Fordham International Law Journal

Volume 34, *Issue* 3 2011 *Article* 4

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Abstract

Part I of this Note explores the background of both the Guantánamo detainee problem-i.e., what rights a foreign national detained at Guantánamo has-and the domestic detainee problem-i.e., what rights a foreign national detained on US soil has-that the United States may soon be facing, as well as the development of the law that has left open these legal ambiguities. Part I also discusses the applicability of international law on the issue. Part II presents the current conflict over the rights foreign detainees should have and the legality of detention on US soil, discusses the applicability of international law within the United States on the issue, and presents the two trial options for foreign detainees in the United States: the civilian criminal justice system and military commissions. Part II also discusses recent events that give a richer dimension to the debate on these issues, as well as recent proposals made by members of Congress for handling the detention and trial of foreign nationals on US soil. Part III argues that a system of military detention and trial before a military commission for foreign detainees on US soil is both legal and proper under the jurisprudence that has developed after September 11. Due to the perceived difficulties posed by trying, in US federal criminal court, a foreign national detained in the "war on terror." Part III asserts that these detainees should be placed into military custody and tried before a military commission unless a civilian criminal trial is feasible. Pending charges, judicial review of a foreign national's detention consistent with the US Supreme Court's decision in Boumediene v. Bush is arguably all that is required as long as the detainee may legally be held under the laws of war.

AFTER GUANTÁNAMO: LEGAL RIGHTS OF FOREIGN DETAINEES HELD IN THE UNITED STATES IN THE "WAR ON TERROR"

Ashley C. Pope *

INTRODUCTION

Much of the discussion of how to address foreign detainees has revolved around those detained at Guantánamo Bay.[1] With US President Barack Obama's promised closure of the Guantánamo Bay detention center more than two years ago, it was thought that many of those detainees could potentially be moved to the United States.[2] While some would have been moved in order to face prosecution,[3] it was likely that others would have

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1. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723 (2008) (holding that Guantánamo detainees have the constitutional privilege of habeas corpus); Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (rejecting military commissions' authority, as constituted, to try Guantánamo detainees); *see also* Benjamin Wittes & Robert Chesney, *The Courts' Shifting Rules on Guantanamo Detainees*, WASH. POST, Feb. 5, 2010, at A17 (discussing the conflict of rules and ideas among district court judges in Guantánamo habeas cases).

2. *See, e.g.*, Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009) (ordering the closure of the Guantánamo Bay detention facilities); Mark Mazzetti & William Glaberson, *Obama Issues Directive to Shut Down Guantánamo*, N.Y. TIMES, Jan. 22, 2009, at A1; Charlie Savage, *Plan to Move Guantánamo Detainees Faces New Delay*, N.Y. TIMES, Dec. 23, 2009, at A1 (noting obstacles in the way of a plan to move Guantánamo detainees to the United States); Sheryl Gay Stolberg, *Obama Would Move Some Detainees to U.S.*, N.Y. TIMES, May 22, 2009, at A1 (discussing the potential for Guantánamo detainees to be moved to the United States).

3. *See* Steve Holland, *U.S. to Move Some Guantanamo Prisoners to Illinois*, REUTERS, Dec. 15, 2009, *available at* http://www.reuters.com/article/idUSN1519709020091215 (stating that the Obama administration planned to move Guantánamo detainees to a US prison and hold military commissions trials there); *see also* Charlie Savage & Scott Shane, *Experts Urge Keeping Two Options for Terror Trials*, N.Y. TIMES, Mar. 9, 2010, at A15 (discussing Senator Lindsey Graham's proposal to clarify rules for handling detainees and their trials).

been transferred to the United States in order to continue their detention.[4] In December 2010, the US Congress passed a spending bill prohibiting the use of Department of Defense funds for the transfer of Guantánamo detainees to the United States, even for prosecution.[5] The bill also banned the use of such funds to construct or modify existing facilities to hold Guantánamo detainees in military custody on US soil.[6] President Obama, despite strong objections regarding the bill's effects and its limitation on executive authority, signed the bill into law on January 7, 2011.[7] He has pledged, however, to seek the repeal of the act's restrictions and opposes any extension or expansion of the restrictions in the future.[8] The transfer of foreign detainees

4. *See* Anna Mulrine, *Obama Decision to Move Guantanamo Detainees Spurs Opposition*, U.S. NEWS & WORLD REP., Dec. 23, 2009, http://www.usnews.com/news/articles/2009/12/23/obama-decision-to-move-guantanamo-detainees-spurs-opposition.html (discussing criticism of President Obama's plan to move Guantánamo detainees to the United States on the grounds that the plan could mean that detainees would be held in the United States indefinitely); *see also* Holland, *supra* note 3 (stating that Democrats were planning to lift a restriction on bringing Guantánamo detainees into the United States for purposes other than prosecution if the Obama administration offered an acceptable plan).

5. *See* Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1302, 124 Stat. 4137, 4406 (2011); *see also* Charlie Savage, *Vote Hurts Obama's Push to Empty Cuba Prison*, N.Y. TIMES, Dec. 23, 2010, at A24 (stating that the bill passed by Congress bans the transfer of any Guantánamo detainee into the United States using the bill's funds).

6. *See* Ike Skelton National Defense Authorization Act for Fiscal Year 2011 § 1304, 124 Stat. 4137, 4406.

7. *See* President Barack Obama, Statement by the President on H.R. 6523 (Jan. 7, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/01/07/statement-president-hr-6523 (stating that, despite his strong objections to sections 1302 and 1303, President Obama signed the Act because of its importance to funding military activities).

8. *See id.* ("[M]y Administration will work with Congress to seek repeal of these restrictions, will seek to mitigate their effects, and will oppose any attempt to extend or expand them in the future."); *see also* Charlie Savage, *New Measure to Hinder Closing of Guantánamo*, N.Y. TIMES, Jan. 8, 2011, at A11 (discussing President Obama's plan to urge Congress to repeal the Act's restrictions in the coming months after signing the Act). The Obama administration has already questioned the legality of these provisions of the Act. *See* Statement by the President on H.R. 6523, *supra* note 7 (warning that section 1032 of the Act "represents a dangerous and unprecedented challenge to critical executive branch authority"); Letter from Eric Holder, Jr., U.S. Attorney Gen., to Harry Reid, Majority Leader, U.S. Senate, & Mitch McConnell, Minority Leader, U.S. Senate (Dec. 9, 2010) *available at* http://s3.amazonaws.com/nytdocs/docs/537/537.pdf (communicating his opposition to the corresponding section in the Senate version of the bill, writing that "[t]his provision goes well beyond existing law and would unwisely restrict the ability of the Executive branch to prosecute alleged terrorists in Federal courts or military commissions in the United States as well as its ability to incarcerate those individuals convicted in such tribunals.").

to the United States, should it become an option again, may change the rights to which detainees are entitled, and the fact that foreign detainees are on US soil may or may not require that they be placed in the civilian criminal justice system.

This Note explores whether the current procedures for the detention of foreign nationals at Guantánamo Bay apply on US soil and how the US legal system would absorb foreign nationals detained solely in the United States.[9] Much of the law governing detention and trial in the "war on terror" focuses on Guantánamo detainees.[10] Given the small number of foreign "war-on-terror" detainees currently in the United States,[11] it is first necessary to evaluate detainees' rights, as they have been established, by examining the law applicable to detainees at Guantánamo. This Note addresses the lawfulness of military detention,[12] habeas corpus review of detention,[13] and the legality of and procedures for trial before a military commission as well as in federal criminal court.[14]

Part I of this Note explores the background of both the Guantánamo detainee problem—i.e., what rights a foreign national detained at Guantánamo has—and the domestic detainee problem—i.e., what rights a foreign national detained on US soil has—that the United States may soon be facing, as

9. *See* Holland, *supra* note 3 (discussing the potential for a change in law that would allow Guantánamo detainees to be brought to the United States even if they are not to be prosecuted); *see also* Mulrine, *supra* note 4 (questioning the federal government's authority to hold Guantánamo detainees indefinitely on US soil).

10. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723 (2008) (giving Guantánamo detainees the right to petition for habeas corpus); Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (rejecting the use of military commissions convened by the executive branch to prosecute a Guantánamo detainee); Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (holding that a US citizen who was initially held at Guantánamo but then transferred to the United States could be detained but must be given the right to challenge his detention).

11. In 2009, the US Congress passed laws preventing the transfer of Guantánamo detainees to the United States except for prosecution purposes. *See* Department of Homeland Security Appropriations Act of 2010, Pub. L. No. 111-83, § 552, 123 Stat. 2142 (2009); *see also* Helene Cooper & David Johnston, *Obama Tells Prison to Take Detainees*, N.Y. TIMES, Dec. 15, 2009, at A27 (stating that Congress has barred the transfer of Guantánamo detainees to US soil with an exception for transfer for prosecution). More recently, Congress has barred the transfer of Guantánamo detainees for any purpose. *See* Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1302, 124 Stat. 4137, 4406 (2011).

12. *See* discussion *infra* Parts I.B, II.A.

13. *See* discussion *infra* Part II.B.

14. *See* discussion *infra* Parts I.C, II.C. This Note does not seek to address indefinite detention.

well as the development of the law that has left open these legal ambiguities. Part I also discusses the applicability of international law on the issue. Part II presents the current conflict over the rights foreign detainees should have and the legality of detention on US soil, discusses the applicability of international law within the United States on the issue, and presents the two trial options for foreign detainees in the United States: the civilian criminal justice system and military commissions. Part II also discusses recent events that give a richer dimension to the debate on these issues, as well as recent proposals made by members of Congress for handling the detention and trial of foreign nationals on US soil. Part III argues that a system of military detention and trial before a military commission for foreign detainees on US soil is both legal and proper under the jurisprudence that has developed after September 11. Due to the perceived difficulties posed by trying, in US federal criminal court, a foreign national detained in the "war on terror."[15] Part III asserts that these detainees should be placed into military custody and tried before a military commission unless a civilian criminal trial is feasible. Pending charges, judicial review of a foreign national's detention consistent with the US Supreme Court's decision in *Boumediene v. Bush* is arguably all that is required as long as the detainee may legally be held under the laws of war.

I. *REACTING TO SEPTEMBER 11*

Before evaluating the question of military detention and trial of "war-on-terror" detainees on US soil, some background is necessary. Most of the jurisprudence that informs a discussion of this question has arisen out of the challenges posed by holding and trying the foreign nationals detained at Guantánamo, and, therefore, it is necessary to look to the history and law that has been established because of that facility's existence. This Part endeavors to provide a background to the legal issues surrounding detention and trial in the "war on terror." Section A provides a brief history of the September 11 attacks and the United States' reaction, including the establishment of the detention center at Guantánamo Bay. Section B examines

15. While Guantánamo detainees currently cannot be transferred to the United States to face prosecution, the law in this area has changed frequently. *See supra* notes 3–8 and accompanying text.

sources that provide authority for military detention outside the United States, including the US Constitution, domestic legislation, US court opinions, and international law, Finally, Section C briefly evaluates authorization for the use of military commissions abroad.[16]

A. *September 11, the "War on Terror," and the Legal Hotbed of Guantánamo Bay*

On September 11, 2001, terrorists acting under the direction and planning of Al Qaeda hijacked commercial jets and attacked both the World Trade Center in New York and the Pentagon in Washington, DC, killing thousands of people.[17] One week later, Congress passed the 2001 Authorization for Use of Military Force ("AUMF"), a joint resolution giving the President broad power to use "all necessary and appropriate force" against those who were responsible for or aided those responsible for the September 11 attacks.[18] With this authorization, President George W. Bush declared a "war on terror" and sent US armed forces to Afghanistan to combat both Al Qaeda and the Taliban, which was suspected of supporting Al Qaeda.[19] In the subsequent hostilities, which are ongoing, hundreds of foreign nationals were detained as suspected terrorists and transferred to US detention facilities at Guantánamo Bay.[20]

The detention of foreign nationals at Guantánamo Bay quickly became a source of international controversy, and the legal issues surrounding detention at that facility have been debated at length.[21] While "war-on-terror" detainees have

16. *See infra* Part II.C for further discussion of military commissions.

17. *'A National Tragedy'; Terrorism Hits New York and Washington*, WASH. POST, Sept. 12, 2001, at C16; *see* Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004); *see also* Hamdan v. Rumsfeld, 548 U.S. 557, 567–68 (2006).

18. *See* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); *see also infra* Part I.B.

19. *See* President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/print/20010920-8.html ("Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated."); *see also Hamdan*, 548 U.S. at 568; *Hamdi*, 542 U.S. at 510.

20. *See Hamdan*, 548 U.S. at 568.

