

REPLIES

INTERNATIONAL LAW, U.S. WAR POWERS, AND THE GLOBAL WAR ON TERRORISM

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In *Congressional Authorization and the War on Terrorism*,¹ Professors Curtis Bradley and Jack Goldsmith provide a useful framework for interpreting the contours of the 2001 Authorization for Use of Military Force² (AUMF). Written with the rigor and erudition characteristic of their work, the Article will no doubt make an enduring contribution to debates about the role of law in the Global War on Terrorism (GWOT). The broad, general nature of the AUMF, however, poses real challenges for any effort to define in pragmatic and principled terms the outer limits of the authority Congress has conferred on the President. Professors Bradley and Goldsmith argue that the international law of war — what we will call the law of armed conflict (LOAC) — informs the proper interpretation of the AUMF. In other words, the AUMF arguably authorizes the President to do whatever LOAC permits, in part because this well-established, widely endorsed body of law defines the rights and obligations of belligerents. We agree.³ However, Professors Bradley and Goldsmith systematically understate the interpretive significance of LOAC and thereby blunt the

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¹ Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005).

² Pub. L. No. 107-40, 115 Stat. 224 (2001).

³ Because LOAC is directly incorporated into U.S. domestic law and military policy, it plays an important role in other interpretive factors identified by Professors Bradley and Goldsmith. Congress passed the AUMF against the background of robust, unequivocal commitments to LOAC in past executive practice, *see, e.g.*, Dep't of Def. Directive 5100.77, DoD Law of War Program, para. 5.3.1 (1998) [hereinafter DoD Law of War Program] (establishing a policy to observe the laws of war in all conflicts and the "principles and spirit" of this law in all other operations); U.S. Dep'ts of the Army, the Navy, the Air Force, and the Marine Corps, Army Regulation 190-8/OPNAVINST 3461.6/AFJI 31-304/MCO 3461.1, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees § 1-1 (1997) (requiring that all enemy detainees be treated in accordance with the basic principles of the Geneva Conventions); statutes, *see, e.g.*, War Crimes Act, 18 U.S.C.A. § 2441 (West Supp. 2004); and treaties, *see, e.g.*, Bradley & Goldsmith, *supra* note 1, at 2056 n.25 (collecting citations).

sharp edges of several important law-of-war constraints on executive power.

Our aim is to offer some critical reflections on the role that international law plays in their framework. In particular, two types of problems pervade their analysis. First, they overstate the ambiguity of several relevant LOAC principles and therefore describe a legal landscape conducive to unchecked presidential power: a broad authorization to act limited only by abstract principles, the interpretation of which is the province of the President. Careful explication of LOAC principles, however, suggests several clear limits on the scope of the AUMF.⁴ Second, they misspecify the range of LOAC rules that are conditions of the exercise of core war powers (such as the power to detain and the power to prosecute).

In this brief Reply, we illustrate both of these points by way of three examples. In Part I, we consider LOAC rules relevant to defining the scope of hostilities authorized by the AUMF — in particular, the class of individuals that may be treated as “enemy combatants.” In Part II, we consider two controversial war powers asserted by the President: the power to detain enemy combatants and the power to try certain individuals by special military commission. In both cases, LOAC principles provide clear guidance on the scope and conditions for exercising the asserted authority.⁵

I. THE SCOPE OF GWOT: DEFINING “ENEMY COMBATANTS”

Professors Bradley and Goldsmith correctly argue that the AUMF implicitly authorizes the President to target, capture, and detain enemy combatants. The scope of the hostilities authorized by the AUMF, therefore, turns substantially on the definition of “enemy combatant.” In modern LOAC, two categories of individuals may be so classified:

⁴ Critics might argue that the rules were drafted with traditional conflicts in mind and accordingly do not translate into useful principles in GWOT. The significance of this “translation” problem is often overblown. How best to regulate the conduct of unconventional conflicts, including those involving guerrilla forces, has long been a central problem in LOAC, and it is now widely understood that the core principles of LOAC apply across the spectrum of conflict types. *See, e.g.*, DoD Law of War Program, *supra* note 3, at para. 5.3.1 (requiring compliance “however such conflicts are characterized”). Furthermore, the implications of the translation problem cut both ways: while the problem calls into question the suitability of some constraints on warmaking, it also casts doubt on the suitability of some affirmative grants of power.

