections. It followed that, as the requirements of AR 190-8 and FM 34-52 were driven exclusively by U.S. obligations under these Conventions, a continued application of the regulatory and doctrinal requirements in issue was now simply a matter of policy, not law. And policy could be changed.<sup>51</sup> Indeed, it might be argued, the President had already made this change, previously determining that the level of “humane” treatment accorded al Qaeda and Taliban detainees need only be “consistent” with the Conventions. As noted previously, even this requirement had been made subject to the demands of “military necessity.” Thus, relieved of its international obligations, the U.S. government, it could be argued, was now free to concern itself with only one aspect of U.S. law: the Torture Statute.

Apparently lost in this legal analysis, however, was an awareness of the existence of other substantive provisions of international law that seemingly had a direct bearing on this matter: (1) the International Covenant on Civil and Political Rights;<sup>52</sup> (2) the U.N. Universal Declaration of Human Rights;<sup>53</sup> (3) the fact that Common Article 3 of the Geneva Conventions is almost universally viewed as the customary international law baseline standard of treatment to be afforded individuals

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47. AR 190-8, *supra* note 19; FM 34-52, *supra* note 19.

48. Memorandum from General James T. Hill, Commander, U.S. Southern Command, to General Richard B. Myers, Chairman, Joint Chiefs of Staff (Oct. 25, 2002), *reprinted in* DANNER, *supra* note 3, at 179.

49. *Id.*

50. Torture Statute, 18 U.S.C. §§ 2340-2340A (LexisNexis 1994 & Supp. 2001).

51. See Diane E. Beaver, Staff Judge Advocate, Joint Task Force 170, *Legal Brief on Proposed Counter-Resistance Strategies* (Oct. 11, 2002), *reprinted in* DANNER, *supra* note 3, at 170.

52. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

53. Universal Declaration on Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 12, 1948).

captured in any form of “conflict”;<sup>54</sup> (4) an argument relating to the continued application of the relevant provisions of the Fourth Geneva Convention to the detainees in issue, regardless of their designation as “enemy combatants”; and (5) the fact that the U.S. has long viewed as customary international law those minimal protections to be accorded any individual taken captive in a conflict, set forth in Article 75 of Protocol I Additional to the 1949 Geneva Conventions.<sup>55</sup> Thus, it is far from certain that the U.S. was free to base its legal analysis regarding the legitimacy of the proposed detainee interrogation methods forwarded by U.S. Southern Command solely on an interpretation of the U.S. Torture Statute. Nevertheless, this appears to have been the case.

The process through which a significant number of the interrogation techniques proposed for use at Guantanamo were approved by the Secretary of Defense, the subsequent withdrawal of a number of these methods, and the later re-issuance of modified techniques by the DOD, on the recommendation of a DOD Working Group constituted by the Secretary, has been detailed elsewhere.<sup>56</sup> So, too, has the reasoning contained in an August 2002 memorandum issued by the Office of Legal Counsel, DOJ, that essentially served as the legal basis for the use of a number of these interrogation practices.<sup>57</sup> The significance of this flawed process is highlighted, however, by the fact that an investigation later revealed that the migration of a number of these techniques from Guantanamo to Iraq—where the law of war clearly applied in its entirety—at least partially accounted for the occurrence of detainee abuse at the Abu Ghraib prison.<sup>58</sup> It was only after this abuse had become public in 2004 that the 2002 DOJ opinion and the DOD Working Group Report were withdrawn.<sup>59</sup>

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54. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

55. Protocol Additional to the Geneva Conventions of 1949, and Relating to the Victims of International Armed Conflicts art. 75, June 10, 1977, 16 I.L.M. 1391.

56. See David E. Graham, *The Treatment and Interrogation of Prisoners of War and Detainees*, 37 GEO. J. INT'L L. 61, 73-80 (2005).

57. See *id.* In addition to the August 1, 2002 OLC memorandum that dealt with this subject, the OLC issued a second, classified, March 14, 2003 memorandum to the DOD General Counsel, entitled, “Military Interrogation of Alien Unlawful Combatants Held Outside the United States.” The OLC legal analysis contained in these two memoranda served as the “controlling authority” for, and was reflected in, an April 2003 DOD Working Group Report on Detainee Interrogations to the Secretary of Defense that spoke to the legitimacy of specifically proposed interrogation techniques.

