and Iraq, where they were neither limited nor safeguarded,” and contributed to the widespread and systematic torture and abuse at U.S. detention centers there.\footnote{Schlesinger Report, \textit{supra} note 53, at 14.}

\section*{C. Legal Status of Persons Captured by United States’ Forces in the “Global War on Terrorism”}

According to media reports, the United States has detained more than 83,000 persons since September 11, 2001.\footnote{Katherine Shrader, \textit{U.S. Has Detained 83,000 in War on Terror}, \textit{ASSOCIATED PRESS}, Nov. 22, 2005.} As of December 2005, roughly 14,000 detainees remain in U.S. custody in Iraq, almost 500 persons are reportedly detained at Guantánamo, and over 400 are in U.S. custody in Afghanistan.\footnote{\textit{Id.}; Eric Schmidt and Thom Shanker, \textit{U.S., Citing Abuse in Iraqi Prisons, Holds Detainees}, \textit{NY TIMES}, Dec. 25, 2005; \textit{Associated Press, U.S. Frees 81 Afghan Prisoners; Kabul Officials Push for Release of 400 More}, \textit{AKRON BEACON JOURNAL}, Jan. 17, 2005, at A3.} An unknown number of detainees have “disappeared” after entering U.S. custody. The CIA continues to hold al-Qaeda suspects in prolonged incommunicado detention in “secret locations,” outside the United States, without notifying their families, and without providing them with access to the International Committee of the Red Cross or any other independent oversight body of any sort.\footnote{In December 2005, Human Rights Watch reported that twenty-six al-Qaeda suspects have disappeared and are likely in CIA custody. Human Rights Watch, \textit{List of “Ghost Prisoners” Possibly in CIA Custody}, (Dec. 1, 2005), available at \url{http://hrw.org/english/docs/2005/11/30/usdom12109_txt.htm}; see also Human Rights First, \textit{Behind the Wire: An Update to Ending Secret Detentions} (Mar. 2005), available at \url{http://www.state.gov/g/drl/rls/55712.htm} (noting evidence supporting assertion that secret U.S.-run prisons exist in Diego Garcia, Jordan, and U.S. military ships, particularly USS Bataan and USS Peleliu).} Since September 11, 2001, the U.S. government has also unlawfully rendered 100 terror suspects to foreign countries for detention and interrogation purposes and to CIA secret detention centers overseas.

\subsection*{1. Executive Rather than JudicialDeterminations on Detention}

The United States asserts that all detainees captured in the U.S. government’s “global war on terrorism” are “enemy combatants” and can be held pursuant to the President’s powers as commander-in-chief and under the laws of war until the end of hostilities. The U.S. argues that detaining enemy combatants prevents them from returning to the battlefield, thereby deterring further attacks, and allows the U.S. to gather intelligence through interrogation which also acts to prevent future attacks.\footnote{U.S. Report, Annex, Part One, § II(A).} The government in effect argues that the need to fight a “global war on terrorism”—with no end in sight—justifies the indefinite detention of persons without charge, without access to counsel and family members, and with no judicial oversight.

The U.S. has denied persons detained during hostilities in Afghanistan the status of prisoners of war (“POW”) under international humanitarian law and has denied other meaningful protections under international human rights law.\footnote{ICCPR, \textit{supra} note 38, Arts. 9, 14 (requires that lawfulness of detention must be reviewed by court and providing the right to fair trial).} The U.S. Report states that “there is no doubt under international law as to the status of al-Qaida, the Taliban,
their affiliates and supporters” because the President of the United States had determined that such persons are not POWs under the Geneva Conventions. U.S. policy violates Article 5 of the Third Geneva Convention, ratified by the U.S., which requires each POW determination to be made on an individual basis by a competent tribunal and not by the executive branch of government. Notably, this particular provision of the Third Geneva Convention has been implemented by U.S. Army Regulation 190-8, which further provides that detainees are entitled to POW protection whenever their status is not clear. Detainees held in Guantánamo have challenged their detention and some have asserted POW status thus warranting an Article 5 tribunal under the army’s own regulations.