21. *See* Katharine Q. Seelye, *A Nation Challenged: Captives; Rumsfeld Defends Treatment by U.S. of Cuba Detainees*, N.Y. TIMES, Jan. 23, 2002, at A9 (discussing

historically been held outside the United States, the need to detain foreign nationals on US soil will inevitably arise if the United States continues to be a target for terrorist attacks, whether that need comes from the transfer of those held at Guantánamo or from the detention of those caught in the act.[22]

B. *Sources of Authority for Military Detention: Guantánamo and Abroad*

The federal government's authority to detain foreign nationals in the "war on terror" comes from a variety of sources, including the US Constitution, statutes, and US Supreme Court precedent, and international law. The narrower question of whether the US government may detain a foreign national in the United States remains unresolved, though it seems that the government would have detention authority in the United States.[23]

1. The US Constitution

While not binding law, the preamble to the US Constitution is informative and sets the tone for a discussion of the lawfulness of military detention. It reads, "We the people of the United States, in order . . . to provide for the common defense . . . do ordain and establish this Constitution for the United States of America."[24] Since its founding, the defense of the nation and its people has been an important concern. That "the common defense" is named as one of only six purposes for which the US Constitution was established highlights the importance of national defense to the laws and ideals of the United States.[25]

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international criticism of the treatment of prisoners); *see also* Katharine Q. Seelye & David Sanger, *Bush Reconsiders Stand on Treating Captives of War*, N.Y. TIMES, Jan. 29, 2002, at A14 ("Critics contend that the United States is fudging the definition of war to suit its political purposes.").

22. The so-called Christmas Day Bomber is an example of the need to detain on US soil. *See infra* Part II.E.1.

23. *See* discussion *infra* Part II.A.

24. U.S. CONST. pmbl.

25. *See* Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 958–59 (1988) ("Thus, national defense would seem to have impeccable credentials as a compelling governmental interest despite the lack of specific textual injunction beyond the general language of the preamble."); *see also* Paul Rosenzweig, *Civil Liberty and the Response to Terrorism*, 42 DUQ. L. REV. 663, 674 (2004) ("Thus, as we assess questions of civil liberty it

Under the Constitution, Congress has the power to provide for the common defense of the United States; define and punish offenses against the law of nations; declare war; raise and support armies; provide and maintain a navy; make rules for the government and regulation of the armed forces; and make all laws necessary and proper for carrying out its Article I, Section 8 powers and all powers vested by the US Constitution in the federal government.

Article II, Section 2, Clause 1 establishes that the president is the commander in chief of American armed forces when called into service.[26] While Congress has the power to declare war, the executive branch directs the armed forces. The George W. Bush administration maintained that it had plenary authority to detain enemy combatants under Article II of the US Constitution.[27] The US Supreme Court, however, has not addressed this question in a majority or plurality opinion.[28] Lower court judges have evaluated, to some extent, the scope of the president's inherent Article II powers, but, while they acknowledge that the president has some inherent Article II authority, they are unresolved as to whether the ability to effect military detention of suspected terrorists is authorized by that authority.[29] The Obama

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is important that we not lose sight of the underlying end of government—personal and national security.").

26. U.S. CONST. art. II, § 2, cl. 1.

27. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 516 (2004) ("The Government maintains that no explicit congressional authorization is required, because the Executive possesses plenary authority to detain pursuant to Article II of the Constitution.").

28. *See id.* ("We do not reach the question whether Article II provides such authority."). *But see id.* at 579–82 (Thomas, J., dissenting) (recognizing that the US Constitution vests unitary detention authority in the President but agreeing with the opinion of the Court that the question need not be reached because Congress authorized such detentions with the AUMF); *id.* at 568–69 (Scalia, J., dissenting) (reconciling the proposition that the President lacks indefinite detention authority over citizens with the Founders' mistrust of permanent executive military power).

29. *See, e.g.*, Al-Marri v. Pucciarelli, 534 F.3d 213, 326 (4th Cir. 2008) (5-4 decision en banc) (Wilkinson, J., concurring in part & dissenting in part) ("It is widely accepted that the President has some inherent constitutional powers particularly to act in times of emergency when large numbers of American lives may be at stake."), *vacated as moot sub nom.* Al-Marri v. Spagone, 129 S. Ct. 1545 (2009); *Al-Marri*, 534 F.3d at 288 (Williams, J., concurring in part & dissenting in part) ("The President . . . already has some inherent Article II power to wage war.").

administration, however, does not assert an Article II claim of authority for military detention.[30]

The president also has the power and the duty to see that the laws are "faithfully executed."[31] This constitutional duty allows the president to execute laws that Congress passes governing the detention of suspected terrorists.[32] While the Constitution may give the president Article II authority as commander in chief to detain,[33] US courts typically have looked for congressional authorization when evaluating detention authority.[34]

2. Congressional Authorization

Analysis of the government's authority to effect military detention of suspected terrorists centers on the AUMF. Seven days after the September 11 attacks, Congress passed the AUMF, a joint resolution authorizing the use of the US armed forces against those responsible for the September 11 attacks.[35] The AUMF also explicitly authorizes the president to take action to deter and prevent terrorist attacks on the United States.[36] In the AUMF, Congress stated that it found that acts of "treacherous

30. *See, e.g.*, Hamlily v. Obama, 616 F. Supp. 2d 63, 66 n.1 (D.D.C. 2009) ("Although the government has previously asserted that petitioners' detentions are justified, at least in part, by the President's Article II powers as Commander in Chief . . . , it no longer makes such an assertion."); Gherebi v. Obama, 609 F. Supp. 2d 43, 53 n.4 (D.C. Cir. 2009) ("Under the Bush administration, the government had repeatedly asserted that it could detain individuals pursuant to the President's authority as Commander in Chief under Article II, § 2, clause 1 of the Constitution. . . . These contentions are absent from the government's most recent memorandum of law.").

31. U.S. CONST. art. II, § 3.

32. *See Ex Parte* Quirin, 317 U.S. 1, 26 (1942) ("The Constitution thus invests the President, as Commander in Chief, with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offenses against the law of nations, including those which pertain to the conduct of war.").

33. *See supra* notes 26–30 and accompanying text (discussing Article II authority).

34. *See infra* Part I.B.2.

35. Specifically, the AUMF authorizes the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the [September 11 attacks], or harbored such organizations or persons in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

36. *Id.*

violence" such as the September 11 attacks continued to pose "an unusual and extraordinary threat to the national security and foreign policy" of the United States.[37] The AUMF has provided the necessary framework for US courts to analyze the legality of military detention, which requires that the United States be at war.[38]

3. Judicial Deference to the Political Branches

While the US Constitution and the laws enacted by Congress govern this issue, US courts make the final determination. The US Supreme Court has spoken, to a limited extent, on the issue of detention authority, and lower courts have been left to refine the doctrine.[39] The Supreme Court has chosen not to address the question of whether Article II of the US Constitution authorizes the military detention of suspected terrorists because it has found that the AUMF authorizes such detention.[40]

The US Supreme Court in *Hamdi v. Rumsfeld* held that, under the very narrow circumstances in that case, the AUMF authorized the military detention of a US citizen who, it was alleged, had taken up arms with the Taliban in Afghanistan.[41] In its cases since *Hamdi*, the Court has bypassed the issue of the government's authority to detain.[42] Instead, the Court has left the question to district courts to decide when hearing detainees' habeas corpus claims.[43]

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37. *Id.*

38. *See* discussion *infra* Part I.B.3.

39. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 516–17 (2004) (holding that the AUMF authorized the battlefield detention of a US citizen); *see also* Boumediene v. Bush, 553 U.S. 723, 733 (2008) (leaving the issue of the President's detention authority for lower courts to decide).

40. *See Hamdi*, 542 U.S. at 516–17 ("We do not reach the question whether Article II provides such [detention] authority, however, because we agree with the Government's alternative position, that Congress has in fact authorized Hamdi's detention through the AUMF."). The Obama administration has also chosen not to claim Article II as authorization for its detention power. *See* Hamlily v. Obama, 616 F. Supp. 2d 63, 66 n.2 (D.D.C. 2009).

41. *Hamdi*, 542 U.S. at 509 ("We hold that . . . Congress authorized the detention of combatants in the narrow circumstances alleged here.").

42. *See Boumediene*, 553 U.S. at 733 ("We do not address whether the President has authority to detain these petitioners."); *see also Hamlily*, 616 F. Supp. 2d at 67 ("Since *Hamdi* was decided, the Supreme Court has not revisited this question.").

43. *See Boumediene*, 553 U.S. at 733 ("These and other questions regarding the legality of the detention are to be resolved in the first instance by the District Court."). Since the US Supreme Court held in *Boumediene* that district courts could hear habeas

The Obama administration claims that the president has the authority to detain "persons that the president determines planned, authorized, committed, or aided the [September 11 attacks], and persons who harbored those responsible for those attacks."[44] President Obama also claims that he has the authority to detain persons who were part of, or substantially supported, the Taliban or Al Qaeda forces.[45] The Court of Appeals for the DC Circuit recently addressed the question of who may be lawfully detained in its decision in *Al-Bihani v. Obama*.[46] Al-Bihani is a Yemeni citizen detained at Guantánamo who traveled from Pakistan to Afghanistan to serve in a paramilitary group allied with the Taliban against US forces.[47] Al-Bihani stayed at Al Qaeda-affiliated guesthouses and may have received instruction at Al Qaeda camps. Although he only served as a cook for the group, he did carry an Al Qaeda-issued weapon.[48] The court held that Al-Bihani's detention was lawful, accepting the Obama administration's view on who could be detained.[49] For the court, Al-Bihani's membership as a cook in the group associated with the Taliban was enough to justify his detention.[50] The court did not, however, establish a method by which to determine what constitutes "sufficient support or indicia of membership to meet

challenges from Guantánamo detainees, district court judges have evaluated the legality of a detainee's detention on a case-by-case basis, and the DC Circuit has weighed in as those cases are appealed. *See, e.g.*, Al-Adahi v. Obama, 613 F.3d 1102, 1103 (D.C. Cir. 2010) (reversing the district court's grant of habeas, holding, "'[A]ll necessary and appropriate force' includes the power to capture and detain those described in the [AUMF]. The government may therefore hold at Guantánamo and elsewhere those individuals who are 'part of' al-Qaida, the Taliban, or associated forces" (internal citations omitted)), *cert. denied*, 2011 U.S. LEXIS 646 (Jan. 18, 2011); Al-Bihani v. Obama, 590 F.3d 866, 872 (D.C. Cir. 2010) (holding that the petitioner was lawfully detained whether, as the district court decided, he was part of or supported Taliban or Al Qaeda forces or, as the government defined it, he substantially supported those forces).

44. *Hamlily*, 616 F. Supp. 2d at 67.

45. *See id.*

46. Al-Bihani v. Obama, 590 F.3d 866 (D.C. Cir. 2010).

47. *Id.* at 869.

48. *Id.*

49. *Id.* at 872. Those who "are part of forces associated with Al Qaeda or the Taliban" and "those who purposefully and materially support such forces in hostilities against U.S. coalition partners" are detainable under this decision. *Id.*

50. *Id.* at 872–73.

the detention standard."[51] This question was left to district court judges to answer.[52]

4. International Law

While the previous Sections looked to US law for detention authority, this Section evaluates whether international law provides such authority. The Supreme Court has held that the "war on terror" is an armed conflict and is governed by the Geneva Conventions.[53] Common Article 2 of the Geneva Conventions provides that the Geneva Conventions apply to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties."[54] While Al Qaeda is not a contracting party and may not benefit from the full protections of the Conventions as provided in Common Article 2, the Taliban, as the government of Afghanistan, is a party.[55] Common Article 3, however, is applicable to Al Qaeda members.[56] Common Article 3 provides that, "in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, [the provisions listed in the article]."[57] While the Bush administration maintained that Common Article 3 did not apply to the conflict with Al Qaeda,[58] the US Supreme

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51. *Id.* at 874.

52. Many of the available Guantánamo habeas decisions were decided before the DC Circuit's decision in *Al-Bihani.* Unless overturned, the definition found in the *Al-Bihani* decision will control. *See* Al-Bihani v. Obama, 619 F.3d 1, 23 n.7 (D.C. Cir. 2010) ("Therefore, as the panel opinion explained, the Military Commissions Act [of 2009] definitively establishes that those who purposefully and materially support al Qaeda may be detained for the duration of the hostilities, regardless of what international law might otherwise say about detention of such supporters.").

53. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 630 (2006).

54. Geneva Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention].

55. *See Hamdan*, 548 U.S. at 629 & n.60 ("Al Qaeda, unlike Afghanistan, is not a 'High Contracting Party'—*i.e.*, a signatory of the Conventions.").

56. *See id.* at 630. While the Court of Appeals for the DC Circuit held that the Geneva Conventions were not judicially enforceable in US courts, the Supreme Court rejected this idea. *See id.* at 626–28.

57. Third Geneva Convention, *supra* note 54, art. 3.

58. *See Hamdan*, 548 U.S. at 630 ("[T]he Government asserts[] that Common Article 3 does not apply to Hamdan because the conflict with al Qaeda, being 'international in scope,' does not qualify as a 'conflict not of an international character.'").

Court, in *Hamdan v. Rumsfeld*, has held that it does in fact apply[59] and that the "war on terror" rises to the level of an armed conflict.[60]

It is unclear, however, whether a "war-on-terror" detainee is considered a "prisoner of war" under the Geneva Conventions.[61] If the detainee is a prisoner of war, he is entitled to the full protections of the conventions.[62] Whether a detainee is a prisoner of war arguably depends on whether he is a lawful enemy combatant, as opposed to an unlawful enemy combatant.[63] The terms "lawful enemy combatant" and "unlawful enemy combatant" are often used but rarely defined.[64] Under

59. *See id.* at 631 ("Common Article 3, then, is applicable here.").