⁵ We do not provide a comprehensive assessment of the claims advanced by Professors Bradley and Goldsmith. We also do not consider whether any aspect of LOAC applies, of its own force, to GWOT. *See generally* DEREK JINKS, *THE RULES OF WAR: THE GENEVA CONVENTIONS IN THE AGE OF TERROR* (forthcoming 2005) (analyzing this issue). We take as our point of departure Professors Bradley and Goldsmith’s claim that the laws of war have interpretive significance for the AUMF — irrespective of whether they otherwise apply to GWOT.

lawful combatants⁶ and unlawful combatants (civilians who directly participate in hostilities).⁷ Professors Bradley and Goldsmith accurately identify the “direct participation” standard as an important aspect of this inquiry. Their analysis, however, neither adequately specifies nor usefully applies this standard.⁸

The definition of “direct participation” is much more precise — and the disagreement about its scope much less significant — than Professors Bradley and Goldsmith imply. According to the Commentaries on the Geneva Protocols, “[d]irect participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place,”⁹ and it entails “a sufficient causal relationship between the act of participation and its immediate consequences.”¹⁰ Although this standard was first formalized in a treaty not ratified by the United States, there is substantial evidence that the United States has nonetheless adopted it.¹¹ First, the United States has formally acceded to

⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *adopted* June 8, 1977, art. 51(1), 1125 U.N.T.S. 3, 26 [hereinafter Protocol I].

⁷ *Id.* art. 51(3), 1125 U.N.T.S. at 26.

⁸ Bradley & Goldsmith, *supra* note 1, at 2115–16. The misspecification of the standard leads Professors Bradley and Goldsmith to conclude that it does little work. *Id.* at 2116. They also imply that the standard is satisfied by conduct that has only an oblique connection to direct attacks. *See id.* (suggesting that direct participation excludes “small-scale financial support (especially unknowing support)”). Although such conduct is likely criminal, it bears little relation to the well-settled understanding of “direct participation.” *See, e.g.*, INTER-AM. COMM’N ON HUMAN RIGHTS, ORG. OF AM. STATES, OEA/Ser. L/V/II.102 Doc. 9 rev. 1, THIRD REPORT ON THE HUMAN RIGHTS SITUATION IN COLOMBIA paras. 56–57, at 87 (1999) (explaining, in the context of guerrilla warfare, that conduct failing to satisfy the direct participation standard may nevertheless be a crime).

⁹ INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 516 (Yves Sandoz et al. eds., 1987).

¹⁰ *Id.* at 1453. Colonel W. Hays Parks — the leading proponent of a broad standard for participation — argues that customary international law supports a more expansive definition that would preclude civilians from providing functionally important, though less immediate, support to the military effort. The hypothetical that Colonel Parks uses to illustrate how his approach differs from the Protocol approach is “[a] civilian . . . driving a military truck filled with ammunition towards his front lines.” W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 134 (1990). That this is considered a hard case illustrates the substantial agreement between the two camps. Even on Colonel Parks’s view, civilians are not precluded from participating in “logistics support,” “national C³I [command, control, communications, and intelligence],” “war manufacturing,” “defense R&D,” or other war-related efforts. *Id.* at 122 fig.1.

