

**Trial of the accused Taliban and Al Qaeda operatives
captured in Afghanistan and detained on a
U.S. military base in Cuba**
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I. Introduction

As the United States continues to react to the September 11, 2001 attacks on the World Trade Center and the Pentagon, the legal decisions regarding the trials of prisoners captured in Afghanistan while fighting against the U.S. armed forces remain unsettled. In January 2002, the United States military began transporting these prisoners to the U.S. Naval Base in Guantanamo Bay, Cuba. Since January 2002, approximately 600 to 800 detainees have been flown 8,000 miles from the U.S. base in Kandahar, Afghanistan to the U.S. base in Cuba.¹

Because the detainees are held by the U.S. military on what is effectively U.S. territory, the U.S. government must decide, at some point in the future, whether to release the detainees or to criminally charge them. In order for the detainees to be criminally tried, the government must decide in which court system their trials will be held. If the detainees are tried as ordinary criminal defendants in the U.S. court system, then their trials will likely be held in the Article III courts, i.e. in the U.S. federal court system. From the government's perspective, however, the use of the military justice system to try the detainees may be more advantageous. In particular, trials before military tribunals need not be open to the general public and may be conducted on an expedited basis, permitting the quick resolution of individual cases and avoiding disclosure of highly sensitive intelligence material, which would be made public in an ordinary criminal trial in an Article III court.

This article explores whether it is permissible for an Article I court to try the accused detainees captured in Afghanistan and detained on a U.S. Naval Base in Cuba. This article examines the constitutionality of the legal options available to the U.S. in the future trials of the detainees, assuming that all the detainees are members of either the Taliban or Al Qaeda regime.² It analyzes

¹ Josef Braml, *Bully or Benefactor? Rule of Law or Dictates by Fear: a German Perspective on American Civil Liberties in the War Against Terrorism*, 27 FLETCHER F. WORLD AFF. 115 (Summer/Fall 2003); Nauroz Shah, *25 More Wahabis Arrive at Guantanamo Bay Base*, June 11, 2002, at shianews.com.

² This assumption is based on the facts surrounding this international armed conflict. As will be discussed below, the Taliban was the official government of

the jurisdiction of the military justice system as well as the federal court system. Although this article focuses on Article I courts-martial and not Article II military tribunals, a similar analysis and policy considerations apply to military tribunals and commissions created by the President in exercise of his Article II powers as neither Article I or II tribunals are part of the independent federal judiciary mandated by Article III.

In section II, this article provides the necessary background information. It discusses the U.S. occupation of the naval base at Guantanamo Bay, Cuba as well as the political history of Afghanistan that gave rise to both the Taliban and Al Qaeda

Afghanistan. Therefore, it is reasonable to conclude that when the U.S. invaded Afghani territory, the armed forces fighting against the U.S. armed forces were those of the Taliban. As will also be discussed below, the Al Qaeda fighters have long been a part of the fighting force in Afghanistan and were in a symbiotic relationship with the Taliban government. Accordingly, it is also reasonable to conclude that the fighters were members of Al Qaeda. In addition, both the Taliban and Al Qaeda have openly spoken out against the U.S. and have long had agendas opposed to the U.S. Plus, Al Qaeda has claimed responsibility for numerous actions opposing the influence of the U.S. To conclude that these organizations were the forces opposing the U.S. invasion is therefore reasonable. See notes 23-59, *infra*, and accompanying text for a thorough discussion.

Also, as will be discussed below, the U.S. military continues to question the detainees regarding the planned activities of Al Qaeda. According to news reports and government releases, the interrogations have been successful in preventing Al Qaeda attacks around the world. This too leads to the conclusion that many of the detainees are in fact members of Al Qaeda. See Bryan Robinson, *A Slow Process: Lies and Silence Hamper Intelligence-Gathering at Guantanamo Bay*, Apr. 10, 2002, at abcnews.com.

While it is possible that some detainees could be members of the Northern Alliance in Afghanistan, this is unlikely as the Northern Alliance is now an ally of the U.S. and has been fighting alongside the U.S. since the beginning of this international armed conflict. See Thom Shanker, *A Nation Challenged: The Combat; U.S. Tells How Rescue Turned into Fatal Firefight*, N.Y. TIMES, Mar. 6, 2002, at A1.

While it is also possible that the detainees could be members of different “war lord” tribes of Afghanistan, this too is unlikely as the Taliban government was successful in achieving one of its primary goals: the suppression of these tribes. See AHMED RASHID, *TALIBAN: MILITANT ISLAM, OIL AND FUNDAMENTALISM IN CENTRAL ASIA* (2001), for a thorough discussion. See also notes 23-59, *infra*, and accompanying text.

regimes. It describes the organizational structure of both the Taliban and Al Qaeda regimes and reviews the U.S. government's position regarding the trials of the detainees. It also analyzes the status of the detainees as prisoners of war and combatants subject to a military tribunal under the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (the "Geneva Convention")³ and the Uniform Code of Military Justice.⁴

In section III, the jurisdiction of Article I courts, specifically military courts, is discussed. Section III also briefly examines the law of war. Section IV discusses the establishment of Article III courts, both in the U.S. and abroad. Section V examines the domestic sources of extraterritorial jurisdiction of the Article III courts. It also discusses war crimes and terrorism. Section VI considers the geographical, practical, and political limitations on Article I and III courts, most of which are common to both court systems.

Section VII addresses the constitutional and practical concerns when utilizing Article I courts in place of Article III courts. It reviews the policies underlying the constitutional requirement that the judicial power of the U.S. be confined to Article III courts and applies a balancing test, considering both constitutional and practical limitations. This section also considers the doctrines of separation of powers and checks and balances. Lastly, section VIII provides a conclusion that hopefully ensures constitutional trials for the detainees as well as domestic and international approval.

³ Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 [hereinafter the "Geneva Convention"], 6 U.S.T. 3316.

⁴ Uniform Code of Military Justice [hereinafter "UCMJ"], 10 U.S.C. § 802 *et seq.* (2002).

II. The Historical Setting

A. *The United States in Cuba*

At Guantanamo Bay, the U.S. has a naval base which, for all practical purposes, is American territory.⁵ The U.S. leases this base from Cuba and has done so since U.S. forces occupied Cuba in 1903.⁶ Regarding the leased areas of land and water that comprise the naval base, Cuba agreed that during the period of occupation, the U.S. would exercise “complete jurisdiction and control over and within said areas.”⁷ The U.S., in return, recognized “the continuance of the ultimate sovereignty of Cuba over and above the leased areas.”⁸ “Ultimate,” meaning final or eventual, is the key word in this agreement. It means that Cuban sovereignty is interrupted during the period of U.S. occupancy, since the U.S. exercises complete jurisdiction and control, but in case occupation is terminated, the area reverts to the ultimate sovereignty of Cuba.⁹

The agreement regarding the naval base was later confirmed by the Treaty of 1934 between the U.S. and Cuba, signed at Washington on May 29, 1934.¹⁰ This treaty gives the U.S. a perpetual lease on the naval base, capable of being voided only by U.S. abandonment of the area or by mutual agreement

⁵ 1 THE HISTORY OF GUANTANAMO BAY, ch. 3, *available at* www.nsgtmo.navy.mil/history.htm (last modified Aug. 27, 2002) (last visited Apr. 16, 2003).

⁶ *Id.*

⁷ Lease of Coaling or Naval Stations, Feb. 16-23, 1903, U.S.-Cuba, T.S. No. 418, *reprinted in* THE HISTORY OF GUANTANAMO BAY, app. D, *available at* www.nsgtmo.navy.mil/history.htm (last modified Aug. 27, 2002) (last visited Apr. 16, 2003).

⁸ *Id.*

⁹ *See id.*

¹⁰ Treaty of 1934, May 29, 1934, U.S.-Cuba, T.S. No. 866, *reprinted in* THE HISTORY OF GUANTANAMO BAY, app. D, *available at* www.nsgtmo.navy.mil/history.htm (last modified Aug. 27, 2002) (last visited Apr. 16, 2003).

between the two countries.¹¹ Pursuant to the Treaty of 1934, the U.S. has for approximately seventy years exercised the essential elements of sovereignty over the U.S. Naval Base at Guantanamo Bay, without actually owning it. Unless the U.S. abandons the area or agrees to a modification of the terms of its occupancy, it can continue in the present status as long as it likes. This territorial status means that the detainees held at Guantanamo Bay are effectively on U.S. soil.¹²

¹¹ *Id.*

¹² Notwithstanding the history of the Naval Base in Guantanamo Bay, Judge Matz of the federal district court of California ruled that no federal court has jurisdiction to hear the cases against the detainees as they are on Cuban soil. Judge Matz pointed out that because the detainees were captured abroad and remain abroad, they must be denied access to the U.S. federal courts. “They have not stepped foot on American soil,” Judge Matz said. Barbara Whitaker, *Judge Denies Qaeda Captives a Day in Court*, N.Y. TIMES, Feb. 22, 2002, at A13.

The only other federal courts that have addressed the issue have held that Guantanamo Bay is not within the sovereign territory of the United States and is not the functional equivalent of U.S. sovereign territory. In *Cuban American Bar Assoc. v. Christopher*, 43 F.3d 1412, 1425 (11th Cir. 1995), *cert. denied*, 515 U.S. 1142 and 516 U.S. 913 (1995), the Eleventh Circuit had to determine whether Cuban and Haitian migrants temporarily detained at the Guantanamo Bay Naval Base could assert rights under various U.S. statutes and the U.S. Constitution. *Id.* at 1421. Citing the language of the lease agreement, the Court of Appeals stated “the district court erred in concluding that Guantanamo Bay was a ‘United States territory.’ We disagree that control and jurisdiction is equivalent to sovereignty.” *Id.* at 1425. The Court of Appeals then went on to reject the argument that U.S. military bases which are leased abroad and remain under the sovereignty of foreign nations are “‘functionally equivalent’ to being ... within the United States.” *Id.* See also *Bird v. United States*, 923 F. Supp. 338, 342-43 (D. Conn. 1996) (holding that sovereignty over Guantanamo Bay rested with Cuba and therefore plaintiff’s tort claim was barred under the “foreign country” exception of the Federal Tort Claims Act).

For the purposes of this article, I will adhere to the history of the Naval base and assume that it is U.S. territory because the above cases are distinguishable. All the cases that the courts have heard regarding the status of Guantanamo Bay have dealt with the rights of persons merely present at the naval base. The courts presume that there is no jurisdiction when persons outside the U.S. seek to assert rights that only persons within U.S. territory may assert. The holdings in those cases follow that presumption. The cases against the detainees is distinguishable because the detainees are not asserting rights under any U.S.

B. The Political History of Afghanistan

In 1973, Afghanistan became a republic and Sardar Mohammed Daud became president.¹³ In order to crush a nascent Islamic fundamentalist movement, Daud turned to the Soviet Union for additional aid to try and modernize the state structure of Afghanistan.¹⁴ From 1956 to 1978, the Soviet Union gave over US\$1 billion in economic aid and US\$1.25 billion in military aid to Afghanistan, as the Soviets welded the country into their sphere of influence at the height of the Cold War.¹⁵ During the same period, the U.S. gave Afghanistan US\$533 million in total aid.¹⁶ Despite this aid, Daud failed to build institutions and a loose centrally-administered bureaucracy was laid over the existing society with little public representation.

