A MATTER OF DISCIPLINE AND SECURITY: PROSECUTING SERIOUS CRIMINAL OFFENSES COMMITTED IN U.S. DETENTION FACILITIES ABROAD

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A detainee who has assaulted [*Guantanamo Bay*] *guards on over 30 occasions, has made gestures of killing a guard and threatened to break a guard's arm. . . .* [*Another detainee*] *told the MPs that he would come to their homes and cut their throats like sheep.*[1]

I. Introduction

It was 1 November 2000 at the Metropolitan Correction Center in New York City.[2] Prison Guard Louis Pepe was escorting Mamdouh Mahmud Salim from a recreation room back to his prison cell.[3] Salim was suspected as an aide to the notorious Osama Bin Laden and had been meeting with his attorneys.[4] With the assistance of his cellmate, Khalfan Khamis Mohamed, Salim overwhelmed the almost 300-pound Pepe, threw hot sauce in his eyes, tied him up, and demanded the keys to the cells.[5] When Pepe refused to give them the keys, Salim stabbed Pepe in

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[1] U.S. Dep't of Defense, JTF-GTMO Information on Detainees 5–6 (Mar. 4, 2005), http://www.defenselink.mil/news/Mar2005/d20050304info.pdf [hereinafter JTF-GTMO Information on Detainees].

[2] Phil Hirschkorn, *Bin Laden Aide Sentenced to 32 Years in Prison for Jail Stabbing*, CNN, May 3, 2004, http://edition.cnn.com/2004/LAW/05/03/attacks.prison.stabbing/index.html; Jonah Goldberg, *Gitmo By Any Other Name . . .*, NAT'L REV. ONLINE, June 15, 2005, http://www.nationalreview.com/goldberg/goldberg200506150748.asp.

[3] Hirschkorn, *supra* note 2.

[4] *Id.*

[5] *Id.*

the eye with a comb that had been sharpened into a knife-like shank.[6] The weapon sank three inches into Pepe's eye socket.[7] Mohamed and Salim then began to beat him severely.[8] Thinking that they had killed him, Salim and Mohamed then used Pepe's own blood to paint a cross on the guard's torso.[9] Pepe spent twenty-eight months in the hospital and he is permanently injured.[10] He has no left eye and he has only 40% of the vision in his right eye.[11] He is significantly paralyzed on the right side of his body and needs therapy to help him regain his ability to speak.[12]

The attack on Louis Pepe is not the only instance where terror suspects have assaulted their guards while in the custody of the United States. Department of Defense (DOD) reports show that instances of violence are somewhat commonplace, even if not as severe as the attack on Louis Pepe.[13] Guards at Guantanamo Bay routinely endure acts of violence, including punches, scratches, and stabs.[14] Guard personnel have seized weapons of all types, including "a billy club fashioned from MRE wrappers, an intricate trash-bag garrote, and a variety of crude shanks."[15] Detainees assault guards with other "weapons" as well. In 2006 alone, guards endured more than 400 assaults with bodily fluids, including urine and feces.[16] In May of 2006, the detainees at Guantanamo Bay drew media attention when they rioted in the detention facility.[17] One prisoner staged a suicide attempt while several others made the floor slippery with human waste and soapy water.[18] As the

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[6] *Id*; Goldberg, *supra* note 2.
[7] Hirschkorn, *supra* note 2; Goldberg, *supra* note 2.
[8] Goldberg, *supra* note 2.
[9] *Id.*
[10] Hirschkorn, *supra* note 2.
[11] *Id.*
[12] *Id.*
[13] John Solomon, *Gitmo Guards Often Attacked by Detainees*, Aug. 1, 2006, http://www.boston.com/news/world/europe/articles/2006/08/01/gitmo_guards_often_attacked_by_detainees?mode=PF.
[14] *Id.*
[15] Sergeant Jim Greenhill, *GITMO Guardians*, SOLDIERS, Mar. 2007, at 8, 12.
[16] Kathleen T. Rhem, *New Guantanamo Facility Safer for Guards, More Comfortable for Detainees*, ARMED FORCES INFO. SERV., Jan. 11, 2007, http://www.defenselink.mil/news/ http://www.defenselink.mil/news/NewsArticle.aspx?ID=2665.
[17] James Bone, *Riot at Guantanamo as Torture Watchdog Calls for Its Closure*, TIMES ONLINE, May 20, 2006, http://www.timesonline.co.uk/printFriendly/0,,1-10889-2188705-10889,00.html; Associated Press, *Three Detainees Commit Suicide at Guantanamo Bay*, FOXNEWS.COM, June 10, 2006, http://www.foxnews.com/printer_friendly_story/0,3566, 199001,00.html [hereinafter Associated Press, *Three Detainees Commit Suicide*].
[18] Bone, *supra* note 17.

guards responded to prevent the suicide, the detainees "assaulted the guards with broken light fixtures, fan blades, and bits of metal."[19] A five-minute fight ensued and, while no guards were hurt, six detainees suffered minor injuries.[20] In January of 2008, during the sentencing proceedings for his terrorist activities, it was revealed that Mohammed Mansour Jabarah had plotted to kill his law enforcement handlers while held in a federal facility at Fort Dix, New Jersey.[21]

Salim's assault on Louis Pepe occurred in a federal facility and he was tried, convicted, and sentenced in federal district court in New York.[22] But what if the incident had happened at the detention facility at Guantanamo Bay, and the victim had been one of the guards there? What if a detainee had killed a guard during the May 2006 riot? What if a detainee murdered a fellow detainee for testifying against him in a military commission or for providing incriminating information to an interrogator? With a population of about 290 detainees now at Guantanamo Bay[23] and "increasing displays of defiance from the prisoners," a serious issue arises: how should incidents of serious post-capture criminal misconduct be prosecuted to ensure the safety, the good order, and the discipline in the detention facility?[24]

Under current U.S. policy, pre-capture offenses—that is, those offenses that led to the detention of these individuals in the current War on Terror—will be tried by military commission under the Military Commissions Act of 2006.[25] The prosecution of post-capture

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[19] *Id.*
[20] *Id.*
[21] Josh White & Keith B. Richburg, *Terror Informant for FBI Allegedly Targeted Agents; Once-Trusted Jabarah Sentenced to Prison*, WASH. POST, Jan. 19, 2008, at A1 (believed to be a low security threat, Jabarah was given significant freedoms and he collected a cache of rope, steak knives, instructions on bomb-making, maps of Fort Dix, and names of prosecutors and investigators; he was sentenced to life in prison for his terrorist activities).
[22] Hirschkorn, *supra* note 2.
[23] Carol Rosenberg, *Milestone: Gitmo Captive Census Drops Below 300*, MIAMI HERALD, Dec. 13, 2007, *available at* https://www.us.army.mil/suite/earlybird/Dec2007/e20071213567285.html (quoting Pentagon officials as stating that the number of detainees at Guantanamo Bay as of 12 December 2007 was "approximately 290").
[24] Associated Press, *Three Detainees Commit Suicide*, *supra* note 17.
[25] *See* Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 3, 120 Stat. 2600 (codified as amended at 10 U.S.C.S. §§ 948a–950w (LexisNexis 2008)); U.S. DEP'T OF DEFENSE, MANUAL FOR MILITARY COMMISSIONS (Jan. 18, 2007) [hereinafter MANUAL FOR MILITARY COMMISSIONS]; Military Order of November 13, 2001, 3 C.F.R. tbl. 3 (2002) [hereinafter Military Order]. The term "War on Terror" is used throughout this

misconduct, however, is an open issue. From the Salim case, it appears that detainee misconduct in a detention facility on U.S. soil would be handled in federal district court.[26] Under the Uniform Code of Military Justice (UCMJ) and the Military Commissions Act of 2006, enemy POWs and "lawful enemy combatants" may be tried by court-martial for offenses that they commit while detained.[27] At this point, though, there is no clear mechanism for prosecuting serious misconduct in the Guantanamo Bay detention facility when committed by a class of detainees termed "alien unlawful enemy combatants."[28] As there is no definitive legal mechanism for prosecuting these post-capture offenses, three options exist for prosecuting post-capture misconduct by alien unlawful enemy combatants in U.S. detention facilities abroad. Those three options are: military commissions, courts-martial, and U.S. federal district courts.[29] This article analyzes these three options and proposes a forum that is most appropriate for the prosecution of these offenses.

In analyzing this issue, Part II provides the fundamental background principles. This part first traces the historical development of international law with respect to handling and prosecuting crimes committed in prisoner of war (POW) camps. Part II then outlines the current U.S. policy governing the classification of detainees and concludes with a discussion of the critical distinction between offenses that require camp disciplinary procedures and offenses requiring judicial punishment. Part III provides an overview of the three primary options available for prosecuting misconduct in detention facilities, outlining their jurisdictional foundations and describing their procedural

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article to refer to the U.S. military operations against terrorism. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 516–21 (2004); COALITION INFORMATION CENTERS, WASHINGTON, U.S.A., LONDON, U.K., ISLAMABAD, PAKISTAN, THE GLOBAL WAR ON TERRORISM: THE FIRST 100 DAYS 12 (2001) [hereinafter COALITION INFORMATION CENTERS], *available at* http://www.whitehouse.gov/news/releases/2001/12/100dayreport.pdf.

[26] Hirschkorn, *supra* note 2.

[27] *See* UCMJ art. 2(a)(9) (2008) (extending UCMJ jurisdiction over "Prisoners of war in the custody of the armed forces."); 10 U.S.C.S. § 802(a)(13) (extending UCMJ jurisdiction over "Lawful enemy combatants . . . who violate the law of war."); sec. 4(a)(1), 120 Stat. 2600, 2631 (adding Article 2(a)(13) to the UCMJ).

[28] *See* § 948a(1), (3) (defining the terms "alien" and "unlawful enemy combatant").

[29] While host-nation criminal courts offer a potential forum for certain types of criminal misconduct in detention facilities in certain combat theaters, no such forum exists in Cuba and therefore, the viability and wisdom of selecting a host-nation forum for the prosecution of post-capture offenses is beyond the scope of this article. *See, e.g.*, U.S. DEP'T OF DEFENSE, MEASURING SECURITY AND STABILITY IN IRAQ 7–9 (Nov. 30, 2006), *available at* http://www.defenselink.mil/pubs/pdfs/9010Quarterly-Report-20061216.pdf (discussing developments and improvements to the Iraqi criminal justice system).

highlights. Finally, Part IV proposes one particular forum after considering the quality of the jurisdictional reach, the practical implications of the forum, and the important policy considerations in prosecuting post-capture detainee misconduct in each forum.

Of the three options that exist, should the need arise, trial by court-martial offers the most attractive forum for the prosecution of post-capture criminal misconduct. However, based on the current state of U.S. detention policy, it is trial by military commission that provides the most secure means to prosecute those serious offenses committed by alien unlawful enemy combatants held in U.S. detention facilities. A complete resolution of the question, however, requires a statutory solution from Congress that establishes more airtight jurisdiction over crimes in a detention facility when committed by alien unlawful enemy combatants. With more detainees becoming depressed, despondent, and desperate, government officials, commanders, and Judge Advocates must be prepared to try these cases as necessary to maintain good order and discipline in the confinement facility, and to punish those detainees who commit serious criminal offenses in U.S. detention facilities abroad.[30]

II. Fundamental Principles Governing the Prosecution of Detainees

In selecting the most appropriate forum for prosecuting alien unlawful enemy combatants for post-capture misconduct, some fundamental background principles are critical to framing the issue. First, international treaties have continually developed the law of war over the past one hundred years, and the treatment of those in detention has always occupied a significant portion of these treaties.[31] Second, in the ongoing War on Terror, the United States has determined that certain detainees do not qualify as "prisoners of war," as defined in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, and therefore determined that these individuals lack the

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[30] While this article focuses primarily on Guantanamo Bay, Cuba, most of the principles remain the same should detainee misconduct occur in any facility located outside the United States.

[31] *See, e.g.*, Convention (IV) Respecting the Laws and Customs of War on Land, October 18, 1907, annex, arts. 4–20, 36 Stat. 2295, 2296–2301, 1 Bevans 631, 644–47 [hereinafter Hague IV]; Convention Relative to the Treatment of Prisoners of War § V, ch. 3, July 27, 1929, 47 Stat. 2021, 2046–53, 2 Bevans 932, 948–53 [hereinafter 1929 GPW]; Geneva Convention Relative to the Treatment of Prisoners of War art. 83, Aug. 12, 1949, 6 U.S.T. 3316, 3382, 75 U.N.T.S. 135, 200 [hereinafter GC III].

protections afforded to POWs under international law.[32] The current term for these individuals who do not fit the definition of POW is "enemy combatant," and the classification of detainees has significant bearing on the rights to which they are entitled, including how their misconduct may be tried.[33] Third, if an individual commits a crime while detained, not all offenses justify punishment imposed through a judicial process.[34] Some minor offenses may warrant basic camp disciplinary procedures. In an effort to provide the fundamental background principles for prosecuting post-capture misconduct by those who are alien unlawful enemy combatants, this part will trace the historical development of the law regarding the prosecution of misconduct by POWs, outline the current U.S. policy concerning the status of those detained at Guantanamo Bay, and describe the principles that distinguish those offenses that warrant a judicial disposition from those that warrant a minor disciplinary disposition.

A. Historical Development of the Criminal Punishment of Prisoners of War

From the beginning of the formal regulation of modern warfare, the drafters of the treaties that govern warfare have recognized the importance of maintaining good order and discipline in POW camps. General Orders No. 100 (Lieber Code), drafted in 1863 during the U.S. Civil War by Francis Lieber, is generally recognized as the first codification of the law of modern warfare.[35] Article 75 of the Lieber

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[32] GC III, *supra* note 31, art. 4, 6 U.S.T. at 3320–22, 75 U.N.T.S. at 138–40; 10 U.S.C.S. § 948b(g); Memorandum, President of the United States, to the Vice President, the Secretary of State, the Secretary of Defense, the Attorney General, the Chief of Staff to the President, the Director of Central Intelligence, the Assistant to the President for National Security Affairs, and the Chairman of the Joint Chiefs of Staff, subject: Humane Treatment of Al Qaeda and Taliban Detainees (7 Feb. 2002) [hereinafter Humane Treatment of Al Qaeda and Taliban Detainees Memo], *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 134–35 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

[33] *See* GC III, *supra* note 31, art. 4, 6 U.S.T. at 3320–22, 75 U.N.T.S. at 138–40 (providing the categories of personnel entitled to POW status); 10 U.S.C.S. § 948d (describing the jurisdiction of military commissions and providing that lawful enemy combatants may be tried by courts-martial); UCMJ art. (2)(a)(9) (2008); U.S. DEP'T OF DEFENSE, DIR. 2310.01E, DEP'T OF DEFENSE DETAINEE PROGRAM para. E2.1.1 (5 Sept. 2006) [hereinafter DOD DIR. 2310.01E].

[34] *See* discussion *infra* Part II.C.

[35] FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (1863) [hereinafter LIEBER CODE], *reprinted in* THE LAWS OF ARMED

Code provides that "Prisoners of War are subject to confinement or imprisonment such as may be deemed necessary on account of safety."[36] Article 77 mandates that, while an escape attempt is not a crime, a conspiracy to escape that is discovered "may be rigourously punished, even with death; and capital punishment may be also be inflicted upon prisoners of war discovered to have plotted rebellion against the authorities of the captors, whether in union with fellow prisoners, or other persons."[37] In his classic treatise on military law, first published in 1886, Colonel William Winthrop acknowledged that "[p]risoners of war must conform to the law, regulations and orders in force in the enemy's army, or country . . . and for insubordinate or contumacious conduct must expect disciplinary measures."[38] Colonel Winthrop's treatise is limited in its application, though, because it only addresses disciplinary sanctions against prisoners for misconduct in the camp, and refers to the trial of prisoners only when discussing those offenses committed prior to their capture.[39]

As the international agreements regarding POWs became more formalized, the rules for the punishment of POWs for post-capture acts of misconduct did not become much more specific than the basic guidelines provided by Francis Lieber and Colonel Winthrop.[40] In the Annex to the Convention (IV) Respecting the Laws and Customs of War on Land, held at the Hague in 1907, Article 8 stated the following regarding treatment of misconduct in POW camps: "Prisoners of war shall be subject to the laws, regulations, and orders in force in the army

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CONFLICTS 3 (Dietrich Schindler & Jiri Toman eds., 3d ed.1988); *see also id.* ("The Lieber Instructions represent the first attempt to codify the laws of war").

[36] LIEBER CODE, *supra* note 35, at 13 (art. 75).

[37] *Id.* at 13–14 (art. 77).

[38] COLONEL WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 792–93 (William S. Hein & Co., Inc. 2000) (1920).

[39] *See id.* at 793 (citing Article 59 of the Lieber Code and stating, "For any material violation of the laws of war committed before his capture, a prisoner of war is amenable to trial and punishment after his capture.").