Irrespective of whether international humanitarian law applies, the parallel obligations under human rights law are applicable at all times. As noted by the U.N. Human Rights Committee, the International Covenant on Civil and Political Rights “applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specifically relevant for the purposes of the interpretation of Covenant rights, both spheres of laws are complementary, not mutually exclusive.”

2. Status of Persons Detained In Guantánamo Bay and Afghanistan

Detainees in Afghanistan

The U.S. military exercises control over detainees in U.S. military custody in Afghanistan under an agreement with the Afghan government. The U.S. Report notes that the status

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71 U.S. Report, supra note 1, Annex, Part One, § II (B); see also Ari Fleischer, White House Press Secretary announcement of President Bush’s determination re legal status of Taliban and al Qaeda detainees (Feb. 7, 2002) (declaring that the Taliban and al-Qaeda are not POWs), available at http://www.state.gov/s/l/38727.htm.

72 Geneva Convention Relative to the Treatment of Prisoners of War, Art. 5, Aug. 12, 1949, 75 U.N.T.S. 135 (“should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hand of the enemy . . . such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal”).

73 U.S. DEPT. OF ARMY REGULATION 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES § 1-6(a) (Oct. 1, 1997), available at http://usmilitary.about.com/gi/dynamic/offsite.htm?site=http://www.usapa.army.mil/pdffiles/r190%5F8.pdf. The Army Field Manual 34-52 states: “Captured insurgents and other detained personnel whose status is not clear, such as captured terrorists, are entitled to POW protection until their precise status has been determined by competent authority.” Army Field Manual 34-52, supra note 3.


of persons detained is reviewed within 90 days of being taken into custody. At that time
an initial determination is made as to whether they fall under the category of “enemy
combatant” and their status is then reviewed annually. The U.S. government continues
to disregard its obligations under international humanitarian and human rights law by
detaining individuals in Afghanistan indefinitely with no right to contest their detention
before an independent tribunal. These policies put the detainees at high risk of torture
and abuse.

**Detainees at Guantánamo Bay**

For more than three years the U.S. government has violated its treaty obligations under
international humanitarian and human rights law by refusing to allow more than 700
detainees held in Guantánamo the right to challenge the legality of their detention. Only
after the U.S. Supreme Court’s decisions in June 2004 in *Rasul v. Bush* and *Hamdi v.
Rumsfeld* was the government forced to provide a review process for the detainees. In *Rasul*, the Supreme Court held that U.S. courts have jurisdiction to hear cases by
Guantánamo detainees. In *Hamdi*, a case involving a U.S. citizen held as an “enemy
combatant,” the court held that persons detained by the U.S. must be afforded a
meaningful opportunity to contest their detention before a neutral decision maker.

As of April 2005, roughly 520 detainees remained in Guantánamo. From January 2002
until April 2005, 232 Guantánamo detainees were released or transferred to the custody
of their country of origin. These transfers did not transpire as a result of habeas
proceedings, but took place through secret negotiations between the U.S. and the
governments of the detainees’ nationality. The U.S. government asserts that some of the
released detainees have returned to the battlefield and engaged in attacks on U.S. forces
in Afghanistan. Secrecy and rejection of judicial or other independent scrutiny has
marked the U.S. government’s detention policies and practices, making it impossible to
verify such claims. The U.S. Report also fails to acknowledge that most of the released
detainees were never charged with a crime.

In 2004, the U.S. Department of Defense established the Combatant Status Review
Tribunals (“CSRTs”) and Administrative Review Tribunals (“ARBs”) as a forum for
Guantánamo detainees to contest their status as “enemy combatants.” The CSRTs and
ARBs violate U.S. obligations under the ICCPR and fail to guarantee fundamental due
process protections. The constitutionality of these commissions is currently on appeal to
the U.S. Supreme Court.

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(No. 05-184).
**Combatant Status Review Tribunals**

According to the U.S. government, CSRTs “serve as fora for detainees to contest their designation as enemy combatants and thereby the legal basis for their detention.” Issued on July 7, 2004, the CSRT Order broadly defines the term “enemy combatant” to mean “an individual who was part of or supporting Taliban or al Qaeda forces, or . . . . partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.”