58. INDEP. PANEL TO REVIEW DOD DETENTION OPERATIONS 14 (2004) (Schlesinger Report).

59. The August 1 DOJ opinion was withdrawn on December 30, 2004. Memorandum from Daniel Levin, Acting Assistant Attorney General, U.S. Dep’t of Justice, to James B. Comey, Deputy Attorney General (Dec. 30, 2004), <http://www.usdoj.gov/olc/18usc23402340a2.htm>. The DOD Working Group Report was withdrawn on March 17, 2005. Memorandum from William J. Haynes, DOD General Counsel, for The Judge Advocates General and the Staff Judge Advocate to the Commandant (May 17, 2005). In this memorandum, the DOD General Counsel stated,

I agree that, in light of the Justice Department’s modification of its earlier legal analysis, the legal portion of the 2003 DoD Working Group Report on Detainee Interrogations does not reflect now-settled executive branch views on the relevant law. . . . [I] determine that the Report of the Working Group . . . is to be considered a historical document with no

As of 2004, the pre-9/11 legal regime that had long been in place for all “detainees” held by U.S. Armed Forces had clearly been supplanted by a regime that now set forth a different standard of treatment and interrogation for not only al Qaeda and Taliban detainees, but for all detainees unilaterally deemed by the DOD to be “unlawful combatants” in the “Global War on Terrorism.”

#### VI. A TRILOGY OF DETAINEE-RELATED 2004 SUPREME COURT DECISIONS

In the summer of 2004, as reports of the abusive treatment of detainees by U.S. personnel were making headlines worldwide, the United States Supreme Court issued three decisions directly impacting both legal and policy decisions previously made by the Administration regarding the manner in which it would classify, treat, interrogate, and bring to trial detainees it deemed as participants in the “GWOT.”

In *Rumsfeld v. Padilla*,<sup>60</sup> the Court considered the government’s assertion that it possessed the authority to seize a U.S. citizen in the United States, designate him an “unlawful combatant” without affording him an opportunity to contest this designation, and confine him indefinitely in a navy brig in Charleston, South Carolina.<sup>61</sup> While the Court dismissed Padilla’s habeas action challenging such executive authority, it did so on purely technical grounds and declined to accept the asserted executive power, leaving this matter for consideration in a clearly available writ of habeas that might later be filed in an appropriate United States District Court. Two years later, just as the Court was determining whether to consider a habeas challenge to the legality of Padilla’s continued military detention, he was transferred to civilian custody and later tried and convicted of “conspiracy to commit terrorism” in a United States District Court in Miami.<sup>62</sup>

In *Hamdi v. Rumsfeld*,<sup>63</sup> the Court considered the due process protections to be afforded a U.S. citizen of Saudi Arabian origin, who was seized in the Afghanistan theater of war, declared an “unlawful combatant,” and indefinitely confined in the navy brig at Charleston. During

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standing in policy, practice, or law to guide any activity of the Department of Defense.

*Id.*

60. 542 U.S. 426 (2004).

61. The officials seized Padilla as he was exiting an airplane at the O’Hare International Airport in Chicago. *Id.* at 430-31.

62. See generally *United States v. Padilla*, No. 04-60001-CR, 2007 WL 188146 (S.D. Fla. Jan. 22, 2007). Padilla was sentenced on Jan. 22, 2008. See Press Release, Dep’t of Justice, Jose Padilla and Co-defendants Sentenced on Terrorism Charges (Jan. 22, 2008), available at [http://www.usdoj.gov/opa/pr/2008/January/08\\_nsd\\_046.html](http://www.usdoj.gov/opa/pr/2008/January/08_nsd_046.html) (last visited Jan. 19, 2009); Kirk Semple, *Padilla Sentenced to 17 Years in Prison*, N.Y. TIMES, Jan. 22, 2008, available at <http://www.nytimes.com/2008/01/22/us/22cnd-padilla.html>.