60. *See id.* at 630 ("Common Article 3 . . . affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory 'Power' who are involved in a conflict 'in the territory of' a signatory. The latter kind of conflict is distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations.").

61. Third Geneva Convention, *supra* note 54, art. 4 (establishing classes of people who are considered prisoners of war).

62. *See id.* arts. 12–16.

63. *See id.* art. 4.

64. *See, e.g.*, U.S. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005, 119 Stat. 2680, 2740–44 (2005) (creating combatant status review tribunals, but neglecting to define "combatant") (codified as amended at 10 U.S.C. § 801); Hamdi v. Rumsfeld, 542 U.S. 507, 522 n.1 (2004) ("The legal category of enemy combatant has not been elaborated upon in great detail. The permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them."); Exec. Order No. 13,440, 72 Fed. Reg. 40,707 (July 20, 2007) (using the term "unlawful enemy combatant," but not including the term in its list of definitions); Exec. Order No. 13,425, 72 Fed. Reg. 7737 (Feb. 14, 2007) (defining "unlawful enemy combatant" as it is defined in the Military Commissions Act ("MCA") of 2006). The MCA of 2006 defines a lawful enemy combatant as

> (A) a member of the regular forces of a State party engaged in hostilities against the United States; (B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or (C) a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.

Military Commissions Act of 2006, Pub. L. No. 109-366, § 3(a)(1), 120 Stat. 2600, 263–36. An unlawful enemy combatant is defined as

> (i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or (ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status

international law, lawful combatants may be detained for the duration of the hostilities.[65] It is less clear, however, whether international law authorizes the military detention of unlawful enemy combatants.[66]

While international law may, to some, serve as authority for military detention,[67] there is dissent within the courts on this issue.[68] Some lower courts in the United States have dismissed international law and held it to be inapplicable as a source of rights within the United States.[69] The Court of Appeals for the DC Circuit summarizes this position: "We have no occasion here to quibble over the intricate application of vague treaty provisions and amorphous customary principles. The sources we look to for resolution . . . are the sources courts always look to: the text of relevant statutes and controlling domestic case law."[70] The DC Circuit has recently refused to re-evaluate the issue of

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Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

Id.

65. *See* Third Geneva Convention, *supra* note 54, art. 118 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.").

66. In *Hamdan*, the US Supreme Court held that Common Article 3 applies to individuals involved in a conflict in the territory of a signatory power. Hamdan v. Rumsfeld, 548 U.S. 557, 631 (2006). The Court, however, evaluated the applicability of Common Article 3 in the context of what judicial process was due to Hamdan, not in the context of the legality of his detention. *Id.* at 631–32.

67. *See* Robert E. Barnsby, *Yes, We Can: The Authority to Detain as Customary International Law*, 202 MIL. L. REV. 53, 54–55 (2009) (arguing that regardless of the type of conflict, the authority to detain rises to the level of customary international law, as detention in war is a fundamental and accepted tool).

68. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 587–88 (2004) (Thomas, J., dissenting) ("The plurality relies primarily on Article 118 of the [Third Geneva Convention]. . . . But I do not believe that we may diminish the Federal Government's war powers by reference to a treaty and certainly not to a treaty that does not apply."); *see also* Noriega v. Pastrana, 130 S. Ct. 1002, 1002 (2010) (Thomas and Scalia, JJ., dissenting) (arguing that the US Supreme Court should address the open issue of the domestic applicability of the Geneva Conventions). Justice Scalia joined in Thomas's dissent in *Noriega*.

69. *See* Al-Bihani v. Obama, 590 F.3d 866, 871 (D.C. Cir. 2010) ("The international laws of war as a whole have not been implemented domestically by Congress and are therefore not a source of authority for U.S. courts."); *see also* Noriega v. Pastrana, 564 F.3d 1290 (11th Cir. 2009) (holding that section 5 of the MCA of 2006, which provides that no person may invoke the Geneva Conventions as a source of rights in a habeas corpus or other action to which the United States is a party in a US court, precluded the petitioner's argument that the Geneva Conventions gave him a right enforceable in federal court, as an adjudged prisoner of war, to be repatriated to his home country).

70. *Id.* at 871–72.

the enforceability of international law in US courts.[71] This ruling remains binding law within the DC Circuit, as the US Supreme Court last addressed this issue in the detention context in *Hamdi v. Rumsfeld* under the specific circumstances of Hamdi's detention.[72]

C. *Military Commissions*

Having discussed authorization for detention outside the United States, this Section briefly turns to the ability to try foreign nationals so detained in the "war on terror" for crimes related to terrorism. It seems settled that, under US law, violations of the laws of war may be adjudicated before a military commission.[73] Current US law provides that unprivileged enemy belligerents[74] may be tried before a US military commission.[75] Included in the codified definition of an "unprivileged enemy belligerent" are those who have "engaged in hostilities against the United States," those who have "purposefully or materially supported hostilities against the United States," and those who were members of Al Qaeda at the time the violation occurred.[76] Since the enactment of the Military Commissions Act of 2009, two convictions have been obtained using military commissions at Guantánamo, but both of these resulted from plea agreements.[77]

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71. *See* Al-Bihani v. Obama, 619 F.3d 1 (D.C. Cir. 2010) (denying rehearing en banc).

72. In *Hamdi*, the Supreme Court addressed the legality of an individual's detention, including a discussion of international law, only in the very narrow circumstances of the case. 542 U.S. at 521.

73. *See Ex Parte* Quirin, 317 U.S. 1, 27–28 (1942); *see also* discussion *infra* Part II.C.

74. The Military Commissions Act of 2009 uses the terms "unprivileged enemy belligerent," defined as an individual falling within one of the three categories discussed in the text above, and "privileged belligerent," defined as an individual falling within one of the eight categories in Article 4 of the Third Geneva Convention, whereas the MCA of 2006 used the terms "unlawful enemy combatant" and "lawful enemy combatant." Military Commissions Act of 2009, Pub. L. No. 111-84, sec. 1802, §§ 948a (6)–(7), 123 Stat. 2190 (codified at 10 U.S.C. §§ 948a (6)–(7)); *see* Military Commissions Act of 2006, Pub. L. No. 109-366, § 3(a)(1), 120 Stat. 2600, 2600–37.

75. 10 U.S.C. § 948c (2009).

76. *Id.* § 948a(7).

77. *See* Charlie Savage, *Deal Averts Trial in Disputed Guantánamo Case*, N.Y. TIMES, Oct. 26, 2010, at A12 (noting that Omar Khadr's plea agreement marks the second military commission conviction of a Guantánamo detainee during President Obama's administration); *see also* Peter Finn, *Former Cook for Bin Laden Reaches Deal with U.S. on Sentence; With Judge's Blessing, Prosecution and Defense Seal Agreement*, WASH. POST, Aug. 10,

This Part has examined the law that applies to detention and trial of foreign nationals abroad, specifically, at Guantánamo. This background analysis has produced several conclusions that inform Part II. US jurisprudence on detention in the "war on terror" is based in large part on the 2001 AUMF and how US courts have interpreted its grant of authority to the president.[78] While international law and the laws of war have informed the development of this jurisprudence, its role on US soil and application in US courts is anything but secure.[79] Military commissions as constituted under the MCA of 2009, though the subject of much debate,[80] have been little used at Guantánamo.[81] Because of this, few examples are available to inform an analysis of this venue for terrorism trials. Anticipating a continuation of the "war on terror" after the once-promised closure of the Guantánamo detention facilities, Part II turns to the question of detention and trial on US soil.

II. *CURRENT CONFLICT: DETENTION AND TRIAL ON US SOIL*

The conflict over which system should be employed to detain and try foreign nationals suspected to be terrorists on US soil received an increased amount of attention beginning in December 2009, when Umar Farouk Abdulmutallab attempted to ignite a bomb hidden in his underwear on a plane over Detroit.[82] The controversy that arose over trying Khalid Shaikh Mohammed, the alleged mastermind of the September 11 attacks, in a federal district court in lower Manhattan near the site of the attacks has only added to the debate over venue.[83] More recently, evidentiary rulings and the jury's verdict in Ahmed Ghailani's federal criminal trial have given rise to a

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2010, at A4 (stating that Ibrahim Al-Qosi's plea agreement marked the first conviction by military commission of a Guantánamo detainee since President Obama took office in 2009).

78. *See supra* notes 35–52 and accompanying text.

79. *See supra* notes 53–72 and accompanying text.

80. *See, e.g., infra* notes 145, 156–65 and accompanying text.

81. *See supra* note 77 and accompanying text.

82. *See infra* Part II.E.1.

83. *See* Michael Barbaro & Al Baker, *Bloomberg Balks at 9/11 Trial, Dealing Blow to White House*, N.Y. TIMES, Jan. 27, 2010, at A1 (discussing opposition to the plan to prosecute Khalid Shaikh Mohammed in federal court); *see also* discussion *infra* Part II.E.2.

renewed push for the use of military commissions.[84] Given the provisions in the recently enacted defense-spending authorization bill for 2011, a federal criminal trial currently seems to be unavailable to those detained at Guantánamo.[85] Section A evaluates the legality of military detention of foreign nationals on US soil, and Section B discusses whether a detainee may challenge this detention. Section C moves to the question of whether foreign detainees may be tried by military commissions on US soil. Section D examines the alternative to military commissions: the US criminal justice system. Finally, Section E presents recent developments and controversies to illuminate this debate.

A. *Legality of Military Detention within the United States*

Most of the legal discussion of the government's ability to detain suspected terrorists has focused on detention that took place outside of the United States, and, as seen in Part I, this issue has yet to be completely resolved. The question of whether the government may detain *within* the United States suspected terrorists has been addressed even less.[86] This Section will analyze the sources of law that may authorize military detention on US soil.

1. Alien Enemy Act

The Alien Enemy Act of 1798 ("Alien Enemy Act") provides that in a state of declared war or invasion by a foreign nation or government, all citizens, natives, or subjects of the foreign nation in the United States may be "apprehended, restrained, secured,

84. *See infra* Part II.E.3.

85. *See supra* notes 5–7 and accompanying text (explaining the provisions). *But see* Peter Finn & Anne E. Kornblut, *White House May Challenge Bill's Guantanamo Provisions*, WASH. POST, Jan. 4, 2011, at A8 (reporting that the Obama administration was weighing issuing a signing statement declaring that he would not enforce the provisions on constitutional grounds); Charlie Savage, *Obama May Bypass Guantánamo Rules, Aides Say*, N.Y. TIMES, Jan. 4, 2011, at A15 (explaining that aides in the Obama administration have advanced the idea that President Obama's executive authority allows him to disregard the transfer-banning provisions).

86. *See Ex Parte* Quirin, 317 U.S. 1, 25 (1942). The Fourth Circuit specifically addressed this question in its 2008 *en banc* decision in Al-Marri v. Pucciarelli, 534 F.3d 213, 326 (4th Cir. 2008) (5-4 decision), *vacated as moot sub nom.* Al-Marri v. Spagone, 129 S. Ct. 1545 (2009); *see also infra* Part II.A.3.

and removed as alien enemies."[87] The majority opinion in *Johnson v. Eisentrager* provides that courts will hear an alien's challenge to executive custody under the act to determine whether the US is at war and whether the alien is an alien enemy subject to the act, referring to these questions as jurisdictional elements.[88] According to the majority in *Eisentrager*, once these elements are met, courts will not inquire into any other internment issues.[89]

While the language of the statute would suggest that it is largely inapplicable to the "war on terror," given that the statute refers to actions of nations and governments rather than of nonstate actors, there may be room for debate. *Hamdi v. Rumsfeld* presented the question of whether a US citizen could be detained in the "war on terror" and held that detention of a US citizen was authorized.[90] In his dissent, Justice Antonin Scalia cites the Alien Enemy Act to support his argument that citizens and aliens are not subject to the same wartime detention authority;[91] instead, he argues that citizens and noncitizens are treated differently under the law.[92]

2. US Supreme Court Precedent

The last time the US Supreme Court directly addressed the question of whether foreign nationals can be subject to military detention on US soil was in *Ex Parte Quirin* in 1942. In *Quirin*, the Court evaluated whether the president could order the detention and military trial of Germans who had entered the United States with instructions to destroy American war industries and war facilities while the United States was at war with Germany.[93] The Federal Bureau of Investigation ("FBI") detained the Germans and later turned them over to military custody while they were

87. Alien Enemy Act of 1798, 1. Stat. 577 (codified as amended at 50 U.S.C. § 21 (2003)).

88. Johnson v. Eisentrager, 339 U.S. 763, 775 (1950).

89. *Id.*

90. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 509 (holding that detention of a US citizen was lawful under the specific circumstances presented in that case).

91. *See id.* at 574 n.5 (Scalia, J., dissenting) ("The plurality's assertion that detentions of citizen and alien combatants are equally authorized has no basis in law or common sense. Citizens and noncitizens, even if equally dangerous, are not similarly situated.").