[40] *See, e.g.*, Project of an International Declaration Concerning the Laws and Customs of War, Aug. 27, 1874, arts. 23, 28, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 35, at 25, 30–31 ("Art. 23. . . . Any act of insubordination justifies the adoption of such measures of severity as may be necessary. . . . Art. 28. Prisoners of war are subject to the laws and regulations in force in the army in whose power they are."); Inst. of Int'l Law, The Laws of War on Land arts. 62, 67 (1880), *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 35, at 35, 43 ("Art. 62. [Prisoners of War] are subject to the laws and regulations in force of the army of the enemy. . . . Art. 67. Any act of insubordination justifies the adoption towards them of such measure of severity as may be necessary.").

of the State in whose power they are. Any act of insubordination justifies the adoption towards them of such measures of severity as may be considered necessary."[41] Prisoners of war are military personnel held for military purposes, therefore, it is appropriate that they be "subject to the same penal and disciplinary legislation as members of the armed forces of the Detaining Power, and liable to the same punishment for similar actions, except" for escapes.[42]

The experiences of World War I revealed that this "strict assimilation of prisoners of war with the armed forces of the Detaining Power" could lead to abuses.[43] Therefore, the drafters of the treaty adopted in the Convention Relative to the Treatment of Prisoners of War held in Geneva in 1929 (1929 Convention) sought to "lay down certain rules in order to ensure a more precise penal and disciplinary system for prisoners of war."[44] Chapter 3 of Section V of the 1929 Convention specifically addressed penal sanctions against POWs.[45] One important concept in this chapter is the distinction between disciplinary and judicial punishments.[46] These two dispositions are distinguishable in three ways: the amount of due process, the entity with the power to impose punishment, and the maximum punishment.[47]

First, prisoners facing judicial punishment receive more due process, including the right to an advocate of their choosing, the right to have the protecting power notified of the proceedings, and the right to appeal.[48] Second, the imposition authority distinguishes disciplinary measures from judicial measures. Under Article 59, "[d]isciplinary punishments may only be awarded by an officer vested with disciplinary powers in his capacity as commander of the camp."[49] Article 63 prescribes that

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[41] Hague IV, *supra* note 31, art. 8, 36 Stat. at 2297, 1 Bevans at 645.
[42] *See* 3 COMMENTARY, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 406 (Jean S. Pictet ed., 1960) [hereinafter GC III COMMENTARY].
[43] *Id.*
[44] *See* 1929 GPW, *supra* note 31, § 5, ch. 3, 47 Stat. at 2046–53, 2 Bevans at 948–53; GC III COMMENTARY, *supra* note 42, at 407.
[45] *See* 1929 GPW, *supra* note 31, § 5, ch.3, 47 Stat. at 2046–53, 2 Bevans at 948–53.
[46] *See id.* (distinguishing between disciplinary and judicial sanctions).
[47] *See* 1929 GPW, *supra* note 31, arts. 54–59, 60–67, 47 Stat. at 2049–53, 2 Bevans at 951–53.
[48] *See* 1929 GPW, *supra* note 31, arts. 60–67, 47 Stat. at 2051–53, 2 Bevans at 951–53. "A Protecting Power is . . . a State instructed by another State (known as the Power of Origin) to safeguard its interests and those of its nationals in relation to a third Power (known as the detaining Power)." GC III COMMENTARY, *supra* note 42, at 93.
[49] *See* 1929 GPW, *supra* note 31, art. 59, 47 Stat. at 2051, 2 Bevans at 951.

judicial sanctions may be imposed only "by the same tribunals and in accordance with the same procedure as in the case of persons belonging to the armed forces of the detaining Power."[50] While the Convention does not specifically mention courts-martial, the necessary implication is that if courts-martial are used to impose judicial-type sentences (meaning death or significant confinement) against the forces of the detaining power, then courts-martial must be used to impose the same sentences upon POWs.[51] Finally, the most critical distinction between disciplinary and judicial sanctions is the amount of punishment that may be imposed. The maximum punishment authorized under disciplinary proceedings is imprisonment for not more than thirty days, while any appropriate punishment, including death, may be imposed under judicial proceedings.[52]

The 1929 Convention remained in force through the Second World War, and it "became apparent to those who benefited from it as well as those who had to apply it, that the 1929 Convention needed revision on a number of points because of changes in the conduct and consequences of war and even in human living conditions."[53] The Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 made significant amendments to the 1929 Convention.[54] With these amendments, the rules regarding penal and disciplinary sanctions against POWs were expanded to provide greater protections to POWs, including several important changes regarding the punishment of prisoners for misconduct during detention. The first important expansion was that the 1949 Convention directed the detaining powers to "ensure that the competent authorities exercise the greatest leniency and adopt, wherever possible, disciplinary, rather than judicial measures" when punishing POWs.[55] There was a similar provision in the 1929 Convention, but it was primarily directed at punishing escapes and attempted escapes.[56] The drafters expanded this principle of leniency for two reasons.[57] First, in addressing misconduct, detaining powers must understand that POWs

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[50] *Id.* art. 63.
[51] *See id.*
[52] *See id.* arts. 54 & 66.
[53] GC III COMMENTARY, *supra* note 42, at 5–6 (describing the impetus for the revision of the 1929 Convention).
[54] *See* GC III, *supra* note 31.
[55] GC III, *supra* note 31, art. 83, 6 U.S.T. at 3382, 75 U.N.T.S. at 200.
[56] *See* 1929 GPW, *supra* note 31, art. 52, 47 Stat. at 2049, 2 Bevans at 950; GC III COMMENTARY, *supra* note 42, at 411.
[57] GC III COMMENTARY, *supra* note 42, at 411.

have no allegiance to the detaining power.[58] Second, the detaining power must consider the "honourable motives which prompted the prisoner of war to act in that manner."[59] Resistance and escape are considered the duty of the captive soldier, and therefore should not be punished as harshly as the same or similar offenses committed by a member of the detaining power's own forces.[60] In addition to these two reasons, the drafters also recognized that POWs are subject "more than anyone else to the influences which are generally recognized as extenuating circumstances: extreme distress, great temptation, anger or severe pain."[61] Therefore, the drafters favored leniency—rather than harsh punishment in the name of good order and discipline in the camp—as the guiding principle in addressing POW misconduct.[62]

Along with the preference for disciplinary rather than judicial proceedings, Article 84 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War mandates, as a general rule, that POWs be tried by military court, rather than a civilian court.[63] While there is an exception for those jurisdictions where only civilian courts have jurisdiction to try certain offenses, the drafters deliberately chose to have military courts try POWs because of the courts' expertise in trying military-specific offenses.[64] Article 102 of the 1949 Convention further clarifies Article 84.[65] Article 102 states:

> A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts

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[58] *Id.* at 410.
[59] *Id.* (internal quotations removed) (citations omitted).
[60] *See* WINTHROP, *supra* note 38, at 793 n.27 (citations omitted). *See generally* GC III COMMENTARY, *supra* note 42, at 406–07 (providing justification for the general preference for leniency toward POWs, as contrasted with the typically harsh punishments under the military penal code for military personnel who commit misconduct).
[61] GC III COMMENTARY, *supra* note 42, at 411.
[62] *Id.* at 410–11.
[63] GC III, *supra* note 31, art. 84, 6 U.S.T. at 3382, 75 U.N.T.S. at 200–02. Additionally, the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War also allows for the use of regularly constituted military courts to try persons in occupied territory, as well as internees. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 66 & 117, Aug. 12, 1949, 6 U.S.T. 3516, 3558–60, 3596, 75 U.N.T.S. 288, 328–330, 366 [hereinafter GC IV]; 4 COMMENTARY, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 339, 476 (Jean S. Pictet ed., 1960) [hereinafter GC IV COMMENTARY].
[64] *See* GC III COMMENTARY, *supra* note 42, at 412.
[65] GC III, *supra* note 31, art. 102, 6 U.S.T. at 3394, 75 U.N.T.S. at 212; GC III COMMENTARY, *supra* note 42, at 476.

> according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.[66]

Just as Article 63 of the 1929 Convention required, POWs are to be treated in judicial matters in the same manner as the detaining power's own forces.[67] But, this is not without limits. Article 84 expressly forbids the trial of POWs before courts that do not provide "the essential guarantees of independence and impartiality."[68] Under Article 105, the court must also provide, at a minimum, an assistant, advocate, or counsel, and an interpreter.[69] Finally, the military penal code must be consistent with the protections of Chapter III of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (Articles 82 through 108), which provide substantial due process to an accused POW.[70] As stated in the Commentary, these obligations "outweigh national legislation and the States party to the Convention must modify their own legislation if necessary, and in particular their military penal code, in order to respect [these] minimum standards."[71]

After the 1949 Geneva Convention Relative to the Treatment of Prisoners of War, the next major international treaty to address the status and treatment of POWs was the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, adopted on 8 June 1977 (Additional Protocol I).[72] This treaty did not address the trial of a POW

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[66] GC III, *supra* note 31, art. 102, 6 U.S.T. at 3394, 75 U.N.T.S. at 212; *see also* GC III COMMENTARY, *supra* note 42, at 476.

[67] 1929 GPW, *supra* note 31, art. 63, 47 Stat. at 2052, 2 Bevans at 952; GC III, *supra* note 31, arts. 63 & 102, 6 U.S.T. at 3364–66, 3394, 75 U.N.T.S. at 182–84, 212; *see also* GC III COMMENTARY, *supra* note 42, at 476.

[68] GC III, *supra* note 31, art. 84, 6 U.S.T. at 3382, 75 U.N.T.S. at 200–02; *see also* GC III COMMENTARY, *supra* note 42, at 476.

[69] GC III, *supra* note 31, art. 105, 6 U.S.T. at 3396, 75 U.N.T.S. at 214 ("The prisoner of war shall be entitled to assistance by one of his prisoner comrades, to defence by a qualified advocate or counsel of his own choice, to the calling of witnesses and, if he deems necessary, to the services of a competent interpreter."); *see also* GC III COMMENTARY, *supra* note 42, at 476.

[70] GC III, *supra* note 31, § 6, ch. III, 6 U.S.T. at 3382–3400, 75 U.N.T.S. at 200–18; GC III COMMENTARY, *supra* note 42, at 476.

[71] GC III COMMENTARY, *supra* note 42, at 476.

[72] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]. The United States signed, but did not ratify

in the hands of a detaining power.[73] Thus, the 1949 Convention represents the culmination of the efforts to establish a system for the trial of POWs for post-capture misconduct. Shortly after the conclusion of the 1949 Convention, the United States implemented the provisions related to the trial of POWs when Congress passed the Uniform Code of Military Justice, which provided for court-martial jurisdiction over enemy POWs.[74] For POWs, then, the laws are well-established. Unfortunately, as the next section will explain, very few—if any—of those detained in the War on Terror qualify as "enemy prisoners of war" according to U.S. law and policy.

B. The Legal Classification of Those Detained by the United States

President George W. Bush called the September 11th terrorist strikes against the World Trade Center and the Pentagon "acts of war,"[75] and began a global effort to "eradicate the evil of terrorism."[76] According to President Bush, "Our war on terror begins with al Qaeda, but it . . . will not end until every terrorist group of global reach has been found, stopped, and defeated."[77] On 14 September 2001, without going so far as to actually declare war, Congress passed a joint resolution authorizing military action against "those nations, organizations, or persons" responsible for the terrorist attacks on September 11th, as well as those

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Additional Protocol I. *See* Int'l Comm. of the Red Cross, State Signatories of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=S (last visited Feb. 22, 2008). For the articles in Additional Protocol I that the United States generally considers to be customary international law, see Memorandum, W. Hays Parks et al., to John H. McNeill, Assistant General Counsel (International), Office of the Secretary of Defense, subject: 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications (9 May 1986) (on file with author).

[73] *See* Additional Protocol I, *supra* note 72, arts. 43–47, 1125 U.N.T.S. at 23–25.

[74] Act of May 5, 1950, Pub. L. No. 81-506 ch. 169, § 1, art. 2(a)(9), 64 Stat. 109.

[75] Evan J. Wallach, *The Logical Nexus Between the Decision to Deny Application of the Third Geneva Convention to the Taliban and al Qaeda, and the Mistreatment of Prisoners in Abu Ghraib*, 37 CASE W. RES. J. INT'L L. 541, 543 (2005) (citations omitted).

[76] *See* President George W. Bush, Radio Address of the President to the Nation (Sept. 14, 2001), http://www.whitehouse.gov/news/releases/2001/09/print/20010915.html ("We are planning a broad and sustained campaign to secure our country and eradicate the evil of terrorism."); President George W. Bush, Address to a Joint Session of Congress and the American People, Washington, D.C. (Sept. 20, 2001), http://www.whitehouse.gov/news/releases/2001/09/print/20010920-8.html [hereinafter President Bush, Address to a Joint Session of Congress] (referring to the "war on terror").

[77] *Id.*

that "harbored such organizations or persons."[78] That same September, the United Nations Security Council "adopted two resolutions which (1) identified the attacks on the United States as a threat to international peace and security, and (2) mandated that states 'deny safe haven to those who finance, plan, support, or commit terrorist acts.'"[79] After clear warnings to the Taliban government in Afghanistan,[80] strikes began against terror training camps and Taliban military installations in Afghanistan on 7 October 2001.[81]

As a part of the military strategy against al Qaeda and the Taliban, the United States sought to capture or kill senior al Qaeda and Taliban officials.[82] On 13 November 2001, President Bush issued an order authorizing the detention of al Qaeda members and certain others for trial by military commission.[83] By the end of December 2001, the allied coalition had detained almost 7000 individuals thought to be part of

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[78] Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). The joint resolution became law on 18 September 2001. Wallach, *supra* note 75, at 544.

[79] *Id.* (quoting S.C. Res. 1368, U.N. Doc S/RES/1368 (Sept. 12, 2001) and S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001)).

[80] *See* President George W. Bush, Address to a Joint Session of Congress, *supra* note 76. In the address, President Bush said:

> [T]he United States of America makes the following demands on the Taliban: Deliver to United States authorities all the leaders of al Qaeda who hide in your land. Release all foreign nationals, including American citizens, you have unjustly imprisoned. Protect foreign journalists, diplomats and aid workers in your country. Close immediately and permanently every terrorist training camp in Afghanistan, and hand over every terrorist, and every person in their support structure, to appropriate authorities. Give the United States full access to terrorist training camps, so we can make sure they are no longer operating.

Id.

[81] *See* President George W. Bush, Presidential Address to the Nation, Washington, D.C. (Oct. 7, 2001), http://www.whitehouse.gov/news/releases/2001/10/print/20011007-8.html ("On my orders, the United States military has begun strikes against al Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan.").

[82] *See* COALITION INFORMATION CENTERS, *supra* note 25, at 11–12.

[83] Military Order, *supra* note 25.

either al Qaeda or the Taliban.[84] With these detentions, serious questions arose regarding the status of these detainees.[85]

Applying international law in cases where detainee status is in doubt, the Commander of the U.S. Central Command issued an order on 17 October 2001 stating that all detained personnel would receive treatment in accordance with the "traditional interpretation" of the Geneva Conventions and "would be screened to determine whether or not they were entitled to prisoners of war status."[86] In early 2001, the United States began transporting a number of those detained to the Naval Base at Guantanamo Bay, Cuba.[87]

On 19 January 2002, Secretary of Defense Donald Rumsfeld issued a memorandum to the Chairman of the Joint Chiefs of Staff declaring that "Al Qaida and Taliban individuals under the control of the Department of Defense are not entitled to prisoner of war status for purposes of the Geneva Conventions of 1949."[88] Less than a month later, President Bush issued a memorandum declaring, among other things, that "none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting party."[89] The memorandum also announces that "the Taliban detainees are unlawful combatants and,

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[84] Wallach, *supra* note 75, at 544 (citing *US Questions 7,000 Taliban and al-Qaida Soldiers*, GUARDIAN UNLIMITED, Dec. 21, 2001, http://www.guardian.co.uk/afghanistan/story/0,1284,623701,00.html).

[85] *See, e.g.*, Memorandum, Jay S. Bybee, Assistant Attorney General, to Alberto Gonzales, Counsel to the President and William J. Haynes II, General Counsel of the Department of Defense, subject: Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (22 Jan. 2002) [hereinafter Bybee Memo], *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 81–117 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

[86] U.S. DEP'T OF DEFENSE, FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS 80 (Aug. 2004), *available at* http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf; *see also* GC III, *supra* note 31, art. 5, 6 U.S.T. at 3322–24, 75 U.N.T.S. at 140–42; Wallach, *supra* note 75, at 544.

[87] Wallach, *supra* note 75, at 544–45; Rasul v. Bush, 542 U.S. 466, 470 (2004).

[88] Memorandum, Secretary of Defense, to the Chairman of the Joint Chiefs of Staff, subject: Status of Taliban and Al Qaida (19 Jan. 2002), *available at* http://www.defenselink.mil/news/Jun2004/d20040622doc1.pdf; *see also* Message, 211933Z Jan 02, CJCS Washington D.C., subject: Status of Taliban and Al Qaida Detainees, *available at* http://www.defenselink.mil/news/Jun2004/d20040622doc2.pdf.

[89] Humane Treatment of Al Qaeda and Taliban Detainees Memo, *supra* note 32, at 134.

therefore, do not qualify as prisoners of war under Article 4 of Geneva."[90]

The first Supreme Court review of the U.S. detention policy came in April of 2004, in the case of *Hamdi v. Rumsfeld*.[91] In that case, Justice O'Connor concluded that detention of unlawful combatants as a means of preventing them from returning to battle in the War on Terror was a valid exercise of the "necessary and appropriate force" that Congress authorized in the 18 September 2001 Authorization for the Use of Military Force.[92] The Supreme Court held, however, that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[93] After this case, on 7 July 2004, Deputy Secretary of Defense Paul Wolfowitz published an order establishing Combatant Status Review Tribunals to determine the appropriate classification of detainees at Guantanamo Bay.[94] This memo included a definition of "enemy combatant," as well as the procedures for the tribunals.[95] The

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[90] *Id.*

[91] 542 U.S. 507 (2004).

[92] Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). The authorization states:

> The President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, 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.

Id.

[93] *Hamdi*, 542 U.S. at 533.

[94] *See* Memorandum, Deputy Secretary of Defense, to the Secretary of the Navy, subject: Order Establishing Combatant Status Review Tribunal (July 7, 2004).

[95] *Id*. This memo defined "enemy combatant" as:

> [A]n individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners . . . includ[ing] any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

Id.

memo also provided a mechanism for release of those not properly detained.[96]

After Congress passed the Detainee Treatment Act of 2005,[97] the DOD changed the procedures for the Combatant Status Review Tribunals.[98] Then, in 2006, the DOD detainee policy changed again. After the Supreme Court decided *Hamdan v. Rumsfeld*,[99] the DOD published DOD Directive 2310.01E.[100] The purpose of this directive was to revise the DOD detention policy and provide a "solid foundation upon which to build future detention operations policy."[101] This directive establishes two important policies. First, it sets minimum standards for the treatment of detainees in the custody of the United States, regardless of their status, incorporating Common Article 3 to the 1949 Geneva Conventions as well as certain additional protections for detainees.[102] In addition to these minimum standards, the policy also acknowledges that the law of armed conflict provides certain categories of detainees, like enemy POWs, more protections than the minimum standards articulated.[103] Second, the policy establishes a definite set of legal classifications for the various categories of personnel detained by the United States. The directive modifies, once again, the definition of "enemy combatant," now defining an "enemy combatant" as "a person engaged in hostilities against the United States or its coalition partners

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[96] *Id.* Should the Combatant Status Review Tribunal determine that an individual is not an enemy combatant, the Secretary of State is to be informed so that the Secretary of State may "coordinate the transfer of the detainee for release to the detainee's country of citizenship or other disposition consistent with domestic and international obligations and the foreign policy of the United States." *Id.*

[97] Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739.

[98] *See* Memorandum, Gordon England, Deputy Secretary of Defense, to Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, and the Under Secretary of Defense for Policy, subject: Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba (July 14, 2006) [hereinafter Implementation of Combatant Status Review Tribunal Procedures Memo].

[99] 126 S. Ct. 2749, 2796–97 (2006) (holding, *inter alia*, that Common Article III applies to those, like Hamdan, detained in the conflict with al Qaeda).

[100] DOD DIR 2310.01E, *supra* note 33.

[101] Cully Stimson, Deputy Assistant Sec'y of Defense for Detainee Affairs and Lieutenant General John Kimmons, Deputy Chief of Staff for Intelligence, U.S. Army, DOD News Briefing with Deputy Assistant Secretary Stimson and Lt. Gen. Kimmons from the Pentagon, Washington D.C. (Sept. 6, 2006) (transcript available at http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3712).

[102] DOD DIR 2310.01E, *supra* note 33, at 2; GC III, *supra* note 31, art. 3, 6 U.S.T. at 3318–20, 75 U.N.T.S. at 136–38.

[103] DOD DIR 2310.01E, *supra* note 33, at 2.

during an armed conflict."[104] The directive further distinguishes between "lawful enemy combatants," who meet criteria established in Article 4(a)(2) and (3) of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War, and "unlawful enemy combatants [who] are persons that are not entitled to combatant immunity, who engage in acts against the United States and its coalition partners in violation of the laws and customs of war during an armed conflict."[105] The directive also expressly includes in the definition of unlawful enemy combatant, "an individual who is or was part of or supporting Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners."[106] While U.S. policy maintains several categories of "detainee," this directive clearly defines each possible status and outlines the standards of detention applicable to each.