63. 542 U.S. 507 (2004).

more than two years of confinement, Hamdi had been denied access to an attorney and denied the right to have the validity of his designated status reviewed. In an 8-to-1 decision, the Court ruled that, though under the 2001 Authorization for the Use of Military Force, Congress had impliedly “authorized the detention of combatants in the narrow circumstances alleged,” due process demanded that a U.S. citizen held in the United States as an “enemy combatant” be afforded access to an attorney and the right to contest the factual basis for his status determination before a “neutral decision-maker.”<sup>64</sup>

Reacting to the *Hamdi* decision, the U.S. government made the decision to conduct Combatant Status Review Tribunals (CSRTs) at Guantanamo, theoretically complying with that which the Court, in *Hamdi*, had stated the Due Process Clause required for a U.S. citizen in such a context. However, despite appearing to have acceded to the demands of the Court by creating these CSRTs, the government would later see the sufficiency of the CSRT procedures also challenged before the Court.<sup>65</sup> Moreover, the government avoided further judicial rulings on the specific procedural protections to be afforded Hamdi by reaching an agreement that he would be released and returned to Saudi Arabia if he forfeited his U.S. citizenship.

Finally, in *Rasul v. Bush*,<sup>66</sup> the Court considered a case involving a British citizen captured in Afghanistan and held as an “enemy combatant” for over two years at Guantanamo. In a 6-to-3 decision, the Court ruled that U.S. courts did, in fact, possess the jurisdiction to consider habeas challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay.<sup>67</sup> An essential aspect of the Court’s ruling centered on its view that “the United States exercised complete jurisdiction and control over the Guantanamo [Base].”<sup>68</sup> Consequently, the government’s rationale for choosing Guantanamo as the site for its indefinite detention of foreign nationals designated as “enemy combatants”—the fact that habeas writs could not be filed in U.S. courts by such detainees—no longer appeared to be valid.

## VII. THE 2005 DETAINEE TREATMENT ACT: LEGISLATIVELY SANCTIONING A DISTINCT U.S. LEGAL REGIME FOR “UNLAWFUL

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64. *Id.* at 509.

65. The alleged insufficiency of the CSRT procedures was a principal element later considered by the Supreme Court in its decision rendered in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008). The petitioners cited numerous structural and procedural flaws in the CSRT process, including: a ban on counsel for individuals appearing before the CSRTs; the lack of an independent decision maker; and the failure to provide detainees with notice of the factual basis for the government’s claim, or any meaningful opportunity to present evidence of their own. *Id.* at 267-69.

66. 542 U.S. 466 (2004).

67. *Id.* at 468, 473.

68. *Id.* at 480.

## COMBATANT” DETAINEES

In the issuance of its 2004 trilogy of decisions dealing with detainee-related matters, the Court had substantially diminished the asserted unitary executive authority of the Administration, a claim of authority unchallenged by a suppliant legislature. Shortly thereafter, Congress, reacting to both the publicly revealed abuse of detainees held at Abu Ghraib and the Court’s decisions, passed legislation that dealt directly with the issues of the treatment, interrogation, and trial of U.S.-held detainees designated as “unlawful combatants.”<sup>69</sup>

Significantly, the 2005 Detainee Treatment Act (DTA) mandated a definitive standard of treatment and interrogation for all detainees held in the custody, or under the effective control, of the DOD, or under detention in a DOD facility. This was accomplished through a statutory declaration that no such individual could be subjected to any treatment or method of interrogation not specifically authorized by and listed in FM 34-52.<sup>70</sup> Given this statutory mandate, there understandably followed an intense U.S. inter-agency debate concerning the appropriate content of the Army FM that was to supersede FM 34-52. After months of often rancorous discussion, in September 2006, a new FM was produced: FM 2-22.3 entitled, “Human Intelligence Collector Operations.”<sup>71</sup> With the publication of this FM, there occurred, in essence, a legislatively imposed reaffirmation of—and return to—the pre-9/11 legal regime for DOD-held detainees, a regime that once again reflected the applicable requirements of international law.

Overlooked at the time—and still not fully appreciated—was the fact that the DTA also clearly sanctioned a parallel U.S. standard of detainee treatment and interrogation. This occurred in the form of an obtuse legislative endorsement of the detainee legal regime that had been constructed by the government since 9/11—and one that would now apply to only those “unlawful combatant” detainees held in the custody or under the physical control of a non-DOD U.S. government agency. This was accomplished in the following manner. While the DTA prohibits the “cruel, inhuman, or degrading treatment or punishment” of these detainees, this section of the DTA goes on to define such treatment or punishment as only that form of “cruel, unusual, and inhumane treatment . . . prohibited by the Fifth, Eighth, and Fourteenth Amend-

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69. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (2005) (codified at 42 U.S.C. § 2000dd).