¹¹ The United States refused to ratify Protocol I in substantial part on the grounds that two of its provisions aggrandize and encourage terrorists by characterizing them as combatants rather than criminals. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE PROTOCOL II ADDITIONAL TO THE GENEVA CONVENTIONS OF AUGUST 12, 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF NONINTERNATIONAL ARMED CONFLICTS, S. TREATY DOC. NO. 100-2, at IV (1987) [hereinafter MESSAGE FROM THE PRESIDENT]. The concern with Protocol I, therefore, was that it too readily swept terrorists into

the standard in other LOAC treaties.¹² Additionally, the United States formally endorsed the definition in signing (in 2000) and ratifying (in 2002) the Protocol on Children in Armed Conflict.¹³ U.S. military authorities have confirmed that the United States accepts this framework¹⁴ in all armed conflicts.¹⁵

Notwithstanding some modest, if persistent, definitional squabbles,¹⁶ it is well settled that providing some important logistical support to armed forces, even in a zone of active military operations, falls below the threshold for direct participation. LOAC specifies that persons accompanying armed forces, such as “supply contractors[and] members of labour units or of services responsible for the welfare of the armed forces,” are noncombatants,¹⁷ as are medical and religious

the very legal category — “combatant” — that the Bush Administration liberally applies to all members of al Qaeda and its associated forces.

¹² The United States is a signatory to Protocol II to the Geneva Conventions, which applies the direct participation standard to noninternational conflicts. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *adopted* June 8, 1977, art. 4(1), 1125 U.N.T.S. 609, 612.

¹³ The Protocol requires states to ensure that children under the age of eighteen “do not take a direct part in hostilities.” Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, *adopted* May 25, 2000, art. 1, S. TREATY DOC. NO. 106-37, at 33 (2000), 39 I.L.M. 1285, 1287. Upon ratification, the United States adopted the following understanding:

The United States understands the phrase “direct part in hostilities” to mean immediate and actual action on the battlefield likely to cause harm to the enemy because there is a direct causal relationship between the activity engaged in and the harm done to the enemy. The phrase “direct participation in hostilities” does not mean indirect participation in hostilities, such as gathering and transmitting military information, transporting weapons, munitions, or other supplies, or forward deployment.

MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING TWO OPTIONAL PROTOCOLS TO THE CONVENTION ON THE RIGHTS OF THE CHILD, S. TREATY DOC. NO. 106-37, at VII (2000). The letter of submittal makes plain that the definition in the Protocol and the understanding is indistinguishable from the LOAC direct participation standard. *Id.* at VI.

¹⁴ *See, e.g.*, U.S. ARMY, LAW OF WAR WORKSHOP DESKBOOK 129 (Brian J. Bill ed., 2004); ANNOTATED SUPPLEMENT TO THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS para. 11.1, at 481 (A.R. Thomas & James C. Duncan eds., 1997).

¹⁵ DoD Law of War Program, *supra* note 3, at para. 5.3.1.

¹⁶ There is some technical disagreement over whether the level of participation required is best characterized as “direct” or “active.” *See, e.g.*, U.S. ARMY, SENIOR OFFICER LEGAL ORIENTATION DESKBOOK 43-8 to -14 (2005). However, the terms are generally considered synonymous. *See, e.g.*, OPERATIONAL LAW HANDBOOK 14, 17, 78, 398 (Derek I. Grimes ed., 2005). The distinction, even when framed with great care, is dispositive only in a narrow range of cases, none of which has obvious strategic significance in GWOT. *See, e.g.*, U.S. ARMY, SENIOR OFFICER LEGAL ORIENTATION DESKBOOK, *supra*, at 43-11 n.42.

¹⁷ Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, *opened for signature* Aug. 12, 1949, art. 4(a)(4), 6 U.S.T. 3316, 3320, 75 U.N.T.S. 135, 138 [hereinafter Third Geneva Convention]; *see also, e.g.*, JOINT CHIEFS OF STAFF, U.S. DEP’T OF THE ARMY, THE NAVY, THE AIR FORCE, AND THE MARINE CORPS, JOINT PUB. 4-0, DOCTRINE FOR LOGISTIC SUPPORT OF JOINT OPERATIONS V-1 to -2 (2000) [hereinafter JOINT CHIEFS OF STAFF] (defining the combatant category to exclude civilians performing such functions as

personnel.¹⁸ Individuals who perform these roles may risk incidental injury or death due to their proximity to armed forces, and they may even have a “force multiplier effect [that] enhances . . . fighting capability,”¹⁹ but they are not combatants within the meaning of LOAC. LOAC therefore does not support Professors Bradley and Goldsmith’s proposition that “Congress has authorized the President to use force against *all members* of al Qaeda.”²⁰