Based on the current DOD detention policy established in DOD Directive 2310.01E, detained personnel fall into three distinct categories. First, there are those who are actual "prisoners of war" as defined by Article 4 of the Geneva Conventions of 1949 Relative to the Treatment of Prisoners of War.[107] These individuals are held until the end of hostilities.[108] These individuals would be properly tried by court-martial for any post-capture misconduct under Article 2(a)(9) of the UCMJ, as well as Articles 84 and 102 of the Geneva Conventions of 1949 Relative to the Treatment of Prisoners of War. The next category is "lawful enemy combatant."[109] While DOD Directive 2310.01E makes "lawful enemy combatant" a separate status, they receive the same treatment as POWs under U.S. policy.[110] The final classification of individuals is "unlawful enemy combatant."[111] They receive the minimum standard of treatment under Common Article 3 and DOD Directive 2310.01E, are held for the duration of hostilities, and may be subject to trial by military commission.[112] Should there be a need to prosecute any post-capture misconduct, it is this last category of detainees who are most problematic

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[104] *Id.* at 9.
[105] *Id*; GC III, *supra* note 31, art. 4(a)(2–3), 6 U.S.T. at 3320–22, 75 U.N.T.S. at 138–40.
[106] DOD DIR 2310.01E, *supra* note 33, at 9.
[107] *See* GC III, *supra* note 31, art. 4, 6 U.S.T. at 3320–22, 75 U.N.T.S. at 138–40.
[108] *See* GC III, *supra* note 31, art. 118, 6 U.S.T. at 3406, 75 U.N.T.S. at 224; Hamdi v. Rumsfeld, 542 U.S. 507, 520–521 (2004).
[109] DOD DIR 2310.01E, *supra* note 33, at 9.
[110] *See id.*
[111] *See id.*
[112] *See id.* at 2, 9; Military Commissions Act of 2006, 10 U.S.C.S. § 948c (LexisNexis 2008).

under current U.S. policy. Fortunately, as the next section will explain, the class of offenses that warrant judicial punishment is narrow.

C. Honorable Motive or Malice Aforethought: Selecting Camp Disciplinary Procedures or Judicial Means to Prosecute Post-Capture Misconduct

Aside from status, there is another consideration in handling post-capture misconduct. Not every offense a camp commander may need to punish in order to ensure camp discipline is worthy of judicial punishment. Some offenses are minor and require no more than disciplinary procedures established by the camp commander. As described in the last section, Chapter III of Section VI of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War distinguishes between disciplinary proceedings and judicial proceedings, and mandates a preference for disciplinary measures.[113] The key distinction is that prisoners serving disciplinary sentences must be released along with the other POWs at the end of hostilities, regardless of whether they have completed their disciplinary punishment, while those serving judicial sentences remain in the custody of the capturing power until their sentence is complete.[114]

Army Regulation (AR) 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*, implements these tenets of international law in U.S. detention operations and applies to detention operations in the War on Terror.[115] In accordance with Chapter III of Section VI of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War, AR 190-8 establishes a regime that differentiates between camp discipline and judicial measures, and establishes a preference for the former.[116] Paragraph 3-7f of AR 190-8 states that escape attempts and related offenses that are "committed by

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[113] *See* GC III, *supra* note 31, arts. 82, 83, 6 U.S.T. at 3382, 75 U.N.T.S. at 200.

[114] *See* GC III, *supra* note 31, arts. 115, 119, 6 U.S.T. at 3404, 3406–08, 75 U.N.T.S. at 222, 224–26; R.C. HINGORANI, PRISONERS OF WAR 181 (1982); *see also* GC III COMMENTARY, *supra* note 42, at 534.

[115] U.S. DEP'T OF ARMY, REG. 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES paras. 1-1, 1-5 (1 Oct. 1997) [hereinafter AR 190-8]; *see also* Human Rights First, Human Rights First Analyzes DOD's Combatant Status Review Tribunals, http://www.humanrightsfirst.org/us_law/detainees/status_review_080204.htm (last visited Jan. 16, 2007). *See generally* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2795 (2006) (discussing AR 190-8).

[116] *See* AR 190-8, *supra* note 115, paras. 3-6, 3-7.

detainees with the sole intent of making their escape easier and that do not entail any violence against life or limb will warrant disciplinary punishment only."[117] Aside from these specified offenses and others that clearly warrant judicial punishment, like murder, aggravated assault, and rape, there is a gray area where a commander will have to decide whether disciplinary or judicial punishment is warranted.

In deciding what system of punishment is most appropriate for those offenses in the gray area, commanders are not without guidance. Besides the preference for disciplinary over judicial punishment in international law and AR 190-8, Rule for Courts-Martial (RCM) 306(b) and its discussion provide a valuable tool for commanders and their Judge Advocates in selecting disciplinary or judicial measures for handling detainee misconduct.[118] First, RCM 306(b) mandates that allegations of misconduct "should be disposed of in a timely manner at the lowest appropriate level of disposition."[119] Next, the discussion to RCM 306(b) outlines several other considerations. First, the discussion cites various factors for commanders to consider in determining a proper disposition, including "the nature of the offenses, any mitigating and extenuating circumstances, . . . [and] the interest of justice."[120] Further, the discussion articulates the desired goal: "a disposition that is warranted, appropriate, and fair."[121] The discussion concludes with a list of additional factors for the commander to consider in determining a proper disposition.[122] Even if the case is not being tried by court-martial, these rules provide helpful guidelines in distinguishing between disciplinary and judicial punishment for a particular offense.

In addition to the considerations set out in the Geneva Conventions, AR 190-8, and the *Manual for Courts-Martial* (*MCM*), there are three

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[117] *Id.* para. 3-7f. This is taken almost verbatim out of Article 93 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War. *See* GC III, *supra* note 31, art. 93, 6 U.S.T. at 3388, 75 U.N.T.S. at 206.

[118] GC III, *supra* note 31, art. 83, 6 U.S.T. at 3382, 75 U.N.T.S. at 200 ("In deciding whether proceedings . . . shall be judicial or disciplinary, the Detaining Power shall ensure that the competent authorities exercise the greatest leniency and adopt, wherever possible, disciplinary rather than judicial measures."); AR 190-8, *supra* note 115, para. 3-7c ("When possible, disciplinary rather than judicial measures will be taken for an offense."); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 306(b) (2008) [hereinafter MCM].

[119] MCM, *supra* note 118, R.C.M. 306(b).

[120] *Id.* R.C.M. 306(b) discussion.

[121] *Id.*

[122] *Id.*

other important factors in determining an appropriate disposition of offenses. First, in the case of unlawful enemy combatants, one of the arguments for leniency—that misconduct is often driven by "honorable motives"—may not apply.[123] A number of those detained are alleged to have participated in some part of the War on Terror as unlawful combatants, and may be seeking to continue their unlawful activities.[124] A detainee's escape and subsequent reunion with hostile forces may have more consequence, considering the nature of the War on Terror. There are several documented cases of released detainees continuing hostile activities against U.S. or coalition forces.[125] Second, the leniency rationale for escape attempts does not necessarily apply either.[126] Considering that he was detained for conduct that is considered illegal under international law, an alien unlawful enemy combatant escaping from the detention facility at Guantanamo Bay is more akin to a prisoner escaping from a federal penitentiary, rather than a POW escaping from a POW camp. Again, a detainee's escape and continued aggression as an unlawful combatant may be of more consequence, considering the unconventional nature of the War on Terror. Third, it is logical that a disciplinary punishment, like the loss of a comfort item or a privilege, may have more of an impact on a detainee facing indefinite detention or serving a lengthy military commission sentence, rather than continued

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[123] *See* GC III COMMENTARY, *supra* note 42, at 411.

[124] *See generally* Implementation of Combatant Status Review Tribunal Procedures Memo, *supra* note 98 (outlining the procedures for Combatant Status Review Tribunals that ensure that detainees are "properly classified as enemy combatants").

[125] Bryan Whitman, Pentagon Spokesman, and Senior Defense Officials, U.S., Dep't of Defense, Press Briefing: Annual Administrative Review Boards for Enemy Combatants Held at Guantanamo Attributable, to Senior Defense Officials, Washington, D.C. (Mar. 6, 2007), http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3902. On 6 March 2007, a senior defense official stated:

> We have had individuals that have . . . persuaded us that they were an innocent bystander, and as soon as they were released, they returned to the fight. . . . [W]e have confirmed 12 individuals have returned to the fight, and we have strong evidence that about another dozen have returned to the fight.

Id.; *see also* U.S. Dep't of Defense, Former Guantanamo Detainees Who Have Returned to the Fight (July 12, 2007), http://www.defenselink.mil/news/d20070712formergtmo.pdf (stating that there are thirty documented cases of former Guantanamo detainees who have taken part in "anti-coalition militant activities after leaving U.S. detention," and providing seven anecdotes).

[126] *See* GC III, *supra* note 31, art. 93, 6 U.S.T. at 3388, 75 U.N.T.S. at 206; GC III COMMENTARY, *supra* note 42, at 411, 452–54.

confinement adjudged as a judicial punishment. In deciding which punishment is appropriate, many considerations may often conflict.

The three previous sections present the fundamental principles underlying the issue of punishing detainee misconduct. There has been substantial development in the international law and U.S. policy governing the trial of enemy POWs for misconduct in the hands of the detaining power. Even if the law does not expressly protect a detained person in a particular conflict, the principles that those laws express are worthy of consideration. Also, under current U.S. policy detainees fall into three basic categories, and their status governs the protections and rights they receive. Finally, not all post-capture offenses are worthy of judicial punishment; some offenses warrant mere camp discipline. In addressing post-capture misconduct, these principles should govern the decision to try a detainee for a particular offense and will assist in determining the most appropriate forum for a trial of an alien unlawful enemy combatant for crimes committed in a detention facility.

III. Options Available for Prosecuting Post-Capture Misconduct

Should an alien unlawful enemy combatant commit a crime warranting judicial punishment, it appears that U.S. law and policy offer three primary options for a trial. Those three options are trial by military commission, trial by court-martial, and trial in U.S. federal court. All three options have distinct jurisdictional limits and different procedural rules that impact their utility for trying alien unlawful enemy combatants for post-capture misconduct.

A. Prosecuting Post-Capture Offenses in Military Commissions

Based on current U.S. policy, the most obvious forum for a trial of a detainee is the military commission.[127] Military commissions have existed, in some form, since the earliest days of this country,[128] and in the

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[127] Military Commissions Act of 2006, 10 U.S.C.S. § 948c (LexisNexis 2008); Military Order, *supra* note 25.

[128] *See* Major Timothy C. MacDonnell, *Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts*, ARMY LAW., Mar. 2002, at 19, 26; Major Michael O. Lacey, *Military Commissions: A Historical Survey*, ARMY LAW., Mar. 2002, at 41, 41; Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terror*, 118

Military Order of November 13, 2001, President Bush directed that any person detained pursuant to the order, "when tried, be tried by military commission for any and all offenses triable by military commission."[129] Initial attempts to bring detainees to trial by military commissions resulted in the Supreme Court decision in *Hamdan v. Rumsfeld*, where the Court held that the military commissions, as then constructed, violated Article 36 of the UCMJ.[130] After *Hamdan*, Congress passed the Military Commissions Act of 2006, outlining new procedures and implementing certain minimum due process safeguards for the trial of detainees by military commission.[131] In early 2007, the Secretary of Defense published the *Manual for Military Commissions*, a "comprehensive Manual for the full and fair prosecution of alien unlawful enemy combatants by military commissions, in accordance with the Military Commissions Act of 2006."[132] The *Manual for Military Commissions* explains that the Military Commissions Act "amends both Articles 21 and 36 [of the Uniform Code of Military Justice] . . . to permit greater flexibility in constructing procedural and evidentiary rules for trials of alien unlawful enemy combatants by military commission . . . [with s]everal key provisions . . . accommodat[ing] . . . military operational and national security considerations."[133] Later in 2007, the DOD promulgated the *Regulation for Trial by Military Commissions*, implementing the provisions of the Military Commissions Act of 2006 and the *Manual for Military*

HARVARD L. REV. 2047, 2132 (2005) *(*"Historically, the United States has used military commissions for three basic purposes: to try enemy belligerents for crimes triable under the laws of war, to administer justice in territory occupied by the United States, and to replace civilian courts where martial law has been declared."). *See generally* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2775–76 (2006) (describing past practice for military commissions).

[129] Military Order, *supra* note 25; *see also Hamdan*, 126 S. Ct. at 2749.

[130] *See Hamdan*, 126 S. Ct. at 2792–93; *see also* UCMJ art. 36 (2008). The primary operating documents that comprised the trial procedures for the version of military commission that the Court examined in *Hamdan* were Military Commission Order Number 1 and the Detainee Treatment Act of 2005. *See* U.S. Dep't of Defense, Military Commission Order No. 1, Aug. 31, 2005, *available at* http://www.defenselink.mil/news/Sep2005/d20050902order.pdf [hereinafter Military Commission Order No. 1]; Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739.

[131] *See* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600; H.R. REP. NO. 109-664, pt. 1, at 29, 69 (2006); 152 CONG. REC. S10,251–53 (daily ed. Sept. 27, 2006)..

[132] MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, foreword.

[133] *Id.* at I-1; *see also* U.S. DEP'T OF DEFENSE, REG. FOR TRIAL BY MILITARY COMMISSIONS foreword (Apr. 27, 2007) [hereinafter REGULATION FOR TRIAL BY MILITARY COMMISSIONS].

Commissions.[134] These three resources establish the current procedural rules for any trial by military commission.

1. Personal Jurisdiction under the Military Commissions Act

The jurisdiction of the military commission is narrow. The only persons subject to the jurisdiction of military commissions are alien unlawful enemy combatants. According to the Military Commissions Act, a military commission has "jurisdiction to try any offense made punishable by [the Act] or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001."[135] Title 10 U.S.C. § 948a provides definitions for both "alien" and "unlawful enemy combatant."[136] First, an "alien" is, quite simply, any "person who is not a citizen of the United States."[137] Under the Military Commissions Act of 2006, an "unlawful enemy combatant" is:

> [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 . . . a person who, before, on, or after the date of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or other competent tribunal established under the authority of the President or the Secretary of Defense.[138]

From these key definitions, there are three important principles to note. First, military commissions lack jurisdiction over U.S. citizens. Second, military commissions lack jurisdiction over "lawful enemy combatants" as defined in the Act.[139] Third, once a Combatant Status Review

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[134] REGULATION FOR TRIAL BY MILITARY COMMISSIONS, *supra* note 133.
[135] 10 U.S.C.S. § 948d(a).
[136] *Id.* § 948a.
[137] *Id.*; MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, R.M.C. 103(1).
[138] 10 U.S.C.S. § 948a(1); MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, R.M.C. 103(24).
[139] *See* 10 U.S.C.S. § 948a(1)(ii); Implementation of Combatant Status Review Tribunal Procedures Memo, *supra* note 98 (outlining the procedures for Combatant Status Review Tribunals).

Tribunal or a similar competent authority establishes that an individual is an "unlawful enemy combatant," that status determination is "dispositive for purposes of jurisdiction for trial by military commission."[140] If an individual is deemed to be an alien unlawful enemy combatant, the next issue is subject matter jurisdiction, or jurisdiction over the particular criminal offense.

2. Subject Matter Jurisdiction under the Military Commissions Act of 2006

Individuals subject to trial by military commission may be tried for offenses established by the Military Commissions Act of 2006 or the law of war.[141] The Military Commissions Act sets out two important preliminary points. First, the Act specifically states that it codifies "offenses that have been traditionally triable by military commissions . . . [and] does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission."[142] One of the major points of disagreement among the justices in *Hamdan* was whether "conspiracy to violate the law of war," as charged in that case, was a violation of the law of war and a proper charge for trial by military commission.[143] In essence, Congress has determined that certain offenses violate the law of war and are therefore appropriate for trial by military commission. It does not appear to limit, however, any other offenses that may also violate the law of war but are not specifically listed.[144]

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[140] *See* 10 U.S.C.S. § 948d(c); MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, R.M.C. 202(b); Implementation of Combatant Status Review Tribunal Procedures Memo, *supra* note 98 (outlining the procedures for Combatant Status Review Tribunals).

[141] 10 U.S.C.S. § 948d(a); MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, R.M.C. 203.

[142] *See* 10 U.S.C.S. § 950p(a).

[143] *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2777–856 (2006). Justice Stevens concludes that "conspiracy to violate the law of war" is not itself a violation of the law of war and therefore not a proper charge for trial by military commission. *Id.* at 2785. Justice Thomas, on the other hand, concluded that conspiracy to violate the law of war is a crime properly triable by military commission. *Id.* at 2831 (Thomas, J., dissenting).

[144] *See* 10 U.S.C.S. § 948b; MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, R.M.C. 203 ("Military commissions may try any offense under the M.C.A. or the law of war."); MacDonnell, *supra* note 128, at 26–33 (discussing historical military commission jurisdiction).

Second, the Military Commissions Act of 2006 specifically states that the statute is retroactive; that is, it allows trial for crimes that occurred before its enactment because it does not enact new law, but is rather "declarative of existing law."[145] With this provision, Congress has minimized the likelihood of success of any motion that these offenses violate the Ex Post Facto Clause of the Constitution.[146]

In establishing the offenses punishable by military commission, the Military Commissions Act of 2006 codifies the common criminal law concepts of principals, accessory after the fact, attempts, and solicitation.[147] The Act then establishes twenty-eight substantive offenses that are proper for trial by military commission when committed by alien unlawful enemy combatants.[148] Finally, the Act establishes perjury, contempt, and obstruction of justice as additional crimes that may be tried by military commission.[149]

Part IV of the *Manual for Military Commissions* provides additional information regarding the substantive offenses in the Military Commissions Act.[150] First, the *Manual for Military Commissions* provides the elements of each offense.[151] One element in nearly every offense is that the crime "took place in the context of and was associated with armed conflict."[152] "Armed conflict" is not defined anywhere in the Military Commissions Act of 2006, nor is it defined in the *Manual for Military Commissions*.[153]

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[145] *See* 10 U.S.C.S. § 950p(b).

[146] U.S. CONST. art. I, § 9 ("No . . . ex post facto Law shall be passed."). "Ex post facto" means "having retroactive force or effect." BLACK'S LAW DICTIONARY 601 (7th ed. 1999).

[147] *See* 10 U.S.C.S. § 950q–u.

[148] *See id.* § 950v(b).

[149] *See id.* § 950w.

[150] MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, pt. IV.

[151] *See id.*

[152] *See, e.g., id.* pt. IV, ¶ 6(13)b (providing as an element of Intentionally Causing Serious Bodily Injury, "(5) The conduct took place in the context of and was associated with armed conflict"). This is no doubt intended to stave off challenges to the subject matter jurisdiction of the military commissions. *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2780 (2006) ("At a minimum, the Government must make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war.").

[153] *See generally* Military Commissions Act of 2006, 10 U.S.C.S. §§ 948a–950w (LexisNexis 2008) (not defining "armed conflict"); MANUAL FOR MILITARY COMMISSIONS, *supra* note 25 ("not defining "armed conflict"). Also, neither Common Article 2 nor Common Article 3 defines "armed conflict." *See, e.g.*, GC III, *supra* note

In addition to the elements of the substantive offenses, the *Manual for Military Commissions* establishes the maximum punishment for each offense.[154] It does not cite any authority as a source for the maximum punishments, and the Military Commissions Act is silent as to maximum punishments for each of the offenses, stating only that individuals convicted of offenses by the commission "shall be punished as a military commission under this chapter shall direct."[155] Further, the Act states that the "punishment which a military commission . . . may direct for an offense may not exceed such limits as the President or Secretary of Defense may prescribe for that offense."[156] By this language, it appears that the DOD is free to assign maximum punishments as it deems appropriate.