70. *Id.* § 1002.

71. FM 2-22.3, *supra* note 25. FM 2-22.3 sets forth nineteen approved interrogation techniques. *Id.* at 8-6. Sixteen of these techniques were contained in FM 34-52. Compare FM 34-52, *supra* note 19, at 3-14 to 3-20, with FM 2-22.3, *supra* note 25, at 8-6 to 8-17. The three additional interrogation methods require special approval prior to their use. FM 2-22.3, *supra* note 25, at 8-17 to 8-19, app. M at M-9. All of these techniques are valid under U.S. law and meet U.S. obligations under international law.

ments to the Constitution.”<sup>72</sup> As reflected in U.S. case law, this definition embodies a treatment standard that poses this question: Given the totality of the circumstances surrounding the treatment in issue, does this treatment actually “shock the conscience” of the court?<sup>73</sup> This exceptionally broad and circumstantially dependent standard is readily subject to an interpretation that arguably enables non-DOD agency representatives to engage in detainee treatment and interrogation practices specifically prohibited from use by DOD personnel.

In direct response to the 2004 Supreme Court decisions, which limited the government’s power to subject “unlawful combatant detainees” to indefinite detention and trial by Military Commission, Congress prohibited U.S. courts from hearing writs of habeas corpus filed by such detainees.<sup>74</sup> Finally, in a related matter, Congress chose to vest in the United States Court of Appeals for the District of Columbia Circuit the exclusive jurisdiction to review the validity of any status determination made by a CSRT in adjudging whether a captive alien detainee was, in fact, an “enemy combatant” who the U.S. might then indefinitely confine and prosecute.<sup>75</sup>

Shortly after the passage of the DTA, the Administration was confronted with the most significant judicial challenge, to date, of the implementation of its unitary executive philosophy and resultant legal regime for the treatment and interrogation of “unlawful enemy combatant” detainees.<sup>76</sup> Hamdan, a Yemeni national, was captured by militia forces in 2001 during hostilities in Afghanistan, turned over to the U.S. military, transported to Guantanamo, and, in 2003, charged with “conspiracy to commit . . . offenses triable by Military Commission.”<sup>77</sup> In a habeas petition, Hamdan challenged the authority of a Military Commission to try him. While a U.S. District Court granted habeas relief and stayed the Commission’s proceedings, the D.C. Circuit Court reversed, ruling that the Geneva Conventions were not judicially enforceable and that the trial of Hamdan before a Military Commission would not violate the UCMJ.<sup>78</sup>

Brushing aside the DTA-imposed limitation on the Supreme Court’s jurisdiction to review the decision rendered by the D.C. Circuit Court, the Supreme Court stunned the Administration by ruling that the Military Commissions process violated both the UCMJ and Common

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72. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1003(d), 119 Stat. 2739 (2005) (codified at 42 U.S.C. § 2000dd).

73. See *County of Sacramento v. Lewis*, 523 U.S. 833, 846-47 (1998); *Collins v. Harker Heights*, 503 U.S. 115, 126 (1992); *Rochin v. California*, 342 U.S. 165, 172 (1952).

74. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(2), 119 Stat. 2739 (2005) (codified at 42 U.S.C. § 2000dd).

75. *Id.*

76. *Supra* note 44.

77. *Hamdan v. Rumsfeld*, 548 U.S. 557, 566 (2006).

78. *Id.* at 567-72; see Uniform Code of Military Justice, 10 U.S.C. §§ 801-946 (2006).

