

## A BATTLE OF WORDS AT GUANTANAMO BAY

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### Introduction

*Over the past 35 months, a plethora of opinions have been provided on the legality of the detainees at Guantanamo Bay. Scholars, lawyers, government agencies, NGOs, and even courts have commented on the application of specific legal rules to the hundreds of individuals being held in this remote naval base in Cuba. What has not frequently been recognized, however, is that Guantanamo Bay is as much about power as it is about legal interpretation, and that this power is being created and controlled through the careful manipulation of legal discourse. This paper will explore two specific linguistic techniques being used by the U.S. government to legitimize its actions at Guantanamo Bay, and will argue that in each case legal discourse is being used as a tool to increase that government's own position of power.*

“The Bush Administration has attempted to turn the forty-eight square miles of its naval base at Guantanamo Bay into territory beyond the reach of any law and outside the jurisdiction of any court. In its treatment of the detainees at Guantanamo, it has been unwilling to fully apply international humanitarian law (often called the laws of war), has flouted international human rights

standards, and has fought hard to block judicial review by U.S. courts of the legality of its detentions.”

--Human Rights Watch, January 2004<sup>1</sup>

“Detention of enemy combatants in wartime is not an act of punishment. It is a matter of security and military necessity. It prevents enemy combatants from continuing to fight against the U.S. and its partners in the war on terror. Releasing enemy combatants before the end of the hostilities and allowing them to rejoin the fight would only prolong the conflict...the U.S. is under no obligation to grant al-Qaida [sic] and Taliban forces POW status and did not do so.”

--United States Department of Defense, February 2004<sup>2</sup>

## **Background on Guantanamo Bay**

Subsequent to attacks on New York and Washington in September 2001, the United States announced that it was launching a “war on terrorism”. As part of this offensive, the U.S. and several allied countries invaded Afghanistan and engaged in armed combat with representatives of both the de facto government of Afghanistan, the Taliban, and Al Qaeda, the terrorist organization who claimed responsibility for the September 11<sup>th</sup> attacks.<sup>3</sup>

In January 2002, the U.S. began transferring individuals captured during this conflict to the Guantanamo Bay detention facility in Cuba. Suspected terrorists captured in other parts of the world were also transferred to Guantanamo Bay. Estimates indicate that between 600-800 individuals were sent to the facility between January 2002 and March 2004.<sup>4</sup> As of October 2004, 540 suspects from approximately 40 countries were still being held at the centre.<sup>5</sup>

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<sup>1</sup> Human Rights Watch, “United States: Guantanamo Two Years On” (9 January 2004), online: <<http://hrw.org/english/docs/2004/01/09/usdom6917.htm>>

<sup>2</sup> United States Department of Defense, “Guantanamo Detainees Fact Sheet” (13 February 2004), online: <<http://www.defenselink.mil/news/Apr2004/d20040406gua.pdf>> [Guantanamo Detainees].

<sup>3</sup> G. Aldrich, “The Taliban, Al Qaeda, and the Determination of Illegal Combatants” (2002) 96 AJIL 891. [Aldrich]

<sup>4</sup> Estimates vary according to source. See for example: S. Murphy, ed., “Contemporary Practice of the United States Relating to International Law”

Several members of the international community, many human rights groups, and a number of legal commentators have argued that the detentions at Guantanamo Bay are not in compliance with international law. The most prevalent and persistent argument amongst these groups is that the detainees qualify as prisoners of war (“POWs”) under the *Third Geneva Convention* and are therefore entitled to the protections of this agreement.<sup>6</sup> A more nuanced version of this argument suggests that members of the Taliban are entitled to POW treatment under the *Third Geneva Convention*, while Al Qaeda operatives are entitled only to the more general protections available under the *Fourth Geneva Convention*.<sup>7</sup> It is alleged that current practices at Guantanamo Bay do not meet the standards required by either the *Third* or *Fourth Geneva Conventions*.

The United States government has strongly resisted the suggestion that the *Third Geneva Convention* applies to Guantanamo Bay detainees. In February 2002, a White House “fact sheet” stated explicitly that “neither the Taliban nor al-Qaida [sic] detainees are entitled to POW status.”<sup>8</sup> This position was confirmed in a more detailed document released by the U.S. Department of Defense in February of 2004 that states that “...the U.S. was under no obligation to grant al-Qaida [sic] and Taliban forces POW status and did not do so.”<sup>9</sup> Despite these statements, the Government has maintained that the detainees are

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(2004) 98 AJIL 353; Human Rights Watch World Report (2003), online: <<http://www.hrw.org/wr2k3/us.html>>.