92. *Id.*

93. *Ex Parte* Quirin, 317 U.S. 1, 21–22 (1942).

awaiting trial before the military commission.[94] The Court held that the military commission was lawfully constituted and that keeping the Germans in military custody pending trial before a military commission was lawful.[95] While *Quirin* is applicable on the question of whether detainees may be tried before a military commission,[96] it may not be applicable to the question of whether military detention of foreign nationals on US soil is authorized.[97]

A few years after it decided *Quirin*, the Court was again presented with a wartime habeas question. *Johnson v. Eisentrager* involved habeas petitions from Germans who were held abroad and convicted for violating the laws of war and held overseas.[98] Justice Jackson, writing for the majority, noted at the outset that US law retains both the citizen-alien distinction and the friendly-enemy alien distinction.[99] Justice Jackson also declared that an enemy alien in the United States is subject to arrest and internment whenever a declared war exists.[100]

When the Court granted certiorari in *Al-Marri*, many anticipated that the it would have to directly address the question of whether foreign nationals suspected to be terrorists could be subject to military detention in the United States .[101] The Court, however, did not decide the question because it granted the

94. *Id.* at 21, 23.

95. *Id.* at 48.

96. *See* discussion *infra* Part II.C.1.

97. As noted, it was the FBI that detained the Germans, and they were later placed in military custody in anticipation of trial before the military commission. *See Quirin*, 317 U.S. at 21. The Court evaluated the legality of the detention in connection with the fact that the detention was in anticipation of trial before the military commission. *See id.* at 48. The United States was also at war with Germany pursuant to a formal declaration of war by Congress. *See id.* at 21.

98. Johnson v. Eisentrager, 339 U.S. 763, 765–66 (1950).

99. *Id.* at 768–69 ("[O]ur law does not abolish inherent distinctions . . . between citizens and aliens, nor between aliens of friendly and of enemy allegiance, nor between resident enemy aliens who have submitted themselves to our laws and nonresident enemy aliens who at all times have remained with, and adhered to, enemy governments.").

100. *Id.* at 775.

101. *See* Al-Marri v. Pucciarelli, 129 S. Ct. 680 (2008) (granting petition for writ of certiorari); *see also* Adam Liptak, *Justices Take Case on President's Power to Detain*, N.Y. TIMES, Dec. 6, 2008, at A11 ("The central question in this case is whether Mr. Marri should be treated as an enemy soldier who may be held until hostilities end or as a criminal like Timothy J. McVeigh, who was convicted in a civilian court of blowing up the Oklahoma City federal building.").

government's application to transfer Al-Marri from military custody to the custody of the US attorney general.[102]

3. Fourth Circuit Reasoning in *Al-Marri*

The Court of Appeals for the Fourth Circuit decided Al-Marri's case in a five-to-four en banc decision, issuing a lengthy and complex opinion in which seven justices issued separate concurrences or dissents.[103] While this decision was vacated as moot after the US Supreme Court granted the government's application to transfer Al-Marri, the opinion is instructive, as it is the only instance in which a federal appellate court specifically addressed the question of military detention of a foreign national within the United States post-September 11.[104]

Al-Marri is a citizen of Qatar who was arrested in his home in Illinois as a material witness in the September 11 investigation and later indicted on criminal charges of making false statements, possession of unauthorized or counterfeit credit cards with intent to defraud, and using another person's identification.[105] After his arrest, however, President Bush declared him an enemy combatant, and Al-Marri was transferred to military detention on a brig in South Carolina.[106] The government submitted evidence to the court that Al-Marri received training and funding from Al Qaeda before the September 11 attacks, entered the United States as a sleeper agent, and was instructed to carry out additional terrorist activities for Al Qaeda.[107] Al-Marri filed a habeas petition, arguing that the government did not have the authority to detain him because he was taken into custody in the United States and was entitled to civilian status.[108]

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102. Al-Marri v. Spagone, 129 S. Ct. 1545 (2009).

103. Al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008) (per curiam), *vacated as moot sub nom.* Al-Marri v. Spagone, 129 S. Ct. 1545 (2009).

104. *See* Liptak, *supra* note 101, at A11 (stating that two other men, both US citizens, had been detained in the United States as enemy combatants since September 11).

105. *Al-Marri*, 534 F.3d at 219 (Motz, J., concurring).

106. *Id.*

107. *Id.* at 253 (Traxler, J., concurring).

108. *Id.* at 257.

Five judges held that the government had authority for military detention of a foreign national on US soil.[109] In what can be characterized as a deferential reading of the AUMF,[110] the plurality of judges was persuaded that Al Qaeda is in fact an enemy force whose members and supporters are rendered detainable under that resolution, even on US soil.[111] After analyzing US Supreme Court precedent, Judge Williams offered her own definition of an enemy combatant subject to detention pursuant to Congress' authorizations.[112] According to Judge Williams, a person qualifies as an enemy combatant if he or she meets two criteria: "(1) he attempts or engages in belligerent acts against the United States, either domestically or in a foreign combat zone; (2) on behalf of an enemy force."[113] Under this definition, Al-Marri was detainable as an enemy combatant.[114]

Four judges dissented from the majority's holding, arguing that the government did not have authority for military detention

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109. *Id.* at 216 (per curiam). There are two holdings in *Al-Marri*, the first of which is the focus of this Section. The second holding answered in the negative the question of whether Al-Marri had been afforded sufficient process to challenge his classification as an enemy combatant. *Id.*

110. In its brief opposing Al-Marri's petition for certiorari, the government argued that Congress must have intended to allow the detention of those like Al-Marri, as any contrary interpretation

> relies on the assumption that when Congress authorized the use of military force to respond to the September 11 attacks, it did not intend to reach individuals virtually identically situated to the September 11 hijackers, none of whom had engaged in combat operations against our forces on a foreign battlefield.

Brief for the Respondent in Opposition at 24, Al-Marri v. Pucciarelli, 129 S. Ct. 680 (2008) (No. 08-368).

111. *See Al-Marri*, 534 F.3d at 259–60 (Traxler, J., concurring) (reasoning that Congress sought to target people affiliated with Al Qaeda, like Al-Marri, when it passed the AUMF); *id.* at 285–86 (Williams, J., concurring & dissenting) ("The AUMF grants the President power to use force against 'organizations' that he determines 'planned, authorized, committed, or aided in' the September 11 attacks. Al Qaeda is obviously an 'organization' that 'planned, authorized, committed, or aided in' those attacks. Thus, in my view, the AUMF has labeled Al Qaeda an enemy force."); *id.* at 294 (Wilkinson, J., concurring & dissenting) ("By ignoring the AUMF's plain language and patent meaning, the plurality comes all too close to holding that no person lawfully in the United States may be seized as an enemy combatant and subjected to military detention.... That to me is the plain import of the plurality's view, and its interpretation of the AUMF ... undermines Congress's intent.").

112. *Id.* at 285 (Williams, J., concurring & dissenting) (evaluating definitions of 'enemy combatant' found in *Hamdi* and *Quirin*).

113. *Id.*

114. *See id.*

of Al-Marri.[115] The dissenting judges cited the US Supreme Court's decision in *Ex Parte Milligan*,[116] in which the Court held that there was no justification to hold Milligan, a US citizen, as a combatant under the laws of war, as he was a civilian and had to be treated as such.[117] Relying on *Milligan* and narrow interpretations of *Quirin* and *Hamdi*, the dissent reasoned that Al-Marri could not be subjected to military detention because he was not a combatant affiliated with the military arm of an enemy government.[118] Judge Motz pointed to *United States v. Salerno*[119] for the proposition that detention without trial is—and should remain—a carefully limited exception to the norm.[120]

The question of whether a foreign national suspected to be a terrorist may be militarily detained within the United States remains open.[121] While the vacated *Al-Marri* decision provides insight into how the courts might analyze such a question, it is not predictive. The five-to-four holding that the AUMF authorized the detention of a foreign national on US soil is a shaky one, and is rendered even more so by the Supreme Court's decision to grant certiorari in the case.[122] The tenuousness of the threads binding the plurality together is demonstrated by Judge Traxler, the swing vote on both questions in the Fourth Circuit decision: "Like my colleagues, I agree that neither *Hamdi* nor *Padilla* [*v. Hanft*][123] compels the conclusion that the AUMF

115. *Id.* at 216 (per curiam).

116. *Ex Parte* Milligan, 71 U.S. 2 (1866). Milligan was an Indiana resident during the Civil War; the government argued that he had communicated with the enemy, conspired to seize war supplies, and had joined and aided an enemy organization in order to overthrow the government. *Id.* at 6.

117. *Id.* at 121–22, 130; *see Al-Marri*, 534 F.3d at 230 (Motz, J., concurring).

118. *See Al-Marri*, 534 F.3d at 235 (Motz, J., concurring).

119. 481 U.S. 739, 755 (1987) ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.").

120. *See Al-Marri*, 534 F.3d at 243–44 (Motz, J., concurring) (criticizing Judge Williams' definition of 'enemy combatant' as too malleable and vague to ensure that detention without trial remains a carefully limited exception to the norm).

121. *See* Adam Liptak, *Justices Erase Ruling that Allowed Detention*, N.Y. TIMES, Mar. 7, 2009, at A9 (stating that the Supreme Court erased a lower court ruling answering this question); *see also* Press Release, Brennan Center for Justice, Al-Marri Detention Case Vacated (Mar. 6, 2009), *available at* http://www.brennancenter.org/content/resource/al_marri_detention_case_vacated (stating the same and noting that the Supreme Court did not take advantage of the opportunity to clarify the law on this question).

122. *See supra* notes 101–04 and accompanying text.

123. 423 F.3d 386 (4th Cir. 2005), *cert. denied* 547 U.S. 1062 (2006). In *Padilla*, the Fourth Circuit held that a US citizen who took up arms with Al Qaeda in Afghanistan

authorized the president to detain al-Marri as an enemy combatant.... I disagree, however, that *Ex Parte Milligan* compels the opposite conclusion."[124] Despite the fact that the legality of military detention of foreign nationals suspected to be terrorists on US soil remains unknown, the next Section turns to the question of what rights a foreign national so detained would have.

B. *Detainees' Rights to Challenge the Lawfulness of Their Detention*

While Congress and the Bush administration sought to limit Guantánamo detainees' access to federal courts,[125] the US Supreme Court in *Boumediene v. Bush* ruled that Guantánamo detainees have the constitutional right to challenge the legality of their detention in federal court through a petition for habeas corpus.[126] The *Boumediene* Court held that the habeas-jurisdiction-stripping provision in the Military Commissions Act of 2006 ("MCA of 2006"), which prohibited US courts from considering a habeas petition from aliens detained by the United States and was not specific to Guantánamo detainees,[127] was an unconstitutional suspension of the writ.[128] Although *Boumediene* involved Guantánamo detainees, a foreign national detained in

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and returned to the United States to carry out Al Qaeda-directed acts of terrorism could be militarily detained as an enemy combatant on US soil pursuant to the AUMF. *Id.* at 391. Like Al-Marri, Padilla was transferred to civilian custody on the government's motion. *See* Hanft v. Padilla, 546 U.S. 1084 (2006) (granting the government's application to transfer Padilla to civilian custody).

124. *Al-Marri*, 534 F.3d at 259 (Traxler, J., concurring) (internal citation omitted).

125. Congress passed the Detainee Treatment Act of 2005 to establish combatant status review tribunals ("CSRTs") to determine the enemy combatant status of detainees held at Guantánamo. *See* Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005, 119 Stat. 2680, 2740–44 (codified as amended at 10 U.S.C. § 801 note). The Act provided that no court could hear a habeas petition from Guantánamo detainees. *Id.* § 1005(e)(1). The Act also gave the Court of Appeals for the DC Circuit exclusive jurisdiction to determine the validity of a CRST determination. *Id.* § 1005(e)(2)(A). The MCA of 2006 also prohibited courts from hearing habeas petitions from "an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635–36 (codified at 28 U.S.C. § 2241(e)(1)).

126. *See* Boumediene v. Bush, 553 U.S. 723 (2008). The Court held that the CSRTs fell well short of being an adequate substitute for habeas review. *Id.* at 767.

127. *See* Military Commissions Act of 2006 § 7(a) (codified at 28 U.S.C. § 2241(e)(1)).

128. *Boumediene*, 553 U.S. at 733.

the "war on terror" in the United States would also benefit from the decision and have the right to present a habeas petition.[129]

While a detainee in the United States would have the right to petition for habeas review, the right may not be immediately available, and the remedy for unlawful detention may not be the detainee's release.[130] Even though habeas courts must have the power to order the release of an unlawfully held detainee, the *Boumediene* Court noted that release need not be the exclusive remedy and would not always be appropriate.[131] The Court also specified that lower courts could defer to the government for a period of time for initial detention and screening.[132] The Court noted that exigencies could require the judicial branch to stay habeas proceedings until the government could comply with the proceedings' requirements.[133] While a foreign national militarily detained in the United States in the "war on terror" would be able to challenge the basis for his detention, it is unclear how robust that right would be in practice.