The government contends that “unlike an Article 5 tribunal [under the Geneva Conventions] the CSRT guarantees the detainee additional rights, such as the right to a personal representative to assist in reviewing information and preparing the detainee’s case, presenting information, and questioning witnesses at the CSRT,” as well as to “receive an unclassified summary of the evidence in advance of the hearing in the detainee’s native language, and to introduce relevant documentary evidence.”

The CSRT and Article 5 hearings serve entirely different purposes and operate under markedly different circumstances. Article 5 hearings take place on or near the zone of combat, immediately after capture, and are designed to swiftly determine a prisoner’s legal status: detention under the Geneva Convention as a POW, referral for prosecution for war crimes or prosecution for violation of civilian law. If found innocent, the detainee is returned to the place of capture and released. Article 5 hearings conducted in the combat zone are summary in form because they are followed by additional processes that protect against unlawful and arbitrary detention.

In contrast the CSRT hearings are conducted months or years after arrest or capture, thousands of miles from the combat zone, and after repeated interrogation under questionable circumstances. During this entire period detainees are held virtually incommunicado with limited or no access to family or legal counsel. In contrast to an Article 5 hearing, an adverse determination in a CSRT hearing is not necessarily followed by additional legal process. Rather, the detainee has no further opportunity to demonstrate his innocence, thereby resulting in an indefinite loss of liberty.

CSRTs also fail to provide minimum standards of fairness and due process. For example, by presuming that the detainee is in fact an “enemy combatant,” the tribunals do not adhere to the initial presumption of innocence standard. The individual detainee, therefore, carries the burden of rebutting the presumption. By contrast, in an Article 5 hearing the detainee is initially presumed to be a POW. These administrative tribunals rely substantially upon classified evidence and detainees are entitled only to the assistance of a personal representative—a member of the detaining authority who may keep no conversations between the detainee confidential—and not to genuine legal

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82 U.S. Report, *supra* note 1, Annex, Part One § II(B).
representation. In violation of Article 15 of the Convention, evidence extracted under torture or coercion is also not excluded in CSRTs.

The CSRT procedure has been heavily criticized by a federal judge in a consolidated habeas case on behalf of a number of the detainees. U.S. District Judge Joyce Hens Green ruled in January 2005 that CSRT procedures “fail to satisfy constitutional due process requirements in several respects” and held that the U.S. government should allow detainees to challenge their detention in U.S. courts. Her ruling is on appeal before the U.S. Court of Appeals for the District of Columbia Circuit.

**Administrative Review Board**

The Administrative Review Board is a second administrative body also established by the executive branch that annually reviews the detainees’ CSRT designated status as “enemy combatants.” Based on classified evidence, including evidence that might have been extracted under coercion, the Board determines whether an individual detainee should remain in U.S. custody, be transferred to the custody of another country, or be released. As in CSRT proceedings, detainees have no access to a lawyer and are presumed to pose a threat to the United States or its allies.

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85 *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d at 468-78 (finding the following due process violations: all the CSRT’s decisions were based substantially on classified evidence that the detainees were not allowed to see; the personal representative of the detainee is neither a lawyer nor an advocate and thus cannot be considered an effective substitute for a lawyer and is obligated to disclose to the tribunal any relevant inculpatory information he or she obtains from the detainee; the tribunal can rely on statements possibly obtained through torture or other coercive means; and the definition of “enemy combatant” is vague and overly broad).

86 In a second decision concerning the rights of Guantánamo detainees, Judge Richard J. Leon, also of the district court for the District of Columbia, ruled in favor of the government, finding that detainees had no rights cognizable under habeas and that the CSRT procedure provided more than adequate due process protections. *Khalid v. Bush*, 355 F. Supp. 2d 311 320-23 (D.D.C. 2005). This decision is also on appeal before the United States Court of Appeals for the District of Columbia Circuit. *Khalid v. Bush*, No. 05-5063 (D.C. Cir. filed Mar. 2, 2005).


Detainees are expected to compile the information necessary to support their claims to innocence. In other words, detainees held thousands of miles from home, virtually incommunicado, with limited or no contact with family, and no legal counsel, are expected to gather information to prove that they are not a threat and should be released. The detainee may request the assistance of a U.S. military officer but, as in the case of the CSRT “personal representative,” the detainee relationship with the military officer is not privileged, nor could the detainee be expected to trust someone who is appointed by the detaining authority. The panel makes a recommendation to the Designated Civilian Official, appointed by the Secretary of Defense, who makes the final status decision. There is no appeal to an independent body.  