<sup>5</sup> P. Jackson, “Life after Guantanamo Bay,” *BBC News* (4 October 2004), online: <[news.bbc.co.uk/1/hi/world/Americas/3929535.stm](http://news.bbc.co.uk/1/hi/world/Americas/3929535.stm)>.

<sup>6</sup> See for example: A. de Zayas, “The Status of Guantanamo Bay and the Status of the Detainees” (Douglas McK. Brown Lecture, Simon Fraser University, 28 November 2003) online: <[www.law.ubc.ca/events/2003/november/McK\\_Brown\\_Lecture.html](http://www.law.ubc.ca/events/2003/november/McK_Brown_Lecture.html)>. [de Zayas].

<sup>7</sup> See for example: K. Dormann, “The Legal Situation of Unlawful/Unprivileged Combatants,” 85 IRR 45 (2003) [Dormann]; Aldrich, *supra* note 3.

<sup>8</sup> “White House Fact Sheet: Status of Detainees at Guantanamo” (7 February 2002), online: <[www.whitehouse.gov/news/releases/2002/02/print/20020207-13.html](http://www.whitehouse.gov/news/releases/2002/02/print/20020207-13.html)>. [White House Fact Sheet].

<sup>9</sup> Guantanamo Detainees *supra* note 2 at 4.

being held in a manner that is “consistent with the principles” of the *Geneva Conventions*.<sup>10</sup>

A number of court cases have been launched relating to the detentions at Guantanamo Bay. As a result of these claims, U.S. courts have found that detainees are entitled to challenge their detentions,<sup>11</sup> have the right to unmonitored, private interactions with their defense counsel,<sup>12</sup> have the right to be present when evidence is presented against them,<sup>13</sup> and are able to launch complaints through the U.S. court system.<sup>14</sup> The most recent legal development occurred in November 2004 when the Federal District Court for the District of Columbia found that the *Third Geneva Convention* must be applied to the detainees. The court determined that according to the rules of the Convention, detainees are assumed to be POWs until a competent tribunal determines otherwise.<sup>15</sup>

## Law, Language, and Power

The debate surrounding Guantanamo Bay has been framed by the majority of commentators as a legal one: the central issue being discussed is what laws apply and to whom. The reality, however, is that this is not simply a question of legal interpretation. Guantanamo Bay is largely about power; and the tools being used to gain this power are primarily linguistic ones. It is therefore important to evaluate the arguments surrounding Guantanamo Bay not only for their legal merits, but also for their impact on legal discourse.

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<sup>10</sup> White House Fact Sheet, *supra* note 8.

<sup>11</sup> *Hamdi v. Rumsfeld* (28 June 2004), Supreme Court of the United States, online: <<http://a257.g.akamaitech.net/7/257/2422/28june20041215/www.supremecourt.us.gov/opinions/03pdf/03-6696.pdf>>.

<sup>12</sup> *Al Odah v. United States* (20 October 2003), United States District Court for the District of Columbia, online: <<http://www.dcd.uscourts.gov/02-828a.pdf>>.

<sup>13</sup> *Hamdan v. Rumsfeld* (8 November 2004), United States District Court for the District of Columbia, online: <<http://www.dcd.uscourts.gov/04-1519.pdf>>.[Hamdan].

<sup>14</sup> *Rasul v. Bush* (28 June 2004), Supreme Court of the United States, online: <<http://a257.g.akamaitech.net/7/257/2422/28june20041215/www.supremecourt.us.gov/opinions/03pdf/03-334.pdf>>.

<sup>15</sup> *Hamdan*, *supra* note 13.