C. *Military Commission on US Soil*

The previous Sections discussed the legality of detention of foreign nationals on US soil and the right to challenge that detention. This Section turns to the question of whether a military commission on US soil may try foreign nationals for terrorism-related crimes. While it is accepted that a military commission may try foreign detainees for violations of the laws of war outside the United States, whether detainees in the United States may be tried before a military commission is debatable.[134]

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129. Indeed, Al-Marri brought a habeas petition to challenge his detention on US soil. *See* Al-Marri v. Pucciarelli, 534 F.3d 213, 216 n.* (4th Cir. 2008) ("The Government relied on section 7 of the Military Commissions Act (MCA) of 2006 . . . . [T]he Supreme Court declared section 7 of the MCA unconstitutional. The Government now concedes that we have jurisdiction over al-Marri's habeas petition." (citations omitted)), *vacated as moot sub nom.* Al-Marri v. Spagone, 129 S. Ct. 1545 (2009).

130. *See Boumediene*, 553 U.S. at 779, 793–94.

131. *Id.* at 779.

132. *Id.* at 793–94 ("[P]roper deference can be accorded to reasonable procedures for screening and initial detention under lawful and proper conditions of confinement and treatment for a reasonable period of time.").

133. *Id.*

134. *See* discussion *supra* Part I.C; *see also* Savage & Shane, *supra* note 3, at A15 (explaining opinions from each side of the debate).

1. US Supreme Court Precedent for Military Commissions on US Soil in *Ex Parte Quirin*

The US Supreme Court's decision in *Quirin* establishes that foreign nationals detained in the United States in wartime may be tried before a military commission.[135] While *Quirin* was previously discussed in connection with detention authority, this Section evaluates the precedent in *Quirin* for trial before a military commission on US soil. In Article 15 of the Articles of War, Congress provided that unlawful belligerents could be tried and punished by military commission according to the law of war.[136] Eight Germans who had entered the United States with explosives in order to destroy American war facilities[137] were charged with violating the laws of war and tried by the military commission ordered by the president.[138] The Court denied their habeas petitions,[139] reasoning that by coming into the country, not in uniform, and with intentions to destroy American facilities, the Germans became unlawful enemy belligerents who could be tried and punished via military commission.[140]

2. Congressional Authorization: The Military Commissions Act of 2009

In addition to the US Supreme Court's authorization for trial by military commission, Congress has also authorized such trials.[141] Any "alien unprivileged enemy belligerent" is subject to trial by military commissions under the Military Commissions Act of 2009 ("MCA of 2009"),[142] which supports the assertion that a foreign national detained as a suspected terrorist within the United States may be tried before a military commission. A military commission under the MCA of 2009 has jurisdiction over

135. *Ex Parte* Quirin, 317 U.S. 1, 48 (1942) (holding that the military commission ordered by the President was lawfully constituted).

136. Act of June 4, 1920, ch. 227, 41 Stat. 759, 790 (Article of War 15); *see also* Quirin, 317 U.S. at 35.

137. *Id.* at 21–22.

138. *Id.* at 23.

139. *Id.* at 48.

140. *Id.* at 37.

141. *See* Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2190 (codified in scattered sections of 10 U.S.C.); *see also* Military Commissions Act of 2006, Pub. L. No. 109-366, §§ 1–10, 120 Stat. 2600, 2600–37, *amended by* Military Commissions Act of 2009 §§ 1801–1807.

142. 10 U.S.C. § 948c.

any alien unprivileged enemy belligerent for any offense established in the MCA of 2009, Articles 104 and 106 of the Uniform Code of Military Justice, or the laws of war.[143] Crimes covered under the MCA of 2009 include attacking civilians, civilian objects, or protected property; murdering protected persons; denying quarter; taking hostages; using poison; using torture, cruel or inhuman treatment; intentionally causing serious bodily injury in violation of the law of war; murdering in violation of the law of war; destroying property in violation of the law of war; hijacking or hazarding a nonmilitary vessel or aircraft; committing terrorism; providing material support for terrorism; wrongfully aiding the enemy; spying; and committing conspiracy, among others.[144]

While the procedures established by the MCA of 2006 for military commissions were widely criticized,[145] the MCA of 2009 provides a little more process.[146] Notice of the charges must be given to the accused detainee "as soon as practicable";[147] statements obtained through the use of torture or cruel, inhuman, or degrading treatment are excluded;[148] any other statement that the detainee made can be admitted into evidence if the judge finds that "the totality of the circumstances renders the statement reliable and possessing sufficient probative value" and that it was either made incident to lawful conduct during military operations at the point of capture or was voluntarily given.[149] The detainee is also guaranteed the right to present evidence in his defense, cross-examine witnesses, examine and

143. *Id.* § 948d.

144. *Id.* § 950t.

145. *See Military Commissions Act of 2006*, ACLU (Mar. 13, 2007), http://www.aclu.org/national-security/military-commissions-act-2006 (stating that the MCA of 2006 undermines the US Constitution and gives the President absolute power); *see also* Peter Baker & David M. Herszenhorn, *Obama Planning to Keep Tribunals for Detainees*, N.Y. TIMES, May 14, 2009, at A18 ("During last year's presidential campaign, Mr. Obama called the military commission system put in place by Mr. Bush 'an enormous failure' and vowed to 'reject the Military Commissions Act.'").

146. *See* Warren Richey, *Obama Endorses Military Commissions for Guantánamo Detainees*, CHRISTIAN SCI. MONITOR, Oct. 29, 2009, http://www.csmonitor.com/USA/Justice/2009/1029/p02s01-usju.html ("[S]upporters say that the [MCA of 2009] balances the demands of fairness and due process against a real-world need for flexibility when seeking to prosecute accused Al Qaeda leaders and supporters.").

147. 10 U.S.C. § 948q(b).

148. *Id.* § 948r(a).

149. *Id.* § 948r(c).

respond to all admitted evidence,[150] be present for all acceptable sessions of the commission, be represented by counsel, and suppress evidence that is unfairly prejudicial, confusing on the issues, or misleading.[151] Hearsay evidence, however, may be admitted by the military judge if he or she makes the required determinations under the MCA of 2009.[152] Convictions require only a two-thirds vote of the members of the commission,[153] and decisions of the military commission can be reconsidered by the United States Court of Military Commission Review.[154] The Court of Appeals for the DC Circuit then has exclusive appellate jurisdiction, and, subsequently, a defendant may petition the Supreme Court for a writ of certiorari.[155] Based on these procedures, the next Section addresses whether a trial before a military commission meets international law obligations.

3. Geneva Conventions Satisfied?

Trial before a military commission constituted under the MCA of 2009 may satisfy the Geneva Conventions. In *Hamdan*, the US Supreme Court noted that ordinary military courts are included in the definition of a regularly constituted tribunal required by Common Article 3.[156] Regular military courts in the US system are the courts-martial established by congressional statutes.[157] Nevertheless, a military commission can be regularly constituted "if some practical need explains deviations from court-martial practice."[158] According to the Court, however, the military commission convened by President Bush to try Hamdan for conspiracy was not an ordinary military court.[159]

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150. *Id.* § 949a(b)(2). The government may, however, seek to withhold classified evidence that would damage national security. The judge may allow discovery if the classified information would be noncumulative, relevant, and helpful to the defense. The judge may also withhold certain items of classified information or substitute summaries for classified information. *See id.* § 949p-4.

151. *Id.* § 949a(b)(2).

152. *Id.* § 949a(b)(3)(D).

153. *Id.* § 949m.

154. *Id.* § 950f.

155. *Id.* § 950g.

156. Hamdan v. Rumsfeld, 548 U.S. 557, 632 (2004).

157. *See id.* at 632.

158. *Id.*

159. *See id.* at 632–33.

While the commission at issue in *Hamdan* did not meet the requirements of Common Article 3,[160] a military commission authorized under the MCA of 2009 may.[161] Military commissions as envisioned by the MCA of 2009 exist pursuant to congressional statute, whereas the *Hamdan* commission did not.[162] In addition, the Court in *Hamdan* took issue with the commission's procedural rules that would have allowed Hamdan to be convicted based on evidence he had not seen or heard and would have allowed evidence to be admitted that did not comply with the admissibility or relevance rules applicable in criminal trials and court-martial proceedings.[163] Congress and President Obama enacted the MCA of 2009 to address the perceived shortcomings of Bush's military commissions and those created by the MCA of 2006.[164] In *Hamdan*, the Court noted that Common Article 3 allows for flexibility in trying individuals captured during an armed conflict and that its general requirements could accommodate a variety of legal systems.[165] Whether the commissions created by the MCA of 2009 require too much flexibility or are a legal system that can be accommodated, however, is unclear.

D. *Alternatively: Civilian Criminal Detention and Trial Rather than Military Detention and Trial before a Military Commission*

While the previous Sections evaluated whether foreign nationals suspected of terrorism could be subject to military detention and trial before a military commission on US soil, there is also the alternative of domestic, civilian criminal

160. The Court in *Hamdan* held that Common Article 3's requirements included that the accused must be present for his trial and that he must hear the evidence against him. *Id.* at 634–35.

161. *See id.* at 621.

162. *See id.* at 593; *see also* discussion *supra* Part II.C.2 (discussing the Military Commissions Act of 2009).

163. *See Hamdan*, 548 U.S. at 615–16.

164. *See* David Johnston, *In Senate, Debate on Detainee Legal Rights*, N.Y. TIMES, July 7, 2009, at A18 ("The changes [in the MCA of 2009] would be intended to withstand legal challenges and bolster the credibility of the tribunals domestically and overseas."); *see also* Josh Gerstein, *Obama Signs Military Commissions Reforms*, POLITICO (Oct. 28, 2009, 4:58PM), http://www.politico.com/blogs/joshgerstein/1009/Obama_signs_Military_commissions_reforms.html (stating that the MCA of 2009 was designed to meet the legal standards set out by the Supreme Court in its recent decisions).

165. *Hamdan*, 548 U.S. at 635.

detention and trial in the criminal justice system. Some argue that detention by law enforcement authorities in anticipation of criminal prosecution in a civilian court is the only appropriate option for suspected terrorists detained in the United States.[166] Some also question the implications that a rule allowing the military to detain foreign nationals on US soil would have for US citizens.[167]

The USA Patriot Act of 2001 ("Patriot Act") authorizes the detention of foreign nationals for terrorism-related crimes committed in the United States.[168] The Act enlarges the criminal law with respect to terrorism, terrorist conspiracies,[169] and supporting terrorism;[170] and increases the maximum penalties that can be given for terrorism-related offenses.[171] Enacted after the September 11 attacks, the Patriot Act amended federal criminal law to address the needs of post-9/11 America, making detention by law enforcement authorities and a criminal trial in the civilian justice system a viable option for foreign nationals suspected to be terrorists.[172]

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166. *See* Editorial, *Indefinite Detention*, N.Y. TIMES, Nov. 24, 2008, at A30 ("There is no authority, in the Constitution or in any law passed by Congress, for a president to seize and detain indefinitely individuals in the United States without charges. If the government wants to imprison such suspects, it should bring regular criminal charges against them in the civilian system."); *see also USA: Abandon Military Commissions, End Indefinite Detention Without Criminal Trial*, AMNESTY INT'L, Apr. 30, 2010, http://www.amnesty.org/en/appeals-for-action/usa-abandon-military-commissions-end-indefinite-detention-without-criminal-trial-0 (calling for trials in civilian courts rather than by military commission).

167. *See* Editorial, *supra* note 166, at A30 ("The federal appeals court made clear that its ruling upholding the president's power to detain enemy combatants applies equally to American citizens. If the ruling stands, presidents would be able to throw out due process, habeas corpus and other basic constitutional and statutory rights for anyone they declared to have terrorist ties.").

168. Pub. L. No. 107-56, §§ 801–817, 115 Stat. 272, 374–86.

169. *Id.* §§ 801–803, 808, 811, 817(2) (codified in scattered sections of 18 U.S.C.) (amending existing federal laws to reflect new definitions of terrorism-related crimes).

170. *Id.* §§ 803, 805, 807 (codified in scattered sections of 18 U.S.C.) (adding a crime for concealing or harboring terrorists, and amending existing federal law).

171. *Id.* § 810 (increasing the maximum sentences a convicted defendant could receive for terrorism-related crimes, for example, by adding five years to the maximum sentence, doubling the maximum sentence, or authorizing life in prison where it had not been authorized before).