Just five years later in 1978, Marxist sympathizers in the army, who had trained in the Soviet Union, overthrew Daud in a bloody military coup.¹⁷ Daud and his family were massacred.¹⁸ The communists, who were bitterly divided, began to fight among themselves and their lack of understanding of Afghanistan's complex tribal society led to widespread rural revolts against them.¹⁹ Within a few short months Afghanistan was catapulted into the center of the intensified Cold War between the U.S. and the Soviet Union.²⁰

statute but rather are being held accountable for their actions and are being held in U.S. military custody.

¹³ RASHID, *supra* note 2, at 12.

¹⁴ *Id.* at 12-13.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 13.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

With U.S. support, the Afghans became anti-Soviet troops in their fight to defeat outsiders who were trying to subdue them and replace their time-honored religion and society with an alien ideology and social system.²¹ Out of this conflict, which claimed 1.5 million Afghan lives between 1978 and 1989, emerged a group of Islamic extremist Afghans who called themselves Taliban, or students of Islam.²²

C. The Taliban's Political and Military Organization

The Taliban was a structured government established in 1994, though that structure existed in theory only.²³ In actuality, the Taliban's political and military decision-making process was secretive, dictatorial, inaccessible, and highly centralized in Mullah Omar,²⁴ who was elevated to Amir-al-Mumineen, Leader of the Faithful, in 1996.²⁵ The Taliban's head decision-making body was the Supreme Shura,²⁶ known as the Kandahar Shura because it was based in Kandahar, Afghanistan.²⁷ Omar appointed all the original ten members from among his friends and colleagues.²⁸ Two other Shuras reported to the Kandahar Shura: the Kabul Shura and the military Shura.²⁹

²¹ *Id.*

²² *Id.*

²³ *Id.* at 95-104.

²⁴ *Id.* at 95. It is also unrepresentative of the people and funds its operations with illegal drug trade, *id.* at 98, 117-27, but those issues and others regarding the legitimacy of the government are beyond the scope of this article.

²⁵ Scott Johnson & Evan Thomas, *Mullah Omar Off the Record*, NEWSWEEK, Jan. 21, 2002, at 26-28. It is unclear who "elevated" Omar to this status: others within the Taliban or himself.

²⁶ "Shura" is an Arabic term meaning "Islamic council." RASHID, *supra* note 2, at 244.

²⁷ *Id.* at 98.

²⁸ *Id.*

²⁹ *Id.*

The Kabul Shura was designed to deal with the day-to-day problems of the government and the city.³⁰ The Kandahar Shura, however, frequently revoked even minor decisions made by the Kabul Shura.³¹ Underneath the Kabul Shura, the Taliban had representatives such as the governor, mayor, police chiefs, and senior administrators in the cities of Kabul, Herat, and Mazar.³² Omar prohibited these representatives from acquiring any local power base and they had no real control or authority.³³

The military Shura was a loose body that planned strategy and implemented tactical decisions for the armed forces, but had no decision-making powers.³⁴ The head of the Taliban's armed forces was Omar, even though he had no official position.³⁵ Under Omar was the chief of general staff and then chiefs of staff for the army and air force.³⁶ There were at least four army divisions and one armored division.³⁷ There were officers and commanders, but no clear military hierarchy.³⁸ Omar constantly shifted unit commanders around, often once a month, so that no commander gained a power base in any one region.³⁹ The Taliban armed forces enlisted both short-term fighters and professionally trained

³⁰ *Id.*

³¹ *Id.* For example, the Kandahar Shura has revoked simple decisions to grant journalists permission to travel and to allow new U.N. aid projects within Afghanistan. *Id.*

³² *Id.* at 98-99.

³³ *Id.* This is part of the above-referenced Taliban goal to suppress various "tribes" in Afghanistan. *See* note 2, *supra*.

³⁴ RASHID, *supra* note 2, at 99.

³⁵ *Id.* Full information regarding the Taliban military structure is unknown as it is a highly secretive regime.

³⁶ RASHID, *supra* note 2, at 99.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* Unfortunately for the Taliban, no commander gains much comprehensive experience either. *Id.* This too is part of the Taliban's above-referenced tactic to prohibit the dominance of any "war lord" or "tribe." *See* note 2, *supra*.

soldiers.⁴⁰ Essentially, the Taliban's governmental and military structures were only a shell within which Omar dictated.⁴¹

The Taliban regime was a mostly unopposed government within Afghanistan, by Afghans and other nations, from 1996 to 2001.⁴² Therefore, it is accurate to describe the Taliban as Afghanistan's legitimate government in 2001 when the U.S. began its war against terrorism.⁴³ Under international law, it is of no consequence that the U.S. and other nations did not recognize the Taliban as a legitimate government.⁴⁴

D. The Structure of Al Qaeda

Al Qaeda's formation began in 1982 when the U.S. and British governments encouraged over 100,000 Muslim radicals, from forty-three Islamic countries in the Middle East, North and East Africa, Central Asia, and the Far East, to travel to Afghanistan to fight side-by-side against the Soviet Union.⁴⁵ Among these thousands of recruits was a young Saudi student named Osama Bin Laden, who became head of the network in 1989 and gave it the name "Al Qaeda."⁴⁶ Al Qaeda, which is an Arabic word for "military base,"⁴⁷ is a worldwide network with no clear structure

⁴⁰ RASHID, *supra* note 2, at 100. Presumably, the Taliban are these professionally trained soldiers, drawn from the former anti-communist army. I will assume, for the purposes of this article, that this presumption is correct.

⁴¹ *See id.* at 102, 104.

⁴² *Id.* at 102-04.

⁴³ *See* Thom Shanker & Katharine Q. Seelye, *Word for Word, the Geneva Conventions: Who Is a Prisoner of War? You Could Look It Up. Maybe.*, N.Y. TIMES, Mar. 10, 2002, sec. 4, p. 9, col. 1 (quoting Doug Cassell).

⁴⁴ Analysis of Article 4(A)(1) is the same as an analysis of Article 4(A)(3) of the Geneva Convention, which encompasses "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power."

⁴⁵ RASHID, *supra* note 2, at 128-30.

⁴⁶ *Id.* at 131-32.

⁴⁷ *Id.* at 132.

and very little apparent hierarchy beyond its apex in Osama Bin Laden.⁴⁸

According to Jamal Ahmed al-Fadl, a former aide to Bin Laden, Al Qaeda has a somewhat corporate structure.⁴⁹ Beneath the “emir,” as Bin Laden is called, sits a council of about twelve advisers called the shura.⁵⁰ The council included Bin Laden confederates such as Muhammad Atef, an Egyptian who served as military commander of Al Qaeda,⁵¹ and Ayman al-Zawahiri, who led Egyptian Islamic Jihad, a terrorist group.⁵² It is unclear who sits on the council now as numerous Al Qaeda members have been killed or captured. Within Al Qaeda, there are two types of operatives: (1) a sophisticated group that takes care of the planning, intelligence gathering, surveillance, and bomb making; and (2) the expendable operatives that carry out the attacks.⁵³

Al Qaeda’s central function is to train militant Islamic terrorists at its headquarter camps in Afghanistan.⁵⁴ The Al Qaeda network appears to be comprised of numerous cells, from Bosnia

⁴⁸ Michael Elliott, *Hate Club*, TIME, Nov. 12, 2001, at 58. It is believed that Abu Zubaydah (a Saudi-born Palestinian) was Al Qaeda’s director of international operations. *Id.* Zubaydah was arrested in late March 2002 with the help of Pakistani authorities. Deborah Charles, *Zubaydah Arrest Helps Avert New Attack on U.S.- FBI*, REUTERS, Apr. 3, 2002.

⁴⁹ Benjamin Wiser & Tim Golden, *A Nation Challenged: Bin Laden’s Network; Al Qaeda: Sprawling, Hard-to-Spot Web of Terrorists-in-Waiting*, N. Y. TIMES, Sept. 30, 2001, at B4.

⁵⁰ *Id.* “Shura” is an Arabic term meaning “Islamic council.” RASHID, *supra* note 2, at 244.

⁵¹ U.S. officials have said that Atef was killed in American air strikes on Afghanistan. Charles Aldinger, *Rumsfeld Slams ‘Hyper-Ventilation’ Over Captives*, REUTERS, Feb. 8, 2002.

⁵² Wiser & Golden, *supra* note 49.

⁵³ *Id.* (relating account of Mohammed Saddiq Odeh, a Jordanian convicted in Summer 2001 of helping plan the bombing of the U.S. Embassy in Nairobi).

⁵⁴ Elliott, *supra* note 48.

to the Philippines to Uganda,⁵⁵ controlled by Bin Laden.⁵⁶ In addition to directing its own attacks, it acts as an umbrella group, financing the operations of its widely-flung cells and providing operatives in order to successfully carry out terrorist attacks against all “infidels,” a term that includes both non-Muslims and Muslims of “lesser” faith.⁵⁷ It is unclear whether Bin Laden has been aware of the domestic agendas of all the cells at all times.⁵⁸ What is clear is that Bin Laden had considerable influence with the Taliban and directly increased the Taliban’s hostility toward the U.S., its allies, and Muslim regimes around the world.⁵⁹

E. President Bush’s Executive Order Regarding the Trial of the Taliban and Al Qaeda Detainees

In response to the attacks on the World Trade Center and the Pentagon on September 11, 2001, President Bush began a “War Against Terrorism.”⁶⁰ The U.S. sent troops into Afghanistan in November 2001 to fight and capture Taliban soldiers and Al Qaeda operatives.⁶¹ On November 13, 2001, President Bush issued the Military Order Regarding Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (the “Military Order”).⁶² In the Military Order, President Bush stated that the

⁵⁵ *Id.* While many of the original Al Qaeda members were from Afghanistan and other Arab nations, many of the new members were born and raised in the Muslim communities of Europe. *See id.*

⁵⁶ RASHID, *supra* note 2, at 136. The Al Qaeda network follows Bin Laden’s fatwas (legal rulings issued by Islamic scholars) even though they carry no moral weight in the Muslim world as Bin Laden is neither an Islamic scholar nor a teacher and thus cannot legally issue fatwas.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 139.

⁶⁰ *See* Jessica Wong, *FAQ: Is the United States really “at war”?*, CBC NEWS ONLINE, Sept. 2001, at www.cbc.ca/news.

⁶¹ *See* Thom Shanker, *A Nation Challenged: The Combat; U.S. Tells How Rescue Turned into Fatal Firefight*, N.Y. TIMES, Mar. 6, 2002, at A1.

⁶² Military Order Regarding Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism [hereinafter “Military Order”], 66 Fed.

U.S. intends to use military tribunals to try the Taliban and Al Qaeda detainees captured while fighting against U.S. armed forces in Afghanistan.⁶³ The Military Order declares that the military tribunals convened to try the Taliban and Al Qaeda detainees will resemble ordinary courts-martial in some ways, but not in all.⁶⁴ As in an ordinary court-martial, a defendant will be given a military lawyer and also may hire a civilian attorney, and the panels will include three to seven officers.⁶⁵ Conviction of any crimes will require a two-thirds majority of the panel,⁶⁶ unlike the unanimity required for civilian trials.⁶⁷

The tribunals, like courts-martial, will be able to consider any punishment permitted by the law of war, including death sentences,⁶⁸ but any decision to impose such death sentence must be unanimous.⁶⁹ If convicted, a defendant could ask a special review panel, consisting of three members, to re-evaluate the case.⁷⁰ The defendant could not, however, appeal to any federal court.⁷¹ Notwithstanding the above limitations, the U.S. Supreme Court is allowed to review certain cases that a military court

Reg. 57,833, § 1(e) (Nov. 13, 2001). While the military tribunal created by President Bush is an Article II court, the same policy considerations and analysis attach whether the military tribunal is ultimately created by the President or Congress. For the purposes of this article, the phrase “Taliban and Al Qaeda detainees” refers only to the detainees held at Guantanamo Bay.