The Military Commissions Act provides an expansive set of crimes that are subject to trial by military commission and the *Manual for Military Commissions* establishes the elements and the sentences for those offenses. As there is no caselaw yet on any of the language in these offenses, there is still some question as to the exact limits of what constitutes an offense under the law of war as well as a question as to the exact meaning of the element "took place in the context of and was associated with armed conflict."[157] Nevertheless, there must be subject matter jurisdiction before a commission can reach the procedural aspects discussed below.

3. Overview of Procedure in Trial by Military Commission

Once it is determined that a military commission may try an alien unlawful enemy combatant, the Military Commissions Act, the *Manual for Military Commissions*, and the *Regulation for Trial by Military*

31, arts. 2 & 3, 6 U.S.T. at 3318–20, 75 U.N.T.S. at 136–38 (providing an example of Common Articles 2 and 3). The Commentaries, on the other hand, provide some criteria for assessing whether armed conflict exists for the purposes of triggering their application. *See* GC III COMMENTARY, *supra* note 42, at 35–36.

[154] *See* MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, pt. IV.

[155] 10 U.S.C.S. § 950v(b)(3). Although this section of the Military Commissions Act refers to the crime of attacking civilian objects, the quoted language is common to all offenses.

[156] *Id.*

[157] 10 U.S.C.S. § 948b; *see, e.g.*, MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, pt. IV, ¶ 6(13)b (providing an example of this element in Intentionally Causing Serious Bodily Injury, "(5) The conduct took place in the context of and was associated with armed conflict.").

Commissions provide the procedural rules for the trial.[158] As a tribunal crafted to handle the exigencies of the current War on Terror while maintaining due regard for the rights of an accused, the military commission's procedural rules differ from other courts and govern its utility for post-capture misconduct.[159]

The military commission is very similar to the court-martial in terms of the general procedural framework. There are, however, several key differences between a court-martial and a trial by military commission. First, there is no requirement for a pre-trial investigation.[160] Under the current rules, the Convening Authority appears to have only three options: (1) dismiss any or all of the charges, (2) dismiss any or all of the specifications, or (3) refer any or all of the charges and the specifications to a military commission.[161] Second, cases are referred to military commission by either the Secretary of Defense or the Convening Authority for Military Commissions.[162] The Convening Authority falls under the DOD.[163] The Convening Authority "reviews and approves charges against persons determined to be alien unlawful enemy combatants, . . . appoints military commissions members, and reviews military commissions' verdicts and sentences."[164]

Next, there is no statutory right to a speedy trial in the Military Commissions Act of 2006.[165] Despite the lack of a statutory speedy trial right, Rule for Military Commission (RMC) 707 still provides some

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[158] *See generally* 10 U.S.C.S. §§ 948a–950w; MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, pts. II, III; REGULATION FOR TRIAL BY MILITARY COMMISSIONS, *supra* note 133.

[159] *See* MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, Executive Summary.

[160] *See* 10 U.S.C.S. § 948b(d)(C); *cf.* UCMJ art. 32 (2008); MCM, *supra* note 118, R.C.M. 305.

[161] *See* MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, R.M.C. 407(a).

[162] *See* 10 U.S.C.S. § 949h; REGULATION FOR TRIAL BY MILITARY COMMISSIONS, *supra* note 133, para. 4-1.

[163] REGULATION FOR TRIAL BY MILITARY COMMISSIONS, *supra* note 133, para. 4-1; *see also* News Release, U.S. Dep't of Defense, Seasoned Judge Tapped to Head Detainee Trials (Feb. 7, 2007), http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=10493 [hereinafter News Release, U.S. Dep't of Defense, Seasoned Judge Tapped].

[164] News Release, U.S. Dep't of Defense, Seasoned Judge Tapped, *supra* note 163; *see also* REGULATION FOR TRIAL BY MILITARY COMMISSIONS, *supra* note 133, para. 4-1b.

[165] *See* 10 U.S.C.S. § 948b(d)(A) (stating that Article 10 of the UCMJ along with any RCM related to speedy trial does not apply to military commissions); *cf.* UCMJ art. 10 (2008); MCM, *supra* note 118, R.C.M. 707. It appears that the Sixth Amendment speedy trial right does not apply to military commissions either. *See* U.S. CONST. amend. VI.

protections for an accused.[166] Subject to certain exceptions and continuances, an accused must be arraigned within thirty days of the service of charges, and the military commission must be assembled within 120 days of the service of charges.[167]

The rules for compulsory self-incrimination are also different. The Military Commissions Act specifically states that Article 31 (a), (b), and (d) of the UCMJ do not apply.[168] In general, these three provisions prohibit compulsory self-incrimination, require warnings, and exclude evidence obtained by compulsion.[169] In place of the Article 31 protections, the Military Commissions Act substitutes new rules. First, the Act states that "[n]o person shall be required to be a witness against himself at a proceeding of a military commission."[170] Next, the Act prohibits the use of statements obtained by torture.[171] Finally, the Act distinguishes between statements obtained by coercion before the passage of the Detainee Treatment Act of 2005 and statements obtained by similar means after that act was passed.[172] The Detainee Treatment Act of 2005 prohibits interrogation methods that amount to "cruel, inhuman, or degrading treatment," and statements obtained using these methods are not admissible.[173] However, statements obtained using these methods prior to the Detainee Treatment Act of 2005 may be admissible if the judge makes certain findings.[174]

As for rules of evidence, the Military Commissions Act of 2006 gives the Secretary of Defense, in consultation with the Attorney General, the authority to draft the rules of evidence for military

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[166] MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, R.M.C. 707.
[167] *See id.*; *cf.* UCMJ art. 10; MCM, *supra* note 118, R.C.M. 707.
[168] *See* 10 U.S.C.S. § 948b(d)(B).
[169] *See* UCMJ arts. 31 (a), (b), (d).
[170] 10 U.S.C.S. § 948r(a).
[171] *Id.* § 948r(b).
[172] *Id.* § 948r(c), (d).
[173] *See* Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1003, 119 Stat. 2739–40 (codified as amended at 42 U.S.C. § 2000dd); 10 U.S.C.S. § 948r(d)). The Military Commissions Act also contains a provision prohibiting cruel, inhuman, or degrading treatment. *See* Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 6(c), 12 Stat. 2600, 2635 (codified as amended at 42 U.S.C.S. 2000dd-0 (LexisNexis 2008)). The *Manual for Military Commissions* incorporates these rules against self-incrimination in Rule 301 of the Military Commission Rules of Evidence. *See* MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, MIL. COMM. R. EVID. 301.
[174] 10 U.S.C.S. § 948r(d) (outlining the findings that the judge needs to make in order to admit statements obtained by some manner of coercion prior to 30 December 2005).

commissions.[175] The Act, however, directs that certain provisions be a part of the evidentiary rules.[176] First, an accused must be permitted to present evidence, cross examine witnesses, and examine and respond to most of the evidence presented against him.[177] Further, the accused must be permitted to be present (unless excluded for cause) at all stages of the proceedings (except deliberations or voting), must receive the assistance of counsel, and must be permitted to represent himself at trial.[178]

The Military Commissions Act also permits the Secretary of Defense to adopt certain other evidentiary provisions, including a relaxed rule of admissibility for evidence, a rule allowing the introduction of evidence seized without a warrant, and a rule allowing the introduction of evidence obtained by coercion or compulsory self-incrimination.[179] In addition, the Military Commissions Act permits the introduction of hearsay that is not otherwise admissible according to the Federal Rules of Evidence (FREs) or the Military Rules of Evidence (MREs), subject to certain disclosure requirements, unless the defense can make a showing of unreliability or lack of probative value.[180] In the *Manual for Military Commissions*, the Secretary of Defense adopted nearly every one of these relaxed rules for military commissions authorized by Congress.[181]

Another major difference in the procedures for military commissions is the procedure for appellate review. Instead of using any of the service courts of criminal appeals, the Military Commissions Act established a new scheme for review of commission cases. Cases decided by military commission are first subject to review by the "Court of Military

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[175] 10 U.S.C.S. § 949a(a). In fact, the Secretary of Defense must consult with the Attorney General in crafting any procedural rules for the military commissions.
[176] *Id.* § 949a(b).
[177] *Id.* §§ 949a(b)(A), 948r(d). The accused is not permitted to view classified evidence. *See id.* § 949j(c).
[178] *Id.* §§ 948r(d), 948a(b)(B–D). *See generally* MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, R.M.C. 506, 701, 703, 804 (providing the procedural rules implementing these congressional mandates).
[179] *See* 10 U.S.C.S. § 949a(b)(2).
[180] *See id.* § 949a(b)(2)(D).
[181] The only "relaxed rule" that was not adopted explicitly in the current Rules for Military Commissions is 10 U.S.C.S. § 949a(b)(2)(B), authorizing the admission of evidence obtained without a warrant or other search authorization. *See id.* § 949a(b)(2)(B); MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, R.M.C. 101(a) ("(a) *Purpose.* These rules are intended to provide for the just determination of every proceeding relating to trial by military commissions. (b) *Construction*. These rules shall be construed to secure simplicity in procedure, fairness in administration, and elimination of unjustifiable expense and delay.").

Commission Review."[182] From there, detainees may appeal their cases to the U.S. Court of Appeals for the District of Columbia Circuit.[183] After the Court of Appeals for the District of Columbia Circuit has rendered a final judgment, the U.S. Supreme Court may review this decision by writ of certiorari.[184] This differs significantly from courts-martial, which are appealed first to a service court of criminal appeals, like the Army Court of Criminal Appeals (ACCA), then to the Court of Appeals for the Armed Forces (CAAF), and then, by writ of certiorari, to the Supreme Court.[185]

The Military Commissions Act of 2006 allows military commissions to prosecute alien unlawful enemy combatants for crimes punishable under the Act that occurred "before, on, or after September 11th, 2001."[186] The procedural rules for military commissions are designed to "ensure that alien unlawful enemy combatants who are suspected of war crimes and certain other offenses are prosecuted before regularly constituted courts affording all the judicial guarantees which are recognized as indispensable by civilized people."[187] Whether military commissions are available, and if so, whether they are the best choice for the judicial prosecution of post-capture misconduct, are questions that Part IV will seek to answer.

B. Prosecuting Post-Capture Offenses in Military Courts-Martial

In considering the issue of prosecuting post-capture misconduct in detention facilities, another option is the court-martial. For POWs who commit misconduct while in the hands of the United States, international

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[182] 10 U.S.C.S. § 950f(2)(D); *see also* MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, R.M.C. 1201; REGULATION FOR TRIAL BY MILITARY COMMISSIONS, *supra* note 133, paras. 25-1 & 25-2.

[183] 10 U.S.C.S. § 950g. *See also* MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, R.M.C. 1205(a).

[184] 10 U.S.C.S. § 950g(d); 28 U.S.C. § 1257 (2000) (providing that a final judgment from the "highest court of a State" may be reviewed by the Supreme Court by writ of certiorari" and "the term 'highest court of a State' includes the District of Columbia Court of Appeals."); *see also* MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, R.M.C. 1205(b).

[185] *See* UCMJ arts. 66, 67, 67a (2008); 28 U.S.C. § 1259 (2000); *see also* MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, R.M.C. 101(a).

[186] 10 U.S.C.S. § 948d(a).

[187] *See* MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, Executive Summary (quoting the operable language contained in Common Article 3).

law, the UCMJ, and AR 190-8 direct that they be tried by military court-martial.[188] It is an established system that has been refined through continual assessment by Congress, appellate courts, and the President.[189] Like any other court, however, there are jurisdictional requirements, as well as unique procedural rules, which must be considered when assessing its value as a tool for handling post-capture offenses by alien unlawful enemy combatants in U.S. detention facilities.

1. Personal Jurisdiction under the Uniform Code of Military Justice

Unlike the Military Commissions Act of 2006, the personal jurisdictional sweep of the court-martial is broad. Article 2 of the UCMJ provides the extensive list of individuals subject to the UCMJ.[190] There are three categories of interest to this discussion. The first category includes those who are "[p]risoners of war in the lawful custody of the armed forces" who are subject to the UCMJ under Article 2(a)(9).[191] The second category includes "lawful enemy combatants who violate the law of war," who are subject to the UCMJ under Article 2(a)(13).[192] The third category includes those who are "alien unlawful enemy combatants." Under current U.S. policy, those persons categorized as alien unlawful enemy combatants are neither "prisoners of war" nor "lawful enemy combatants,"[193] and are to be tried by military

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[188] *See* GC III, *supra* note 31, art. 83, 6 U.S.T., at 3382; UCMJ art 2(a)(9); AR 190-8, *supra* note 115, para. 3-7b.

[189] *See, e.g.*, H.R. REP. NO. 109-664, pt. 1, at 86 (2006) (dissenting view of Rep. McKinney) ("[Since World War II, military commissions have been] based legally and in form on the Military Rules of Evidence and the Manual for Courts Martial procedures that have developed over decades under the UCMJ and in military court decisions or civilian court appeals and reviews."); Exec. Order No. 13,387, 70 Fed. Reg. 60,697 (2005) (2005 Amendments to the Manual for Courts-Martial, United States).

[190] UCMJ art. 2.

[191] *Id.* art. 2(a)(9).

[192] Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 4(a)(1), 120 Stat. 2600, 2631 (codified as amended at 10 U.S.C.S. § 802(a)(13) (LexisNexis 2008)) (extending UCMJ jurisdiction over "Lawful enemy combatants . . . who violate the law of war.").

[193] *See* GC III, *supra* note 31, art. 4, 6 U.S.T. at 3320–22, 75 U.N.T.S. at 138–40; *see also* GC III COMMENTARY, *supra* note 42, at 51–65; DOD DIR. 2310.01E, *supra* note 33, para. E2.1.1; Memorandum, Gordon England, Deputy Secretary of Defense, to Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, and the Under Secretary of Defense for Policy, subject: Revised Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba (July 14, 2006) [hereinafter Implementation of Administrative Review Procedures Memo]; Implementation of Combatant Status Review Tribunal Procedures Memo, *supra*

commission for their acts against the United States.[194] Historically, though, one reason for having POWs subject to the UCMJ is to subject them to trial by courts-martial for misconduct within the camp.[195]

Article 2(a)(12) contains another category of individuals subject to the UCMJ that may support an argument that alien unlawful enemy combatants are subject to the UCMJ for post-capture offenses.[196] This article provides jurisdiction over, subject to some exceptions, "persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside of the United States."[197] The original intent of this section was to ensure that the armed forces had jurisdiction over foreign nationals who entered military property overseas and committed offenses on the property.[198] There are not any reported cases of this provision being used to court-martial civilians for misconduct on a military installation outside of the United States.[199] Nevertheless, the United States leases the forty-five square miles of land on which the Naval Base at Guantanamo Bay sits under a lease agreement signed in 1903 between the governments of the United States and Cuba.[200] Pursuant to a treaty signed in 1934, the lease continues as long as the United States does not

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note 98; Humane Treatment of Al Qaeda and Taliban Detainees Memo, *supra* note 32, at 134; Bybee Memo, *supra* note 85.

[194] *See* Military Commissions Act of 2006, 10 U.S.C.S. § 948b(a) (LexisNexis 2008); Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2777–85, 2791 (2006); Military Order, *supra* note 25.

[195] *See* 1929 GPW, *supra* note 31, arts. 45, 63, & 64, 47 Stat. 2046, 2052, 2 Bevans at 948, 952; COLONEL FREDERICK BERNAYS WIENER, THE UNIFORM CODE OF MILITARY JUSTICE 41 (2nd prtg. 1951) ("[Article 2(a)(9)] is consistent with articles 45 and 64 of the Geneva Convention on Prisoners of War . . . in that prisoners of war are subject to this code . . . .") (citations omitted).

[196] UCMJ art. 2(a)(12).

[197] *Id.* For brevity, the two exceptions were excluded from the quotation in the main text. Those two exceptions are (1) "Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law" and (2) "which is outside the United States and outside the Canal Zone, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands." *Id.* It appears that neither one of these exceptions would apply to detainees held at the U.S. Naval Base at Guantanamo Bay, Cuba.

[198] *See* H.R. REP. NO. 81-491, at 9 (1949), *reprinted in* INDEX AND LEGISLATIVE HISTORY: UNIFORM CODE OF MILITARY JUSTICE (William S. Hein & Co. 2000) (1949).

[199] Major Susan S. Gibson, *Lack of Extraterritorial Jurisdiction Over Civilians: A New Look at an Old Problem*, 148 MIL. L. REV. 114, 134 (1995).

[200] *See* Rasul v. Bush, 542 U.S. 466, 480 (2004) (citing Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T. S. No. 418).

abandon the base.[201] As the Supreme Court said in *Rasul v. Bush*, "the United States exercises complete jurisdiction and control over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses."[202] From the plain language of the article, it appears that personal jurisdiction should extend over individuals, including detainees, who commit crimes on Guantanamo Bay.

Once it is determined that an individual is subject to the UCMJ, that individual is subject to trial by court-martial by operation of Article 17.[203] As an important corollary, Article 21 provides that several other courts may have concurrent jurisdiction, including military commissions.[204] Therefore, the UCMJ does not deprive any other court of jurisdiction that may properly have personal jurisdiction over an accused, including military commissions, just because an individual is subject to trial by court-martial.[205] Once personal jurisdiction attaches, however, the next inquiry is subject matter jurisdiction.

2. Subject Matter Jurisdiction under the Uniform Code of Military Justice

In order for a court-martial to have jurisdiction over a particular offense, the offense must be a crime under the UCMJ.[206] The range of offenses under the UCMJ is broad, covering offenses that are common law crimes, like murder, as well as offenses that strictly pertain to the military, like disrespect of a superior commissioned officer.[207] As applied to detainees, there are numerous crimes in the UCMJ that cover the range of misconduct that one might anticipate from a prisoner. For example, considering the attack on Louis Pepe in Manhattan, Mamdouh Salim could have been charged with, at a minimum, Aggravated Assault

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[201] *See id.* at 480 (citing Treaty Defining Relations with Cuba, May 29, 1934, U.S.-Cuba, art. III, 48 Stat 1683, T.S. No. 866).
[202] *Id.* (quoting Treaty Defining Relations with Cuba, May 29, 1934, U.S.-Cuba, art. III, 48 Stat 1683, T.S. No. 866) (internal quotations omitted).
[203] UCMJ art. 17(a) (2008) ("Each armed force has court-martial jurisdiction over all persons subject to this chapter.").
[204] *Id.*
[205] *Id.*
[206] *See* MICHAEL J. DAVIDSON, A GUIDE TO MILITARY CRIMINAL LAW 2 (1999). *But see* UCMJ art. 18 ("General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.").
[207] *See* UCMJ arts. 92, 118.

under Article 128 and Conspiracy under Article 81.[208] Finding subject matter jurisdiction over detainee misconduct under the UCMJ is a rather simple task. The more difficult task, as outlined in Part II.C., is determining which offenses are worthy of judicial punishment as opposed to mere camp disciplinary measures.

3. Procedural Rules Unique to Military Courts-Martial

As stated in the Preamble to the *MCM,* "[t]he purpose of military law is "to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote effectiveness in the military establishment, and thereby to strengthen the national security of the United States."[209] Thus, courts-martial have procedures that differ from civilian trials or a military commission. While the differences are many, this section will highlight several that may impact a trial of a detainee.