How then does this legal regime apply to GWOT? The first inquiry is whether the individuals in question qualify as lawful combatants under the Geneva Conventions.²¹ Although militant groups could satisfy these criteria in theory, it is unlikely that many, if any, will do so in fact.²² The only remaining inquiry is whether, under the unlawful combatant prong,²³ the individuals in question satisfy the direct participation standard.²⁴ The fact of membership in a group that is itself engaged in fighting may be the starting point in this analysis, but it is plainly insufficient to establish direct participation.²⁵ Critics might argue that membership itself constitutes direct participation,²⁶ but the validity of this point in any particular case would turn on what role the member assumed in the group.²⁷ Even under a *broad* definition of direct participation, members conducting “local intelligence, intermediate logistics, recruiting, [and] training” would retain their status as noncombatants.²⁸

The limits this rule implies on the scope of the AUMF go far beyond those suggested by Professors Bradley and Goldsmith. Indeed, the President’s notion of “enemy combatants” in GWOT exceeds the

maintenance of weapon systems, command-and-control infrastructure, and communication systems, as well as construction of roads, airfields, transportation services, and prison facilities).

¹⁸ See, e.g., Third Geneva Convention, *supra* note 17, art. 33, 6 U.S.T. at 3344, 75 U.N.T.S. at 162.

¹⁹ JOINT CHIEFS OF STAFF, *supra* note 17, at V-1.

²⁰ Bradley & Goldsmith, *supra* note 1, at 2109 (emphasis added).

²¹ See *supra* p. 2655.

²² See, e.g., A.P.V. ROGERS, LAW ON THE BATTLEFIELD 7–9 (1996).

²³ See *supra* p. 2655.

²⁴ See ROGERS, *supra* note 22, at 8 (arguing that the appropriate inquiry is direct participation analysis); W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, ARMY LAW, Dec. 1989, at 9 app. B (same).

²⁵ See, e.g., Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT’L L. 511, 528–29 & n.71 (2005) (arguing that a “threshold requirement [of noncombatant status] is independence from the armed forces,” but noting that a nonindependent individual must still directly participate in the conflict to acquire combatant status).

²⁶ See ROGERS, *supra* note 22, at 8–9.

²⁷ See, e.g., Parks, *supra* note 24, at 9 app. C (disaggregating members of a group by function).

²⁸ *Id.*; cf. S. EXEC. REP. NO. 107-4, at 7, 35 (2002) (explaining that training is not direct participation), available at http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.21&filename=ero04.pdf&directory=/disk3/wais/data/107_cong_reports.

scope of LOAC.²⁹ Specifically, the Administration's designation of financiers,³⁰ bodyguards,³¹ an accountant, and a propagandist³² as combatants flouts even a broad definition of direct participation.

II. TACTICS IN GWOT: DETENTION AND MILITARY COMMISSIONS

Professors Bradley and Goldsmith apply their framework to several controversial war powers asserted by the President. The relevance of

²⁹ See *infra* note 32 (collecting specific examples). The plurality in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), adopted a definition of combatant that is consistent with LOAC. See *id.* at 2639 (defining "enemy combatant" as "an individual who . . . was 'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan and *who* 'engaged in an armed conflict against the United States' there" (emphasis added) (quoting Brief for the Respondents, at 3 (No. 03-6696), available in 2004 WL 724020 (quoting U.S. DEP'T OF DEF., FACT SHEET: GUANTANAMO DETAINEES 5 (2004), available at <http://www.defenselink.mil/news/Feb2004/d20040220det.pdf>) (internal quotation marks omitted)). After *Hamdi*, the Order Establishing Combatant Status Review Tribunals subtly tweaked this definition such that the direct participation standard is no longer accommodated. See Memorandum from Deputy Secretary of Defense Paul Wolfowitz to the Secretary of the Navy 1 (July 7, 2004) (defining "enemy combatant" as "an 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. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces" (emphasis added)), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>; cf. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 475 (D.D.C. 2005) (criticizing the nonrestrictive use of the term "includes").