Access to Courts

The U.S. Report paints a deceptive picture in which Guantánamo detainees are able to access U.S. courts, noting that habeas corpus petitions have been filed and that “domestic judicial proceedings . . . may address allegations of mistreatment and complaints about the CSRTs that have arisen with respect to Guantánamo Bay.” Given numerous obstacles, including the United States’ refusal to identify all of the detainees at Guantánamo, less than two hundred detainees have filed habeas petitions. In addition, in response to each habeas petition filed since June 2004, the government has repeated its pre-Rasul position that detainees have no rights under the U.S. Constitution because the U.S. is not sovereign over Guantánamo, and that the executive has sole discretion to determine who is an enemy combatant. 

Guantánamo detainees’ access to courts has also been seriously jeopardized by the Detainee Treatment Act, which undermines the landmark U.S. Supreme Court decision, http://www.defenselink.mil/home/dodupdate/documents/20060328a.html; Memorandum from Gordon England, Sec’y of the Navy to Sec’y of State, et al., Re: Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba (July 29, 2004), available at http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf; In re Guantánamo Detainee Cases, 355 F.Supp.2d at 450 (The opinion summarizes the tribunals by writing “[t]he detainees do not have a right to counsel in the proceedings, although each is assigned a military officer who serves as a ‘Personal Representative’ to assist the detainee in understanding the process and presenting his case. Formal rules of evidence do not apply, and there is a presumption in favor of the government’s conclusion that a detainee is in fact an ‘enemy combatant.’” ).  

91 U.S. Report, supra note 1, Annex, Part One § II(G).  
92 Brief for Appellant, Al Odah et al. v. United States of America, No. 50-5064 (D.C. Cir. filed Mar. 7, 2005), available at http://www.scotusblog.com/AlOdah_CTADC.DOJ.OpeningBrief.pdf. The brief argues that “the determination of who are enemy combatants is a quintessentially military judgment entrusted primarily to the Executive Branch.” Id. at 53. The executive, the government argues, “has a unique institutional capacity to determine enemy combatant status and a unique constitutional authority to prosecute armed conflict abroad and to protect the Nation from further terrorist attacks. By contrast, the judiciary lacks the institutional competence, experience, or accountability to make such military judgments at the core of the war-making powers.” Id. On the question of the Geneva Conventions, the brief argues that the lower court’s contention that Talibán detainees picked up in Afghanistan should have been presumed to have prisoner of war status is “inconsistent with the deference owed to the President as Commander-in-Chief” who had unilaterally decided otherwise. Id. at 60.
Rasul v. Bush, granting Guantánamo detainees a meaningful opportunity to contest their detention in U.S. courts. The DTA includes the Graham-Levin Amendment, which strips U.S. courts of jurisdiction to hear challenges by Guantánamo detainees, except for the U.S. Court of Appeals for the District of Columbia Circuit, which has sole jurisdiction to review the final decision of the Combatant Status Review Tribunals. The DTA bars detainees from filing any other action against the U.S. regarding any aspect of their detention. Thus, Guantánamo detainees are prevented from seeking redress from the United States or its agents for alleged torture and abuse while in U.S. custody. Following enactment of the DTA, for example, the government moved to dismiss a Guantánamo detainee’s torture claim for forced feeding on the grounds that the DTA removes court jurisdiction to hear or consider applications for writs of habeas corpus and other actions brought by Guantánamo detainees.

President Bush’s statement upon signing the DTA also signaled the administration’s intention to use the Act to move to dismiss currently pending Guantánamo habeas cases. The congressional sponsors of the Graham-Levin Amendment appear to have differing views as to how the law should be applied to pending and future cases.

Just days after the DTA became law, the U.S. Department of Justice filed notice in federal courts in Washington D.C. of its intention to file motions to dismiss the pending habeas petitions. On January 12, 2006, the Department of Justice filed a motion to dismiss Hamdan v. Rumsfeld (pending before the U.S. Supreme Court), which challenges the constitutionality of military commissions. The government, citing the DTA, which states that the law “shall take effect on the date of the enactment of the Act,” argues that only the U.S. Court of Appeals for the District of Columbia has jurisdiction to hear cases by Guantánamo detainees. Thus, the government contends that all pending cases before any U.S. court should be dismissed for lack of jurisdiction. The Supreme Court is expected to resolve this issue in the Hamdan case.