The first significant procedural right guaranteed to an accused in the military justice system is the "pretrial investigation."[210] Article 32 of the UCMJ, as implemented in RCM 405, guarantees that every accused facing a general court-martial receives an independent investigation of the charges by an officer to ensure that the evidence supports the charges and that a general court-martial is an appropriate disposition of the offenses.[211] Once the Article 32 is complete, the investigating officer makes a non-binding recommendation to the command as to the disposition of the offenses.[212] As an additional right, the accused and his counsel are able to participate in the investigation, including calling and cross-examining witnesses.[213]

Second, Article 31 provides an accused broad protection against self-incrimination; indeed, its provisions informed the Supreme Court's landmark decision in *Miranda v. Arizona.*[214] No person may be compelled to incriminate himself or to answer any question which may

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[208] *See id.* arts. 81, 128(4).
[209] MCM, *supra* note 118, pt. I, ¶ 3.
[210] UCMJ art. 32; MCM, *supra* note 118, R.C.M. 405.
[211] UCMJ art. 32; MCM, *supra* note 118, R.C.M. 405.
[212] UCMJ art. 32; MCM, *supra* note 118, R.C.M. 405.
[213] UCMJ art. 32; MCM, *supra* note 118, R.C.M. 405.
[214] UCMJ art. 31; MCM, *supra* note 118, MIL. R. EVID. 304, 305; Miranda v. Arizona, 384 U.S. 436, 489 (1966).

tend to incriminate him.[215] Further, before any "official questioning," an accused must be advised of the nature of the offenses of which he is suspected, be advised that he does not have to make a statement, and be advised that any statement may be used against him.[216] Finally, Article 31 directs that no statement obtained in violation of the rule, or obtained through coercion, unlawful influence, or unlawful inducement, may be received into evidence against him in a trial by court-martial.[217]

Third, the MREs govern the admissibility of evidence at courts-martial. These track the FREs very closely. In fact, changes to the FREs apply to the MREs unless affirmative action is taken to preclude the automatic adoption of a rule.[218] Among other things, these rules are specifically designed to "filter out evidence . . . that may cause a panel to improperly convict . . . [and] evidence that is not sufficiently trustworthy."[219] One recent Supreme Court decision that has significantly affected all American trials—including courts-martial—is the recent Supreme Court ruling in *Crawford v. Washington*.[220] The Court's interpretation of the Sixth Amendment's Confrontation Clause, as well as the rest of the hearsay rules contained in the MREs, would play a significant role in a trial of a detainee by military court-martial for post-capture offenses.[221]

Two final differences in the court-martial are the referral process and the appellate process. First, cases are "referred" to a court-martial by an officer appointed as the "convening authority."[222] Individuals become convening authorities either by their position, their level of command, or by special appointment.[223] Second, after cases are referred, completed at the trial level, and approved by the convening authority, cases may be appealed. They are appealed first to a service court of criminal appeals, like the ACCA or the Navy-Marine Corps Court of Criminal Appeals (N-MCCA).[224] Once the service court has rendered a final decision, cases

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[215] UCMJ art. 31(a).
[216] *Id.* art. 31(b).
[217] *Id.* art. 31(d).
[218] MCM, *supra* note 118, MIL. R. EVID. 1102(a) (2005).
[219] DAVIDSON, *supra* note 206, at 59.
[220] 541 U.S. 36 (2004).
[221] *See generally* U.S. CONST. amend. VI; Crawford v. Washington, 541 U.S. 36 (2004); MCM, *supra* note 118, MIL. R. EVID. 801–807.
[222] MCM, *supra* note 118, R.C.M. 601(a).
[223] *See generally* UCMJ arts. 22–24 (2008) (outlining who may convene the various levels of courts-martial).
[224] *See* UCMJ art. 66; MCM, *supra* note 118, R.C.M. 1203.

may then be appealed to the CAAF.[225] After the CAAF has rendered a final decision, cases may then be appealed, via writ of certiorari, to the Supreme Court.[226] Although judges at the CAAF are civilians, cases never leave the military justice system until they are appealed to the Supreme Court.[227]

The court-martial is a tool that has been available to military commanders since the earliest days of our nation's military.[228] In general, the military justice system exists "to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote effectiveness in the military establishment, and thereby to strengthen the national security of the United States."[229] It is an established system that, in many ways, provides a model of due process protections.[230] Whether the court-martial is available, and if available, whether it is the best choice of forum for the judicial prosecution of post-capture detainee misconduct, are questions that Part IV will seek to answer.

C. Prosecuting Post-Capture Offenses in U.S. Federal Courts

United States federal district court is the third and final forum for consideration in prosecuting post-capture misconduct in detention facilities. Several terror suspects, including Timothy McVeigh, Zacarias Moussaoui, and Mamdouh Mahmud Salim have been tried in U.S. federal district court recently, and many others have sought habeas relief there.[231] As long as jurisdiction exists, the criminal code and criminal procedures are well-defined and well-established.[232]

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[225] *See* UCMJ art. 67; MCM, *supra* note 118, R.C.M. 1204.
[226] *See* UCMJ art. 67a; 28 U.S.C. § 1259 (2000); MCM, *supra* note 118, R.C.M. 1205.
[227] *See generally* UCMJ arts. 141–145.
[228] *See* WINTHROP, *supra* note 38, at 47.
[229] MCM, *supra* note 118, Pt. I, ¶ 3.
[230] 152 CONG. REC. S10,381 (daily ed. Sept. 27, 2006) (Letter to Sen. Frist from the Association of the Bar of the City of New York).
[231] Hirschkorn, *supra* note 2; *The McVeigh Trial: After 28 Days of "Overwhelming Evidence," the Jury Speaks: Guilty*, CNN.COM, http://www.cnn.com/US/9706/17/mcveigh.overview/ (last visited Feb. 25, 2008); Phil Hirschkorn, *Jury Spares 9/11 Plotter Moussaoui*, CNN, May 3, 2006, http://www.cnn.com/2006/LAW/05/05/moussaou.verdict/index.html; Carol Rosenberg, *Funds Requested to Help Prosecute Accused Detainees*, MIAMI HERALD, Feb. 6, 2007, at A15 ("The Justice Department . . . has for nearly five years been fending off hundreds of habeas corpus petitions filed by Guantánamo captives in the federal courts.").
[232] *See* 18 U.S.C. §§ 2–6005 (2000); FED. R. CRIM. P. 1–60; FED. R. EVID. 101–1103.

1. Personal Jurisdiction for U.S. Federal Courts

All of the suspects detained in the War on Terror who are destined for long-term detention and trial by military commission are brought to Guantanamo Bay, Cuba.[233] Should the Government contemplate trying in U.S. federal district court an alien unlawful enemy combatant detainee for a serious offense committed while at Guantanamo Bay, the first question is whether there is personal jurisdiction over him.

There is no "common law criminal jurisdiction in the federal courts."[234] Federal courts "are created by Congress and they possess no jurisdiction but what is given them by the power that creates them."[235] In considering whether a federal court has jurisdiction over conduct that occurs outside of the United States, the critical question related to conduct at Guantanamo Bay is "whether the United States has the power to reach the conduct in question under traditional powers of international law."[236]

International law allows nations to prohibit and punish "conduct that, wholly or in substantial part, takes place within its territory."[237] This principle is called a "link of territoriality."[238] It extends the jurisdiction of the United States over foreign nationals, as long as the conduct occurs in an area that can properly be considered the territory of the United States.[239] There are several U.S. laws that proscribe conduct "within the special maritime and territorial jurisdiction of the United States."[240] Title

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[233] *See* Sergeant Sara Wood, *Guantanamo Still Important, Relevant, Official Says*, ARMED FORCES INFO. SERVICE, Jan. 10, 2007, http://www.defenselink.mil/News/NewsArticle.aspx?ID=2642; Rhem, *supra* note 16.

[234] *See* Gibson, *supra* note 199, at 134 (quoting Hudson v. Goodwin, 10 U.S. (7 Cranch) 32, 33 (1812)).

[235] *Id.* at 135 (quoting Hudson v. Goodwin, 10 U.S. (7 Cranch) 32, 33 (1812)) (internal quotations omitted).

[236] *Id.* (quoting United States v. Noriega, 746 F. Supp. 1506, 1512 (S.D. Fla. 1990)).

[237] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(a) (1987).

[238] *Id.* § 402 cmt. a.

[239] *See id.* ("Territoriality and nationality are discrete and independent bases of jurisdiction . . . ."); *see, e.g.*, United States v. Lee, 906 F.2d 117 (4th Cir. 1990) (Jamaican national prosecuted in U.S. federal court for sexually abusing a child at Guantanamo Bay, Cuba). This is, of course, subject to a principle of reasonableness under international law. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987).

[240] *See* Gibson, *supra* note 199, at 135; 18 U.S.C. § 7 (2000); United States v. Erdos, 474 F.2d 157, 159 (4th Cir. 1973).

18 U.S.C. § 7 provides an extensive definition of this term of art.[241] If conduct occurs outside of the United States but "within the special maritime and territorial jurisdiction of the United States," federal courts will, in most cases, have jurisdiction over the conduct in question.

2. Criminal Code and Procedural Rules for U.S. Federal Courts

Once jurisdiction is established, prosecuting a detainee in federal court for post-capture misconduct simply involves the application of Title 18 of the U.S. Code.[242] The U.S. criminal code "cover[s] most common felonies such as assault, theft, robbery, murder, and manslaughter."[243] There are also several provisions that directly govern prison behavior, like possession of contraband, mutiny and riot, escape, and fleeing to avoid prosecution.[244]

Aside from the criminal code, U.S. criminal procedure, including both the Federal Rules of Criminal Procedure and the FREs, will apply in federal court.[245] Assistant United States Attorneys try the cases, although Judge Advocates may sometimes assist as Special Assistant U.S. Attorneys.[246] Further, should a public defender be necessary, he or she would be provided by the federal district court public defender program.[247] Finally, choice of venue is governed by 18 U.S.C. § 3238.[248] For cases arising out of Guantanamo Bay, Cuba, it is most likely that the charges would be filed in the District of Columbia.[249]

As long as jurisdiction exists and the conduct is proscribed by federal law, U.S. federal court offers a viable forum for the trial of criminal

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[241] 18 U.S.C. § 7.
[242] *Id.* §§ 2–6005.
[243] *See* Gibson, *supra* note 199, at 135.
[244] *See* 18 U.S.C. §§ 751, 1073, 1791, 1792.
[245] *See* FED. R. CRIM. P. 1(a); FED. R. EVID. 101.
[246] *See generally id.* FED. R. CRIM. P. 1(b)(1) (defining "Attorney for the government"); 28 U.S.C. § 543 (2000) (allowing for the appointment of Special Attorneys by the Attorney General); U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 23-3 (16 Nov. 2005) (describing the appointments of Special Assistant U.S. Attorneys).
[247] *See generally* 18 U.S.C. § 3006A (2000) (directing district courts to establish a method for appointing public defenders).
[248] 18 U.S.C. § 3238 (2000).
[249] *See* 18 U.S.C. § 3238 (allowing a criminal information to be filed in the District of Columbia if the crime occurs outside of a district and the last known residence of the offender or joint offenders is not known).

suspects. The system is well-known and well-established, and many detainees have sought redress in U.S. federal court through habeas petitions.[250] Part IV will weigh the procedural and practical strengths and weaknesses of federal district court as a forum for the prosecution of post-capture detainee misconduct.

Over the course of its history, the American legal system has handled the prosecution of POWs, spies, war criminals, and terrorists.[251] Alien unlawful enemy combatants are a new category of individuals, and the selection of the best forum for prosecuting them for crimes that occur completely within the context of their detention at Guantanamo Bay or another detention facility abroad presents a challenge. As there is no express law or policy governing post-capture misconduct by alien unlawful enemy combatants at Guantanamo Bay, the United States may be forced to select a forum for a trial should there be an instance of serious criminal misconduct in the detention facility.

IV. Selecting the Best Forum for the Prosecution of Post-Capture Misconduct

The preceding discussion demonstrates that no clear choice exists for an appropriate forum to try post-capture misconduct. International law suggests that the court-martial is the most appropriate forum; current U.S. policy suggests that the military commission is the most appropriate forum; and the trial of Mamdouh Mahmud Salim suggests that federal district court may be the most appropriate forum.[252] In selecting the best forum for trying this type of criminal misconduct, there are four basic criteria to consider. The first is personal jurisdiction. Without personal jurisdiction over an individual, the forum simply cannot hear the case. The next consideration is subject matter jurisdiction over the offense. There is a different slate of offenses available for each potential forum for trial. Third, there are practical issues that must factor into the decision, including the ease of charging, the location of the trial, and the availability of the parties. Finally, there are policy issues that surround each forum, including the current U.S. detainee policy and the

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[250] *See, e.g.*, Rasul v. Bush, 542 U.S. 466, 470 (2004).
[251] *See, e.g.*, Johnson v. Eisentrager, 339 U.S. 763 (1950); *In re* Yamashita, 327 U.S. 1 (1946); *Ex Parte* Quirin, 317 U.S. 1 (1942); Hirschkorn, *supra* note 231.
[252] *See supra* Part II.A; Military Order, *supra* note 25; Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600; Hirschkorn, *supra* note 2.

pragmatism of certain actions considering the U.S. position in the world community. This part will analyze each of the three available forums using these four criteria to assess their potential as a forum for prosecuting alien unlawful enemy combatants for post-capture misconduct, and conclude with a recommendation for those confronted with this issue.

A. Trial of Post-Capture Misconduct by Military Commission

Under current U.S. policy, alien unlawful enemy combatants will be tried by military commission for the crimes that led to their capture, specifically, those terrorist acts or other violations of the law of war for which they were detained.[253] The Military Order of November 13, 2001 states, "Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed . . . ."[254] After the Supreme Court decision in *Hamdan*, Congress overhauled the military commissions system with the Military Commissions Act of 2006.[255] The DOD has implemented this legislation with the *Manual for Military Commissions* and the *Regulation for Trial by Military Commissions*.[256] With nearly constant review and change, trying these individuals by military commission has proven arduous. More than six years have passed since the September 11th terrorist attacks and the Military Order of November 13, 2001, and only one case has proceeded to a conviction.[257]

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[253] *See* 10 U.S.C.S. § 948b(a) (LexisNexis 2008).
[254] *See* Military Order, *supra* note 25.
[255] *See* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.
[256] *See* MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, pmbl.; REGULATION FOR TRIAL BY MILITARY COMMISSIONS, *supra* note 133.
[257] This is the David Hicks case that concluded in March 2007. In return for a favorable pretrial agreement, David Hicks pled guilty to one charge. *See* News Release, U.S. Dep't of Defense, *Detainee Convicted of Terrorism Charge at Guantanamo Trial* (Mar. 30, 2007), http://www.defenselink.mil/releases/release.aspx?releaseid=10678 [hereinafter Press Release, U.S. Dep't of Defense, Detainee Convicted]; Rosenberg, *supra* note 23; *see also* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2761 (2006); Carol D. Leonnig & Julie Tate, *Some at Guantanamo Mark 5 Years in Limbo; Big Questions About Low-Profile Inmates*, WASH. POST, Jan. 16, 2007, at A01; Desiree N. Williams, *Guantanamo Prosecutor Expects New Charges Against Detainees by February*, JURIST, Jan. 6, 2007, http://jurist.law.pitt.edu/paperchase/2007/01/guantanamo-prosecutor-expects-new.php; Amnesty Int'l, Close Guantanamo: Guantanamo in Numbers (Dec. 2006), http://web.amnesty.org/library/Index/ENGAMR511862006?open&of=ENG-381 [herein after Amnesty Int'l, Guantanamo in Numbers] (on file with author).

For the trial of post-capture offenses, the viability of the military commission, as established under the Military Commission Act and implemented by the *Manual for Military Commissions*, depends first on whether the individual is subject to trial by military commission in the first place. The only individuals subject to trial by military commission are "alien unlawful enemy combatants."[258] A finding that an individual is an unlawful enemy combatant by a Combatant Status Review Tribunal, or similar competent authority, is dispositive for jurisdictional purposes.[259] If an individual is deemed to be a lawful enemy combatant, the military commission lacks jurisdiction and any offenses would be tried by court-martial.[260] If an individual is deemed to be a POW, the military commission lacks jurisdiction and any offenses would also be tried by court-martial.[261] If they are not aliens, but are U.S. citizens, the military commission lacks jurisdiction and any offenses would be tried in federal court.[262] Alien unlawful enemy combatants are the only persons that may be tried by a military commission.[263]

If the accused is an alien unlawful enemy combatant, personal jurisdiction attaches. The next question is whether the post-capture offense is a crime that may be tried by military commission. The Military Commissions Act of 2006 specifies the offenses for which an accused may be tried by military commission and the *Manual for Military Commissions* provides the elements for those offenses.[264] The offenses must be enumerated in the Act or must otherwise violate the law of war.[265] These are the only offenses that may be tried by military

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[258] *See* 10 U.S.C.S. §§ 948c, 948d(a).

[259] *See* 10 U.S.C.S. §§ 948d(a), (c); MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, R.M.C. 202(b); DOD DIR. 2310.01E, *supra* note 33, at 9. Unfortunately, many CSRTs simply categorized detainees as "enemy combatants" rather than "unlawful enemy combatants." *See* United States v. Khadr, No. 07-001 (U.S. Ct. Mil. Comm. Rev. Sep. 24, 2007).

[260] *See* Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 4, 120 Stat. 2600, 2631 (codified as amended at 10 U.S.C.S. § 802(a) (LexisNexis 2008)).

[261] *See* UCMJ art. 2(a)(9) (2008).

[262] *See* 10 U.S.C.S. §§ 948a, 948c (defining "alien," "unlawful enemy combatant," and specifying those persons subject to trial by military commissions); United States v. Lindh, 227 F. Supp. 2d 565 (E.D. Va. 2002); Gibson, *supra* note 199, at 135.

[263] *See* 10 U.S.C. S. § 948c.

[264] *Id.* § 950v; MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, pt. IV.