The relationship between power and language is well established. Michel Foucault is one of the most recognized contributors to this area and is credited for having equated discourse with the power to shape reality.<sup>16</sup> Joanna Thornborrow evaluated the ways a number of theorists have expanded on Foucault's ideas, and concluded that "within social theories of power, language, or perhaps most appropriately discourse, has been seen as an important site for both constructing and maintaining power relations."<sup>17</sup> Kyle Felder drew on these theories in a discussion about the rhetoric surrounding September 11<sup>th</sup>. He began his piece by reminding readers that "language is a powerful tool: the most powerful tool that humans have ever devised. It does more than describe in some kind of neutral way. Rather language has the power to create realities, to shape the very way we experience events. It allows us to communicate ideas and to convince people to view reality in a particular way."<sup>18</sup>

The power of language is heightened when it is applied in a legal context, due in part to the control law itself exerts over society. Peter Goodrich argued that law is a discourse that should be "read in terms of control—of dominance and subordination—and of social relations portrayed and addressed to a far more general audience than that of law-breakers and wrong doers alone."<sup>19</sup> Gerald Burns interpreted Goodrich's work as saying that law "translates social reality into its own terms in order to control it" and that legal language is "rhetoric disguised as logic."<sup>20</sup> Kent Greenwalt took a slightly different approach to the relationship between power and legal discourse. He argued that power is not only protected and created through law, but that power is also a source of law: "[a] common source [of both law and cultural morality], which may be more or less conscious, is the

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<sup>16</sup> D. Lodge, ed. *Modern Criticism and Theory* (New York: Addison Wesley Longman, 1988) at 196. [Lodge].

<sup>17</sup> J. Thornborrow, *Power Talk: Language and Interaction in Institutional Discourse* (London: Pearson Education, 2002) at 7.

<sup>18</sup> K. Fedler, "On the Rhetoric of a 'War on Terrorism': A Lecture Presented at Ashland University on September 17, 2001," (2002) 51:4 *Cross Currents* 498 at 498-499.

<sup>19</sup> P. Goodrich, *Reading the Law: A Critical Introduction to Legal Method and Techniques* (London: Basil Blackwell, 1986) at 20, cited in G. Burns, "Law and Language: A Hermeneutics of the Legal Text" in G. Leyh, ed, *Legal Hermeneutics* (Los Angeles: University of California Press, 1992) 23 at 24. [Burns].

<sup>20</sup> Burns, *supra* note 20 at 25.

interests of those who enjoy positions of dominance within the society.”<sup>21</sup>

Language, and in particular legal discourse, can be manipulated in a large number of ways to maximize its inherent power. In the case of Guantanamo Bay, the government of the United States is using a variety of linguistic techniques to do just that. The exchange of rhetoric and legal terminology in relation to Guantanamo Bay is extensive, and it is beyond the scope of this paper to provide a detailed analysis of this discourse in its entirety.<sup>22</sup> Rather, I will focus on two specific terms — “war” and “enemy combatants” — to demonstrate both the means through which legal discourse is being manipulated and the ways this manipulation is translating into an increase in power for the United States.

### “War”: Manipulation of Current Terminology

Since September 2001, the United States has stated clearly and repeatedly that they are engaged in a “war against terrorism.”<sup>23</sup> *Black’s Legal Dictionary* offers the following definitions of the term “war”:

1. Hostile conflict by means of armed forces, carried on between nations, states, or rulers, or sometimes between parties within the same nation or state; a period of such conflict <the Gulf War>.
2. A dispute or competition between adversaries <fare wars are common in the airline industry>.
3. A struggle to solve a pervasive problem <America’s war against drugs>.<sup>24</sup>

It is clear that the conflict in Afghanistan, and the subsequent one in Iraq, are examples of the first type of war defined in *Black’s* — they

<sup>21</sup> K. Greenwalt, *Law and Objectivity* (New York: Oxford University Press, 1992) at 167. [Greenwalt].

<sup>22</sup> For more detailed analysis on U.S. actions in Guantanamo Bay see generally: S. Hersh, *Chain of Command: The Road from 9/11 to Abu Gbraib* (New York: Harper Collins, 2004); R. Clarke, *Against All Enemies: Inside America’s War on Terrorism* (New York: Free Press, 2004); D. Rose, *Guantanamo: The War on Human Rights* (New York: HarperCollins, 2004); or M. Ratner and E. Ray, *Guantanamo: What the World Should Know* (Chelsea Green, 2004).

<sup>23</sup> See generally website of the United States Department of Defense: <<http://www.defendamerica.mil/>>.

<sup>24</sup> *Black’s Law Dictionary*, 8th ed., *s.v.* “war.”

were “hostile conflicts by means of armed forces.” What is less clear, however, is whether the ongoing “war against terrorism” is also an example of this first type of “war”. I would argue that intuitively it is not. America’s “war on terrorism” seems entirely analogous to the “war against drugs” contemplated in the third definition provided by *Black’s*: it is “a struggle to solve a pervasive problem”.