Article 3 of the Geneva Conventions.<sup>79</sup> Recognizing the need for a statutory basis for the establishment of the Military Commission process in issue, a still compliant Congress, urged on by the Administration, quickly moved to provide the constituting authority sought by the President. Following only the most minimal of public debate and facing approaching elections that were almost certain to alter the congressional landscape, Congress acted swiftly to meet the demands of the Administration. The result was the Military Commissions Act (MCA).<sup>80</sup>

VIII. THE 2006 MILITARY COMMISSIONS ACT: REAFFIRMING A DUAL  
U.S. LEGAL REGIME FOR “UNLAWFUL ENEMY COMBATANT”  
DETAINEES

In passing the MCA, Congress clearly reaffirmed that there now exists two very distinct U.S. legal regimes for U.S.-held detainees. The Act’s definition of “enemy combatant” is so sweeping in nature that it potentially subjects many individuals who have never committed belligerent acts against the U.S. in a battlefield environment to seizure, indefinite confinement, and trial before a Military Commission. Also reaffirmed is the ability of non-DOD U.S. personnel to engage in “enhanced” interrogation techniques as long as these practices, given the prevailing circumstances surrounding their use, do not “shock the conscience” of a U.S. court.<sup>81</sup> Of particular note, as well, is the fact that the MCA surprisingly authorizes the use of a detainee’s coerced testimony before a Military Commission.<sup>82</sup> The provision apparently reflects a congressional intent to specifically sanction the use of coercive measures against “unlawful combatant” detainees in the custody of a non-DOD U.S. agency. Additionally, the MCA reaffirms the DTA’s provision stripping U.S. federal courts of jurisdiction to hear habeas appeals from individuals declared by the U.S. government to be “enemy combatants” through the use of the CSRT process at Guantanamo.<sup>83</sup>

Finally, another very significant, but often overlooked, aspect of the MCA was its confirmation of the President’s authority to interpret, on behalf of the U.S., both the meaning of the various provisions of the

79. *Hamdan*, 548 U.S. at 567-72.

80. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified at 10 U.S.C. §§ 948a-950w and other sections of Titles 10, 18, 28, and 42).

81. Military Commissions Act of 2006, Pub. L. No. 109-366, § 3(a)(1), 120 Stat. 2600 (2006) (codified at 10 U.S.C. § 948a). The definition of “unlawful enemy combatant” contained in this provision of the MCA removes any requirement of proximity to the battlefield and includes persons who are merely deemed to be supporting hostile actions against any “co-belligerent” state in the “Global War on Terrorism,” not just the United States. *Id.* Section 6(c) of the MCA again defines “cruel, inhuman, or degrading treatment or punishment” as only that “cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution”—a restatement of the “shocks the conscience of the court” standard. *Id.* § 6(c).

82. *Id.* § 3.

83. *Id.* § 7.

1949 Geneva Conventions and when these Conventions would and would *not* apply to U.S. actions, as well as those of its agents. In keeping with this stated authority, the Act thus called upon the President to issue, in the form of an Executive Order, “higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions.”<sup>84</sup> This Executive Order was to be authoritative, except as to grave breaches of Common Article 3 of the Geneva Conventions, which Congress had specifically identified elsewhere in the MCA.<sup>85</sup> Grave breaches were now the only breaches of Common Article 3 for which U.S. agents could be prosecuted under the War Crimes Act.<sup>86</sup>

While not readily apparent, this provision of the MCA, in essence, reflected a congressional intent to require the President to issue guidance concerning non-DOD detainee treatment and interrogation practices he deemed to be compliant with the provisions of Common Article 3, including Article 3(1)(c), which prohibits “outrages upon [human] dignity, in particular, humiliating and degrading treatment.”<sup>87</sup> This Executive Order was a long time in coming and, rather than meeting the congressional desire that the President bring an element of clarity to this issue, it served only to justify and reaffirm prior executive policy and le-

84. *Id.* § 6(a)(3)(A).

85. *Id.* § 6(b). The concept of “grave breaches” is common to all four of the 1949 Geneva Conventions. All parties to these Conventions are obligated to enact any legislation necessary to provide penal sanctions for persons committing, or ordering to be committed, any of the grave breaches defined in the respective Conventions. Article 130 of the GPW lists, as grave breaches, the following acts “if committed against persons . . . protected by the Convention: wilful [sic] killing, torture or inhuman treatment, . . . and wilfully [sic] causing great suffering or serious injury to body or health . . . .” GPW, *supra* note 27, art. 130. As noted, it is the position of the U.S. government that “unlawful combatant” detainees are not protected by the GPW. In *Hamdan v. Rumsfeld*, the Supreme Court applied Common Article 3 of the Conventions to the “conflict” with al Qaeda and, thus, to al Qaeda “unlawful combatant” detainees captured, confined, and interrogated by the U.S. As a result of this ruling, Congress originated the concept of, and articulated what it viewed as, “grave breaches” of Article 3. This was done in order to legislatively define—and thus limit—those violations of Common Article 3 subject to prosecution under the War Crimes Act. This congressional invention of Article 3 “grave breaches” is controlling only in terms of U.S. law; it has no effect internationally.