172. *See* Richard A. Serrano, *Holder Defends Arrest of Alleged Airline Bomb Plotter*, L.A. TIMES, Feb. 4, 2010, at A10 (stating that US Attorney General Eric Holder defended the decision to charge Umar Farouk Abdulmutallab with federal crimes and to detain him in connection with those charges); *see also* Benjamin Weiser, *Top Terror Prosecutor Is a Critic of Civilian Trials*, N.Y. TIMES, Feb. 20, 2010, at A1 (discussing successful civilian

Detention by law enforcement authorities in the United States and subsequent criminal trial in the civilian justice system bring more stringent procedural protections than military commissions do: (1) arrests require probable cause;[173] (2) those arrested on criminal charges must be read their *Miranda* rights; (3) the prosecution may not use any statements made by the suspect during interrogation if the suspect was not apprised of his or her rights;[174] (4) the Federal Rules of Evidence exclude hearsay statements unless they fit within narrow exceptions;[175] (5) in order for evidence to be admitted, it must be authenticated or identified;[176] and (6) convictions require proof beyond a reasonable doubt.[177]

While these guarantees provide a detainee with more rights, they may also create problems for the government when trying the detainee. For example, evidence gained through the use of enhanced interrogation techniques would likely be excluded. President Obama has prohibited the use of such techniques,[178] but many of the Guantánamo detainees were subjected to them before this prohibition.[179] Any confessions obtained through the use of enhanced interrogation techniques would create evidentiary problems in a federal courtroom.[180]

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criminal trials for acts of terrorism occurring before September 11 and the Obama administration's use of these successes as support for civilian terrorism prosecutions).

173. *See* U.S. CONST. amend. IV.

174. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966). There is, however, an exception to the *Miranda* rule. If there is a situation in which a threat to public safety arises, the police may question a suspect immediately without reading the *Miranda* rights. *See* New York v. Quarles, 467 U.S. 649, 655–56 (1984).

175. FED. R. EVID. 802.

176. *See* FED. R. EVID. 901.

177. *See In re* Winship, 397 U.S. 358, 364 (1970).

178. *See* Exec. Order No. 13,491, 74 Fed. Reg. 4894 (Jan. 27, 2009) (prohibiting the use of any interrogation techniques not in the Army Field Manual).

179. *See* Matthew Alexander, Opinion, *I'm Still Tortured by What I Saw in Iraq*, WASH. POST, Nov. 30, 2008, at B1, (referring to torture and abuse in interrogations); *see also* John Schwartz, *Path to Justice, but Bumpy, for Terrorists*, N.Y. TIMES, May 2, 2009, at A9 (citing obstacles posed by evidence gained through brutal treatment as a reason to use military commissions rather than civilian courts).

180. *See* Schwartz, *supra* note 179 ("Some methods used by Bush administration officials to gather evidence were shadowy and perhaps tainted."); *see also* Marisa Taylor, *Prosecutors Build Solid Case against Suspect*, MIAMI HERALD, Feb. 28, 2010, at 11A (stating that Khalid Shaikh Mohammed's confessions, which were gained through the use of waterboarding, have become a liability for the Justice Department in US court).

There are, however, also advantages to defendants and to the government when using the criminal justice system. Rather than excluding information that is potentially helpful to a defendant on national security grounds, the Classified Information Procedures Act allows for a balancing between the need to protect classified information and a defendant's rights in a federal criminal trial.[181] The government would also benefit from a criminal trial in federal court from a foreign affairs standpoint. A criminal trial in federal court is seen as the gold standard of justice.[182] The rights available to defendants in federal court surpass those required by the Geneva Conventions.[183]

E. *Boiling Point: The Christmas Day Bomber, Trying the Mastermind of September 11, and Opinions from Every Side*

Recent controversies illuminate the current conflict and spur the debate over what to do with detainees in the United States. This Section discusses the disputes surrounding the detention of Umar Farouk Abdulmutallab, the debate over where Khalid Shaikh Mohammed should be tried, the impact of the verdict in Ahmed Ghailani's trial in federal court, opinions from a variety of sources on these issues, and legislation that was introduced to address the competing concerns that came to light.

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181. *See* Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified as amended at 18 U.S.C. app. 3 §§ 1–16 (2000); *see also* Al-Marri v. Pucciarelli, 534 F.3d 213, 309 (4th Cir. 2008) (5-4 decision en banc) (Wilkinson, J., concurring & dissenting) (describing the Classified Information Procedures Act as a corrective measure designed to protect the government's national security needs while protecting individual rights), *vacated as moot sub nom.* Al-Marri v. Spagone, 129 S. Ct. 1545 (2009).

182. *See* Morris Davis, Op-Ed., *Justice and Guantanamo Bay*, WALL ST. J., Nov. 11, 2009, at A21 ("The evidence likely to clear the high bar gets gold medal justice: a traditional trial in our federal courts.").

183. *See id.* Common Article 3 requires that "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by . . . detention" have a "judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples" before sentences are passed. *See* Third Geneva Convention, *supra* note 54, art. 3(1).

1. Umar Farouk Abdulmutallab

On December 25, 2009, Umar Farouk Abdulmutallab, a Nigerian citizen, attempted to ignite a bomb hidden in his underwear while he was on a plane over Detroit.[184] He was arrested by law enforcement authorities and questioned by federal agents.[185] Officials said that Abdulmutallab initially provided information and intelligence freely, but, after being read his *Miranda* rights hours after his arrest, Abdulmutallab "went silent."[186] The *Miranda* issue generated much debate in both Congress and the media.[187] Many faulted the handling of Abdulmutallab as having prevented the military and intelligence community from obtaining vital information about operations and possible future attacks.[188] Some argued that Abdulmutallab should not have been read his *Miranda* rights and that US intelligence agencies should have been consulted before Abdulmutallab was informed of his rights.[189] Some theorized that

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184. *See* Devlin Barrett, *Details of Arrest of Bombing Suspect Disclosed*, WASH. POST, Jan. 24, 2010, at A3 (describing the bombing attempt); *see also* Mark Hosenball, *The Radicalization of Umar Farouk Abdulmutallab*, NEWSWEEK, Jan. 11, 2010, at 37–41, *available at* http://www.newsweek.com/2010/01/01/the-radicalization-of-umar-farouk-abdulmutallab.html (describing the same).

185. *See* Barrett, *supra* note 184, at A3; *see also* Walter Pincus, *Christmas Day Bomb Suspect Was Read Miranda Rights Nine Hours after Arrest*, WASH. POST, Feb. 15, 2010, at A6 (stating that Abdulmutallab was first questioned more than three hours after arrest).

186. *See* Barrett, *supra* note 184, at A3; *see also* Spenser S. Hsu & Jennifer Agiesta, *Intelligence Chief Says FBI Was Too Hasty in Handling of Attempted Bombing*, WASH. POST, Jan. 21, 2010, at A3 (stating that Abdulmutallab asked for a lawyer and stopped talking after he was read his rights).

187. *See, e.g.*, *Intelligence Reform: The Lessons and Implications of the Christmas Day Attack: Hearing Before the S. Homeland Sec. Comm.*, 110th Cong. 34 (2010) [hereinafter Committee Hearing on Intelligence Reform] (statement of Sen. Susan M. Collins, Ranking Member, S. Homeland Sec. Comm.); Hsu & Agiesta, *supra* note 186, at A3 (noting that some saw the Obama administration's choices regarding Abdulmutallab as a mistake); Eli Lake, *9/11 Panel Chiefs Fault Handling of Bomb Suspect*, WASH. TIMES, Jan. 27, 2010, at A1 (stating that leaders of a commission that investigated September 11 told a US Senate panel that the interrogation of Abdulmutallab was mishandled); Serrano, *supra* note 172, at A10 (discussing Republican Party's criticism of the decision to arrest Abdulmutallab and read him his rights).

188. *See, e.g.*, Committee Hearing on Intelligence Reform, *supra* note 187, at 11 (statement of Sen. Susan M. Collins); *id.* at 18 (statement of Sen. John McCain); Lake, *supra* note 187 (discussing views among some that opportunities to gain information about future attacks and operations were wasted).

189. *See, e.g.*, Committee Hearing on Intelligence Reform, *supra* note 187, at 11 (statement of Sen. Susan M. Collins); *id.* at 18 (statement of Sen. John McCain); Hsu & Agiesta, *supra* note 186, at A3 (explaining the views of those who criticized placing Abdulmutallab in the civilian system); Lake, *supra* note 187, at A1 (pointing to both

the delay in reading Abdulmutallab his *Miranda* rights stemmed from a decision that his confession would not be needed to convict him given the number of witnesses.[190] It is unclear whether the statements Abdulmutallab made before receiving *Miranda* warnings could be admitted under the threat to public safety exception to *Miranda* because questioning did not start until over three hours after his arrest.[191] If the exception does not apply, statements he made during questioning may not be admitted at trial.[192] While *Miranda* applies in federal courtrooms, the rules that govern a military commission do not require that *Miranda* warnings be given in order for evidence to be admissible.[193]

2. Khalid Shaikh Mohammed

The trial of Khalid Shaikh Mohammed, one of the accused September 11 masterminds, was at one time going to take place in federal court in Manhattan.[194] After the announcement was made, many began to discuss the logistical expense of holding the trial in Manhattan, and Mayor Michael Bloomberg and many others in New York City opposed holding the trial there.[195] The security costs alone for the trial could have exceeded US$200 million a year.[196] Echoing the views of many, Mayor Bloomberg remarked, "Can we provide security? Yes. Could you provide security elsewhere? Yeah. The suggestion of a military base is probably a reasonably good one."[197] The Obama administration is now trying to decide where to hold the trial, and there is still a

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Democrats and Republicans who believed intelligence agencies should have been consulted before granting Abdulmutallab constitutional protections).

190. *See* Committee Hearing on Intelligence Reform, *supra* note 187, at 29 (statement of Sen. Claire McCaskill).

191. *See* Barrett, *supra* note 184, at A3; Pincus, *supra* note 185, at A6 (stating that Abdulmutallab was not questioned until over three hours after he was arrested); *see also* New York v. Quarles, 467 U.S. 649, 655–56 (1984) (discussing the public safety exception to the *Miranda* rule).

192. *See* Miranda v. Arizona, 384 U.S. 436, 444–45 (1966).

193. *See* 10 U.S.C. § 949a (2009).

194. *See* Barbaro & Baker, *supra* note 83, at A1 (discussing Mayor Michael Bloomberg's opposition to holding the trial in Manhattan).

195. *See id.*

196. *See id.*

197. *Id.*

debate over whether the trial should be held in civilian court or before a military commission.[198]

3. Ahmed Ghailani

Since a controversial ruling made in the case in October 2010, the criminal trial of Ahmed Ghailani in federal court has made headlines and fueled the debate over the proper venue for post-September 11 terrorism trials.[199] Ahmed Ghailani is a Tanzanian citizen who was held in US Central Intelligence Agency ("CIA") custody and at Guantánamo for five years before he was brought to the United States to stand trial in connection with the bombings of US embassies in Tanzania and Kenya.[200] In October, Judge Kaplan barred the testimony of a critical witness for the government who was first discovered, the defense argued, from statements made by Ghailani while tortured in CIA custody.[201] One month later, Ahmed Ghailani was convicted on one count of conspiracy in connection with the embassy bombings and acquitted on 284 other related counts.[202] The conspiracy count carries a potential sentence of life in prison,

198. *See* Charlie Savage, *White House Postpones Picking Site of 9/11 Trial*, N.Y. TIMES, Mar. 5, 2010, at A13 (stating that a decision has yet to be made on where to try Khalid Shaikh Mohammed); *see also Some Issues Still Blocking Sept. 11 Trial, Holder Says*, N.Y. TIMES, July 11, 2010, at A13 (stating the same).

199. *See* Editorial, *The Ghailani Verdict*, N.Y. TIMES, Nov. 19, 2010, at A30 (describing some US congressmen's outcry over the verdict); *see also* Jack Goldsmith, Op-Ed., *Don't Try Terrorists, Lock Them Up*, N.Y. TIMES, Oct. 9, 2010, at A21 (stating that "liberals and civil libertarians" applauded Judge Kaplan's October 2010 ruling excluding the testimony of a government witness discovered through Ghailani's torture).

200. *See* Editorial, *The Ghailani Verdict*, *supra* note 199, at A30; *see also* United States v. Ghailani, 2010 U.S. Dist. LEXIS 134739, at *1 (S.D.N.Y. Dec. 21, 2010).

201. *See* United States v. Ghailani, 2010 U.S. Dist. LEXIS 109690, at *4–5 (S.D.N.Y. Oct. 6, 2010); *see also* Benjamin Weiser, *Judge Bars Major Witness from Terrorism Trial*, N.Y. TIMES, Oct. 7, 2010, at A1.

202. *See Ghailani*, 2010 U.S. Dist. LEXIS 134739, at *1; *see also* Charlie Savage, *Ghaliani Verdict Reignites Debate over the Proper Court for Terrorism Trials*, N.Y. TIMES, Nov. 19, 2010, at A18.

with a minimum sentence of twenty years.[203] In January, 2011, Ghailani received a life sentence.[204]

Many were quick to point to Ghailani's acquittals as testimony to the fact that "war-on-terror" detainees should be tried before a military commission, calling the conviction on just one count "a close call."[205] Others, however, lauded the trial as an example of the US Constitution and the American criminal justice system working as they should.[206] Jack Goldsmith, an assistant attorney general during the Bush administration, now a professor at Harvard Law School, went so far as to say that the Ghailani trial proved that trials of those detained in the "war on terror," and especially of those who were held at Guantánamo, are not viable, whether in federal court or before a military commission, and that the administration should embrace military detention without trial.[207]

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203. *See* Benjamin Weiser & Charlie Savage, *At Terror Trial, Big Questions Were Avoided*, N.Y. TIMES, Nov. 19, 2010, at A1 (stating that the conspiracy count carries a prison sentence of between twenty years and life); *see also* Peter Finn, *Terror Detainee Largely Acquitted*, WASH. POST, Nov. 18, 2010, at A2 (stating the same).