[265] 10 U.S.C.S. §§ 948b, 948d(a); Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2780 (2006) ("At a minimum, the Government must make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war.").

commission.[266] Furthermore, there are no provisions similar to Article 134 of the UCMJ that are intended to address those offenses that are prejudicial to good order and discipline.[267]

The next relevant inquiry is whether the crimes specified in the Military Commissions Act are intended to address only pre-capture law of war violations, or whether the crimes may include certain offenses committed post-capture. There are a few offenses that address "post-capture" misconduct, namely contempt, obstruction of justice, and perjury.[268] These three crimes, however, are in a separate section from the other substantive crimes, and are distinctly related to the investigation and trial of pre-capture offenses.[269] Aside from these three offenses, the rest seem to address terrorism or battlefield-type law of war violations.[270]

The *Manual for Military Commissions* provides the elements of these offenses and appears to answer the question of which offenses may be tried.[271] Aside from conspiracy, every offense listed in paragraph 950v of the Military Commissions Act contains an element that the conduct at issue "took place in the context of and was associated with armed conflict."[272] The term "armed conflict" is not defined anywhere in the Military Commissions Act of 2006 or the *Manual for Military Commissions*.[273] The best analogy for "armed conflict" appears to be the

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[266] *See* MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, R.M.C. 203.
[267] *See* 10 U.S.C.S. §§ 950p–w; *cf.* UCMJ art. 134 (2008) ("Though not specifically mentioned . . . , all disorders and neglects to the prejudice of good order and discipline . . . shall be taken cognizance of by a general, special, or summary court-martial, . . . and shall be punished at the discretion of that court.").
[268] 10 U.S.C.S. § 950w.
[269] *See id.* ("A military commission . . . may try offenses and impose such punishment as the military commission may direct for perjury, false testimony, and obstruction of justice related to military commissions under this chapter."); *cf.* 10 U.S.C.S. § 950v (demonstrating that contempt, perjury, and obstruction of justice are in a separate section from the other offenses in the Military Commissions Act).
[270] *See* 10 U.S.C.S. § 950v(b) (providing the list of substantive offenses under the Military Commissions Act).
[271] *See* MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, Pt. IV, at 3–21.
[272] *See id.*
[273] *See* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.); MANUAL FOR MILITARY COMMISSIONS, *supra* note 25.

type of conflict contemplated in Common Articles 2 and 3 of the 1949 Geneva Convention.[274]

This element has two prongs. The first prong is that the offense took place "in the context of . . . armed conflict." [275] Even using Common Articles 2 and 3, determining whether a state of "armed conflict" exists at any given point may be difficult due to the nature of the current War on Terror.[276] Fortunately, the Supreme Court simplified this task in two recent detainee cases. First, in *United States v. Hamdi*, the Supreme Court recognized the "unconventional nature" of the conflict in the War on Terror and held that "[t]he United States may detain, for the duration of . . . hostilities, individuals legitimately determined to be Taliban combatants who engaged in an armed conflict against the United States."[277] The Court further held that as long as "United States troops are still involved in active combat in Afghanistan, . . . detentions are part of the exercise of necessary and appropriate force, and are therefore authorized by the [Authorization for the Use of Military Force]."[278] Under the Court's reasoning, armed conflict continues as long as "active combat operations . . . are ongoing in Afghanistan," and detentions may continue as long as hostilities continue.[279] Second, in 2006, the Supreme Court held in *United States v. Hamdan* that Common Article 3 applies in the current conflict with al Qaeda.[280]

Even if it is clear that a state of armed conflict exists, there is still the second prong. Crimes with this element must be "associated with armed conflict."[281] As a general principle, Common Article 3 of the Geneva Conventions refers to those in detention as "hors de combat."[282] It is

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[274] *See, e.g.*, GC III, *supra* note 31, arts. 2 & 3, 6 U.S.T. at 3318–20, 75 U.N.T.S. at 136–38 (providing an example of Common Articles 2 and 3).
[275] *See* MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, Pt. IV, at 3–21.
[276] *See, e.g.*, GC III, *supra* note 31, arts. 2 & 3, 6 U.S.T. at 3318–20, 75 U.N.T.S. at 136–38 (providing an example of Common Articles 2 and 3). *But see* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2796 (2006) ([T]he scope of [Article 3] must be as wide as possible." (quoting GC III COMMENTARY, *supra* note 42, at 36 n.63)).
[277] United States v. Hamdi, 542 U.S. 507, 520 (2004) (internal quotations omitted).
[278] *Id.* at 521 (internal quotations omitted).
[279] *Id.* at 520–21.
[280] Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2793–97 (2006).
[281] *See* MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, Pt. IV, at 3–21.
[282] GC III, *supra* note 31, art. 3, 6 U.S.T. at 3318–20, 75 U.N.T.S. at 136–38. "Hors de combat" means "out of combat." *See* INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK 27 (Aug. 2006) [hereinafter OPERATIONAL LAW HANDBOOK].

commonly accepted, however, that a person who is out of the fight may, by their actions, place themselves back into action.[283] Whether a detainee has placed himself back into the "armed conflict" by committing a violent crime against a guard or another detainee will vary with each case. Consider the following statements from detainees at Guantanamo Bay:

> A detainee who has assaulted GTMO guards on numerous occasions and crafted a weapon in his cell stated that he can either go back home and kill as many Americans as he possibly can, or he can leave [Guantanamo Bay] in a box; either way it's the same to him. . . . [Another detainee stated] "I will arrange for the kidnapping and execution of [U.S.] citizens living in Saudi Arabia. . . . U.S. citizens will be kidnapped, held, and executed. They will have their heads cut off."[284]

These statements indicate that these detainees intend to continue hostilities to the extent they are able. But consider two other statements:

> [One detainee stated,] "Americans are very kind people . . . If people say that there is mistreatment in Cuba with the detainees, those type speaking are wrong, they treat us like a Muslim, not a detainee.' . . . [Another detainee stated, 'These people take good care of me. . . . The guards and everyone else is fine."[285]

These two passages demonstrate that the subjective view of the detainees as to whether armed conflict exists can be vastly different.[286] Whether conduct while in detention meets the element of "in the context of armed conflict" is a question of fact and will almost certainly vary with each case.

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[283] *Cf.* GC III COMMENTARY, *supra* note 42, at 39 (describing those who have laid down their arms) ("The important thing is that the man in question will be taking no further part in the fighting"); OPERATIONAL LAW HANDBOOK, *supra* note 282, at 27 ("[M]ost agree surrender constitutes a cessation of resistance and placement of one's self at the discretion of the captor.").

[284] JTF-GTMO Information on Detainees, *supra* note 1, at 5.

[285] *Id.*

[286] With no caselaw on this subject, it remains to be seen whether this element is a subjective one, an objective one, or has both subjective and objective components.

Based on these two prongs, if the conduct occurs while active hostilities are continuing in the War on Terror and is an effort to continue hostilities, then it appears that the conduct will likely meet the "armed conflict" element.[287] As one example, Mohammed Mansour Jabarah's hoarding of weapons and identification of targets while held in a Fort Dix facility were determined to be a clear effort to continue hostilities against U.S. officials.[288] More difficulty arises in addressing a murder in the course of an escape attempt, or a murder of a fellow detainee. Based on the facts, it may not be clear that the crimes are "associated with armed conflict," and there may be cases where it may be impossible to prove that element beyond a reasonable doubt. [289]

The next issue with subject matter jurisdiction is the nature of the charges subject to trial by military commission. In considering crimes within detention facilities, there appear to be definite limits to the substantive offenses enumerated under the Military Commissions Act.[290] While crimes like murder in violation of the law of war, intentionally causing serious bodily injury, rape, and taking hostages are available in the Act, others, like rioting and escape, are not.[291] This, however, may not be a serious issue. Considering the effort in convening a military commission, the level of appellate scrutiny, and the potential political ramifications for the United States on a national and global scale, perhaps it is prudent that only those crimes that are truly *malum in se* be tried by judicial means.[292] Minor disciplinary infractions and nonviolent escape attempts can be handled easily through the established camp disciplinary measures.[293] More serious post-capture crimes, like

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[287] *See, e.g.*, MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, Pt. IV, at 3–21.

[288] White & Richburg, *supra* note 21 (According to federal prosecutors, Mohammed Mansour Jabarah's writings "make clear that [he] had secretly disavowed cooperation and was affirmatively planning further jihad operations, including in all likelihood the murder of government officials in some sort of suicide operations.").

[289] *See id.*; MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, Pt. IV, at 3–21; *see also* Military Commissions Act of 2006 10 U.S.C.S. § 949l (LexisNexis 2008) (providing an instruction to the commission that offenses must be proven beyond a reasonable doubt).

[290] *See* 10 U.S.C.S. §§ 950p–w.

[291] *See id.*

[292] *Malum in se* means "[a] crime or an act that is inherently immoral, such as murder, arson, or rape." BLACK'S LAW DICTIONARY, *supra* note 146, at 971. This is contrasted with *malum prohibitum*, or "[a]n act that is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral." *Id.*

[293] *See* Greenhill, *supra* note 15, at 12 ("If you break a camp rule or fail to follow the guard's instructions, you becomes a 'noncompliant' detainee, in which case you lose what are considered comfort items . . . ."); AR 190-8, *supra* note 115, para. 3-7c (outlining disciplinary measures available to camp commanders). Withdrawal of

aggravated assault, murder, or rape, are available under the Military Commissions Act, as long as the evidence satisfies the "armed conflict" element.[294]

As long as jurisdiction exists over the detainee and the offense, there are several practical benefits to trying detainees for post-capture misconduct in a military commission. First, as stated earlier, it is clear that under the current U.S. policy, alien unlawful enemy combatants are to be tried by military commission.[295] Second, the post-capture offenses can be tried, in most cases, at the same time as the pre-capture offenses.[296] Third, as outlined in Part III.A, the procedural rules that govern trial by military commission are more relaxed than those that govern trial by court-martial or trial in federal court, while still endeavoring to ensure a fair trial.[297] Fourth, as of now, the military commissions will convene at Guantanamo Bay, making it simple to ensure the presence of the accused.[298] Lastly, the crimes contemplated here would have occurred at the detention facility at Guantanamo Bay, making it easy to obtain the presence of the guards and other detainees who are witnesses, as well as most of the other evidence in the case.

There are, however, at least two practical drawbacks to trying post-capture offenses by military commission. As noted already, only one commission has made it to a verdict.[299] In prosecuting post-capture offenses, it seems very likely that the evidence will be present, the crimes

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privileges is an authorized punishment for a breach of camp discipline, but withdrawal of rights is not. *See* GC III, *supra* note 31, arts. 88, 90, 6 U.S.T. at 3384–86, 75 U.N.T.S. at 202–04.

[294] *See* 10 U.S.C.S. §§ 950p–w; MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, Part IV, at 3–21.

[295] *See* 10 U.S.C.S. §§ 948b, 948c; Military Order, *supra* note 25.

[296] However, not all detainees will be tried by military commission. It appears that only about one-quarter of those detained will face trial. *See* Jim Garamone, *Bush Says Military Commissions Act Will Bring Justice*, ARMED FORCES INFO. SERV., Oct. 17, 2006, http://www.defenselink.mil/news/newsarticle.aspx? id=1633 (stating that only about seventy-five detainees will face trial by military commission); *see also* Carol Rosenberg, Pentagon Still Plans 80 Trials at Guantanamo, MIAMI HERALD, Nov. 14, 2007, *available at* https://www.us.army.mil/suite/earlybird/Nov2007/e20071114561200.html (stating that as of November 2007, only eighty of the 305 detainees will likely face trial for war crimes).

[297] *See* 10 U.S.C.S. § 949a.

[298] Kathleen T. Rhem, *Military Commissions Proceedings to Resume This Week at Guantanamo Bay*, ARMED FORCES INFO. SERV., Jan. 9, 2006, http://www.defenselin.mil/news/newsarticle.aspx?id=14655; Rosenberg, *supra* note 23.

[299] *See* Press Release, U.S. Dep't of Defense, Detainee Convicted, *supra* note 257.

will be apparent, and the need to try the individual for the offenses in a speedy manner will be paramount. The deterrence impact of the trial and punishment of a serious crime will be lessened as the time between the offense and the trial increases.[300] Trying post-capture offenses by military commission may simply take too long to be an effective tool for protecting the good order and discipline in the camps.

The other practical drawback is the nature of the convening authority and the prosecutors for the military commissions. Charges are normally sworn by an official in the Office of the Chief Prosecutor of the Office of Military Commissions.[301] All of the evidence must go to the Convening Authority at the DOD Office of Military Commissions for referral to military commission.[302] This swearing and referral process may take time and will have national-level implications.[303] As a consequence of the significant separation between the facility and those responsible for convening the military commissions, it is foreseeable that those in command of the facility will lack any measure of real control over whether a case of post-capture misconduct goes before a military commission. It is also foreseeable that, on any particular case, the views of the chief prosecutor, the Convening Authority (considering the political and national views of the case), and the commander of the facility (considering the impact of the case on the good order of the facility and morale of the guards) may be divergent.

While these practical drawbacks are important, the policy issues generate the most significant concern with trying post-capture misconduct by military commission. Trying detainees by military commission for terrorist acts or other violations of the law of war has

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[300] Alan M. Dershowitz, Background Paper, *in* TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 69, 72 (1976) ("The severity of the penalty may be less important than such factors as the certainty and promptness of its infliction on all who commit the crime . . . ."). One may question, however, the deterrence value of certain punishments considering the indefinite nature of detention at Guantanamo Bay.

[301] REGULATION FOR MILITARY COMMISSION, *supra* note 134, paras. 4-1, 4-3.

[302] *See* 10 U.S.C.S. § 948h; REGULATION FOR MILITARY COMMISSION, *supra* note 134, paras. 4-1 & 4-3; *see also* News Release, U.S. Dep't of Defense, Seasoned Judge Tapped, *supra* note 164; U.S. Dep't of Defense, Susan J. Crawford, Convening Authority for Military Commissions: Biography, http://www.defenselink.mil/news/d20070207crawford.pdf (last visited Feb. 7, 2008).

[303] The time factor may be only a minor issue, as the Office of the Chief Prosecutor of the Office of Military Commissions is also located at the Department of Defense in Washington, D.C.

proven time-consuming and difficult. On a national level, the procedures have faced intense scrutiny and revision.[304] The U.S. detainee policy has also received criticism on a global level.[305] Additionally, pre-capture offenses often require proof that is difficult to obtain. But post-capture and pre-capture offenses are vastly different. Punishing serious post-capture crimes committed in a U.S. detention facility should not be overly controversial and the crimes should not be very difficult to prove. To maintain safety and discipline in the facility, it is essential that the facility commanders have the ability to address those cases of serious criminal misconduct that occur within the facility. Using the controversial military commission system and combining post-capture misconduct with pre-capture misconduct, however, may cause some to question the legitimacy of the prosecution of the post-capture misconduct by military commission, even though it may not be otherwise challenged or criticized if tried in a court-martial or a federal district court. Additionally, trying the pre-capture offenses with the post-capture offenses may unduly delay and complicate what would otherwise be relatively straightforward trial.

In conclusion, the only individuals who may be tried by military commission are alien unlawful enemy combatants, and the only crimes that may be tried are those in the Military Commissions Act or acts that are crimes under the law of war. Offenses listed in the Military Commissions Act are subject to the requirement that the offenses occur "in the context of and [be] associated with armed conflict."[306] This will

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[304] *See, e.g.*, Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2786–98 (2006) (analyzing and criticizing the procedures for the military commissions established in Military Commission Order No. 1, *supra* note 130); *Recorded Version: Statement by Major General Scott C. Black Before the Armed Services Comm. of the U.S. H. Rep.*, 109th Cong. 1 (2006) ("Current military commission procedures reflect a good start, but we can make the system better.") (addressing the Supreme Court decision in *Hamdan*, 126 S. Ct. at 2749, and the need to amend the military commission procedures created in Military Commission Order No. 1, *supra* note 130).

[305] *See* Press Release, United Nations, UN Expert On Human Rights and Counter Terrorism Concerned That Military Commissions Act is Now Law in United States (Oct. 27, 2006), http://www.unhchr.ch/hurrican.nsf/view01/13A2242628618D12C12572140030A8D9?opendocument [hereinafter United Nations Press Release] (on file with author) ("[T]he [Military Commissions Act of 2006] contains a number of provisions that are incompatible with the international obligations of the United States under human rights law and humanitarian law."); Amnesty Int'l, Guantánamo's Military Commissions, *supra* note 257 ("On 17 October 2006 President Bush signed the Military Commissions Act, which codifies in US law a substandard and discriminatory system of justice for those held in Guantánamo Bay, Afghanistan, and elsewhere.").

[306] *See* MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, Pt. IV, at 3–21.

require a fact-specific determination in each case that may sometimes prove problematic. Further, while there are some practical benefits with trying these offenses by military commission, there are also issues with commingling pre-capture and post-capture offenses that may compromise the legitimacy of the post-capture charges. With these caveats, it seems that the military commission offers a viable forum for prosecuting certain categories of post-capture misconduct.

B. Trial of Post-Capture Misconduct by Court-Martial

The UCMJ, U.S. policy, and international law governing the treatment of POWs provide that the court-martial is the legal mechanism for trying enemy POWs and lawful enemy combatants.[307] For alien unlawful enemy combatants, though, the law is less clear. Whether an alien unlawful enemy combatant is subject to trial by court-martial for post-capture offenses depends on both the personal jurisdiction portion and the substantive offense portions of the UCMJ. Finally, there are other significant practical and policy issues that impact the decision to prosecute post-capture misconduct by court-martial.

First, for POWs, Article 63 of the 1929 Convention directed that judicial sanctions be imposed "by the same tribunals and in accordance with the same procedure as in the case of persons belonging to the armed forces of the detaining Power."[308] Article 102 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War added significant procedural safeguards to Article 63 of the 1929 Convention.[309] The Geneva Conventions also established a definite preference for the trial of POWs by military court, rather than a civilian court.[310]

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[307] *See* UCMJ art. 2(a)(9) (2008); Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 4(a), 120 Stat. 2600, 2631 (codified as amended at 10 U.S.C.S. § 802(a) (LexisNexis 2008)) (amending Article 2(a) to include "lawful enemy combatants . . . who violate the law of war" in the list of persons subject to the UCMJ); *see also supra* Parts II.A, III.B.1..

[308] 1929 GPW, *supra* note 31, art. 63, 47 Stat. at 2052, 2 Bevans at 952.

[309] GC III, *supra* note 31, art. 102, 6 U.S.T. at 3394, 75 U.N.T.S. at 212; *see also* GC III COMMENTARY, *supra* note 42, at 476.

[310] GC III, *supra* note 31, art. 84, 6 U.S.T. at 3382–84, 75 U.N.T.S. at 200–02; MacDonnell, *supra* note 128, at 31. Additionally, the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War also allows for the use of regularly constituted military courts to try persons in occupied territory, as well as internees. *See* GC IV, *supra* note 63, arts. 66, 117, 6 U.S.T. at 3382–84, 75 U.N.T.S. at 328–330, 366; GC IV COMMENTARY, *supra* note 63, at 339–41, 476–77. However, as stated earlier, the

Military courts typically try violations of the military laws and regulations, and have expertise in handling military-specific offenses.[311] Article 2(a)(9) of the UCMJ implements these principles of international law, stating that "prisoners of war in the custody of the armed forces" are subject to UCMJ jurisdiction and may be tried by court-martial.[312] Army Regulation 190-8 also implements this provision.[313] Paragraph 3-7b of AR 190-8 states, "Judicial proceedings against [enemy POWs] . . . will be by courts-martial or by civil courts"[314] and the Military Commissions Act provides for court-martial jurisdiction over "lawful enemy combatants . . . who violate the law of war."[315]

Whether alien unlawful enemy combatants are subject to trial by court-martial remains an open question. Unlike POWs and lawful enemy combatants, alien unlawful enemy combatants are not mentioned at all in Article 2 of the UCMJ.[316] By a plain reading of the statute, it appears that alien unlawful enemy combatants have been deliberately excluded from court-martial jurisdiction. This is supported by the fact that the Military Order of November 13, 2001 specifically directs that those detained pursuant to the order "be tried by military commission for *any and all offenses* triable by military commission."[317] There is no express exclusion for post-capture offenses in either the Military Commissions

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Bush Administration has not applied this convention to detainees in the War on Terror. *See, e.g.*, Bybee Memo, *supra* note 85 (applying only GC III and only collaterally referencing GC IV); Humane Treatment of Al Qaeda and Taliban Detainees Memo, *supra* note 32, at 134 ("[N]one of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting party.").

[311] *See* GC III COMMENTARY, *supra* note 42, at 412.

[312] *See* UCMJ arts. (2)(a)(9), 17 (2008).

[313] *See* AR 190-8, *supra* note 115, para. 1-1.

[314] *See id.* para. 3-7b.