86. The War Crimes Act, Pub. L. No. 104-192, § 2(a), 110 Stat. 2104 (1996) (codified as amended at 18 U.S.C. § 2441 (Supp. II 1996)). Prior to its amendment by the MCA, in which Congress originated the concept of, and defined, “grave breaches” of Common Article 3, the War Crimes Act (WCA) had provided federal courts with the jurisdiction to prosecute any U.S. national, including a member of the U.S. Armed Forces, for the commission of a “war crime.” “War crimes,” in turn, were defined as including, among other violations of the law of war, violations of Common Article 3 of the 1949 Geneva Conventions. Among those acts prohibited to be taken against persons to whom this Article applied were those noted in Article 3(1)(c): “outrages upon personal dignity, in particular, humiliating and degrading treatment . . . .” GPW, *supra* note 27, art. 3(1)(c). While it was evident that the detainee treatment and interrogation practices now mandated for DOD detainees in AR 190-8 and FM 2-22.3 clearly did not violate this Article 3 provision, far less certain was whether this held true for those treatment and interrogation methods that had been sanctioned under the parallel statutorily authorized U.S. legal regime for non-DOD “unlawful enemy combatant” detainees. Faced with this uncertainty, Congress chose to amend the WCA by legislatively creating the concept of “grave breaches” of Common Article 3 and mandating that only the commission of those offenses specifically identified as “grave breaches” would now constitute “war crimes” for the purpose of WCA prosecution. See The War Crimes Act, 18 U.S.C. § 2441(c) (2006). Not surprisingly, Congress chose not to identify Article 3(1)(c) offenses as prosecutable “grave breaches.”

87. GPW, *supra* note 27, art. 3(1)(c).

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On July 20, 2007, the President issued Executive Order (EO) 13440: "Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency."<sup>88</sup> In its preface, the President reiterated the now familiar basis for the approach taken by his Administration in connection with the classification, treatment, interrogation, and trial of "unlawful enemy combatant" detainees:

The United States is engaged in an armed conflict with al Qaeda, the Taliban, and associated forces. . . . On February 7, 2002, I determined for the United States that members of al Qaeda, the Taliban, and associated forces are unlawful enemy combatants who are not entitled to the protections that the Third Geneva Convention provides to prisoners of war. I hereby reaffirm that determination.<sup>89</sup>

This is followed by a restatement of the U.S. government's definition of "cruel, inhuman, and degrading treatment or punishment," the type of treatment prohibited by Common Article 3(1)(c). Such treatment was once again defined as any cruel, unusual, and inhumane treatment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, in other words, treatment that "shocks the conscience" of a U.S. court.

The text of the EO that follows explicitly confirms the continued existence and use of a dual U.S. detainee legal regime. This regime, while clearly at odds with that of the DOD, unmistakably continues to represent an essential component of the Administration's ongoing "war on terrorism." In section 3, the President stated that the order "interprets the meaning and application of the text of Common Article 3 with respect to *certain* detentions and interrogations, and [is to] be treated as authoritative . . . as a matter of [U.S.] law, [to include the] satisfaction of the international obligations of the United States."<sup>90</sup> Referencing his congressionally acknowledged authority contained in the MCA, the President then noted that a program of detention and interrogation approved by the director of the CIA will "fully" comply with U.S. Article 3 obligations when such a program meets certain criteria.<sup>91</sup> The more relevant of these prohibitions follow.

The program's confinement and interrogation practices cannot include: (1) torture, as defined by the U.S.;<sup>92</sup> (2) any acts prohibited by the MCA amendment to the War Crimes Act purportedly listing the "grave

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88. Exec. Order 13,440, 72 Fed. Reg. 40,707 (July 24, 2007).

89. *Id.*

90. *Id.* at 40,707 to 40,708.

91. *Id.*

92. For the U.S. definition of "torture," see Military Commissions Act of 2006, Pub. L. No. 109-366, § 3, 120 Stat. 2600 (2006) (codified at 10 U.S.C. § 950v(b)(11)(A)).