⁶³ *Id.*

⁶⁴ Military Order, *supra* note 62; Anne Gearan, *Tribunals to be Like Courts-Martial*, ASSOCIATED PRESS, Mar. 20, 2002. The Military Order creates an Article II tribunal rather than an Article I tribunal. This distinction is irrelevant to the analysis.

⁶⁵ Gearan, *supra* note 64; UCMJ, *supra* note 4, § 816(2)(A).

⁶⁶ Military Order, *supra* note 62, § 4(c)(6).

⁶⁷ Gearan, *supra* note 64.

⁶⁸ UCMJ, *supra* note 4, § 818; Military Order, *supra* note 62, § 4(a).

⁶⁹ Gearan, *supra* note 64.

⁷⁰ *Id.*

⁷¹ *Id.*

decides.⁷² In addition, the Military Order does not attempt to foreclose habeas corpus.⁷³ As always, the President has the power to grant pardons to any convicted individual.⁷⁴

While defendants will have the right to see the evidence against them, admissibility of evidence is likely to be broader than in civilian trials and courts-martial.⁷⁵ Prosecutors will be able to use evidence that has probative value to a reasonable person,⁷⁶ which will likely include hearsay statements and documents that the prosecutors obtained through unorthodox means.⁷⁷ For example, maps and writings discovered in abandoned houses in Afghanistan that passed through several hands prior to U.S. investigators obtaining them will be admissible.⁷⁸ Also, the tribunals will be “mostly open” to the press, unless classified material needs to be presented.⁷⁹ Lastly, the military tribunals will try only non-U.S. citizens.⁸⁰

⁷² 18 U.S.C. § 1259.

⁷³ Gonzales, *Martial Justice, Full and Fair*, N.Y. TIMES, Nov. 30, 2001, at A27.

⁷⁴ Military Order, *supra* note 62, § 7(2); U.S. CONST. art. II, § 2, cl. 1.

⁷⁵ Gearan, *supra* note 64. “Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find ... that it is not practicable to apply in military [tribunals] under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.” Military Order, *supra* note 62, § 1(f).

⁷⁶ Military Order, *supra* note 62, § 4(c)(3).

⁷⁷ Gearan, *supra* note 64.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Military Order, *supra* note 62, § 2(a). The American Bar Association issued a resolution urging that military tribunals only be used in limited circumstances and in accordance with fair trial standards. In particular, it urged the administration not to use military panels against U.S. citizens or others who are in the U.S. lawfully. James Podgers, *ABA Tackles Tribunals Issue: House Urges Military Panels Trying Terrorists to Operate within Certain Boundaries*, ABA Journal E-Report, Feb. 8, 2002, at www.abanet.org/journal/ereport.

As evidenced by the Military Order, the Bush administration has concluded that both the Taliban and Al Qaeda regimes are military forces and thus all the detainees are within the jurisdiction of the military justice system, either as prisoners of war or combatants. These conclusions, however, are not settled. In order to determine if the conclusions are accurate, it is necessary to apply the Geneva Convention to the members of those regimes.

F. Application of the Geneva Convention to the Detainees

The Geneva Convention applies because this is an international armed conflict⁸¹ between signatories,⁸² namely the U.S. and Afghanistan.⁸³ Its provisions distinguish between armed forces of a party to the conflict and other armed forces. Pursuant to the jurisdictional grant of the Geneva Convention, members of the enemy military and prisoners of war (“POWs”) may be tried by a court-martial “unless existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offen[s]e alleged to have been committed by the prisoner of war.”⁸⁴ The laws of the U.S. – the Detaining Power in the cases against the detainees – do not allow for trial of military matters in federal courts.⁸⁵ In addition to members of the enemy military and POWs, persons that have violated the laws of war, by fighting as unlawful combatants or otherwise, are subject to court-martial

⁸¹ Military Order *supra* note 62, § 1(a): “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.”

⁸² Geneva Convention, *supra* note 3, art. 2 states “the present Convention shall apply to all cases of ... armed conflict which may arise between two or more of the High Contracting Parties.”

⁸³ Other relevant signatories include Cuba, Egypt, France, India, Iran, Iraq, Israel, Pakistan, the Philippines, Saudi Arabia, Sudan, United Arab Emirates, the United Kingdom, and Yemen.

⁸⁴ Geneva Convention, *supra* note 3, art. 84.

⁸⁵ *See* UCMJ, *supra* note 4, § 821.

jurisdiction.⁸⁶ Lastly, when there is a “war,” persons who participate in an international armed conflict and accompany and serve with the armed forces of a country surrender their right to be tried in an Article III court and thus are subject to court-martial.⁸⁷

The Taliban and Al Qaeda detainees, as POWs or lawful combatants, or as unlawful combatants who have violated the laws of war,⁸⁸ would be subject to U.S. military law and thus could be tried by a court-martial.⁸⁹ While the detainees would enjoy extensive due process protections in the military justice system pursuant to both the Uniform Code of Military Justice⁹⁰ and the Geneva Convention, their rights would not be coextensive with the protections civilians enjoy in Article III criminal trials. For example, military tribunals are not required to offer all the procedural protections guaranteed in civilian courts by the Constitution in Article III, the Fourth, Fifth, Sixth, and Fourteenth Amendments, as well as those articulated in various judicial

⁸⁶ “[T]he law of war draws a distinction between ... lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerence unlawful.” *Ex parte Quirin*, 317 U.S. 1, 30-31 (1942). *See also* note 88, *infra*.

⁸⁷ UCMJ, *supra* note 4, § 802.

⁸⁸ Because lawful combatants meet the four requirements enumerated in Article 4(A)(2) of the Geneva Convention, they are POWs. The converse is not necessarily true. David B. Rivkin, *Bringing Al-Qaeda to Justice: The Constitutionality of Trying Al-Qaeda Terrorists in the Military Justice System*, paper published by The Heritage Foundation, Nov. 5, 2001, available at www.heritage.org/library/legalmemo/lm3.html. Unlawful combatants, on the other hand, are those who take up arms but who fail to do so in a manner consistent with the four requirements of Article 4(A)(2) of the Geneva Convention. *Treatment of Al Qaeda and Taliban Under International Law*, transcript of briefing at The Federalist Society, Feb. 27, 2002, at www.fed-soc.org/Publications/Transcripts.

⁸⁹ Persons subject to this chapter include prisoners of war in custody of the armed forces and, in time of war, persons serving with or accompanying an armed force in the field. UCMJ, *supra* note 4, § 802. Each armed force has jurisdiction over all persons subject to this chapter. UCMJ, *supra* note 4, § 817(a).

⁹⁰ UCMJ, *supra* note 4, § 801 *et seq.*

decisions interpreting those constitutional provisions. Due to the diminished procedural protections they are afforded, and their arguably non-military status, the detainees will likely object to the jurisdiction of the military justice system and argue that they are entitled to trial in a non-military court with exactly the same protections as other civilians.

1. Taliban Detainees

Because the Taliban was the official government of Afghanistan and because the Taliban fighters are members of that official government's armed forces,⁹¹ the captured Taliban soldiers appear to be "[m]embers of the armed forces of a Party to the conflict" under the Geneva Convention Article 4(A)(1) and thus are POWs.⁹² As POWs, they are subject to trial by a military court pursuant to both the Geneva Convention and the Uniform Code of Military Justice. A senior U.S. administration official, however, asserts that regardless of whether the Taliban is an armed force or a militia, it must also meet the requirements set out in Article 4(A)(2) of the Geneva Convention in order for its members to be deemed POWs.⁹³ Article 4(A)(2) states that POWs are persons belonging to:

- (2) Members of other militias ... belonging to a Party to the conflict ... providing that such militias ... fulfill the following conditions:
 - (a) that of being commanded by a person responsible for his subordinates;
 - (b) that of having a fixed distinctive sign recognizable at a distance;
 - (c) that of carrying arms openly;

⁹¹ See notes 23-44, *supra*, and accompanying text.

⁹² Geneva Convention, *supra* note 3, art. 4(A): "Prisoners of war ... 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."

⁹³ Shanker & Seelye, *supra* note 43.

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

To support its argument that the Taliban must meet the same four criteria to receive POW status – notwithstanding whether they are categorized as the official army or as a militia – the U.S. administration cites official commentary on Article 4 of the Geneva Convention: “‘regular armed forces’ have all the material characteristics and all the attributes of armed forces in the sense of sub-paragraph (1)... The delegates to the 1949 Diplomatic Conference were therefore fully justified in considering that there was no need to specify for such armed forces the requirements stated in sub-paragraph (2).”⁹⁴ Accordingly, the U.S. administration argues that any official army inherently has the four attributes required by Article 4(A)(2) and that because the Taliban regime does not possess these four attributes, it cannot be the official army of Afghanistan.

This conclusion, however, is disputed.⁹⁵ Commentators and foreign governments have both argued to the contrary. For example, some scholars interpret the Geneva Convention to mean that if a person is a member of the armed forces or of the de facto government of a country, then that person is a POW notwithstanding the four requirements enumerated in Article 4(A)(2).⁹⁶ Additionally, The Netherlands, Britain, Germany,

⁹⁴ *Id.*

⁹⁵ The International Committee of the Red Cross, in particular, disagreed with the U.S. position. In a rare press release, it stated that “international humanitarian law foresees that members of the Armed Forces, as well as militias associated to them, ... are protected by the ... Geneva Convention.” *Treatment of Al Qaeda and Taliban Under International Law*, transcript of briefing at The Federalist Society, Feb. 27, 2002, at www.fed-soc.org/Publications/Transcripts. The International Committee of the Red Cross in Geneva is viewed as the custodian of the Geneva Convention. *Id.*

⁹⁶ *Id.* Doug Cassell, director of the center for international human rights at Northwestern University School of Law, further argues that the four requirements apply only to certain kinds of nongovernmental armed forces. *Id.* Erwin Chemerinsky, a law professor at the University of Southern California, agrees that the detainees are POWs. *Red Cross Objects to Camp Photos; A Federal Judge Will Hear Challenges to the Treatment of Al-Qaeda and Taliban Detainees*, ORLANDO SENTINEL TRIBUNE, Jan. 22, 2002, at A6.

France, and the International Committee of the Red Cross have openly demanded that the detainees be recognized as POWs because they are members of the Taliban and/or Al Qaeda regimes, both of which are military forces, and were captured during armed combat.⁹⁷ British newspapers even attacked the treatment of the detainees as “barbaric,” noting that President Bush was close to losing the support and sympathy of the entire “civilized world.”⁹⁸ The U.S. responded that the international reaction was “hyper-ventilation” and defended its position that the detainees are not POWs.⁹⁹ Nonetheless, under domestic and international political pressure,¹⁰⁰ the U.S. backed away from its position and, while it has not agreed that the Taliban detainees are POWs, it has agreed to apply the Geneva Convention to them and afford them all the protections due to POWs.¹⁰¹ Consequently, it is still unclear whether the Taliban detainees are POWs, lawful combatants, or unlawful combatants subject to courts-martial jurisdiction.