[315] *See* Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 4(a), 120 Stat. 2600, 2631 (codified as amended at 10 U.S.C.S. § 802(a) (LexisNexis 2008)) (amending Article 2(a) to include "lawful enemy combatants . . . who violate the law of war" in the list of persons subject to the UCMJ); *see also* UCMJ art. 17. One point that remains unclear is the scope of this jurisdiction. A plain reading of the statute indicates that lawful enemy combatants are subject to court-martial jurisdiction only if they violate the law of war. However, a more reasonable reading of this provision is that detained lawful enemy combatants who commit offenses in detention are subject to trial by court-martial regardless of whether the offenses in the facility constitute a technical law of war violation.

[316] *See* Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 4(a), 120 Stat. 2600, 2631 (codified as amended at 10 U.S.C.S. § 802(a) (LexisNexis 2008)); UCMJ art. 2(a)(9).

[317] Military Order, *supra* note 25 (emphasis added).

Act or the *Manual for Military Commissions*.[318] Section 948d of the Military Commissions Act states that "[a] military commission . . . shall have jurisdiction to try any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant."[319] This section also states, "Military commissions . . . shall not have jurisdiction over lawful enemy combatants."[320] Finally, while Article 21 of the UCMJ states that court-martial jurisdiction is not exclusive, the Military Commissions Act contains no similar provision.[321]

Together, these provisions imply that military commissions are the exclusive forum for the trial of alien unlawful enemy combatants, regardless of whether the offense is pre-capture or post-capture, as long as the offense is one of those enumerated under the Act.[322] Applying the canon of statutory construction *expressio unius est exclusio alterius*, military commissions are the exclusive forum for the trial of alien unlawful enemy combatants.[323] By specifically providing for court-martial jurisdiction over lawful enemy combatants and not alien unlawful enemy combatants, it appears that Congress excluded alien unlawful enemy combatants from court-martial jurisdiction.

Thus, applying Articles 2(a)(9) and 2(a)(13) of the UCMJ, §§ 948c and 948d of the Military Commissions Act, and the Military Order of November 13, 2001, it appears that courts-martial lack personal jurisdiction over alien unlawful enemy combatants.[324] However, that exclusion is not an express one, leaving a tenuous argument that, should no other forum exist, a court-martial may hear the case.[325] Neither the

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[318] *See* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.); MANUAL FOR MILITARY COMMISSIONS, *supra* note 25.

[319] Military Commissions Act of 2006, 10 U.S.C.S. § 948d(a) (LexisNexis 2008); UCMJ art. 2(a)(9).

[320] 10 U.S.C.S. § 948d(b); UCMJ art. 2(a)(9).

[321] UCMJ art. 21; Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.).

[322] *See* 10 U.S.C.S. § 948d.

[323] *Expressio unius est exclusio alterius* is a canon of statutory construction meaning that "to express or include one thing implies the exclusion of the other, or of the alternative." BLACK'S LAW DICTIONARY, *supra* note 146, at 602.

[324] UCMJ arts. 2(a)(9); 10 U.S.C.S. §§ 948c, 948d; sec. 4(a)(1), 120 Stat. 2600, 2631 (codified as amended at 10 U.S.C.S. § 802(a) (LexisNexis 2008)); Military Order, *supra* note 25.

[325] *See generally* UCMJ art. 2; 10 U.S.C.S § 950v.

UCMJ nor the Military Commissions Act specifically divest alien unlawful enemy combatants of court-martial jurisdiction.[326] Also, the Military Commissions Act appears to focus on pre-capture offenses that constitute war crimes or other violations of the law of war.[327] As such, there is a tenuous argument that, should no other forum exist, a court-martial may hear the case. Advancing the argument one step further, as discussed in Part III.B., Article 2 has one paragraph that offers a potential jurisdictional basis for the trial of alien unlawful enemy combatants. Article 2(a)(12) provides for UCMJ jurisdiction over "persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside of the United States."[328] The original intent of this section was to ensure that the armed forces had jurisdiction over foreign nationals who entered military property overseas, and committed offenses on the property.[329] Although, there is not a single reported case of this authority being used,[330] this provision appears to extend personal jurisdiction over foreign persons present on Guantanamo Bay. While the arguments outlined in the previous paragraph strongly suggest that the military commission is the exclusive forum for the trial of alien unlawful enemy combatants, the plain language of Article 2(a)(12) seems to provide for court-martial jurisdiction over alien unlawful enemy combatants for their post-capture offenses committed on the installation, especially if a another forum lacks jurisdiction over the case.

The caselaw regarding detainee habeas corpus rights further supports the notion that Article 2(a)(12) should provide for jurisdiction over post-capture offenses on Guantanamo Bay. As Supreme Court Justice Anthony Kennedy said in his concurring opinion in *Rasul v. Bush*, "Guantanamo Bay is in every practical respect a United States

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[326] *See generally* UCMJ art. 2; 10 U.S.C.S § 948c.
[327] *See* discussion *supra* Part III.A.2.
[328] UCMJ art. 2(a)(12). For brevity, the two exceptions were excluded from the quotation in the main text. Those two exceptions are: (1) "Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law" and (2) "which is outside the United States and outside the Canal Zone, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands." *Id.* It appears that neither one of these exceptions would apply to detainees held at the U.S. Naval Base at Guantanamo Bay, Cuba.
[329] *See* H.R. REP. NO. 81-491, at 9 (1949), *reprinted in* INDEX AND LEGISLATIVE HISTORY: UNIFORM CODE OF MILITARY JUSTICE (William S. Hein & Co, Inc. 2000) (1949); Gibson, *supra* note 199, at 134.
[330] Gibson, *supra* note 199, at 134.

territory."[331] As discussed in the next section, Section 7 of the Military Commissions Act of 2006 deprives any court of jurisdiction to receive a writ of habeas corpus on behalf of an alien detained as an enemy combatant at Guantanamo Bay.[332] However, the Supreme Court held in *Rasul* that the United States "exercises complete jurisdiction and control" over Guantanamo Bay, and therefore, "[the detainees] are entitled to invoke the federal courts' [habeas corpus] authority . . . ."[333] As aliens present on Guantanamo Bay could invoke their right to file writs of habeas corpus in federal court (before the passage of the Military Commissions Act of 2006), even if present there against their will, it would be logical that they would also be subject to court-martial for crimes committed on the military base under the plain language of Article 2(a)(12). As there is not a single reported case of this authority being exercised, this argument remains a theoretical one.[334]

From the foregoing, it appears that personal jurisdiction is the most significant roadblock for the trial of alien unlawful enemy combatants by court-martial. Article 2(a)(12), at this point, offers the most promise, although it is not immune from the risk of an unfavorable interpretation by a military judge or appellate court. Subject matter jurisdiction, though, is not an issue at all. The UCMJ provides numerous options for charging criminal misconduct in a detention facility. The punitive articles of the UCMJ include the major felony offenses, like murder, sexual assault, and aggravated assault.[335] These articles also cover misconduct specifically related to prisons, like rioting, escape, and "misconduct as a prisoner."[336] Finally, the UCMJ covers a wide range of offenses involving military discipline, including disrespect and failure to follow orders.[337] All in all, the UCMJ offers perhaps the best coverage of criminal misconduct in a military detention facility.

Provided that personal and subject matter jurisdiction exist, there are several practical advantages to trying post-capture misconduct by courts-martial. The first is that the military is experienced at trying courts-martial. The court-martial is the forum by which servicemembers are

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[331] Rasul v. Bush, 542 U.S. 466, 487 (2004) (Kennedy, J., concurring).
[332] Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 7, 120 Stat. 2600, 2635 (codified as amended at 28 U.S.C.S. § 2241 (LexisNexis 2008)).
[333] *Rasul*, 542 U.S. at 480.
[334] Gibson, *supra* note 199, at 134.
[335] *See* UCMJ arts. 118, 120, 128.
[336] *See id.* arts. 95, 105, 116.
[337] *See id.* arts. 89–92.

prosecuted around the world nearly every day. It is recognized as a model of due process protections[338] and it has been continually refined through assessment by appellate courts, Congress, and the President.[339] In addition, as Guantanamo Bay is a military installation, courts-martial have been tried there and will likely continue to be tried there.[340] In stark contrast, military commissions have faced numerous challenges and have only reached a conviction in one case.[341] As courts-martial are a familiar system, cases are likely to move to trial much faster, even with such substantial due process requirements as the Article 32 investigation and the referral process.[342]

Furthermore, the issues that justify military commissions for pre-capture offenses do not exist for crimes that might occur in a detention facility. When proving an offense in a detention facility, it is very likely that there will be witnesses and perhaps even video surveillance evidence. Most witnesses who are guards or detainees will be readily available, and there should be little or no need for classified evidence, hearsay, or a statement obtained through any sort of intelligence-gathering mechanism.[343] Finally, transporting the accused to a trial by

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[338] *See, e.g.*, H.R. REP. NO. 109-664, pt. 1, at 86 (2006); 152 CONG. REC. S10,410 (daily ed. Sept. 28, 2006) (Letter from Air Force Judge Advocate General Major General Jack Rives to Sen. McCain).

[339] *See* Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 4(a)(1), 120 Stat. 2600, 2631 (codified as amended at 10 U.S.C.S. § 802(a) (LexisNexis 2008)) (amending Article 2(a) to include "lawful enemy combatants . . . who violate the law of war" in the list of persons subject to the UCMJ); Exec. Order No. 13,387, 70 Fed. Reg. 60,697 (2005) (2005 Amendments to the Manual for Courts-Martial, United States).

[340] *See* e-mail from Major Michelle Hansen, Assistant Staff Judge Advocate, JTF-GTMO, to the author (Jan. 11, 2008, 07:22:00 EST) (on file with author) (stating that there were three Army and two Navy courts-martial tried on the Guantanamo Bay military installation in 2007); e-mail from Homan Barzmehri, Management Program Analyst, Office of the Clerk of Court, U.S. Army Court of Criminal Appeals, to the author (Jan. 11, 2008, 12:40:00 EST) (on file with author) (stating that there were two Army courts-martial tried on the Guantanamo Bay military installation in 2005 and two in 2003); *see also* United States v. Elmore, 56 M.J. 533 (N-M. Ct. Crim. App. 2001); United States v. Johnson, 1 M.J. 1104 (N.M.C.M.R. 1987); United States v. Suter, 16 C.M.R. 422 (N.M.B.R. 1954).

[341] Once again, this is the Hicks case, concluded in March 2007. *See* Press Release, U.S. Dep't of Defense, Detainee Convicted, *supra* note 257. For examples of criticism and challenge, see Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2791 (2006); Leonnig & Tate, *supra* note 257.

[342] *See* UCMJ art. 32 (2008); MCM, *supra* note 118, R.C.M. 405.

[343] *See Hamdan*, 126 S. Ct. at 2791; Military Order, *supra* note 25; 152 CONG. REC. H7533–35 (daily ed. Sept. 27, 2006) (statement of Rep. Hunter); *Concerning the Supreme Court's Decision in* Hamdan v. Rumsfeld*: Hearing Before the H. Comm. on*

court-martial on the installation should not be any more of a challenge than transporting him to a trial by military commission.

As described earlier, there is also significant legal and historical precedent for trying military prisoners by court-martial. During World War II, U.S. forces convened 119 general courts-martial and forty-eight special courts-martial against 326 enemy POWs held in the United States, where the results ranged from acquittal to the death penalty.[344] In one example, five German POWs were tried and executed for the murder of another German POW at a POW camp in Oklahoma.[345] Both the 1949 Geneva Convention Relative to the Treatment of Prisoners of War and AR 190-8 mandate trial by court-martial or civilian courts for offenses committed by POWs, civilian internees, and retained personnel.[346] As the United States has drawn harsh criticism for its use of military commissions,[347] providing detainees with the complete due process protections of the UCMJ in a trial for post-capture misconduct will build important goodwill with our coalition allies and other world organizations.[348]

Armed Services, 109th Cong. (Sept. 7, 2006) (statement of Steven G. Bradbury, Acting Assistant Att'y Gen. for the Office of Legal Counsel, U.S. Dep't of Justice), *available at* http://armedservices.house.gov/comdocs/schedules/9-7-06BradburyStatement.pdf.

[344] DAVIDSON, *supra* note 206, at 5.

[345] *Id.* For other examples, see Martin Tollefson, *Enemy Prisoners of War*, 32 IOWA L. REV. 52, 58–59 (1946).

[346] *See* GC III, *supra* note 31, arts. 63, 84, 102, 6 U.S.T. at 3364–66, 3382–84, 3394, 75 U.N.T.S. at 182–84, 200–02, 212; AR 190-8, *supra* note 115, para. 3-7b. Additionally, the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War also allows for the use of regularly constituted military courts to try persons in occupied territory, as well as internees. *See* GC IV, *supra* note 63, arts. 66, 117, 6 U.S.T. at 3558–60, 3596, 75 U.N.T.S. at 328–330, 366; GC IV COMMENTARY, *supra* note 63, at 339–41, 476–77. However, for a number of reasons, the Bush Administration has not applied this convention to detainees in the War on Terror. *See, e.g.*, Bybee Memo, *supra* note 85 (applying only GC III and only collaterally referencing GC IV); Humane Treatment of Al Qaeda and Taliban Detainees Memo, *supra* note 32, at 134 ("[N]one of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting party.").

[347] *See, e.g.*, United Nations Press Release, *supra* note 305 ("[T]he [Military Commissions Act of 2006] contains a number of provisions that are incompatible with the international obligations of the United States under human rights law and humanitarian law."); Amnesty Int'l, Guantánamo's military commissions, *supra* note 257 ("On 17 October 2006 President Bush signed the Military Commissions Act, which codifies in US law a substandard and discriminatory system of justice for those held in Guantánamo Bay, Afghanistan, and elsewhere.")

[348] *See also* 152 CONG. REC. S10,256 (daily ed. Sept. 27, 2006) (statement of Sen. Leahy) ("Talk to anyone who travels around the world anywhere, even among some of our closes

There are still drawbacks to using courts-martial. First, as pre-capture offenses would be tried by military commission, any post-capture offenses would be tried separately from the pre-capture offenses. This would likely add an additional burden on the judicial system. This may also force a need for separate counsel for each trial, or at least force some counsel to prepare for two separate proceedings with somewhat different rules. Second, as a policy matter, trying alien unlawful enemy combatants by court-martial for post-capture offenses may weaken the arguments for trying them by military commission for pre-capture misconduct. The Executive Branch has proffered that the difficulties in proof for prosecuting alien unlawful enemy combatants for their law of war violations necessitate trial by military commissions.[349] The difficulties in producing witnesses, the classified nature of certain evidence, and the problems in overcoming certain hearsay issues do not make a court-martial a viable alternative for the pre-capture offenses.[350] But if alien unlawful enemy combatants were tried for *post-capture* misconduct in a court-martial, it may intensify the clamor for *all* offenses to be tried by courts-martial.[351] While a trial for an offense in a detention facility and a trial for a law of war violation on the battlefield are completely different, trying a detainee by court-martial for any offense

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allies, our best friends. We are asked, What are you doing? Have you lost your moral compass?"); 152 CONG. REC. H7554 (statement of Rep. Jackson-Lee) ("[I]f American personnel blithely toss aside our international treaty obligations to uphold standards in the detention and interrogation of wartime prisoners, America will alienate our long-time allies who are crucial partners in the fight against terrorism."); 152 CONG. REC. H7554 (statement of Rep. Cardin) ("[The Military Commissions Act of 2006 . . . will make it harder to work with our allies to build an effective coalition to defeat terrorism.").

[349] *See, e.g.*, Military Order, *supra* note 25; 152 CONG. REC. H7533–35 (daily ed. Sept. 27, 2006) (statement of Rep. Hunter); Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2791 (2006); *Concerning the Supreme Court's Decision in* Hamdan v. Rumsfeld*: Hearing Before the H. Comm. on Armed Services*, 109th Cong. (Sept. 7, 2006) (statement of Steven G. Bradbury, Acting Assistant Att'y Gen. for the Office of Legal Counsel, U.S. Dep't of Justice), *available at* http://armedservices.house.gov/comdocs/schedules/9-7-06BradburyStatement.pdf; David S. Cloud & Sheryl Gay Stolberg, *White House Bill Proposes System to Try Detainees*, N.Y. TIMES, July 26, 2006, at A1 ("[C]ivilian lawyers from the Departments of Defense and Justice . . . had said that they believed the military code was inappropriate for prosecuting terror suspects . . . .").

[350] *See* Military Order, *supra* note 25; 152 CONG. REC. H7533–35 (daily ed. Sept. 27, 2006) (statement of Rep. Hunter); *Hamdan*, 126 S. Ct. at 2791.

[351] *See, e.g.*, Cloud & Stolberg, *supra* note 349 ("[T]he administration was circulating the measure with the intention of winning over Republican senators who have led the calls for using court-martial procedures . . . .").

may cause critics, and perhaps the courts, to question the need for military commissions.[352]

From the foregoing, the benefits to trying alien unlawful enemy combatants by court-martial, even when contrasted with the potential drawbacks, are significant. The court-martial is an established, available forum that is widely accepted for prosecution of criminal misconduct. It is the proper tribunal for lawful enemy combatants and POWs—other detainees who are somewhat similarly situated. Finally, the court-martial provides substantial due process protections for those accused of post-capture misconduct. As the problems of proof should not be an issue for post-capture misconduct, there is little justification for deviating from the due process protections afforded in courts-martial. Nevertheless, personal jurisdiction is a significant roadblock to the actual availability of this forum for the prosecution of post-capture misconduct. Either a liberal interpretation of Article 2(a)(12) or a legislative amendment to Article 2 providing for jurisdiction over alien unlawful enemy combatants for offenses committed while detained by U.S. armed forces would pave the way for the trial by court-martial of misconduct by alien unlawful enemy combatants in a detention facility.

C. Trial of Post-Capture Misconduct in Federal Court

The final forum for consideration is the U.S. federal district court. The case mentioned at the beginning of this article, *United States v. Salim*, was tried in the federal district court in the Southern District of New York.[353] While Salim was physically present in the United States when the crime occurred, it was, nonetheless, post-capture misconduct by an individual who would be, in any other circumstance, an alien unlawful enemy combatant.[354] Whether a detainee at Guantanamo Bay is subject to trial by federal court for post-capture offenses depends first on whether the individual is subject to the personal jurisdiction of a federal court, then on whether Title 18 of the U.S. Code allows for the prosecution of the misconduct alleged. Finally, as with courts-martial,

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[352] *See, e.g.*, *Hamdan*, 126 S. Ct. at 2786–98 (criticizing the military commissions process).

[353] Hirschkorn, *supra* note 2.

[354] Military Commissions Act of 2006, 10 U.S.C.S. § 948a (LexisNexis 2008); Hirschkorn, *supra* note 2.

there are practical and policy issues that impact trying these cases in federal district court.

First, it appears that U.S. federal courts have jurisdiction over crimes that occur at Guantanamo Bay. International law allows nations to prohibit and punish "conduct that, wholly or in substantial part, takes place within its territory."[355] The definition of "territory" is broad. Lands that are characterized as within the "special and maritime jurisdiction of the United States" under 18 U.S.C § 7 include "any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof."[356] The U.S. Naval Base at Guantanamo Bay, Cuba is subject to the exclusive jurisdiction and control of the United States, as well as its criminal laws.[357] Additionally, in 2001, the USA Patriot Act added some more definitive language to 18 U.S.C. § 7.[358] Section 804 of the Patriot Act provides for U.S. federal criminal jurisdiction over crimes committed against U.S. nationals on "the premises of United States diplomatic, consular, military, or other United States government missions or entities in

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[355] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(a) (1987).

[356] 18 U.S.C.S. § 7(3) (LexisNexis 2001).