93 Detainee Treatment Act, supra note 5, § 1005(e).
95 “I also appreciate the legislation’s elimination of the hundreds of claims brought by terrorists at Guantánamo Bay, Cuba, that challenge many different aspects of their detention and that are now pending in our courts.” President’s Statement on the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1920 (Dec. 30, 2005), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2005_presidential_documents&docid=pd30de05_txt-6.pdf. See also Statement on Signing of H.R. 2863, the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1918, available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2005_presidential_documents&docid=pd30de05_txt-5.pdf.
98 Detainee Treatment Act, supra note 5, § 1005(h).
99 Hamdan, Respondent’s Brief, supra note 97.
100 White, Levin Protests Move to Dismiss Detainee Petitions, supra note 96.
Military Commissions

On November 13, 2001, the President signed a Military Order formalizing a Department of Defense plan to try certain non-citizens designated by the President as “enemy combatants” before military commissions. The Military Order can be applied to anyone suspected of being, or having knowingly harbored, either a member of al-Qaeda or someone who has “engaged in, aided or abetted, or conspired to commit, acts of international terrorism.” The Military Order has been supplemented by military commission orders and instructions setting forth crimes cognizable before the commissions and the rules that govern proceedings before them.

As of October 21, 2005, President Bush had designated seventeen detainees eligible for trial before a military commission. Of those, the U.S. has transferred three to their country of origin where they were subsequently released. As of February 2006, ten detainees have been charged with offenses and referred for prosecutions. On August 31, 2005, the Secretary of Defense approved changes to the military commissions, which the U.S. government contends included “a review of relevant domestic and international legal standards.” The amended rules, however, fail to guarantee an independent trial court, or provide impartial appellate review, and do not prohibit the admission of testimony taken under coercive circumstances. In short, the military commissions do not afford a fair trial under the U.S. Constitution, U.S. international treaty obligations, customary international law, or the Uniform Code of Military Justice.

The commission rules and procedures, in their amended form, are flawed in the following ways:

Right to counsel: Military defense counsel is assigned to each defendant. Although a defendant may retain civilian counsel at his own expense, military counsel would remain assigned to the defense team. Many detainees find it difficult to trust or cooperate with U.S. military counsel assigned to them, for reasons of culture, personal history, language.

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102 Id. at 1666.
and the prolonged and arbitrary conditions of their imprisonment, thus undermining trust and cooperation vital to an effective defense.\textsuperscript{107}

Lack of independence: The procedures outlined for military commissions fail to provide for an impartial and independent tribunal. The military, with the President as its commander-in-chief, has the sole authority to appoint the judges, prosecutors and defense counsel. The executive branch is thus prosecutor, judge, and jury, and in death penalty cases, the executor.\textsuperscript{108}

Under the commission system, an “Appointing Authority” controls the make-up of the commission panel and procedures of the commission. The Appointing Authority, appointed by the Secretary of Defense, is responsible for approving and referring criminal charges to the commission on behalf of the executive branch.\textsuperscript{109} Legal questions, including any dispositive questions, are decided by the Appointing Authority on an interlocutory basis.\textsuperscript{110}

Overbroad definition of armed conflict: Acts of terrorism should not be conflated with acts of war.\textsuperscript{111} Yet, an offense prosecutable by the military commissions must be one that took place “in the context of and was associated with armed conflict.”\textsuperscript{112} The instructions further state, “[t]his element does not require a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force.”\textsuperscript{113} The definition of an armed conflict under the commission rules is overbroad and could include any terrorist act anywhere in the world within the commission’s jurisdiction. In fact, the defendant’s conduct need only be distantly or vaguely related to a traditional armed conflict.

Restrictions on access to evidence and proceedings: The commission rules deny civilian counsel with security clearance the same access to classified information as military counsel. Similarly, the rules permit the exclusion of defendants from portions of trials to protect classified information. While military counsel can see all evidence used in the case, military counsel may not discuss classified evidence with their client, which prevents the accused from confronting the evidence against him.