2. Al Qaeda Detainees

There is agreement that the Al Qaeda operatives are not members of the armed forces of a party to this conflict. Notwithstanding that the Taliban harbored Bin Laden and supported the terrorist activities of Al Qaeda, Al Qaeda was not the official army of the Taliban regime as the Taliban had its own army.¹⁰² But the question remains whether the Al Qaeda detainees

⁹⁷ *Id.* See also Aldinger, *supra* note 51.

⁹⁸ *World Asks: Detainee or POW?*, ST. PETERSBURG TIMES, Jan. 22, 2002, sec. National.

⁹⁹ Aldinger, *supra* note 51.

¹⁰⁰ For example, the French and British governments stated that they would have difficulty transferring any future detainees if the Geneva Convention did not apply. The Justice Department, the White House counsel, and Secretary of State Colin L. Powell all advised Mr. Bush to apply the Geneva Convention. Thom Shanker & Katharine Q. Seelye, *Behind-the-Scenes Clash Led Bush to Reverse Himself on Applying Geneva Conventions*, N.Y. TIMES, Feb. 22, 2002, at A12.

¹⁰¹ Shanker & Seelye, *supra* note 100; Deborah Orin, *Bush: Captured Terror Fighters Are Not POWs*, N.Y. POST, Feb. 8, 2002, at 12.

¹⁰² RASHID, *supra* note 2, at 133-40.

qualify as POWs subject to trial by a military court. The answer depends in part on whether they fall within Article 4(A)(2) of the Geneva Convention. In order to do so, they must meet the four criteria previously mentioned for militia and volunteer corps.¹⁰³

U.S. officials argue that they do not meet any of the four criteria. First, it is unclear who commands them. For example, Khalfan Khamis Mohamed, an Al Qaeda operative, attended a remote camp in Afghanistan in 1995 and was sent back home to Tanzania to patiently wait for his call, which he received three years later to help bomb the U.S. Embassy in Tanzania.¹⁰⁴ When Mohamed was captured in 1999, he told the F.B.I. that he was not really sure what Al Qaeda was and that he learned only through news reports who had sponsored his bombing.¹⁰⁵ He said he had never met Bin Laden and did not even know what he looked like.¹⁰⁶ Of course, this may be false. Whether the Al Qaeda detainees fall within the Geneva Convention's definition of POW will depend on all the known information, most of which has come from prior and/or convicted cooperating Al Qaeda operatives. Testimony regarding the lack of knowledge of command structure will be influential in any inquiry.

Second, Al Qaeda has no distinctive sign recognizable at a distance nor do its operatives carry their arms openly. The Islamic

¹⁰³ Prisoners of war ... are persons belonging to one of the following categories, who have fallen into the power of the enemy:

- (2) Members of other militias ... belonging to a Party to the conflict ... providing that such militias ... fulfill the following conditions:
 - (a) that of being commanded by a person responsible for his subordinates;
 - (b) that of having a fixed distinctive sign recognizable at a distance;
 - (c) that of carrying arms openly;
 - (d) that of conducting their operations in accordance with the laws and customs of war.

Geneva Convention, *supra* note 3, art. 4(A)(2).

¹⁰⁴ Wiser & Golden, *supra* note 49.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

ideology Takfir wal Hijra – a kind of Islamic fascism – is believed to be the dominant influence on Al Qaeda.¹⁰⁷ The Takfir encourage violence against both non-Muslims and Muslims who contradict Islam.¹⁰⁸ The goal of the Takfir is to create *undetectable* soldiers who blend into “corrupt” societies in order to plot better attacks.¹⁰⁹ As a result, to have a distinctive sign and carry arms openly would be contrary to Al Qaeda’s goals.

Lastly, Al Qaeda does not follow the laws and customs of war. There are several examples that provide sufficient evidence. On February 23, 1998, all the groups associated with Al Qaeda issued a fatwa¹¹⁰ instructing that “to kill the Americans and their allies – civilians and military – is an individual duty for every Muslim who can do it in any country in which it is possible.”¹¹¹ Then in November 1998, Bin Laden stated that “[h]ostility towards America is a religious duty” and that it was his personal Islamic duty to acquire chemical and nuclear weapons to use against the U.S.¹¹² Both of these international declarations of intent are contrary to the laws and customs of war. Parties to a conflict are required to always aim at the restoration of peace.¹¹³ Al Qaeda has a stated intent – indeed, a religious duty – to perpetuate war, not peace.

Also, civilian persons and objects may not be attacked under the laws of war.¹¹⁴ Clearly, the attack on the non-military World Trade Center on September 11, 2001, which killed 2,837

¹⁰⁷ Elliott, *supra* note 48.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ A fatwa is a legal ruling issued by Islamic scholars. RASHID, *supra* note 2, at 243-44.

¹¹¹ *Id.* at 134.

¹¹² *Id.* at 135.

¹¹³ FREDERIC DE MULINEN, HANDBOOK ON THE LAW OF WAR FOR ARMED FORCES 38 (Int’l Comm. of the Red Cross 1987).

¹¹⁴ *Id.* at 48.

civilians,¹¹⁵ and the explicit Al Qaeda declaration to murder civilians, are both contrary to the laws of war.¹¹⁶ Furthermore, the customary humanitarian law of armed conflict opposes the use of nuclear, chemical and biological weapons.¹¹⁷ In addition, the laws of war forbid the execution of prisoners on the battlefield.¹¹⁸ When Al Qaeda fighters captured a U.S. soldier who had fallen out of a helicopter in Afghanistan and killed him on the battlefield, this was unmistakably outside the laws of war.¹¹⁹ Under the Geneva Convention, that U.S. soldier should have been given POW status.¹²⁰

There are many other aspects of Al Qaeda operations that demonstrate that Al Qaeda does not adhere to the laws of war and thus does not fall within the Geneva Convention's POW definition. It is still unclear, however, whether the Al Qaeda detainees are lawful or unlawful combatants subject to courts-martial jurisdiction.

¹¹⁵ At the World Trade Center, 2,837 dead or missing. At the Pentagon, 184 dead or missing. In Pennsylvania, 40 dead on hijacked plane. *Dead and Missing*, N.Y. TIMES, Feb. 22, 2002, at A12.

¹¹⁶ MULINEN, *supra* note 113, at 43, 45, and 48.

¹¹⁷ See FRITS KALSHOVEN, CONSTRAINTS ON THE WAGING OF WAR 159-60 (Int'l Comm. of the Red Cross 1987).

¹¹⁸ *Id.*

¹¹⁹ Thom Shanker, *A Nation Challenged: The Combat; U.S. Tells How Rescue Turned into Fatal Firefight*, N.Y. TIMES, Mar. 6, 2002, at A1.

¹²⁰ It may be argued that because Al Qaeda operatives do not meet the first three requirements, there is no need for them to follow the laws of war, as they will not be deemed POWs or fall within the Geneva Convention even if they do follow the laws of war. Furthermore, the U.S. has already stated that it will not grant POW status to Al Qaeda operatives. However, these arguable facts do not change the analysis of whether Al Qaeda follows the laws of war. While Al Qaeda operatives clearly have no incentive to apply the Geneva Convention as it will not be applied to them, there is a reciprocity argument wherein if Al Qaeda, or the international community, want the Geneva Convention to apply to Al Qaeda operatives, then Al Qaeda must follow the laws of war and the Geneva Convention.

III. The Creation of Article I Courts Pursuant to the U.S. Constitution

Congress has created tribunals pursuant to its Article I powers in three narrow situations: territorial courts, military courts, and courts or agencies that adjudicate “public rights” cases.¹²¹ In these three areas, there are exceptional circumstances that allow Congress, consistent with the constitutional doctrine of separation of powers, to establish federal courts that lack Article III protections.¹²² This article deals only with the second exception: military courts.

Acting pursuant to its power to regulate armed forces, Congress has created a system of federal military courts developed outside Article III.¹²³ These courts do not have the constitutional protections of the Article III courts in that the judges do not have life tenure or salary protections. Further, the Constitution does not require that military courts, commonly known as courts-martial, provide grand jury indictment, trial by jury, and in some cases, the right to counsel.¹²⁴ A court-martial is tried, not by a jury of the defendant’s peers who must decide unanimously, but by a panel of

¹²¹ *Ex parte Quirin*, 317 U.S. 1 (1942); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64-67 (1982) (plurality opinion).

¹²² Generally, the exceptions also apply to Article II courts. However, the President, unlike the Congress, also has the power to act pursuant to his constitutional power as Commander in Chief. “The President shall be Commander in Chief of the Army and Navy of the United States.” U.S. CONST. art. II, § 2, cl. 1. Also, the President has foreign relations power that the Congress does not. The executive branch powers are beyond the scope of this article. For a thorough discussion on the President’s power to establish Article II tribunals, see Maryellen Fullerton, *Hijacking Trials Overseas: the Need for an Article III Court*, 28 WM. & MARY L. REV. 1 (Fall 1986).

¹²³ “The Congress shall have power to ... make rules for the government and regulations of the land and naval forces.” U.S. CONST. art. I, § 8, cl. 14. *See also* *Gosa v. Hayden*, 413 U.S. 665, 686 (1973); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165 (1963); *Whelchel v. McDonald*, 340 U.S. 122, 127 (1950); *Quirin*, 317 U.S. at 39.

¹²⁴ *Owens v. Markley*, 289 F.2d 751 (7th Cir. 1961). *See also* *Wright v. Markley*, 351 F.2d 592 (7th Cir. 1965); *Thompson v. Willingham*, 217 F. Supp. 901 (D. Pa. 1962), *affirmed* 318 F.2d 657 (3rd Cir. 1962).

officers empowered to act by a two-thirds vote.¹²⁵ The presiding officer at a court-martial is not a judge but is a military law officer.¹²⁶ Because the courts-martial lack these constitutional protections, they may only hear criminal matters that fall within the narrow exception of “military crimes.”¹²⁷

Notwithstanding the lack of constitutional protections, courts-martial are justified because the military must have authority to adjudicate matters in order to maintain an efficient, well-disciplined fighting force.¹²⁸ The rationale for criminal trials in courts-martial is that quick adjudication is necessary to enforce discipline among American soldiers, wherever they may be.¹²⁹ Thus jurisdiction over American soldiers is based solely upon the status of the accused. On the other hand, when members of another nation’s military forces are tried in American military courts, the nature of the offense and the existence of war or imminent threat of war, in addition to the status of the accused, are significant factors.¹³⁰

Congress has enacted statutory provisions, the Uniform Code of Military Justice (“UCMJ”), that set forth both the procedural and substantive law applicable to military courts.¹³¹

¹²⁵ O’Callahan v. Parker, 395 U.S. 258, 263-64 (1969); *see also* Fullerton, *supra* note 122, at 21.

¹²⁶ O’Callahan, 395 U.S. 263-64.

¹²⁷ *Northern Pipeline*, 458 U.S. at 70.

¹²⁸ Reid v. Covert, 354 U.S. 1, 36 (1957).

¹²⁹ Solorio v. United States, 482 U.S. 435 (1987). This rationale might lead to the conclusion that members of the enemy military cannot be tried by courts-martial. This, however, is not true. Efficient discipline of all persons associated with the military also provides for a well-disciplined fighting force. *See Ex parte Quirin*, 317 U.S. 1 (1942).

¹³⁰ *Ex parte Quirin*, 317 U.S. 1 (1942).