204. *See* Benjamin Weiser, *Ex-Detainee Gets Life Sentence in Embassy Blasts*, N.Y. TIMES, Jan. 26, 2011, at A18; *see also* Peter Finn, *Embassy Bomber Receives Life Sentence*, WASH. POST., Jan. 26, 2011, at A2.

205. *See* Finn, *supra* note 203, at A2 ("For some, a conviction on only one count amounted to a close call."); *see also* Anne E. Kornblut & Peter Finn, *Verdict in Terror Case a Setback for Advocates of Civilian Trials*, WASH. POST, Nov. 19, 2010, at A2 ("Across the administration, from the White House to the Justice Department, and among some human rights advocates, there was private dismay that the first trial of a Guantanamo Bay detainee brought into the United States did not result in a clear and unequivocal conviction on all counts."); Editorial, *supra* note 199, at A30 (stating that US Senator John McCain pointed to the Ghailani verdict as proof that all terrorism trials should take place before military commissions, saying that they were created to "get the job done").

206. *See* Editorial, *supra* note 199, at A30 ("The problem was never the choice of a court. The 12 civilian jurors were not too weak-minded, as Mr. King seems to think. The judge was not coddling terrorists. He was respecting the Constitution and the law."); *see also* Savage, *supra* note 202 ("[The administration and supporters of civilian trials] argued that the system had shown that a terrorist could be convicted and sentenced to a stiff prison term even after a judge excluded evidence tainted by coercive interrogations during the Bush administration.").

207. *See* Goldsmith, *supra* note 199, at A21 ("The real lesson of the ruling, however, is that prosecution in either criminal court or a tribunal is the wrong approach. The administration should instead embrace what has been the main mechanism for terrorist incapacitation since 9/11: military detention without charge or trial.").

4. The Debate Continues

Al-Marri, whose case presented difficult questions,[208] reached a plea deal with the US Department of Justice ("DOJ") on the federal criminal charges brought against him.[209] John Schwartz noted that, in agreeing to the plea deal, the DOJ "essentially acknowledged that it would have a hard time prosecuting Mr. Marri to the full extent of the law" and avoided the embarrassment of trying a case with evidence gained through enhanced interrogation techniques.[210] Al-Marri's case is representative of the difficulties associated with prosecuting "war-on-terror" detainees in a civilian criminal trial. As Judge Wilkinson explained in his concurring and dissenting opinion in *Al-Marri*,

> I respect the aspiration that criminal prosecutions be the preferred way of addressing every threat that awaits the nation. But, as the Court and constitutional tradition have long recognized, this is not an ideal world, and not every threat to community safety can be handled by the criminal justice system.[211]

Some worry what kind of message having two systems for terrorism trials sends. Morris Davis, the former chief prosecutor for the military commissions, argues for definitively choosing either a federal courtroom or a military commission rather than deciding on a piecemeal basis[212] because establishing a legal double standard will only reinforce the negative perceptions that already exist with regard to the United States' commitment to the law.[213] Jack Goldsmith theorizes that the Obama administration

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208. *See* discussion *supra* Part II.A.3 (discussing Al-Marri's case).

209. *See* Schwartz, *supra* note 179, at A9 (discussing Al-Marri's plea bargain).

210. *Id.* ("Through the plea deal, the government avoids the embarrassment and the tricky work of proving a case with evidence that might have been derived through the harshest interrogation techniques approved by the Bush administration.").

211. Al-Marri v. Pucciarelli, 534 F.3d 213, 305 (4th Cir. 2008) (5-4 decision en banc) (Wilkinson, J., concurring & dissenting), *vacated as moot sub nom.* Al-Marri v. Spagone, 129 S. Ct. 1545 (2009).

212. *See* Davis, *supra* note 182, at A21 (arguing that the use of both the military system and the civilian criminal justice system is a mistake).

213. *See id.* ("Double standards don't play well in Peoria. They won't play well in Peshawar or Palembang either. We need to work to change the negative perceptions that exist about Guantánamo and our commitment to the law. Formally establishing a legal double standard will only reinforce them.").

has insisted on trials because of the perception among foreign allies that federal trials are more legitimate.[214]

Others worry that an open trial in federal court gives terrorists a microphone through which to promote their cause and pass along sensitive information.[215] The pendulum swings both ways, however, as others, including President Obama, worry that continuing to give detainees limited rights only serves as a recruiting banner to those who would join the terrorist cause.[216] Even a Guantánamo detainee has weighed in on the debate.[217] Ahmed Ghailani has said that he prefers the civilian system and the more expansive rights it has given him.[218] Ghailani added, however, that the judges at Guantánamo and in federal court "seemed the same."[219]

5. Proposed Legislation

Some members of Congress have proposed new codifications of rules and procedures for handling those cases like Abdulmutallab's and Khalid Shaikh Mohammed's.[220] These bills have since been allowed to lapse with the close of the 111th

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214. *See* Goldsmith, *supra* note 199, at A21.

215. Judge Wilkinson notes, "[W]hile a showcase of American values, an open and public criminal trial may also serve as a platform for suspected terrorists. Terror suspects may use the bully pulpit of a criminal trial in an attempt to recruit others to their cause." *Al-Marri*, 534 F.3d at 307 (Wilkinson, J., concurring & dissenting). Judge Wilkinson also notes that terror suspects could use the opportunity provided by criminal trials to interact with others to pass critical intelligence on to their allies. *Id.* at 307.

216. *See* President Barack Obama, Remarks on Security Reviews (Jan. 5, 2010), [hereinafter Obama Remarks], *available at* http://www.whitehouse.gov/the-press-office/remarks-president-security-reviews (stating that the prison at Guantánamo had become a "tremendous recruiting tool" for Al Qaeda); *see also* Alexander, *supra* note 179, at B1 (stating that torture and abuse cost American lives and recruits fighters for Al Qaeda).

217. *See, e.g.*, Benjamin Weiser, *Report Shows Detainee's Insight into Legal Process*, N.Y. TIMES, Sept. 27, 2010, at A16 (discussing Ahmed Khalfan Ghailani's views on the protections he has while standing trial in federal court).

218. *See id.* (documenting Ghailani's opinions on the two systems); *see also* Benjamin Weiser, *Trial of Man Once Held at Guantánamo Opens*, N.Y. TIMES, Oct. 12, 2010, at A21.

219. Weiser, *supra* note 217.

220. *See* Josh Gerstein, *Graham Quietly Files Gitmo Habeas Bill*, POLITICO (Aug. 11, 2010), http://dyn.politico.com/printstory.cfm?uuid=62C1EF84-18FE-70B2-A8FE04DEEFA52344 (discussing Senator Lindsey Graham's bill); *see also* Senator John McCain, Statement on the Enemy Belligerent Interrogation, Detention, and Prosecution Act of 2010 (Mar. 4. 2010), [hereinafter Statement by Senator McCain], *available at* http://mccain.senate.gov/public/index.cfm?FuseAction=PressOffice.FloorStatements&ContentRecord_id=2AF60F3A-05DC-CDF6-7DC9-6501A995C17C.

session of Congress, but they merit discussion for the insight they provide into any willingness in Congress to shape new rules going forward. For instance, Senator Lindsey Graham introduced the Terrorist Detention Review Reform Act on August 4, 2010.[221] This bill, if enacted, would have established new rules for detention review.[222] Individuals covered under the bill included both those detained at Guantánamo and those the United States would seek to hold as unprivileged enemy belligerents.[223] The bill would have established new rules governing habeas corpus petitions in DC district courts, including requiring that such petitions be stayed pending the outcome of military commissions procedures and executive transfer efforts.[224] The bill would have also prevented detainees from being released into the United States.[225]

In March 2010, Senator John McCain introduced the Enemy Belligerent Interrogation, Detention, and Prosecution Act of 2010,[226] a bill which, if enacted, would have eliminated the choice between law-enforcement detention and federal criminal trial for terror detainees.[227] The bill mandated military detention if the interagency team of experts the bill sought to establish determined that the person was an enemy belligerent.[228] That determination had to be made within forty-eight hours of taking a detainee into custody.[229] The bill explicitly provided that detainees would not be given *Miranda* warnings[230] and would have authorized the indefinite detention of an unprivileged enemy belligerent without trial.[231] Most importantly, the bill

221. Terrorist Detention Review Reform Act, S. 3707, 111th Cong. (2010).

222. *See* Gerstein, *supra* note 220 (stating that the bill would clarify who could be detained and how much evidence would be needed to continue detention); *see also* Terrorist Detention Review Reform Act § 2(a).

223. Terrorist Detention Review Reform Act § 2(a).

224. *Id.*

225. *Id.*

226. Enemy Belligerent Interrogation, Detention, and Prosecution Act of 2010, S. 3081, 111th Cong. (2010).

227. *See* Statement by Senator McCain, *supra* note 220; *see also* Enemy Belligerent Interrogation, Detention, and Prosecution Act of 2010 §§ 2–4.

228. Enemy Belligerent Interrogation, Detention, and Prosecution Act of 2010 § 2(a).

229. *Id.* § 3.

230. *Id.* § 3(b)(3).

231. *Id.* § 5. This Act distinguishes between privileged belligerents, who belong to one of the eight categories in Article 4 of the Third Geneva Convention; and

would have withdrawn the option of a criminal trial in an Article III court.[232] Had the bill been passed and upheld by courts if challenged, there would have only been one option: trial before a military commission.

This Part has evaluated whether foreign nationals can be subject to military detention and trial before a military commission on US soil in the "war on terror." It also discussed the domestic alternative of detention and trial in the civilian criminal justice system. The procedures for trial in each system and whether the two systems satisfy international law are essential in evaluating these two options. This Part presented recent controversies surrounding detention and trial of foreign nationals in the "war on terror" in an attempt to illuminate the debate. Newly enacted legislation may alter—or even render moot—the debate.[233]

III. *"A WAR IS A WAR. . . . YOU DON'T BRING YOUR ENEMIES TO THE COURTHOUSE"[234]: MILITARY DETENTION AND MILITARY COMMISSION TRIAL AS THE BETTER OPTION?*

The September 11 attacks, the unusual nature of terrorism, and the legal status of Al Qaeda members have mudded the law regarding detention.[235] In the "war on terror," it is no longer the

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unprivileged enemy belligerents—someone other than a privileged belligerent who engages in hostilities against the United States, has purposely and materially supported hostilities against the United States, or was a part of Al Qaeda when captured. *See id.* § 6(8)–(9).

232. *Id.* § 4(a).

233. *See supra* notes 5–8, 11 and accompanying text (describing Congress's most recent ban on transfers of Guantánamo detainees to the United States and the Obama administration's reaction to the ban).

234. *See* Weiser, *supra* note 172 (quoting Andrew McCarthy, the lead prosecutor in the terrorism trial of a group of men who plotted to blow up the United Nations building, the Holland Tunnel, the Lincoln Tunnel, and other New York City landmarks).

235. *See, e.g., supra* notes 24–32 and accompanying text (discussing constitutional authority for detention); *supra* notes 35–38 and accompanying text (discussing congressional authorization for detention); *supra* notes 39–52 and accompanying text (evaluating the US Supreme Court's decisions on detention authority abroad); *supra* notes 53–72 and accompanying text (discussing the application of international law to the United States' detention authority); *supra* notes 87–92 and accompanying text (discussing the Alien Enemy Act of 1798); *supra* notes 93–102 (looking at US Supreme Court decisions on detention authority within the United States); *supra* notes 103–124 and accompanying text (examining the Fourth Circuit's detention authority analysis in the case of Al-Marri).

norm for enemies to wear uniforms and be readily identifiable.[236] Terrorism moves between states and knows no national borders.[237] While the traditional framework analyzed by this Note arguably authorizes the detention of foreign nationals as suspected terrorists on US soil,[238] that framework has developed in a piecemeal fashion.[239] The law as it has developed after September 11 has been characterized by congressional or executive action followed by judicial review.[240] As such, the US political branches may act in a way that each deems proper, but the ground can shift underneath them when courts go back and examine the foundations of their actions.[241] While this Note argues that military detention on US soil is authorized, it is on ground that is no firmer than the ground on which Congress stood when it passed the Detainee Treatment Act of 2005 and the MCA of 2006.[242]

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236. *See supra* note 64 and accompanying text (distinguishing between lawful enemy combatants and unlawful enemy combatants); *see also supra* note 140 and accompanying text (discussing the US Supreme Court's reasoning in *Quirin*).

237. Al Qaeda is an unconventional enemy in the historical sense in that it is not the enemy arm of a specific state. *See* Al-Marri v. Pucciarelli, 534 F.3d 213, 260 (4th Cir. 2008) (5-4 decision en banc) (Traxler, J., concurring) ("[W]hile [Al Qaeda] may be an unconventional enemy force in a historical context, it is an enemy force nonetheless.").