\textsuperscript{107} See generally ACLU, Conduct Unbecoming: Pitfalls in the President’s Military Commissions (March 2004), available at \url{http://www.aclu.org/FilesPDFs/conductunbecoming.pdf}.
\textsuperscript{108} Id.
\textsuperscript{110} Military Commission Order No. 1, supra note 109 at § 4(A)(d).
\textsuperscript{112} Dep’t of Defense, Military Commission Instruction, No. 2 § 5(C), available at \url{http://www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf}.
\textsuperscript{113} Id.
Use of evidence obtained through coercion not barred: New rules would purportedly prevent the admission of evidence obtained under torture, but the rules contain few safeguards to make the prohibition meaningful and fail to exclude evidence exhorted under coercive interrogation techniques that fall short of torture but are nonetheless prohibited under the Convention. Under the new commission rules evidence “shall be admitted if, in the opinion of the Presiding Officer [or a majority of the commission] . . . the evidence would have probative value to a reasonable person.”

 Defendants can continue to be detained even if acquitted: Even an acquittal of charges does not translate into release from detention because the President may continue to deem and detain such person as an “enemy combatant” until the end of the “global war on terrorism.”

 Limited appeals to civilian courts: Previously, the military commission rules did not allow detainees the right to appeal to a civilian court. The rules were amended by the Detainee Treatment Act, which allow detainees tried in a capital case or sentenced to a term of imprisonment of ten or more years to appeal to the U.S. Court of Appeals for the District of Columbia Circuit. The U.S. Court of Appeals has discretion to review any other case before the military commissions.

 The military commission proceedings began in August 2004 but were halted in November 2004 after a federal district court, in Hamdan v. Rumsfeld, held that the use of military commissions to try detainees violated the U.S. Constitution and international law. On July 15, 2005, the U.S. Court of Appeals for the District of Columbia Circuit unanimously overturned the lower court’s decision and ruled that the President has the power to create military commissions, which the court considered a “competent tribunal” under Article 5 of the Third Geneva Convention. The court ruled that the defendant was not entitled to court-martial proceedings in accordance with the U.S. Uniform Code of Military Justice, nor to the protections of common Article 3 of the Geneva Conventions, which prohibit trials by any tribunal other than “a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”

 The court relied in part by the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001) resolution passed by the U.S. Congress, which authorized the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided” the attacks. The court recognized the President’s “authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States.”

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114 Military Commission Order No. 1, supra note 109, § 6(D)(1).
116 Detainee Treatment Act, supra note 5, § 1005(e).
118 Hamdan v. Rumsfeld, 415 F.3d 33, 42 (D.C. Cir. 2005), cert. granted, 74 U.S.L.W. 3287 (U.S. Nov. 7, 2005) (No. 05-184). (The appeals court also held that “[i]f Hamdan were convicted, and if common article 3 covered him, he could contest his conviction in federal court after he exhausted his military remedies.”).
119 Id. at 37-38.
The U.S. Supreme Court heard oral arguments on this case in March 2006, and is expected to rule by summer 2006. The military commission proceedings resumed in January 2006, despite the pending Supreme Court case.120

3. “Enemy Combatants” in the United States

The U.S. government has designated two U.S. citizens, Jose Padilla and Yaser Esam Hamdi, and a Qatari national, Ali Saleh Kahlah al-Marri, who was in the U.S. on a student visa, as enemy combatants.121 The Supreme Court ruled that Yasser Hamdi, a Saudi national born in the U.S. and detained for more than three years, was entitled to due process and could not be held indefinitely without trial. He was subsequently deported to Saudi Arabia and his U.S. citizenship was revoked.