¹³¹ UCMJ, *supra* note 4. The sources of military jurisdiction include the Constitution and international law, which includes the law of war. MANUAL FOR COURTS-MARTIAL UNITED STATES [hereinafter “MCM”] Preamble I-1 (2000 ed.).

The UCMJ defines those persons subject to its provisions.¹³² The UCMJ then provides that the jurisdiction of courts-martial generally depends on the accused's status as a person subject to the UCMJ,¹³³ rather than on the nature of the offense charged or the place where the offense occurred. Consequently, there are no geographical limitations on the military justice system. Rather, the UCMJ applies in all places where persons subject to the UCMJ are located,¹³⁴ and is not restricted territorially to the limits of a particular State.¹³⁵ Thus the UCMJ application is clearly extraterritorial. Courts-martial have power to try any offense under the UCMJ, including a violation of the law of war, so long as that exercise of jurisdiction is over a person subject to the UCMJ.¹³⁶ There are multiple categories of persons subject to the UCMJ,¹³⁷ but only two groups are relevant to this article: (1) POWs in custody of the U.S. armed forces¹³⁸ and (2) persons who violate the law of war.¹³⁹ Persons who violate the law of war are considered unlawful combatants and are thus outside the constitutional guarantee of trial by jury and subject to courts-martial jurisdiction.¹⁴⁰

¹³² UCMJ, *supra* note 4, § 802.

¹³³ UCMJ, *supra* note 4, § 817(a).

¹³⁴ UCMJ, *supra* note 4, § 805; MCM, *supra* note 131, Rule 201

¹³⁵ *Gosa*, 413 U.S. at 686. *See also Kennedy*, 372 U.S. at 165; *Whelchel*, 340 U.S. at 127; *Quirin*, 317 U.S. at 39. *See also In re Yamashita*, 327 U.S. 1 (1946) (offenses clause of Constitution empowers Congress to create courts to prosecute war crimes and violations of the laws of war occurring outside the U.S. territory).

¹³⁶ MCM, *supra* note 131, Rule 203, discussion (a).

¹³⁷ *See* UCMJ, *supra* note 4, § 802(a)(1) – (12) for the twelve categories of persons subject to military court jurisdiction.

¹³⁸ UCMJ, *supra* note 4, § 802. Many other persons are subject to the UCMJ; however, this article only addresses the categories of persons relevant to the analysis of whether the detainees are subject to courts-martial jurisdiction.

¹³⁹ UCMJ, *supra* note 4, § 818. Nothing in the UCMJ limits the power of courts-martial to try persons under the law of war. MCM, *supra* note 131, Rules 202(b) and 203.

¹⁴⁰ *Quirin*, 317 U.S. at 37-38, 44.

Military courts have jurisdiction over persons who violate the laws of war by, *inter alia*, aligning themselves with enemy military forces for the purpose of committing hostile acts or by committing war crimes.¹⁴¹ Jurisdiction extends to war crimes committed by members of the U.S. military;¹⁴² by persons, including civilians, “in an area of actual fighting”¹⁴³ or in occupied enemy territory;¹⁴⁴ by enemy belligerents, whether military¹⁴⁵ or civilian,¹⁴⁶ even if they are U.S. citizens;¹⁴⁷ and by citizens of third

¹⁴¹ “War crimes” are principally defined by international law. *See* notes 195-202, *infra*, and accompanying text for a more in-depth discussion of what constitutes a war crime.

¹⁴² Under the UCMJ, general courts-martial “have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal.” UCMJ, *supra* note 4, § 818. The MCM, *supra* note 131, § 201(f)(1)(B) (i) is more precise: “General courts-martial may try any person who by the law of war is subject to trial by military tribunal for any crime against ... [t]he law of war” *See also* MCM, *supra* note 131, at § 202(b) (“Nothing in this rule limits the power of general courts-martial to try persons under the law of war”). This jurisdiction of courts-martial does not deprive military commissions and other military tribunals of “concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried” by them. UCMJ, *supra* note 4, § 821.

¹⁴³ *Reid*, 354 U.S. at 33.

¹⁴⁴ *See* *Madsen v. Kinsella*, 343 U.S. 341 (1952) (affirming conviction in 1950 of an air force officer’s wife, by a U.S. occupation court in the nature of a military commission, for murder in violation of the German criminal code, committed in the American Zone of Germany); *see also Reid*, 354 U.S. at 33 n.60. “The authority for such commissions does not necessarily expire upon cessation of hostilities or even, for all purposes, with a treaty of peace. It may continue long enough to permit the occupying power to discharge its responsibilities fully.” *Madsen*, 343 U.S. at 360 (citations omitted).

¹⁴⁵ *See, e.g., Yamashita v. Styer*, 327 U.S. 1 (1946) (post-war trial by military commission of former Japanese commander in the Philippines).

¹⁴⁶ *See Ex Parte Quirin*, 317 U.S. 1 (1942) (trial of civilian German military spies in wartime by U.S. military commission). For the history of U.S. military commissions, which were originally established to try civilians for war crimes, *see id.* at 26-31, and *Madsen*, 343 U.S. at 346-55.

¹⁴⁷ One of the civilians accused in *Quirin* claimed to be a U.S. citizen, although this was disputed by the government. The Court ruled that citizen or not, if he was an enemy belligerent, he could be tried by military commission. *See Quirin*, 317 U.S. at 20, 37-38.

countries not at war with the U.S., for “grave breaches” of the Geneva Conventions.¹⁴⁸

In addition, when a state of war, a military occupation, or some other significant military reason exists, military tribunals may try persons serving with or accompanying an armed force¹⁴⁹ and civilians¹⁵⁰ for non-military crimes. Oftentimes, these military tribunals or commissions are functionally distinct from the courts-martial and are created by the Executive with express or tacit congressional authorization.¹⁵¹ These military commissions are

¹⁴⁸ Soldiers or nationals of third party states who commit “grave breaches” of the Geneva Conventions in international conflicts are subject to universal jurisdiction under international law. *See generally* Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT’L L. 554, 572-74 (1995).

¹⁴⁹ UCMJ, *supra* note 4, § 802. Every person connected with the military is amenable to the jurisdiction of courts-martial while serving in a position that supports the military. *Ex parte* Milligan, 71 U.S. 2 (1866).

¹⁵⁰ *See e.g. Reid*, 354 U.S. at 35; *Madsen*, 343 U.S. at 356-60; *Milligan*, 71 U.S. 2 (1866). However, military courts may not adjudicate criminal charges against civilians based on the threat of armed conflict with a potential military enemy, *Milligan*, 71 U.S. at 127, or during peacetime, *Kinsella v. Singleton*, 361 U.S. 234, 249 (1960). This extension of military justice jurisdiction is limited by the availability of Article III courts to hear a particular case. The U.S. Supreme Court has held that civilians may not be tried by courts-martial when an Article III court is available. *McElroy v. United States*, 361 U.S. 281 (1960); *Kinsella v. United States*, 361 U.S. 234 (1960); *Reid v. Covert*, 354 U.S. 1 (1957); *Ex parte* Milligan, 71 U.S. 2 (1867). This limitation, however, does not necessarily apply in times of war. *Quirin*, 317 U.S. at 39. The Supreme Court has also limited the jurisdiction of courts-martial to service personnel only while in service. Accordingly, courts-martial cannot try former service personnel even if the crime was committed while in the service. *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955). This limitation is beyond the scope of this article.

¹⁵¹ RICHARD FALLON, JR., DANIEL J. METZER, & DAVID L. SHAPIRO, *Note on Military Tribunals or Commissions*, in HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 46 (4th ed. Supp. 2002). While tribunals and commissions created by the executive are Article II courts, the same analysis and policy considerations apply to courts created pursuant to Articles I and II. This article will not discuss Article II tribunals as they have been used mostly abroad, in connection with military occupations of foreign territory, which is not presently the case in the trial of the detainees. For a full discussion of Article II tribunals and commissions, see Fullerton, *supra* note 122.

usually convened during wartime, and have, in some instances continued to try cases after hostilities ended.¹⁵²

Like courts-martial, Article II military tribunals and commissions, which are created by the executive, lack geographical limitations. Both Article I and Article II military courts have been established abroad.¹⁵³ Pursuant to the President's war power, there were military tribunals in Germany established by the American occupying forces in 1945.¹⁵⁴ These extraterritorial tribunals were justified because Germany was occupied by American forces at the time.¹⁵⁵ While the tribunals applied local law, they supplanted the foreign court systems and tried all criminal cases against military and non-military persons, regardless of whether the crimes were military-related or not.¹⁵⁶ Similarly, yet in a more unusual setting, the U.S. Court for Berlin was convened in Germany in 1978 pursuant to the President's foreign relations power. It tried and convicted Detlef Tiede, an East German citizen, for air piracy in hijacking a Polish airliner that was diverted to the U.S. Air Base in West Berlin. It was an executive branch military commission created pursuant to the

¹⁵² *Madsen*, 343 U.S. at 348, 360. Military officers, appointed by the President, generally serve as judges of these commissions. *Id.* They serve for the terms set forth in the appointment and do not receive a guarantee of life tenure or protection against reduction in their salaries. *Quarles*, 350 U.S. at 17.

¹⁵³ In addition to overseas military tribunals, there have been overseas diplomatic courts called consular courts. Consular courts, which exercised criminal jurisdiction over U.S. citizens, were at one time provided for in treaties with Japan, Borneo, Madagascar, the Samoan Islands, Korea, the Tonga Islands, Tripoli, Persia, the Congo, Ethiopia, Morocco, Algiers, Tunis, and Muscat. *Reid*, 354 U.S. at 61-62 (Frankfurter, J., concurring); *see also* Fullerton, *supra* note 122, at 58-60. They were presided over by diplomatic personnel that serve at the will of the President and heard criminal cases.

¹⁵⁴ *See* Fullerton, *supra* note 122, at 20-29. These courts were in effect until 1953 and tried over 600,000 cases. *See id.* at 25.

¹⁵⁵ When a territory is occupied by American Armed Forces, the President has the responsibility to govern that territory. *Madsen*, 343 U.S. at 346-48.

¹⁵⁶ *See e.g. Madsen*, 343 U.S. at 356, 361-62 (homicide conviction of an American civilian tried in Germany by an American occupation court). Madsen was incarcerated in a federal penitentiary in West Virginia.

president's Article II powers.¹⁵⁷ It was staffed by an Article III judge, sitting temporarily in West Berlin, and conducted as an Article III court, including a jury of German citizens.¹⁵⁸

Thus the historical record shows that both Article I and II military tribunals may constitutionally be established overseas. Accordingly, if the detainees may be tried by a military tribunal, that tribunal can be set up anywhere in the world. Assuming that the Taliban detainees are deemed members of the official army of Afghanistan, they are subject to courts-martial jurisdiction. Assuming that Al Qaeda detainees are not deemed such members, additional jurisdiction issues arise regarding Al Qaeda because the use of military tribunals to try non-military personnel is rare and has been used in only very limited circumstances during U.S. history.¹⁵⁹ Nonetheless, as history proves, military tribunals may try both military and non-military personnel, including civilians. This extension of military justice jurisdiction is limited, however, by the availability of Article III courts to hear a particular case. The U.S. Supreme Court has held that civilians may not be tried by courts-martial when an Article III court is available.¹⁶⁰ Therefore, the Al Qaeda detainees may be tried in the military justice system even if they are civilians if at least one of two circumstances is present: there is currently a "war" or there is no Article III court available to try them.