238. *See supra* notes 86–124 and accompanying text (analyzing detention authority on US soil).

239. *See supra* notes 24–72 and accompanying text (analyzing the basis for detention authority abroad); *see also supra* notes 86–124 and accompanying text (analyzing detention authority on US soil).

240. The executive branch began offshore detentions after September 11, and the US Supreme Court responded with the *Hamdi* decision. Congress then enacted the Detainee Treatment Act in response to *Hamdi*, and the Court responded with its decision in *Hamdan*. Congress followed with the MCA of 2006, a provision of which the Court struck down in *Boumediene*. *See supra* notes 125–29 and accompanying text.

241. *See supra* notes 42–52 and accompanying text (explaining that detention authority has been left to the lower courts to refine); *see also supra* notes 125–29 (tracing the development of the law leading up to the *Boumediene* decision).

242. *See supra* note 125 (discussing the Detainee Treatment Act of 2005); *see also supra* notes 125–29 and accompanying text (discussing the US Supreme Court's decision in *Boumediene*).

A. *Military Detention and Trial Before a Military Commission are Authorized under Existing Law*

Under current law, the military may detain on US soil foreign nationals who are suspected to be terrorists.[243] The US Constitution gives both Congress and the president war-making powers.[244] Using its power to make laws and declare war, Congress has authorized the president to detain foreign nationals suspected to be terrorists.[245] This power is not limited to use abroad but also extends to US soil.[246] Indeed, if the AUMF does not authorize the president to detain those like the September 11 hijackers, then the AUMF does nothing to prevent such tragedies.[247]

US Supreme Court precedent in *Quirin* authorizes a military commission trial for a foreign national in the United States who is an unprivileged enemy combatant.[248] More recently, Congress has authorized trial by military commission for those charged with terrorism-related crimes.[249] This authorization is not limited to trial of such persons abroad.[250] Bills such as those introduced by Senators Graham and McCain further illustrate a continuing willingness in Congress, at least among some, to shape special rules and procedures for foreign nationals detained as suspected

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243. *See, e.g.*, discussion *supra* Part II.A (discussing authorization for military detention on US soil); discussion *supra* Part II.C (discussing the legality of trying a foreign national suspected to be a terrorist before a military commission on US soil).

244. *See* discussion *supra* Part I.B.1.

245. *See, e.g., supra* notes 18, 35–38 and accompanying text (discussing the AUMF); *supra* notes 39–52 and accompanying text (analyzing judicial interpretation of the AUMF and the executive branch's detention authority abroad under the AUMF); *supra* notes 87–92 and accompanying text (discussing the Alien Enemy Act); *supra* notes 93–124 and accompanying text (analyzing precedent for detention authority on US soil).

246. *See supra* notes 35–38 and accompanying text (analyzing the AUMF); *see also* discussion *supra* Part II.A (discussing military detention authority on US soil).

247. *See supra* note 110 (discussing the government's position in a brief in Al-Marri's case that Congress must have intended to authorize the detention of those like Al-Marri).

248. *See supra* notes 135–40 and accompanying text (analyzing authority for military commission trial in *Quirin*).

249. *See supra* notes 74–76, 141–44 and accompanying text (discussing the MCA of 2009).

250. *See supra* notes 141–43 and accompanying text (explaining that the MCA of 2009 allows a military commission jurisdiction over *any* alien unprivileged enemy belligerent).

terrorists.[251] More recently, Congress again demonstrated that it is in fact willing to control the issue.[252]

B. *Military Detention and Trial before a Military Commission on US Soil Better Address the Concerns Unique to the "War-on-Terror" Context*

1. Moving Beyond Guantánamo

Any discussion regarding proper trial venue must first acknowledge the negative history associated with detentions in the "war on terror." What is often lost in the fervor to try crimes of terrorism before a military commission is a concern for the detainees' rights that have been violated during their detention.[253] Is it really possible to avoid Guantánamo's legacy in either system?[254] The Ghailani trial casts doubt, even among those in favor of federal criminal trials, on the viability of the civilian system.[255] Using military commissions, however, essentially acknowledges the preference—if not the need—for the more flexible rules and procedures unavailable in federal court.[256] Perhaps that is not so bad.

Despite Congress's transfer ban,[257] bringing the foreign nationals detained at Guantánamo Bay to the United States is the best option. This would allow the United States to finally close the detention facilities at Guantánamo, a promise made two years ago that has yet to come to fruition.[258] Closing Guantánamo should be a priority of the Obama administration and Congress, as it is a focal point for the rights violations carried out in the

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251. *See supra* notes 220–32 and accompanying text (analyzing Senator Graham's and Senator McCain's 'bills).

252. *See supra* notes 5–8, 11 and accompanying text (describing the ban on transfers of Guantánamo detainees to the United States and the Obama administration's reaction to the ban).

253. *See supra* note 205 and accompanying text (discussing Senator John McCain's preference for the use of military commissions).

254. Some say that it is not. *See supra* notes 207, 210 and accompanying text.

255. *See supra* notes 199–207 and accompanying text (discussing the Ghailani trial and its media aftermath). *But see supra* note 203 and accompanying text (stating that Ghailani's conviction carries a sentence of between twenty years and life in prison); *supra* note 206 and accompanying text (discussing praise for the Ghailani trial).

256. *See supra* notes 210–11 and accompanying text.

257. *See supra* notes 5–8, 11 and accompanying text (discussing the ban).

258. *See supra* note 2 and accompanying text (discussing President Obama's order to close Guantánamo).

name of preventing terrorism.[259] If national security is the most pressing concern, closing Guantánamo addresses it because Guantánamo costs lives.[260] Transferring the detainees to the United States should not be just a possibility; it is a necessity.

Once Guantánamo no longer holds foreign nationals "captured" in the "war on terror," the United States can move beyond the Bush—and now the Obama—administration's years of letting detainees languish at Guantánamo. After they are in the United States, however, the next step should be to prosecute them before military commissions. While a federal criminal trial provides "gold medal justice,"[261] it may not be possible to try "war-on-terror" detainees in this system due to the continuing legacy of Guantánamo and the questionable tactics used against detainees during the Bush administration.[262] Those who can be tried in the federal system, of course, should be, as few question the legitimacy of those proceedings.[263] Trial before a military commission should not be looked upon, however, as a failure.[264] The Obama administration should embrace military commissions as an improvement upon the recent past[265] and seize the opportunity to acknowledge that the government violated many

259. *See supra* note 216 and accompanying text (citing President Obama's assertion that Guantánamo is a recruiting tool for Al Qaeda).

260. *See supra* note 216 and accompanying text (stating that torture and abuse cost American lives).

261. *See supra* note 182 and accompanying text (quoting Morris Davis, the former chief prosecutor for military commissions).

262. *See supra* notes 209–10 and accompanying text (discussing Al-Marri's plea deal); *see also* discussion *supra* Part II.E.3 (discussing the Ghailani trial).

263. *See* discussion *supra* Part II.D; *see also* discussion *supra* Part II.E.3 (discussing the Ghailani trial). It is possible that some detainees will present the sensitive issues that are better served by trial before a military commission. *See, e.g.*, *supra* notes 145–55 and accompanying text (discussing the procedures in place for trials before a military commission); *supra* notes 184–93 and accompanying text (highlighting the debate over how the Christmas Day Bomber should have been handled); *supra* notes 194–98 and accompanying text (discussing concerns raised by trying Khalid Shaikh Mohammed in a Manhattan federal courtroom); *supra* notes 208–15 and accompanying text (highlighting the debate over which venue would best address security and procedural concerns). Where trials would not present these issues, a federal criminal trial could work. Even those trials that did present such an issue worked. *See* discussion *supra* Part II.E.3.

264. *But see supra* note 145 and accompanying text (citing criticism of the military commissions system).

265. *See supra* notes 145–65 and accompanying text (analyzing military commissions after the enactment of the MCA of 2009).

detainees' rights.[266] Use of the commissions to prosecute terrorism can be viewed as a necessary apology for the last few years and an impetus to do better in the future. Trials before a military commission are, in reality, the only option for many of the detainees still in custody at Guantánamo that strikes a balance between the need to legitimize the continued detention of those too dangerous to release and the need to redeem the United States' reputation among its allies.[267]

2. Beginning on US Soil

Because the "war on terror" is likely to continue both before and after the closure of the detention facilities at Guantánamo, it is also necessary to address the question of how to detain and try foreign nationals suspected of terrorism on US soil going forward.[268] On US soil, initially, military detention of a foreign national suspected to be a terrorist may provide the better option for addressing the sensitive security and procedural concerns unique to the "war-on-terror" context[269] and may better address intelligence-gathering needs, assuming the detention is the result of an imminent or immediately thwarted attack. Terrorist attacks are often the result of planning and coordination, and, as seen in the controversy surrounding the questioning of Abdulmutallab, it is important to get information about co-conspirators in order to prevent subsequent harm.[270] The *Miranda* warnings required in

266. *See supra* notes 201, 210–11 and accompanying text (illuminating the difficulties created in federal court by evidence gained through enhanced interrogation techniques).

267. *See supra* note 214 and accompanying text (citing Goldsmith); *see also* discussion *supra* Part II.C.3 (discussing military commissions in relation to the requirements of the Geneva Conventions).

268. *See, e.g.*, discussion *supra* Part II.E.1 (discussing Umar Farouk Abdulmutallab, who attempted to ignite a bomb on an airplane over Detroit in December, 2009).

269. *See, e.g., supra* notes 145–55 and accompanying text (discussing the procedures in place for trials before a military commission); *supra* notes 184–93 and accompanying text (highlighting the debate over how the Christmas Day Bomber should have been handled); *supra* notes 194–98 and accompanying text (discussing concerns raised by trying Khalid Shaikh Mohammed in a Manhattan federal courtroom); *supra* notes 208–15 and accompanying text (highlighting the debate over which venue would best address security and procedural concerns).

270. *See supra* notes 184–90 and accompanying text (discussing criticism of Abdulmutallab's interrogation on the grounds that the need for immediate intelligence-gathering was not properly addressed).

the civilian system can cause a suspect to "go silent."[271] While *Miranda* rights are a tenet of the American criminal justice system,[272] the war-like context of terrorism, even on American soil,[273] cannot be ignored.[274] Less immediate threats can be addressed in the civilian criminal justice system.[275]

Going forward, federal criminal trials would become more feasible, depending on the circumstances surrounding pre-trial detention.[276] Concerns about torture behind closed doors should be alleviated now that detainees are protected from enhanced interrogation techniques and other questionable treatment.[277] As discussed above, trial before a military commission on US soil is also a lawful and appropriate option,[278] should it be necessary, but it is difficult to provide a persuasive reason why a civilian criminal trial would not be the preferred option.[279] After all, a criminal trial in federal court unquestionably satisfies the Geneva Conventions.[280] Trial before a military commission as constituted under the MCA of 2009, however, would satisfy the Geneva Conventions as well.[281]

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271. *See supra* notes 186–87 and accompanying text (stating that Abdulmutallab went silent after being read his *Miranda* rights and questioning the wisdom of the decision to inform him of those rights).

272. *See supra* note 174 and accompanying text (explaining the *Miranda* rule).

273. *See supra* notes 103–24 and accompanying text (analyzing the Fourth Circuit's opinion in *Al-Marri*).

274. *See supra* note 234 and accompanying text ("A war is a war. A war is not a crime, and you don't bring your enemies to a courthouse."); *see also supra* notes 35–43 and accompanying text (discussing the AUMF and judicial interpretation of the AUMF).

275. *See* discussion *supra* Part II.D (discussing detention and trial in the civilian criminal justice system).

276. The evidentiary issues that follow detainees who have been subjected to enhanced interrogation techniques or who were captured and held under questionable circumstances should not become an issue for foreign nationals detained on US soil in the future. *See* discussion *supra* Parts II.D, II.E.3.

277. *See supra* notes 178–80 and accompanying text (stating that the use of enhanced interrogation techniques is now prohibited).

278. *See* discussion *supra* Part II.C (discussing the military commissions system).

279. *But see* discussion *supra* Parts II.E.1–4 (discussing criticism of the use of civilian criminal trials).

280. *See supra* notes 182–83 and accompanying text (stating that a federal criminal trial surpasses the requirements of the Geneva Conventions).

281. *See supra* notes 156–65 and accompanying text (analyzing the MCA of 2009 in the context of the Geneva Conventions).

CONCLUSION

While both options discussed in this Note are viable and legal, they are just that: options. This Note stresses the importance of closing the detention facilities at Guantánamo and transferring those that remain in military custody there to the United States. If the foreign nationals currently detained pursuant to the "war on terror" are brought from Guantánamo to the United States, this Note proposes that military commissions should not be seen as a failure but, rather, embraced as an acknowledgement that decisions made in the past were flawed. The civilian criminal justice system, however, should be the standard. Unless the US Supreme Court holds otherwise, Congress and the president can limit the available options for detention and trial. The US Supreme Court's case history suggests that it may continue to defer to the political branches' judgment on these issues, provided that those branches make a concerted effort to comply with the norms of American justice.