The government of the United States disagrees with the “intuitive” characterization that I, and others, have proposed and insists that the country has been in “hostile conflict” since September 11<sup>th</sup>, 2001. The reasons for this insistence are encapsulated nicely in a statement issued by the U.S. Department of Defense (“DOD”) in February 2004. The DOD statement begins by drawing attention to the relationship between being in a state of war and the special laws governing armed conflict. The statement reads: “[T]he law of armed conflict governs this war [the war on terrorism] between the U.S. and al-Qaida [sic] and establishes the rules for the detention of enemy combatants.”<sup>25</sup> It is thus made clear that the United States accepts that special laws are applicable when a country is at war.

The next sentence states that “these rules permit the U.S. to detain enemy combatants without charges or trial for the duration of hostilities.”<sup>26</sup> This second assertion seems particularly significant for explaining U.S. insistence that they are in a continued state of “war.” Here it is apparent that not only is there a leniency in the laws governing during times of war, but that the United States believes this leniency allows for detainees to be held without any procedural rights for the duration of hostilities. If this interpretation is correct, an ongoing “war on terror” will allow the Guantanamo Bay detainees to be held indefinitely without contravening international law.

The International Committee of the Red Cross (“ICRC”) — custodian of the *Geneva Conventions* that codify the laws of war — has expressed concern about the way the United States is characterizing its “war on terrorism.” Gabor Rona, ICRC Legal Advisor, clarified that International Humanitarian Law applies only when there is truly an “armed conflict” (the international legal term for “war”); otherwise, domestic and international criminal and human rights laws are

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<sup>25</sup> Guantanamo Detainees, *supra* note 2 at 1.

<sup>26</sup> *Ibid.*

applicable. Rona noted U.S. attempts to access the permissive International Humanitarian Laws with concern:

The official U.S. view is that an international armed conflict is underway, spanning the world and pitting certain countries against terrorists. This conflict will end once terrorism is defeated. In the meantime, the laws of armed conflict prevail over the entire planet — meaning that within limits, killing, destruction of property and detentions are permitted, all without the restraint of judicial intervention. In this world, instead of merely arresting a suspected terrorist on the street, the U.S., if it considered him an “enemy combatant”, would be within its rights to shoot him.

This theory wreaks havoc with a finely tuned and time-honoured balance between the law of armed conflict, human rights and criminal laws, and thus poses grave risks and consequences for human rights and security.<sup>27</sup>

Kenneth Roth, Executive Director of Human Rights Watch, shares many of Rona’s concerns. While Roth acknowledged that special laws are important during genuine times of war, he warned that “given the way they inherently compromise fundamental rights, they should be used sparingly. Away from a traditional battlefield, they should be used, even against a warlike enemy, as a tool of last resort — when there is no reasonable alternative, not when a functioning criminal justice system is available.”<sup>28</sup>

The difficulty for Rona and Roth, and all others who feel that the U.S. use of International Humanitarian Law is unwarranted during its “war on terrorism,” is that the terms “war” and “armed conflict” are not explicitly defined in the *Geneva Conventions* or elsewhere in international law. Rona argued that the terms are “generally understood” to involve a certain level of violence between a) armed groups within a state; b) a state and an armed group; or c) between two or more states.<sup>29</sup> But this “general understanding” is insufficient to constitute firmly established parameters, making it possible for the United States to manipulate the term to include its “war on terror.”

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<sup>27</sup> G. Rona, “War’ Doesn’t Justify Guantanamo” International Committee of the Red Cross, online:  
<<http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/5WVFB4>>.[Rona]

<sup>28</sup> K. Roth, “The Law of War in the War on Terror” Human Rights Watch, online:  
<[www.hrw.org/english/docs/2003/12/23/usint6873\\_txt.htm](http://www.hrw.org/english/docs/2003/12/23/usint6873_txt.htm)>.

<sup>29</sup> Rona, *supra* note 26 at 1.



The fact that words are subject to a variety of interpretations is not a novel concept. Ferdinand de Saussure, a Swiss linguist who is widely regarded as the father of modern linguistics, was responsible for introducing a conceptual difference between verbal signs (signifiers) and the concepts they represent (signified).<sup>30</sup> According to de Saussure, the signifiers (or words) must be understood to be completely arbitrary and unrelated to the concepts they describe.<sup>31</sup> It is as a result of this arbitrariness that words themselves can be manipulated to encapsulate a variety of conceptual realities. In the case of Guantanamo Bay, the U.S. government has manipulated the signifier, “war”, to include a signified that is different from that previously considered by international law. This manipulation of existing language not only allows the United States to benefit from more permissive international laws, but also gives it a means to assert that it is operating in accordance with existing legal structures. This ability to alter discourse in order to legitimize actions is extremely dangerous and has the potential to dramatically increase the power of the United States government.