¹⁵⁷ The justification for this overseas non-Article III court is questionable as there was no real military occupation of Berlin at the time and the German court system was functional. See Fullerton, *supra* note 122, for a thorough discussion.

¹⁵⁸ This procedure was questionable as German citizens are not entitled to a jury trial under German law. Such a requirement also ignores that jurors for federal trial courts must speak English and be U.S. citizens, 28 U.S.C. §§ 1865, 1869(f). Fullerton, *supra* note 122, at 11 n. 29.

¹⁵⁹ Rivkin, *supra* note 88. The only direct and definitive authority permitting such trials remains the Supreme Court's decision in *Quirin*, which involved a formally declared war, a fact noted by the Court in its ruling. *Id.*

¹⁶⁰ *McElroy v. United States*, 361 U.S. 281 (1960); *Kinsella v. United States*, 361 U.S. 234 (1960); *Reid v. Covert*, 354 U.S. 1 (1957); *Ex parte Milligan*, 71 U.S. 2 (1867).

IV. The Creation of Article III Courts Pursuant to the U.S. Constitution

Pursuant to Article III of the Constitution, the judges sitting in Article III courts have life tenure, assuming good behavior, and salaries that cannot be decreased during their terms in office.¹⁶¹ This provides political insulation so that judges can uphold the constitution and law without regard for the popularity of their decisions.¹⁶² Article III courts are meant to provide protection from majoritarian policies that might be unfair to litigants.¹⁶³

Article III courts derive their jurisdictional powers from the Constitution and federal statutes. Because Congress has the power to create the lower federal courts, i.e. the district and circuit courts, Congress has the power to define their jurisdiction.¹⁶⁴ Similarly, pursuant to the exceptions clause, Congress can limit and define the appellate jurisdiction of the U.S. Supreme Court.¹⁶⁵ As the U.S. Constitution and applicable statutes stand at present, the criminal cases against the detainees must be heard in U.S. district courts as the Supreme Court and Courts of Appeal only have appellate jurisdiction over the cases.¹⁶⁶

The Constitution provides that the judicial power shall extend to all cases arising under the “Constitution, the laws of the United States, and Treaties made, or which shall be made, under

¹⁶¹ U.S. CONST. art. III, § 1, cl. 1.

¹⁶² ERWIN CHERMERINSKY, FEDERAL JURISDICTION 4 (3d ed. 1999).

¹⁶³ *See Northern Pipeline*, 458 U.S. at 58.

¹⁶⁴ “The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish.” U.S. CONST. art. III, § 1. There is disagreement as to how much Congress can limit the jurisdiction of the lower federal courts. However, that discussion is beyond the scope of this article. *See* ERWIN CHERMERINSKY, FEDERAL JURISDICTION 169-191 (3d ed. 1999), for a thorough discussion.

¹⁶⁵ “In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.” U.S. CONST. art. III, § 2, cl. 2.

¹⁶⁶ *See* U.S. CONST. art. III; 18 U.S.C. §§ 1251 and 1291.

their authority.”¹⁶⁷ The constitution limits the federal judicial branch to the exercise of its power in cases or controversies that fall within nine enumerated categories.¹⁶⁸ Article III contains no geographical limitations. As long as the federal court exercises its power within these nine categories and is staffed by judges according to the Article III judicial safeguards of independence, Congress may establish an Article III court outside the U.S.¹⁶⁹

V. Statutory Authorization Providing Extraterritorial Adjudication in Article III Courts

In addition to the abovementioned limitations on Article III courts, the statutory grants of criminal jurisdiction to Article III courts over crimes occurring beyond American borders further limit the reach of the courts. Congress defines and limits the jurisdiction of the lower federal courts through duly enacted statutes. Congress can enact laws applicable beyond the territorial boundaries of the U.S.,¹⁷⁰ but there is a long-standing presumption that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the U.S.¹⁷¹ There are at least seven federal statutes giving the federal courts

¹⁶⁷ U.S. CONST. art. III, § 2, cl. 1.

¹⁶⁸ “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public Ministers and Consuls; —to all Cases of admiralty and maritime Jurisdiction; —to Controversies to which the United States shall be a Party; —to Controversies between two or more States; —between a State and Citizens of another State [changed by the Eleventh Amendment]; —between Citizens of different States; —between Citizens of the same State claiming Lands under Grants of different States; and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects [changed by the Eleventh Amendment].” U.S. CONST., art. III, § 2, cl. 1.

¹⁶⁹ Fullerton, *supra* note 122, at 19 n. 57.

¹⁷⁰ *See e.g.* EEOC v. Arabian American Oil Co., 499 U.S. 244, 248-61 (1991) (parties concede that Congress has the authority to enforce its laws beyond the territory of the U.S.).

¹⁷¹ *Id.* at 248. In order to ensure extraterritorial jurisdiction, Congress utilizes either explicit or implicit language to provide extraterritorial application of federal laws.

jurisdiction to hear the criminal cases against the detainees.¹⁷² However, because only four of them apply extraterritorially, only these four statutes can potentially be used to prosecute the detainees who committed crimes overseas.¹⁷³ These statutes base jurisdiction on the passive personality principle, which depends on the victim's nationality,¹⁷⁴ and the universal theory, which

¹⁷² The Anti-Terrorism Act of 1987, 22 U.S.C. §§ 5201-03 (1987); the Anti-Terrorism Act of 1990, 18 U.S.C. § 2332 (1990) (formerly the Anti-Terrorism Act of 1986, 18 U.S.C. § 2331); the Anti-Terrorism Act of 1991, 18 U.S.C. § 2333 (1991); 18 U.S.C. § 2339A (1994); 18 U.S.C. § 2332b (1996); 18 U.S.C. § 2339B (1996); the War Crimes Act of 1996, 18 U.S.C. § 2441 (1996).

¹⁷³ This discussion is somewhat limited as it can be based only on publicly available information regarding the detainees. Presumably, there is much more information regarding the status of the detainees and the actions they have committed that allegedly constitute crimes. However, much of this information is classified and available only to the U.S. government. Therefore, the discussion of potential criminal charges against the detainees will be somewhat brief.

¹⁷⁴ See the Draft Convention on Research in International Law of the Harvard Law School [hereinafter "Harvard Draft"], *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435, 467 (Supp. 1935).

depends on the nature of the offense,¹⁷⁵ rather than concepts of nationality (of the perpetrator) or territoriality.¹⁷⁶

The Anti-Terrorism Act of 1990¹⁷⁷ provides that “[w]hoever kills a national of the United States, while such national is outside the United States,” shall be subject to prosecution under the Act.¹⁷⁸ The Act further allows for the prosecution of any person who attempts or conspires to kill a national of the U.S.¹⁷⁹ The Act also provides for the prosecution of any person “outside the U.S.” who engages in physical violence “(1) with intent to cause serious bodily injury to a national of the

¹⁷⁵ Section 404 of the Restatement of Foreign Relations Law of the U.S. declares that any State has jurisdiction to define and prescribe punishment for offenses of “universal concern,” such as piracy, hijacking of aircraft, genocide, war crimes, and “perhaps certain acts of terrorism,” regardless of where the acts are perpetrated. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987). The federal courts have exercised this “universal approach” to jurisdiction in numerous cases, *see e.g.* *United States v Rezaq*, 899 F. Supp. 697 (D.C. Cir. 1995) (the legislative history of the Anti-hijacking Act provides a strong indication that Congress intended to provide extended criminal jurisdiction over extraterritorial acts); *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1984) (exercise of jurisdiction under universality principle is proper, especially when such jurisdiction is bolstered by fact that two victims of the act were U.S. nationals); *United States v. Yousef*, 927 F. Supp. 673 (S.D.N.Y. 1996); *United States v. Georgescu*, 723 F. Supp. 912 (E.D.N.Y. 1989) (crimes committed aboard aircraft are considered by both the U.S. and the international community to be offenses against the law of a nations). While all these cases dealt with aircraft hi-jacking, they are relevant in that the court construed the applicable statutes as applying extraterritorially because the crimes were offenses against the law of nations.

¹⁷⁶ *See* Harvard Draft, *supra* note 174.

¹⁷⁷ 18 U.S.C. § 2332 (1990) (formerly the Anti-Terrorism Act of 1986, 18 U.S.C. § 2331 (1986)).

¹⁷⁸ 18 U.S.C. § 2332(a).

¹⁷⁹ 18 U.S.C. § 2332(b). *See Yousef*, 927 F. Supp. at 680. The federal district court held in *Yousef* that 18 U.S.C. §§ 2332 and 371, which together proscribe conspiracy to kill U.S. citizens abroad, applies extraterritorially. The defendants relied on the constitution and international law to challenge the jurisdiction over them for acts that did not occur on U.S. soil, did not involve U.S. citizens as defendants, and did not result in death or injury to a U.S. citizen. Notwithstanding these challenges, the court held that the statutes were intended to apply extraterritorially.

United States; or (2) with the result that serious bodily injury is caused to a national of the United States.”¹⁸⁰ The Act applies extraterritorially to foreign nationals¹⁸¹ and gives the federal district courts exclusive jurisdiction.¹⁸² Any Taliban or Al Qaeda detainee who participated in the international armed conflict may be subject to prosecution under the Anti-Terrorism Act of 1990¹⁸³ as the armed combat involved killing and attempted killing of U.S. soldiers and was certainly intended to cause serious bodily injury to those U.S. soldiers. Because the detainees were all captured during armed combat, it is rational to infer that they were all participating in the international armed conflict.¹⁸⁴

Similarly, 18 U.S.C. § 2332b explicitly allows for extraterritorial application and prosecution for any person who, “involving conduct transcending national boundaries, ... kills, kidnaps, maims, ... or assaults” a member of the U.S. armed forces.¹⁸⁵ Section 2332b also provides for the prosecution of attempts and conspiracies to commit such actions as well. Because Al Qaeda has engaged in such transnational acts by carrying out terrorist attacks, including bombings, murder, and airplane

¹⁸⁰ 18 U.S.C. § 2332(c).

¹⁸¹ *See* *United States v. Yousef*, 927 F. Supp. 673, 682 (S.D.N.Y. 1996).

¹⁸² 18 U.S.C. § 2338 (2000).

¹⁸³ While the Act also requires that the defendant be “found” within the U.S. for purposes of establishing jurisdiction, this does not present an additional barrier to exercising jurisdiction. When defendants are brought into the U.S. for the purpose of prosecution, the “being found in the U.S.” requirement is satisfied. This concern was addressed in *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1984), where the court held that jurisdiction was properly established under the Anti-Hijacking Act, 49 U.S.C. § 1472(n), when the defendant was “found” within the U.S. as a result of his having been brought within the jurisdiction to stand trial for other charges. *Yunis*, 924 F.2d at 1089, 1092. The same conclusion was reached in *United States v. Yousef*, 927 F. Supp. 673 (S.D.N.Y. 1996), where the defendant was found within the U.S. as a result of extradition.

¹⁸⁴ If they were not participating, then they may not be subject to prosecution under this statute.

¹⁸⁵ 18 U.S.C. § 2332b(a), (b), and (e). The Act is entitled “Acts of terrorism transcending national boundaries.” The federal courts have exclusive jurisdiction to hear suits brought pursuant to § 2332b. 18 U.S.C. § 2338.

hijackings against U.S. armed forces,¹⁸⁶ any Al Qaeda detainees may be subject to prosecution under this statute. In addition, the Taliban regime, by supporting Al Qaeda, has conspired to commit such acts.¹⁸⁷ Accordingly, members of the Taliban may also be subject to prosecution under § 2332b.