Jose Padilla was arrested at Chicago O’Hare Airport in May 2002 under suspicion of plotting to detonate a radioactive “dirty” bomb in the U.S. An executive order signed by President Bush declared him an enemy combatant on June 9, 2002. Padilla was then transferred from civilian to military custody, two days before he was to appear for a court hearing on his case, without his lawyer being informed. In September 2005, the U.S. Court of Appeals for the Fourth Circuit held that the President was authorized to detain a U.S. citizen without trial as an enemy combatant if such person had taken up arms against the U.S. and had entered the U.S. for the purpose of attacking the U.S.122

On November 22, 2005, prior to the U.S. Supreme Court’s decision on whether it would review Padilla’s case, the U.S. government unsealed a criminal indictment accusing him of fighting against American forces alongside al-Qaeda in Afghanistan. Notably, the indictment did not mention any of the allegations that were used by the government in designating Padilla as an “enemy combatant.” Padilla was transferred from military to civilian custody, in Florida, in January 2006.123

On June 23, 2003, less than a month before Qatari national al-Marri was due to go on trial in the U.S. on charges of credit card fraud and making false statements to the Federal

123 On December 21, 2005, the U.S. Court of Appeals for the Fourth Circuit denied the government’s application to transfer Padilla for criminal proceedings in Florida and to vacate the court’s opinion. In a stinging rebuke to the government, the court stated that the government’s “actions may be to avoid consideration of our decision by the Supreme Court.” The court further stated that the government “actions have left not only the impression that Padilla may have been held for these years, even if justifiably, by mistake—an impression we would have, though the government could ill afford to leave extant. . . . And these impressions have been left, we fear, at what may ultimately prove to be substantial cost to the government’s credibility before the courts.” Order denying motion to transfer petitioner, Dec. 21, 2005, Padilla v. Hanft, No. 05-6396 (4th Cir. filed Dec. 21, 2005). The U.S. Supreme Court, however, in January 2006 reversed the Fourth Circuit and approved Padilla’s transfer to Florida. Hanft v. Padilla, 126 S.Ct. 978 (Roberts, Circuit Judge 2006). On April 3, 2006, the Supreme Court declined to review Padilla’s case. Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005) cert. denied, 74 USLW 3275.
Bureau of Investigation ("FBI"), President Bush designated him as an “enemy combatant” by executive order.\(^{124}\) Al-Marri was transferred from the control of the Department of Justice to incommunicado solitary confinement in a Naval Consolidated Brig in Charleston, South Carolina. He remains in military custody in South Carolina.\(^{125}\) To date, al-Marri has been detained for more than three years in solitary confinement.\(^{126}\) In August 2005, al-Marri’s lawyers sued government officials claiming that military jailers subjected al-Marri to inhuman treatment, made threats against his family, and mistreated the Quran.\(^{127}\) At the time of this submission, the question of whether President Bush has the authority to detain al-Marri, a non-U.S. citizen, as an “enemy combatant” without charge or due process is being appealed.

D. Torture and Abuse in the “Global War on Terrorism” (Articles 1, 16)

*Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.*

—Definition of torture provided by the Office of Legal Counsel, U.S. Department of Justice, August 2002.\(^{128}\)

1. Torture and Cruel, Inhuman or Degrading Treatment of Detainees at Guantánamo

Since the transfer of the first group of detainees to Guantánamo in early January 2002, credible reports of the use of torture and other cruel, inhuman or degrading treatment were received from various sources, including the news media, U.S. government officials, lawyers representing detainees in habeas litigation, accounts of former detainees, the ICRC and other non-governmental human rights organizations.

Internal documents of the Federal Bureau of Investigation obtained through the ACLU FOIA litigation show that as early as late 2002 the FBI had begun to document and complain internally about interrogation techniques used by the military on Guantánamo detainees. Although heavily redacted, the documents describe the harsh treatment of detainees as part of an approved list of interrogation methods which were referred to as “torture techniques.” FBI agents described specific instances of physical and psychological abuse, sexual humiliations, “torture techniques,” as well as inhuman and degrading conditions of confinement.

➢ Torture techniques: An email from an unnamed official to FBI officials describes an incident in which Defense Department interrogators at Guantánamo

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\(^{125}\) Id. at ¶¶ 25-28.

\(^{126}\) See id. at ¶¶ 25, 34, 38.

\(^{127}\) Id. at ¶¶ 69-72, 80. See also Eric Lichtblau, *Detainee at Brig in Charleston Accuses His Jailers of Abuse*, N.Y. TIMES, Aug. 9, 2005, at A13.

\(^{128}\) Bybee, August 2002 Memorandum, *supra* note 2, at 1.