### **“Enemy/Unlawful Combatants”: Introduction of New Terminology**

The United States has repeatedly declared that the Guantanamo Bay detainees are “unlawful” or “enemy” combatants. This terminology is found not only in press releases, fact sheets, and other documents intended for public consumption, but also in official declarations, presidential orders, and other legal documents.<sup>32</sup> This consistent use of the term “enemy or unlawful combatant” suggests that the words are not mere rhetoric, but rather that they possess a particular legal meaning. The U.S. government, in its “Combatant Status Implementation Guidelines,” provided a clear definition of the term:

An “enemy combatant” for the purposes of this order shall mean an individual who was part of or supporting Taliban or al Qaida [sic] forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes

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<sup>30</sup> F. de Saussure, “Nature of the Linguistic Sign” in Lodge, *supra* note12 at 10.

<sup>31</sup> *Ibid.* at 12.

<sup>32</sup> See generally website of the United States Department of Defense — Press Resources: <<http://www.defenselink.mil/news/>>.

any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.<sup>33</sup>

While this definition is useful for understanding how the United States is using this term, it clearly did not provide an objective standard for determining whether individuals associated with the Taliban or Al Qaeda forces are “unlawful combatants” under broader principles of international law. Rather, this explanation *defined* the term according to membership in these groups—the term itself *presupposed* a relationship between the Taliban or Al Qaeda and being an enemy combatant, it did not provide a standard on which to *evaluate* the relationship.

Although the definition of “enemy combatants” provided by the government is very contextually specific, the United States was not the first entity to draw a distinction between legal and illegal combatants. To the contrary, the notion of illegal combatants has been found in legal literature and military manuals since the beginning of the 20<sup>th</sup> century.<sup>34</sup> The *Geneva Conventions* themselves also distinguish between certain types of combatants, and the protections available under the conventions vary according to the way in which a particular individual was engaged in an armed conflict.<sup>35</sup> Despite distinctions that have been drawn between types of combatants, however, legal discourse has only offered precise definitions of very particular categories of involvement. These have included “spies,” “saboteurs,” and “mercenaries.”<sup>36</sup> The term “unlawful or enemy combatant” is not found amongst these accepted and defined categories.<sup>37</sup>

This has changed since Guantanamo Bay. The United States’ persistent (and insistent) use of this new terminology has resulted in its necessary inclusion in legal discourse. It is now found not only

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<sup>33</sup> U.S. Department of Defense, “Combatant Status Review Guidelines” (29 July 2004), online:  
<<http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>>.

<sup>34</sup> Dormann, *supra* note 7 at 46.

<sup>35</sup> See for example *Geneva Convention III [GC III]* Art. 4, 5; *Geneva Convention IV [GC IV]* Art.4, 5; Protocol I of *Geneva Conventions [PI]* Art. 45, 46.

<sup>36</sup> Dormann, *supra* note 7 at 52; PI Art 46, 47.

<sup>37</sup> See generally Dormann, *supra* note 7.

amongst documents issued by the U.S., but also in legal scholarship,<sup>38</sup> court judgments,<sup>39</sup> and documents issued by other agencies.<sup>40</sup> Perhaps the most persuasive indication that these terms have been appropriated into legal discourse is their inclusion in legal dictionaries. Indeed, the 2004 edition of *Parry & Grant's Encyclopaedic Dictionary of International Law* included the term “unlawful combatants.” It is interesting to note that the definition provided by this dictionary not only restricts application of the term to the Guantanamo Bay situation, but also explicitly recognizes the fact that this terminology has not previously been part of legal discourse:

**unlawful combatants:** This term, used synonymously with enemy combatants, has been applied to the al-Qaeda [sic] and Taliban prisoners taken during the conflict in Afghanistan 2001-2 and held at the US Guantanamo Bay naval based in Cuba. Such a characterization and status are not a generally recognized part of the laws of war.<sup>41</sup>

It would be very difficult for an entity with little or no power to unilaterally implement significant changes to legal discourse, and the success of the United States in introducing new language is an indication of its powerful position in the world. This supports Greenwalt's assertion that the interests of the powerful are a direct *source* of legal discourse.<sup>42</sup> As noted earlier, however, power is also a *product* of language — control of discourse leads to an increase in power.<sup>43</sup> As a result of the cyclical nature of power and discourse, the United States has effectively increased its current power through the introduction of new legal terms: once introduced, the discourse itself will help protect and increase the dominant structures that led to its very creation.