Section 2339B of Title 18 also explicitly applies extraterritorially to prosecutions for providing, attempting to provide, or conspiring to provide material support to designated terrorist organizations¹⁸⁸ such as Al Qaeda.¹⁸⁹ The federal courts have exclusive jurisdiction to hear suits brought pursuant to § 2339B.¹⁹⁰ While this statute applies extraterritorially, the material support must be provided while the defendant was within the United States. Therefore, this statute is not applicable to the detainees captured in Afghanistan.¹⁹¹

Lastly, the War Crimes Act of 1996 provides extraterritorial application for prosecution of war crimes committed against members of the U.S. armed forces and U.S. nationals.¹⁹² While no formal war has been declared, “war” has

¹⁸⁶ See notes 45-59 and 102-120, *supra*, and accompanying text.

¹⁸⁷ See notes 23-44 and 91-101, *supra*, and accompanying text.

¹⁸⁸ 18 U.S.C. § 2339B(a) and (d). Material support means “currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets.” 18 U.S.C. § 2339A(b).

¹⁸⁹ See Military Order, *supra* note 62, § 1(a).

¹⁹⁰ 18 U.S.C. § 2338.

¹⁹¹ It might be possible to prosecute the detainees for any support they provide to Al Qaeda while at Guantanamo Bay, which is U.S. territory. However, it seems unlikely that they could possibly provide any such support while being held in a prisoner camp. Also, if any detainee had previously traveled to the U.S. and provided “material support” to Al Qaeda while in the U.S., then such detainee could be prosecuted under § 2339B. However, based on the known public information regarding the detainees, this is not the case.

¹⁹² 18 U.S.C. § 2441 provides that “[w]hoever, whether inside or outside the United States, commits a war crime” the victim of which is “a member of the

been defined to include an “armed conflict, whether or not war has been declared, between two or more nations; or ... between military forces of any origin.”¹⁹³ Importantly, President Bush declared that an international armed conflict was in existence shortly after the September 11, 2001 attacks on the World Trade Center and the Pentagon.¹⁹⁴

The War Crimes Act of 1996 defines “war crimes” as any conduct that is defined as “a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party.”¹⁹⁵ The relevant “grave breaches” of the Geneva Convention include “willful killing” and “extensive destruction ... of property, not justified by military necessity and carried out unlawfully and wantonly” during an international armed conflict.¹⁹⁶ Thus, any collateral damages, to persons or property, and any terrorism, perpetrated since the armed conflict began are considered war crimes.¹⁹⁷

Armed Forces of the United States or a national of the United States” is subject to prosecution under this Act. 18 U.S.C. § 2441(a) and (b).

¹⁹³ 18 U.S.C. § 2331(4) (1992).

¹⁹⁴ Military Order, *supra* note 62, § 1(a): “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.”

¹⁹⁵ 18 U.S.C. § 2441(c).

¹⁹⁶ Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, Annex II, U.N. Doc. A/CONF.183/9 (1998), art. 8(2)(a)(i) and (iv).

¹⁹⁷ This begs the question: when did the armed conflict begin? When the U.S. started bombing Afghanistan; when the U.S. declared its war against terrorism; when the U.S. ground troops landed in Afghanistan; on September 11, 2001; when Al Qaeda first bombed U.S. embassies in 1995; when Al Qaeda bombed the World Trade Center in 1993; or some other event? Clearly, as evidenced by the Military Order, *supra* note 62, § 1(a), the U.S. believes that Al Qaeda started the conflict: “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

The Geneva Convention's Additional Protocol I, which is applicable to international armed conflicts,¹⁹⁸ and to which the U.S. is a party, includes as a war crime "the feigning of civilian, non-combatant status," focusing on the obligation of combatants to distinguish themselves from the civilian population.¹⁹⁹ Arguably, both the Taliban and Al Qaeda detainees are guilty of this war crime as they do not wear distinguishable uniforms.²⁰⁰ However, there is an exception in Article 44 of Protocol I for "situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself."²⁰¹ It can be argued under the rule and the exception that the Taliban and Al Qaeda fighters are distinguishable because of their "distinctive turbans," even though not distinguishable to U.S. armed forces.²⁰²

Based on the above analysis, there are several extraterritorial U.S. statutes that provide jurisdiction to adjudicate the criminal cases against the detainees.²⁰³ Both the Taliban and

that has created a state of armed conflict that requires the use of the United States Armed Forces."

¹⁹⁸ Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict: Protocols I and II to the Geneva Conventions, Aug. 15, 1977, [hereinafter "Protocol I"], U.N. Doc. A/32/144, 161 I.L.M. 1391 (1977).

¹⁹⁹ Protocol I, *supra* note 198, at art. 37. *See also* FRITS KALSHOVEN, CONSTRAINTS ON THE WAGING OF WAR 83 (Int'l Comm. of the Red Cross 1987).

²⁰⁰ *See* notes 23-59, *supra*, and accompanying text.

²⁰¹ *See* KALSHOVEN, *supra* note 199, at 83.

²⁰² *See, e.g.* Shanker & Seelye, *supra* note 43.

²⁰³ In order to bolster the argument for extraterritorial application, the abovementioned statutes that provide explicit or implicit extraterritorial application can be compared with other similar statutes that do not apply extraterritorially. For example, the Anti-Terrorism Act of 1991, which provides a civil remedy, allows any U.S. national injured in his or her person or property by reason of an act of international terrorism to sue in federal district court for recovery of threefold the damages sustained. 18 U.S.C. § 2333. *See also* Boim v. Aurant Literacy Inst., 127 F. Supp. 2d 1002, 1003-04 (N.D. Ill. 2001) (ruling that court had subject matter jurisdiction over suit for damages when plaintiff's son was killed in a terrorist shooting in Israel). While the federal district courts have exclusive jurisdiction over such suits, 18 U.S.C. § 2338, the Act does not

Al Qaeda detainees can likely be tried under the Anti-Terrorism Act of 1990 and 18 U.S.C. § 2332b. They may also arguably be tried for acts in violation of the War Crimes Act of 1996.

In addition to the above statutes, the U.S. Article III courts, pursuant to international law, have universal jurisdiction to try any detainee who participated or conspired to participate in an act of international terrorism.²⁰⁴ International terrorism is defined in U.S. law by statute enacted pursuant to Congress' power to define and establish the punishment for "[o]ffenses against the Law of Nations."²⁰⁵ International terrorism includes activities that

provide even implicit extraterritorial application as there is no language addressing activities occurring outside the U.S. "Any national injured in his or her person ... by reason of any act of international terrorism ... may sue therefore in any appropriate district court of the United States...." 18 U.S.C. § 2333.

Similarly, the Anti-Terrorism Act of 1987, which prohibits the Palestine Liberation Organization ("PLO") from operating in the U.S., does not imply extraterritorial application. 22 U.S.C. § 5201-03. Rather, it specifically states that the PLO "should not benefit from operating in the United States." Likewise, 18 U.S.C. § 2339A, which prohibits material support to terrorists, provides that a "violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed." 18 U.S.C. § 2339A(a). Section 2339A differs from § 2339B in that the former deals solely with terrorists and the latter deals with organizations that have been *designated* as terrorist organizations. See 18 U.S.C. § 2339B.

²⁰⁴ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987). See also *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Australian Mining & Smelting Europe Ltd. v. E. C. Commission*, European Court of Justice, [1982] 2 Common Mkt. Rep. (CCH) 264. See also International Convention for the Suppression of the Financing of Terrorism, 1999, G.A. Res. 54/109 of Dec. 9, 1999; Measures to Eliminate International Terrorism, G.A. Res. A/52/165 of Dec. 15, 1997; International Convention for the Suppression of Terrorist Bombings, G.A. Doc. A/52/653 of Nov. 25, 1997; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Action, done at Montreal on Feb. 24, 1988. These and other resolutions are available at the "UN Action Against Terrorism" website, at www.un.org/terrorism.

²⁰⁵ U.S. CONST. art. I, § 8, cl. 10.

(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State;

(B) appear to be intended –

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and

(C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.²⁰⁶

The Al Qaeda agenda falls within this definition²⁰⁷ and is in violation of U.S. domestic law, as the various Anti-Terrorism Acts²⁰⁸ and the Military Order²⁰⁹ evidences.²¹⁰ United States law

²⁰⁶ 18 U.S.C. § 2331(1) (1992). The definition of “domestic terrorism” is substantially similar with the exception that the acts occur “primarily within the territorial jurisdiction of the United States.” 18 U.S.C. § 2331(5). Notwithstanding these explicit definitions, there may be a potential international concern in that the international community has yet to agree on a definition for terrorism. See Rohan Sullivan, *Muslim Meeting Won’t Define Terror*, ASSOCIATED PRESS, Apr. 3, 2002; Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, Oct. 8, 1976, 27 U.S.T. 3949.

²⁰⁷ See notes 45-59 and 102-120, *supra*, and accompanying text.

²⁰⁸ The Anti-Terrorism Act of 1987, 22 U.S.C. §§ 5201-03 (1987); the Anti-Terrorism Act of 1990, 18 U.S.C. § 2332 (1990) (formerly the Anti-Terrorism Act of 1986, 18 U.S.C. § 2331); the Anti-Terrorism Act of 1991, 18 U.S.C. § 2333 (1991); 18 U.S.C. § 2339A (1994); 18 U.S.C. § 2332b (1996); 18 U.S.C. § 2339B (1996).

sufficiently defines terrorism to allow for the prosecution of any Al Qaeda detainees in an Article III court.

VI. Geographical, Practical, and Political Limitations in Both Article I and III Courts

While there are no constitutional geographical limitations on the use of Article I and III courts,²¹¹ other geographical limitations may inhibit the trial of a defendant in the U.S. for crimes committed overseas.²¹² For example, the subpoena power of the court might not reach important witnesses and the defendant might legitimately claim that lack of witnesses hampered him in presenting his defense. In the trial of Zacharias Moussaoui, who has been charged in an Article III court in connection with the September 11 attacks, there were allegations of unfairness based on, *inter alia*, the absence of testimony from witnesses previously unable to be compelled to testify.²¹³

Other practical geographical considerations include the location of the defendants, witnesses, and evidence. Questions to

²⁰⁹ Military Order, *supra* note 62, § 1(a): “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.”

²¹⁰ Islamic law also prohibits terrorism as a crime against humanity, punishable by any court, called hirabah. It prohibits killing by stealth and targeting defenseless victims in a manner intended to cause terror in society. Alan Cooperman, *Islamic Law Indictment Sought for Terrorists*, THE RECORD (Bergen County, NJ), Jan. 22, 2002, at A7 (quoting Khaled Abou Fadl, a professor of Islamic law at the University of California at Los Angeles).

²¹¹ See discussion in sections III and IV, *supra*.

²¹² Fullerton, *supra* note 122, at 71.