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breaches” of Common Article 3;<sup>93</sup> (3) any other acts of cruel, inhuman, or degrading treatment or punishment prohibited by both the MCA and the DTA;<sup>94</sup> and (4) “willful and outrageous acts of personal abuse done for the purpose of humiliating or degrading [an] individual in a manner so serious that any reasonable person, considering the circumstances, would deem the acts to be beyond the bounds of human decency, such as sexual or sexually indecent acts undertaken for the purpose of humiliation . . . .”<sup>95</sup>

This latter provision of prohibited practices has raised considerable concern. Critics contend that it is so substantially caveated that it intentionally affords the CIA the flexibility to engage in any number of abusive interrogation techniques, measures prohibited from use by the DOD, and almost universally viewed as, if not torture, most assuredly acts of cruel, inhuman, and degrading treatment.<sup>96</sup>

As to the individuals to whom such a CIA program of detention and interrogation would apply, the President has mandated its use in connection with any alien detainee determined by the director of the CIA to be:

a member or part of or supporting al Qaeda, the Taliban, or associated organizations, and [who are] likely to be in possession of information that could assist in detecting, mitigating, or preventing terrorist attacks within the United States . . . or against its [allies] or other . . . countries cooperating in the war on terror . . . , or [that] could assist in locating the senior leadership of al Qaeda, the Taliban, or associated forces.<sup>97</sup>

Such a unilateral determination results, of course, in an alien detainee automatically being classified as an “unlawful enemy combatant,” with all of the resulting ramifications wrought by this designation: indefinite detention, subjection to “enhanced” interrogation techniques, and potential trial before a Military Commission.

## IX. CONCLUSION

The United States government now employs not one, but two very distinct detainee legal regimes. In an encapsulated manner, EO 13440 clearly confirms and details the existence and framework of a U.S. legal regime applied exclusively to individuals whom the U.S. has designated as “unlawful enemy combatants.” It is a regime that currently parallels the very different approach utilized by the DOD toward all categories of

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93. 18 U.S.C. § 2441(d) (the MCA amendment of the War Crimes Act).

94. This standard is also known as the “shocks the conscience of the court” standard. See *County of Sacramento v. Lewis*, 523 U.S. 833, 846-47 (1998); *Collins v. Harker Heights*, 503 U.S. 115, 126 (1992); *Rochin v. California*, 342 U.S. 165, 172 (1952).

95. Exec. Order, *supra* note 88, § 3(b)(i)(E).

96. See P.X. Kelley & Robert F. Turner, *War Crimes and the White House: The Dishonor in a Tortured New “Interpretation” of the Geneva Conventions*, WASH. POST, Jul. 26, 2007, at A21.

97. Exec. Order, *supra* note 88, § 3(b)(ii).

detainees. While the latter regime is characterized by an adherence to international law, the former has been established through a series of executive decisions and has been sanctioned, in large part, by a passive and compliant Congress. This reflects a U.S. assertion that, in matters of national security, the president may both disregard and unilaterally interpret the long-established international principles applicable to this subject.

The Bush Administration's expanded view of the unitary executive authority of a "war time" commander-in-chief and its expedient creation of a "war" in the form of its mythical "Global War on Terrorism" has led to the Administration's disdain for and self-serving, selective application of international law, in general, and the law of war, in particular. The result has been significant damage to the United States' credibility throughout the world. The transparently flawed detainee legal regime resulting from such hubris cannot survive an objective test of legitimacy. It is both unlawful and unworkable. It should not, and will not, stand. Consistently found wanting by the U.S. judicial system, it has recently suffered still another defeat at the hands of the Supreme Court in *Boumediene v. Bush*,<sup>98</sup> a case in which the Court ruled that detainees held at Guantanamo may challenge their designated status as "unlawful enemy combatants" through the filing of writs of habeas corpus.<sup>99</sup> It is a regime certain to be subjected to even more judicial and legislative challenges in the future as these branches of our government seek to restore a lawful and prudent balance between the nation's security and its commitment to both the domestic and international rule of law.

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98. 128 S. Ct. 2229 (2008).

99. *Id.* at 2262; *see supra* note 65 and accompanying text.