The introduction of the term “unlawful/enemy combatant” increases the power of the United States in two distinct ways. First, these terms

<sup>38</sup> See for example Aldrich *supra* note 3; de Zayas, *supra* note 6.

<sup>39</sup> See most notably: *Hamdan*, *supra* note 13.

<sup>40</sup> These include reports by the International Committee of the Red Cross, the United Nations, and Human Rights Watch.

<sup>41</sup> J. Grant and C. Barker, ed., *Parry and Grant Encyclopaedic Dictionary of International Law*, 2d ed. (New York: Oceana, 2004) *s.n.* “unlawful combatants.”

<sup>42</sup> See discussion on Greenwalt above.

<sup>43</sup> See generally discussion on Law, Language, and Power above.

increase the ability of the U.S. to legitimize its detentions in Guantanamo Bay through the application of a quasi-legal framework. On August 18<sup>th</sup>, 2004, the U.S. Department of Defense released a two-page report summarizing the processes available for Guantanamo detainees.<sup>44</sup> The first page of this document outlined three distinct tribunal processes, noted the legal purpose of each one, and linked to detailed information about the rules that have been created to guide the procedures. The second page presented much of the same information, although this time it appeared in a table format. At the bottom of this table a single footnote contains the official United States definition of the term “enemy combatant.” This footnote is critical to the table and indeed to the entire process being described: the legal basis underlying detention in Guantanamo Bay is an individual’s status as an “enemy combatant.” Both the form of the tribunals and the substance they are meant to consider are premised on acceptance that being an “enemy combatant” is illegal and warrants ongoing detention. The ability of the United States to create this term has given it the power to structure an entire legal process around its applicability. This in turn has added an air of legal legitimacy to the detentions themselves.<sup>45</sup>

The second way the creation of these terms has increased U.S. power is by allowing the circumvention of existing legal structures. The government’s contention that “the law of armed conflict...establishes the rules for detention of enemy combatants”<sup>46</sup> is false. “Enemy combatants” are a recent creation of the U.S. and as such are not contemplated by the traditional laws governing times of war. This lack of explicit reference has enabled the United States to claim that this type of enemy is not subject to many provisions of the *Geneva Conventions*, including those pertaining to POWs. If the United States were obliged to treat the Guantanamo Bay detainees as POWs, many

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<sup>44</sup> Department of Defense, “Guantanamo Detainee Processes,” link available online at: <<http://www.defenselink.mil/news/detainees.html>>

<sup>45</sup> I do not mean to suggest that the processes at Guantanamo Bay have been accepted as legally sound. They have in fact been subject to considerable criticism (see for example Human Rights Watch at: <[hrw.org/English/docs/2004/08/16/usdom9235.htm](http://hrw.org/English/docs/2004/08/16/usdom9235.htm)> and “Agora: Military Commissions,” 96 AJIL 320 (2002)). The very presence of these debates amongst legal commentators, however, indicates that the U.S. has succeeded in framing these processes as quasi-legal in nature.

<sup>46</sup> Guantanamo Detainees, *supra* note 2 at 1.

current practices would be in contravention of legally protected rights. The *Geneva Conventions* guarantee, for example, a judicial process that is equivalent to that offered to armed forces of the detaining power.<sup>47</sup> The Guantanamo Bay Military Commissions would not meet this requirement. Another notable protection is found in Article 17, which guarantees that POWs will not be subject to any “physical or mental torture nor to *any other form of coercion*” and that POWs who do not provide information “may not be threatened, insulted, or *exposed to unpleasant or disadvantageous treatment of any kind* [Emphasis added].”<sup>48</sup> Given the U.S. priority on gaining information from individuals being held at Guantanamo, it seems highly unlikely that officials are adhering to these standards when questioning detainees.

Many organizations and legal scholars have argued persuasively against the U.S. position on enemy combatants. They claimed that the detainees at Guantanamo Bay are POWs and are therefore entitled to protections under the *Third Geneva Convention*.<sup>49</sup> The majority of these commentators noted that Article 5 of the Convention indicated clearly that, when there is doubt about the POW status of a detainee, a “competent tribunal” must make the final determination about his/her status:

Art. 5. The present Convention shall apply to the persons referred to in Article 4 [which details who qualifies as a POW], from the time they fall into the power of the enemy and until their final release and repatriation.