²¹³ Neil A. Lewis, *Administration’s Position Shifts on Plans for Tribunals*, N.Y. TIMES, Nov. 2, 2002. In response to such allegations of unfairness, the district court granted Moussaoui’s request to depose two or more Al Qaeda captives held at Guantanamo Bay. In response, the U.S. government has moved to dismiss the case, citing national security concerns. *Judge Grants Moussaoui Access to Al Qaeda Captives*, YAHOO! NEWS, Sept. 3, 2003, at <http://news.yahoo.com>.

consider include whether it makes sense to fly all the detainees to the U.S. to stand trial. It would certainly be more convenient for the defendants if the U.S. established an Article I or III court at Guantanamo Bay. All 600 to 800 detainees are present there and, because detainees may be testifying as witnesses in the trial of other detainees, such an overseas court would also be more convenient for at least some of the witnesses. However, much of the evidence against the defendants is likely in Afghanistan.²¹⁴ When looking to the location of the evidence, it seems more practical to establish an American court in Afghanistan. This is likely not possible as there is still much social, political, and military unrest in Afghanistan.²¹⁵ In light of the diplomatic warnings advising U.S. citizens not to visit Afghanistan,²¹⁶ U.S.

²¹⁴ See, e.g., Lewis, *supra* note 213. This assumption is further based on the fact that the detainees were all captured in Afghanistan and thus their crimes, if there be any, were likely committed there as well. Because the public information surrounding the capture of the detainees is limited, it is impossible to definitively conclude the location of all the evidence.

²¹⁵ “The ability of Afghan authorities to maintain order and ensure security is limited. Remnants of the former Taliban regime and the terrorist Al-Qaida network, and other groups hostile to the government, as well as criminal elements, remain active. U.S.-led military operations continue. Travel in all areas of Afghanistan, including the capital Kabul, is unsafe due to military operations, landmines, banditry, armed rivalry among political and tribal groups, and the possibility of terrorist attacks, including attacks using vehicular or other bombs. The security environment remains volatile and unpredictable.” December 27, 2002 Afghanistan Travel Warning, *available at* the United States Department of State website, http://travel.state.gov/afghanistan_warning.html.

²¹⁶ “This Travel Warning provides updated information on the security situation in the country and continues to emphasize the Embassy’s limited capability to provide consular services. The security threat to all American citizens in Afghanistan remains high. This Travel Warning supersedes that of November 18, 2002. The Department of State strongly warns U.S. citizens against travel to Afghanistan. ... Several United Nations and private humanitarian workers, including Americans, were assaulted in June 2002 in the northern areas of Afghanistan in and around the city of Mazar-e-Sharif. As a result of these attacks, the U.S. Government warns American citizens, including those familiar with Mazar-e-Sharif, against traveling to or residing in the area. On June 18, an unidentified group launched rockets within Kabul, and several rockets landed in the vicinity of the Embassy. On September 5, a car bomb was detonated in downtown Kabul, killing more than 30 Afghans. On December 17, 2002, a grenade attack injured two U.S. soldiers in central Kabul. From time to time, the U.S. Embassy places shopping and other areas frequented by foreigners off limits to its personnel depending on current security conditions. Private U.S.

court personnel, as well as the detainees themselves, might be in great danger in Afghanistan. It therefore seems unlikely that Congress would choose to establish an American court there.

There is also the political consideration that the U.S. wants to ensure that persons who attack U.S. armed forces or commit international terrorism are prosecuted. To allow the detainees' home countries to try them for their offenses would likely prove fatal to the conviction. Afghanistan would not prosecute members of the Taliban, regardless of the war crimes they may have committed, as they were fighting with the country's official army. This is evidenced by the release of hundreds of Taliban fighters in February 2002 by President Karzai of Afghanistan.²¹⁷ In addition, to allow the country of citizenship of the members of Al Qaeda to try those members would also prove a political and diplomatic nightmare. The detainees would likely become international bargaining chips in the U.S. war on terrorism. Trying to reach a uniform punishment for the same crimes across the international community would likely be impossible.

VII. Constitutional Considerations Regarding the Use of Article I Courts in Place of Article III Courts

Thus far, this article has reached several conclusions. First, both the Taliban and Al Qaeda detainees are likely subject to Article I court-martial jurisdiction as POWs and combatants, respectively. Second, they are also subject to Article III federal court jurisdiction for criminal prosecutions pursuant to several U.S. statutes. Third, Al Qaeda is additionally subject to prosecution for acts of terrorism. The question now becomes: which court *should* try the detainees? In order to answer this question, the constitutional basis for the use of the military justice system to try the detainees must be carefully considered and weighed against the constitutional and statutory jurisdiction of the U.S. federal court system, while still considering the above mentioned practical, geographical, and political limitations.

citizens are strongly urged to heed these restrictions as well." December 27, 2002 Afghanistan Travel Warning, *available at* the United States Department of State website, http://travel.state.gov/afghanistan_warning.html.

²¹⁷ *Karzai Watches as Afghan Taliban Prisoners Freed*, REUTERS, Feb. 9, 2002.

The policies underlying the judicial independence of Article III courts – to protect against biased adjudication, to protect the courts from political pressure exerted by the legislative and executive branches to decide the case in a politically desirable manner, and to protect the ability of the courts to strike down unlawful action taken by the political branches – are even more relevant when litigation involves foreign defendants.²¹⁸ In fact, the need for an Article III court is particularly great when foreign defendants such as the detainees are accused of terrible crimes and the atmosphere is highly politicized.²¹⁹ On the other hand, given the amount of negative media coverage in the U.S., it is unclear that a jury trial in an Article III court located in the U.S. would be more fair for the detainees.²²⁰

Even more essential, though, is that the framers designed Article III as a restraint on the federal government.²²¹ When the framers structured the federal government to embody the separation of powers doctrine they were attempting to limit the intrusion by one branch into the affairs of another branch.²²² They were conscious of the potential dangers of a strong central government and attempted to prevent the executive and legislative branches from exercising too much power by providing a system of checks and balances among the three branches.²²³ The

²¹⁸ See Fullerton, *supra* note 122, at 51 n.181.

²¹⁹ *Id.*

²²⁰ See, e.g. Felicity Barringer with Douglas Jehl, *U.S. Says Video Shows Captors Killed Reporter*, N.Y. TIMES, Feb. 26, 2002, at A1; Devlin Barrett, *Inside the Boot Bombs*, N.Y. POST, Feb. 8, 2002, at 6. Of course, it is not clear that the U.S. constitution would require a criminal trial by jury if an Article III court were established overseas. Indeed, federal statutes require that jurors for federal trials must speak English and be U.S. citizens. 28 U.S.C. §§ 1865, 1869. Nonetheless, a jury trial in an Article III court raises interesting questions: who would be the defendant's peers? U.S. citizens or foreign citizens? If the jury were composed of foreign citizens, e.g. Afghani nationals, this would be an unusual obligation for many foreigners whose legal system does not include trial by jury. Such was the case in the overseas trial of Detlef Tiede. See Fullerton, *supra* note 122, at 11 n. 29.

²²¹ See Fullerton, *supra* note 122, at 51 n.181.

²²² *Id.*

²²³ *Id.*

structural theory that guided the framers is upset if the political branches are allowed to create their own courts when there is an Article III court that has jurisdiction to hear a case, particularly when the threat of political influence on the tribunal is so great.²²⁴

Nonetheless, there are justifications for creating and utilizing an Article I court. For example, Congress may create an Article I court out of a desire to keep the federal judiciary small and prestigious or because it prefers to create a court that has expertise in particular areas in order to better decide particular controversies.²²⁵ Neither of these justifications seems applicable to the criminal trials of the Al Qaeda detainees as no new Article III court is necessary to conduct the trials. Also, Congress may prefer an Article I tribunal because the judges, who lack life tenure and salary protections, are less likely to be independent and are more likely to be influenced by political pressure.²²⁶ This justification may be applicable here, but it violates checks and balances and separation of powers.

In light of these constitutional doctrines, there are several factors to consider when determining if an Article I court may be used in place of an Article III court. One factor is the origin and importance of the rights that the Article I court is adjudicating.²²⁷ The rights at issue in the cases against the detainees are life and liberty, clearly two of the most basic and valuable individual rights. This suggests that the criminal cases should be heard in an Article III court because it provides more constitutional protection than an Article I court. Also a factor is the extent to which the Article I court is exercising jurisdiction and powers normally vested only in Article III courts.²²⁸ The answer is unclear. If the detainees are POWs, lawful combatants, or unlawful combatants violating the law of war, then jurisdiction in the military courts is proper and the Article III courts are not being deprived of their

²²⁴ *Id.*

²²⁵ ERWIN CHEMERINSKY, FEDERAL JURISDICTION 218-19 (3d ed. 1999)

²²⁶ *Id.*

²²⁷ CFTC v. Schor, 478 U.S. 833 (1986).

²²⁸ *Id.*

usual jurisdiction. On the other hand, if the detainees are civilians and/or terrorists and there is no “war,” then their criminal cases would normally be heard in an Article III court and giving jurisdiction to an Article I court would upset the balance of the carefully crafted constitution.

The ultimate consideration is a balancing test, with the benefits of utilizing an Article I court weighed against the disadvantages of an Article I court, particularly whether the Article I court undermines the doctrine of checks and balances.²²⁹ The benefits in having an Article I court try the detainees is a less public, less “circus-like” atmosphere because Article I courts need not be public and may be conducted on an expedited basis. Also, because the evidentiary rules of admissibility will be different than in an Article III court,²³⁰ the trials are likely to be less time consuming, which is important considering there are over 600 detainees at Guantanamo Bay. Of the disadvantages, the most prominent is that a highly politicized trial should not be tried by the political branches as the constitution was designed to allow the judicial branch to check and balance the political branches in political situations. However, Article III courts do not always find it necessary to balance in such a manner, e.g. when they decline to hear an otherwise justiciable case because it is a political question that the political branches should handle.²³¹

VIII. Conclusion: A Solution

Approximately a year has passed since the Taliban soldiers and Al Qaeda operatives were detained and international pressure regarding their treatment and detention has waned.²³² Most importantly, domestic pressure for swift retribution for the

²²⁹ *Northern Pipeline*, 458 U.S. at 113-16 (J. White, dissenting).

²³⁰ *See* Military Order, *supra* note 62, § 4(c)(3). *See also* notes 75-78, *supra*, and accompanying text.

²³¹ The criminal trials would not be deemed a political question; nonetheless, the doctrine is an example of an Article III court leaving an issue to be decided by the political branches. *See* ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 143-68 (3d ed. 1999) for a full discussion of the political question doctrine.

²³² Lewis, *supra* note 213.

September 11 attacks has faded.²³³ Accordingly, the U.S. administration is no longer in a hurry to prosecute the detainees as a prosecution will halt the ability to interview the detainees in order to obtain valuable information.²³⁴ When the U.S. is ready to prosecute the detainees, there are several possibilities. One solution, however, is superior to the others. In light of the constitutional considerations, recognized exceptions to Article III, and foreign policy, the Taliban detainees should be tried in an Article I court-martial and the Al Qaeda detainees should be tried in an Article III court. This supports the U.S. war against terrorism by separating the Taliban armed forces from the Al Qaeda terrorists.²³⁵ It also provides a basis for desirable international reciprocity regarding any future trials of members of the U.S. armed forces.

This solution is not, however, without faults as the application of extraterritorial statutes in an Article III court may subject U.S. citizens to negative reciprocal treatment abroad, especially when armed forces in an international armed conflict are at issue. The U.S. cannot hope to prosecute foreign acts committed against its citizens without subjecting U.S. citizens, including U.S. military personnel, to similar prosecutions from foreign countries. In order to avoid this unfavorable reciprocity, the Al Qaeda detainees could be tried by court-martial as unlawful combatants and for violating the law of war.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ If a detainee is a member of both regimes, then he should be tried as an Al Qaeda terrorist in order to increase the impact of the U.S. war against terrorism.