[357] *See* Rasul v. Bush, 542 U.S. 466, 480 (2004) ("By the express terms of its agreements with Cuba, the United States exercises complete jurisdiction and control over the Guantanamo Bay Naval Base . . . ."); *id.* at 483 ("No party questions the District Court's jurisdiction over [the detainees'] custodians."); *see also* Gherebi v. Bush, 374 F.3d 727, 737 (9th Cir. 2003) ("We subject persons who commit crimes at Guantanamo to trial in United States courts. . . . [I]t is apparent that the United States exercises exclusive territorial jurisdiction over Guantanamo and that by virtue of its exercise of such jurisdiction, habeas rights exist for persons located at the Base."); Haitian Ctrs. Council, Inc., et al. v. Sale, 823 F. Supp. 1028, 1041 (E.D.N.Y. 1993); Haitian Ctrs. Council, Inc., et al. v. McNary, 969 F.2d 1326, 1342 (2d Cir. 1992) (citing United States v. Lee, 906 F.2d 117, 117 & n.1 (4th Cir. 1990); United States v. Rogers, 388 F. Supp. 298, 301 (E.D. Va. 1975).

> The United States Naval Base at Guantanamo Bay was obtained through a leasing agreement in 1903. By the lease, Cuba agreed that the United States should have complete control over criminal matters occurring within the confines of the base. It is clear to us that under the leasing agreement, United States law is to apply.

Id.

[358] *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, sec. 804, 115 Stat. 272, 377 (codified as amended at 18 U.S.C.S. § 7 (LexisNexis 2008)).

foreign States . . . ."[359] This language appears to capture crimes by detainees against U.S. military guards or other U.S. personnel on Guantanamo Bay, but would exclude crimes against third-country nationals present on the installation. For crimes against third-country nationals, jurisdiction would have to rest on a finding that the crime occurred within the special and maritime jurisdiction of the United States. In sum, 18 U.S.C. § 7 appears to provide federal courts with personal jurisdiction over those present on the military base at Guantanamo Bay, including detainees, who violate those U.S. federal laws that are applicable within the "special maritime and territorial jurisdiction of the United States" or who otherwise commit crimes against U.S. nationals on the premises of certain U.S. missions overseas.[360]

Next, subject matter jurisdiction should exist over most crimes that an Assistant U.S. Attorney might seek to punish in federal court; however, this will have to be determined case-by-case and crime-by-crime. Title 18 of the U.S. Code covers most serious criminal offenses with which a detainee may be charged, but not all federal crimes apply within the special and maritime jurisdiction of the United States.[361] There are also several crimes that apply to misconduct that might occur in a federal prison facility like possession of contraband, mutiny, riot, escape, and fleeing to avoid prosecution, but there may be issues in applying these crimes to an overseas detention facility.[362] There may also be an issue in addressing serious military-specific offenses should the need arise.[363] Just like the Military Commissions Act, Title 18 does not include military-specific disciplinary offenses.[364] Once again, though, these issues may not present a serious problem.[365] Considering the effort and expense in convening a federal trial, and the global media exposure that such a trial may generate, it is most likely that an Assistant U.S. Attorney will wish to prosecute only those offenses that are truly *malum in se*.[366] Minor infractions can be handled through camp

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[359] *See* 18 U.S.C.S. § 7(9) (LexisNexis 2008).
[360] *See id.* §§ 7(3), (9); *Lee*, 906 F.2d at 117 & n.1; Gibson, *supra* note 199, at 134.
[361] *See* 18 U.S.C.S. Pt.1 (LexisNexis 2008); Gibson, *supra* note 199, at 135.
[362] *See* 18 U.S.C.S. §§ 751, 1073, 1791, 1792.
[363] Some examples of military offenses include disrespect, failure to follow orders, and conduct prejudicial to good order and discipline. *See* UCMJ arts. 89, 90, 91, 92, 134 (2008).
[364] *See* 18 U.S.C.S. Pt. I.
[365] *See supra* Part IV.A.
[366] *See supra* Part IV.A and note 292.

disciplinary procedures, and Title 18 covers almost any major offense, including sexual assault, homicide, and assault, that may need to be punished through judicial means.

As long as there is personal and subject matter jurisdiction, detainees may be tried for post-capture misconduct in federal district court. Doing so has several advantages. The substantive crimes and criminal procedures are well-established. Additionally, trying these cases in federal court may build some goodwill with our coalition partners, and perhaps the rest of the world.[367] In criticizing the military commissions, some have called for terrorism charges to be tried in federal court.[368] In addition, detainees have been seeking redress in federal court since the implementation of the U.S. detainee policy.[369] Providing detainees with the complete due process protections of the federal court system in a trial for their post-capture misconduct may enable the United States to regain some "political capital" with our coalition allies and other world organizations.[370]

The drawbacks to trying these cases in federal district court, though, are significant. First, as a practical matter, the venue for these cases will almost definitely be the District of Columbia.[371] Unless the detainee were to waive personal appearance, the detainee would have to be brought from Guantanamo Bay to Washington, D.C. for every

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[367] *See* Interview with Lieutenant Colonel Thomas A. Wagoner, Professor and Vice-Chair, International and Operational Law Department, The Judge Advocate General's Legal Center and School, in Charlottesville, Va. (Feb, 28, 2007) [hereinafter Wagoner Interview].

[368] *See* United Nations Press Release, *supra* note 305; Amnesty Int'l, Guantánamo's Military Commissions, *supra* note 257.

[369] *See, e.g.*, Rasul v. Bush, 542 U.S. 466, 71 (2004) ("In 2002, petitioners, through relatives acting as their next friends, filed various actions in the U.S. District Court for the District of Columbia challenging the legality of their detention at [Guantanamo Bay].").

[370] *See* 152 CONG. REC. S10,256 (daily ed. Sept. 27, 2006) (statement of Sen. Leahy) ("Talk to anyone who travels around the world anywhere, even among some of our closes allies, our best friends. We are asked, What are you doing? Have you lost your moral compass?"); 152 CONG. REC. H7554 (statement of Rep. Jackson-Lee) ("[I]f American personnel blithely toss aside our international treaty obligations to uphold standards in the detention and interrogation of wartime prisoners, America will alienate our long-time allies who are crucial partners in the fight against terrorism."); 152 CONG. REC. H7554 (statement of Rep. Cardin) ("[The Military Commissions Act of 2006 . . . will make it harder to work with our allies to build an effective coalition to defeat terrorism.").

[371] *See* 18 U.S.C. § 3238 (2000) (allowing a criminal information to be filed in the District of Columbia if the crime occurs outside of a district and the last known residence of the offender or joint offenders is not known).

appearance and the trial.[372] In addition, the Sixth Amendment right of confrontation would apply, requiring the personal appearance of every detainee and guard who were witnesses in the case.[373] Finally, all of the evidence would have to be brought from Guantanamo Bay to Washington, D.C. This is a significant administrative burden on the system for a trial, especially when there are other forums available.[374]

Another issue influencing the selection of a trial in federal court over a trial by court-martial or military commission is the international law in this area. As described earlier, the 1949 Geneva Convention Relative to the Treatment of Prisoners of War mandates that POWs be tried by military court, rather than a civilian court.[375] While there is an exception for places like the United Kingdom where only civilian courts had jurisdiction to try certain offenses, the drafters deliberately chose to have military courts try POWs because it is generally the military courts that have the expertise in military-specific offenses.[376] In addition, under AR 190-8, paragraph 3-7b, a POW "will not be tried by a civil court for committing an offense unless a member of the U.S. Armed Forces would be so tried."[377] Article 21 of the UCMJ does not preclude the trial of a U.S. servicemember in federal court where both a court-martial and federal court have jurisdiction, and servicemembers may be tried in federal court for crimes punishable there.[378]

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[372] *See* FED. R. CRIM. P. 43.
[373] *See* U.S. CONST. amend. VI; Crawford v. Washington, 541 U.S. 36 (2004).
[374] This practical drawback could easily be eliminated if the federal district court were to travel to Guantanamo Bay. It is unclear whether the district court rules allow for the court to travel to hear a case, especially one on a military base in a foreign country. *See* Wagoner Interview, *supra* note 367.
[375] *See* GC III, *supra* note 31, art. 84, 6 U.S.T. at 3382–84, 75 U.N.T.S. at 200–02. Additionally, the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War also allows for the use of regularly constituted military courts to try persons in occupied territory, as well as internees. *See* GC IV, *supra* note 63, arts. 66 & 117, 6 U.S.T. at 3558–60, 3596, 75 U.N.T.S. at 328–330, 366; GC IV COMMENTARY, *supra* note 63, at 339–41, 476–77. However, for a number of reasons, the Bush Administration has not applied this convention to detainees in the War on Terror. *See, e.g.*, Bybee Memo, *supra* note 85 (applying only GC III and only collaterally referencing GC IV); Humane Treatment of Al Qaeda and Taliban Detainees Memo, *supra* note 32, at 134 ("[N]one of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting party.").
[376] *See* GC III COMMENTARY, *supra* note 42, at 412.
[377] AR 190-8, *supra* note 115, para. 3-7b.
[378] UCMJ art. 21 (2008).

However, under current U.S. law, alien unlawful enemy combatants are not POWs, and they only have the protections of Common Article 3, not the full-blown protections of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War. Common Article 3 only requires trial by a "regularly constituted court, affording all of the guarantees which are recognized as indispensable by civilized peoples."[379] There can be no doubt that Title 18 provides those protections. Nonetheless, there appears to be a clear preference for trying prisoner misconduct in military courts, providing an argument, by analogy, that these post-capture misconduct cases belong in a military commission or court-martial rather than federal court.

Another significant policy barrier for the trial of detainees in federal court is the effort thus far to limit detainees' rights to file writs of habeas corpus in federal courts. After two Supreme Court opinions held that detainees had a constitutional right to challenge their detention in U.S. federal courts through writs of habeas corpus, Congress responded.[380] Section 7 of the Military Commissions Act of 2006 deprives any court of jurisdiction to receive a writ of habeas corpus on behalf of an alien detained as an enemy combatant.[381] The section further provides that, subject to two exceptions, courts lack "jurisdiction to hear or consider any other action against the United States . . . relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States."[382] Those two exceptions are: (1) the United States Court of Appeals for the District of Columbia Circuit has jurisdiction to review a decision related to a detainee status rendered by the Combatant Status Review Tribunal, and (2) the United States Court of Appeals for the District of Columbia Circuit also has jurisdiction to review decisions rendered by a military commission.[383] This language is definitive and has been upheld by the Federal District Court for the District of Columbia as well as the U.S.

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[379] GC III, *supra* note 32, art. 3, 6 U.S.T. at 3318–20, 75 U.N.T.S. at 136–38.

[380] Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2763–2770 (2006); Rasul v. Bush, 542 U.S. 466, 483 (2004); *see also* Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 7, 120 Stat. 2600, 2635 (codified as amended at 28 U.S.C.S. § 2241 (LexisNexis 2008)).

[381] Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 7, 120 Stat. 2600, 2635 (codified as amended at 28 U.S.C.S. § 2241 (LexisNexis 2008)).

[382] *Id.*; Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(2), 119 Stat. 2739, 2742–43.

[383] Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 7, 120 Stat. 2600, 2635 (codified as amended at 28 U.S.C.S. § 2241 (LexisNexis 2008)); Detainee Treatment Act of 2005, § 1005(e)(3).

Court of Appeals for the District of Columbia Circuit.[384] Quite simply, according to the Military Commissions Act of 2006, federal courts lack jurisdiction to hear writs of habeas corpus or any other claims by detainees against the United States, unless the court is the United States Court of Appeals for the District of Columbia Circuit hearing appeals of cases decided by the Combatant Status Review Tribunal or a military commission.[385]

Despite this clear statutory language, bringing a detainee into the United States to face trial in a federal district court would likely eviscerate arguments supporting a denial of habeas rights.[386] One of the primary bases for denying the right to seek habeas relief for several German prisoners in the 1950 Supreme Court decision in *Johnson v. Eisentrager*[387] was that the prisoners were held outside of U.S. territory.[388] The Court held that the "Constitution does not confer rights on aliens without property or presence in the United States."[389] Applying this principle from *Eisentrager*, the D.C. Circuit upheld the statutory suspension of habeas rights to detainees held at Guantanamo Bay in *Boumediene v. Bush*.[390] Bringing a detainee into the United States for the purpose of a criminal trial would undoubtedly have the collateral effect

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[384] *See In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005); Khalid v. Bush, 355 F. Supp. 2d 311 (D.D.C. 2005); Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 127 S. Ct. 2078 (2007) (affirming both *In re Guantanamo Detainee Cases* and *Khalid*); Sergeant Sara Wood, *Federal Court Rules Against Guantanamo Detainee*, ARMED FORCES INFO. SERV., Dec. 14, 2006, http://www.defenselink.mil/news/newsarticle.aspx?id=2420. The Supreme Court heard oral arguments in the Boume dien e case in December 2007.

[385] *See* Military Commissions Act § 7 (2006); Detainee Treatment Act of 2005, § 1005(e)(3).

[386] *See* Vikram Amar & Whitney Clark, *Enemy Combatants: Does the Military Commissions Act of 2006 Violate the Suspension Clause*, 35 PREV. U.S. SUP. CT. CAS. 126–33 (2007). There is already some clamor in Congress to re-visit the issue of detainee habeas corpus rights. *See* Josh White, *Bill Would Restore Detainees' Rights, Define "Combatant*," WASH. POST, Feb. 14, 2007, at A08 (describing the Restoring the Constitution Act of 2007 that "would restore habeas rights to all detainees in U.S. custody").

[387] 339 U.S. 763 (1950).

[388] *Id.* at 776 (stating that the "nonresident enemy alien" does not have even "qualified access" to U.S. courts).

[389] Boumediene v. Bush, 476 F.3d 981, 991 (D.C. Cir. 2007), *cert. granted*, 127 S. Ct. 2078 (2007).

[390] *Id.* at 987–88.

of resurrecting the detainee's right to challenge the underlying basis for his detention.[391]

Additionally, trying a detainee in federal court for post-capture misconduct may open the door to collateral claims related to the propriety of the detention, treatment, or conditions of confinement, in the course of the criminal trial. It is likely that a detainee facing trial in criminal court for post-capture misconduct may challenge the conditions and propriety of his detention in order to challenge jurisdiction, make a case in extenuation or mitigation, or seek sentence credit.

In sum, federal courts should have personal and subject matter jurisdiction over detainees, including alien unlawful enemy combatants, who commit certain types of crimes while in detention at Guantanamo Bay. In addition, no one can question the due process afforded to an accused in federal court. However, a trial in federal court will entail significant effort to transport the accused, witnesses, and evidence to the trial. Also, this option may also have severe collateral effects on the overall U.S. detainee prosecution policy. If it is determined that military commissions or courts-martial are unavailable, federal district courts provide a viable forum for the prosecution of post-capture misconduct. But the drawbacks to trying a detainee in federal court are substantial, and it should therefore be a choice of last resort.

D. Choosing the "Least Bad" Option[392]

From the foregoing, it should be evident that the handling of alien unlawful enemy combatants who commit misconduct in the post-capture context presents a challenge. While three distinct forums exist for the prosecution of post-capture misconduct, there is no direct path to any one of them under current law. At this point, though, the military commission appears to offer the most secure option. While courts-martial have historical precedent, a basis in international law, and practical advantages for trying post-capture misconduct, personal jurisdiction over alien unlawful enemy combatants is questionable at

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[391] *See Eisentrager*, 339 U.S. at 776–78; *Boumediene*, 476 F.3d at 990; Amar & Clark, *supra* note 386, at 129–30.

[392] Matthew Waxman, *The Smart Way to Shut Gitmo Down*, WASH. POST, Oct. 28, 2007, at B4 (quoting former Secretary of Defense Donald Rumsfeld as calling Guantanamo Bay the "least bad" option for holding those captured in the War on Terror).

best. Article 2(a)(12) offers a colorable argument that jurisdiction exists, but it appears that alien unlawful enemy combatants have been deliberately excluded from court-martial jurisdiction in an effort to protect the viability of the military commission. While there is precedent and jurisdiction to prosecute most types of post-capture misconduct in federal courts, bringing detainees into the United States for trial in a federal district court has tremendous practical hurdles and policy consequences. Moving detainees and witnesses to a trial in the continental United States would be time-consuming and costly, and the security risk and the potential for renewed habeas challenges present additional difficulties. It should be the option of last resort.

As of now, the military commission provides the best forum for prosecuting crimes committed by alien unlawful enemy combatants while in detention. The Military Commissions Act provides express personal jurisdiction over alien unlawful enemy combatants. In addition, the practicality of trying pre-capture and post-capture offenses together in the same forum cannot be matched by either the court-martial or trial in federal court. Adding the post-capture offenses to the document charging the pre-capture offenses should be very straightforward. But, there remains an element of risk in trying post-capture offenses by military commission. There is still some question whether offenses committed in the detention facility qualify as "in the context of and . . . associated with armed conflict," and an adverse ruling at the trial level or appellate level could result in delay, if not complete dismissal, of the charges.[393] Considering the issues surrounding the other two options, charging and trying offenses under the Military Commissions Act of 2006 is, as of now, the best means available for prosecuting post-capture crimes by alien unlawful enemy combatants while in detention.

V. Charting the Course Forward

If any of the U.S. detention policies contemplate prosecuting detainees at Guantanamo Bay for serious post-capture criminal misconduct in a U.S. detention facility, it is not evident from any of the documents creating their legal basis. Riots, assaults, and other violent acts are not infrequent at Guantanamo Bay. Serious criminal misconduct in the detention facility worthy of judicial punishment is not only

[393] MANUAL FOR MILITARY COMMISSIONS, *supra* note 25, at IV-11 (listing the elements for Intentionally Causing Serious Bodily Injury).

foreseeable—it is imminent. Considering that this issue arises out of a gap in the statutory provisions of the Military Commissions Act of 2006 and the UCMJ, the ultimate solution requires a change in the law. There are two changes that would solve this problem. First, to the extent that the military commissions lack subject matter jurisdiction over post-capture offenses, Congress can amend the Military Commissions Act of 2006 to include the language necessary to make clear that military commissions can prosecute instances of post-capture misconduct in U.S. detention facilities. Second, Congress can amend the UCMJ to provide for court-martial jurisdiction over alien unlawful enemy combatants who commit offenses while in the custody of the armed forces. As the court-martial provides the best combination of historical precedent, due process protections, crimes available, and practical simplicity, this solution offers the most promise.

Until any of these long-term solutions are adopted, however, the military commission appears to be the best mechanism for handling post-capture misconduct, consistent with the intent of the Military Commissions Act of 2006 and the Military Order of November 13, 2006. Should Congress revisit the issue of prosecuting detainees for their crimes, a statutory solution is absolutely necessary to close this gap in the U.S. criminal jurisdictional framework to provide the tools necessary to seek justice should an attack like that on Louis Pepe occur in the military detention facility at Guantanamo Bay or any other foreign detention facility.[394]

[394] While it appears that Guantanamo Bay will remain the detention facility for terror suspects captured outside of the United States for the foreseeable future, the possibility of its closure remains. *See, e.g.*, Waxman, *supra* note 392 (describing the discomfort of President Bush and former Secretary of Defense Donald Rumsfeld with the detention facility at Guantanamo Bay and proposing a plan to close the facility). If it is indeed closed and re-opened in another location outside of the United States, the issues identified in this article remain as long as there is not a viable host nation criminal justice system available to prosecute the misconduct.