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.<sup>50</sup>

In November 2004, an American court applied this same reasoning and concluded that the United States had an obligation under international law to apply the *Geneva Conventions* to detainees of Guantanamo Bay. Specifically, the court held that Article 5 of the *Third Geneva Convention*, requiring that detainees be treated as POWs

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<sup>47</sup> *GC III*, Art. 102.

<sup>48</sup> *GC III*, Art. 17.

<sup>49</sup> See for example: de Zayas, *supra* note 6; Aldrich, *supra* note 3; Human Rights Watch.

<sup>50</sup> *GC III*, Art. 5.

until a competent tribunal determines otherwise, applied. The court also rejected arguments that the President of the United States had the power to determine that all members of al Qaeda are “enemy combatants” and therefore are not entitled to POW protections:

The government’s legal position is that the CSRT [Combatant Status Review Tribunal] determination that [the detainee] was a member of or affiliated with al Qaeda is also determinative of [his] prisoner-of-war status, since the President has already determined that detained al Qaeda members are not prisoners-of-war under the Geneva Conventions...The President is not a “tribunal,” however. The government must convene a competent tribunal (or address a competent tribunal already convened) and seek a specific determination as to [the detainee’s] status under the Geneva Conventions. Until or unless such a tribunal decides otherwise, [the detainee] has, and must be accorded, the full protection of a prisoner-of-war.<sup>51</sup>

This judgment created a significant challenge to the United States’ position that “enemy combatants” are not subject to the Geneva Conventions, and threatened to undermine both the tribunal structures of Guantanamo Bay and the legal discourse on which these structures are based. It is clear that the collapse of this discourse will result in a significant loss of power for the United States government. It is therefore not surprising that the U.S. Department of Justice issued a statement in response to the case declaring that they “vigorously disagree with the court’s decision” and will be “seeking an emergency stay of the ruling.” The Department also announced an intention to appeal the decision immediately.<sup>52</sup>

## Conclusion

Since January 2002, the government of the United States has been carefully altering legal discourse to legitimize the detention of hundreds of individuals at Guantanamo Bay. Techniques being used to accomplish this goal include the manipulation of existing terminology, including the word “war,” and the introduction and definition of entirely new legal terms, including “enemy/unlawful combatants.”

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<sup>51</sup> *Hamdan*, *supra* note 13 at 18-19.

<sup>52</sup> Department of Justice, “Statement of Mark Corallo, Director of Public Affairs, on the Hamdan Ruling” (8 November 2004), online: <[www.usdoj.gov/opa/pr/2004/November/04\\_opa\\_735.htm](http://www.usdoj.gov/opa/pr/2004/November/04_opa_735.htm)>.

It is interesting to examine the combined implications of these two techniques. By declaring that it is at “war,” the United States is able to access the more permissive rules of International Humanitarian Law. This allows the U.S. to operate with maximum freedom and minimal judicial intervention. Even the more lenient International Humanitarian Law, however, contains some guarantees for individual human and judicial rights. The U.S. attempts to avoid its responsibility to respect these rights by creating a new category of combatant and circumventing the very legal instruments it claims to be following. This combination of linguistic techniques allows the United States to maximize its own power, while minimizing the power of others.

It is true that words are powerful and that discourse has the ability to shape realities and reinforce existing power structures. The situation in Guantanamo Bay exemplifies this dynamic. It is also true, however, that it is people who choose how to use powerful words. Karl Sornig reminded us that discourse itself is not ultimately responsible for the power it creates:

Words can, in fact, be used as instruments of power and deception, but it is never the words themselves that should be dubbed evil and poisonous...the responsibility for any damage that might have been done by using certain means of expression still lies with the users, those who, not being able to alter true reality try — through interpretative strategies — to change its reception and recognition by their interlocutors.<sup>53</sup>

In the case of Guantanamo Bay, those attempting to alter perceptions of reality are doing a dangerously good job.

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<sup>53</sup> K. Sornig, “Some Remarks on Linguistic Strategies of Persuasion,” in R. Wodak, ed., *Language, Power and Ideology: Studies in Political Discourse* (Philadelphia: John Benjamins, 1989) at 96.