³⁰ U.S. DEP'T OF DEF., *supra* note 29, at 2 (including among "representative examples" of detained combatants individuals "involved in terrorist financing," "with links to a financier of the September 11th plots," and "who served as an al Qaeda translator and managed operating funds").

³¹ That a person is an armed guard, without more, is unhelpful. See, e.g., Schmitt, *supra* note 25, at 513, 538 (noting the prevalent use of civilian guards by U.S. forces and that service as an armed guard in a combat zone, in the abstract, does not constitute direct participation).

³² Consider the principal charges against some "unlawful combatants" designated for prosecution before military commissions. One allegedly served as an "accountant and treasurer" and "provided logistical support such as food, shelter and clothing"; he also "assisted in loading and transporting" weapons and ammunition. Charge Sheet at 3-4, *United States v. al Qosi* (U.S. Military Comm'n), available at <http://www.defenselink.mil/news/Jun2004/d20040629AQCO.pdf>. A second "created several instructional and motivational recruiting video tapes." Charge Sheet at 3, *United States v. al Bahlul* (U.S. Military Comm'n), available at <http://www.defenselink.mil/news/Jun2004/d20040629ABCO.pdf>. These allegations alone clearly would not support a finding of "direct participation" under LOAC; indeed, these facts fall squarely within expressly identified examples of indirect participation or nonparticipation. See MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS 672 (1982) (noting that "transporting supplies, serving as messengers or disseminating propaganda" does not constitute direct participation). Conversely, consider Jose Padilla — the so-called "dirty bomber" — who allegedly accepted missions from al Qaeda to carry out attacks against the United States. See *Padilla v. Hanft*, No. 2:04-2221-26A, 2005 WL 465691, at *1 n.3 (D.S.C. Feb. 28, 2005). These facts, if proven, would satisfy the direct participation standard, notwithstanding the recent district court ruling. See *id.* at *6 (reasoning that the "enemy combatant" term includes only individuals who have taken up arms on the battlefield). Although the court perhaps reached the proper conclusion — that the President may lack authority under domestic law to detain without charge U.S. citizens captured under such circumstances — its reasoning is inconsistent with the LOAC definition of combatant.

LOAC for defining the scope of congressional authorization, according to Professors Bradley and Goldsmith, is subject to a conceptual qualification: “A violation of international law would negate a claim of implied authority under the AUMF only if the international law requirement in question was a condition of the exercise of the particular authority.”³³ This point is certainly correct. Nevertheless, Professors Bradley and Goldsmith misapply it because they fail to identify the conditions established in LOAC for the exercise of the asserted war powers. They mistakenly suggest that many LOAC-based constraints are not relevant to the determination of whether the President is authorized to detain or try by military commission captured enemy combatants. These arguments are crucial, given that the confinement/treatment regime applied to GWOT detainees and the procedures for military commissions arguably fail to satisfy the basic requirements of LOAC.

A. *The Power To Detain*

As Professors Bradley and Goldsmith observe, LOAC permits states to detain combatants — and even noncombatants — in certain identified circumstances.³⁴ The question is what LOAC rules are conditions of the authority to detain. Professors Bradley and Goldsmith suggest that the authority to detain combatants is not predicated on the adequacy of either the procedures used to classify individuals as such or the conditions of confinement. As propositions of LOAC, these points require substantial qualification. We do not argue that the LOAC-based authority to detain is conditioned on “perfect compliance” with all aspects of LOAC. Our claim, instead, is that there is a demonstrable structural commitment in LOAC conditioning the exercise of coercive authority on the observance of certain minimum humanitarian requirements.³⁵

First, the power to detain is predicated on fulfilling minimum procedural guarantees. The Fourth Geneva Convention, for example, states in no uncertain terms that “[p]arties to the conflict *shall not intern* protected persons, *except* in accordance with” particular proce-

³³ Bradley & Goldsmith, *supra* note 1, at 2095.

³⁴ *Id.* at 2094.

³⁵ More generally, no special authority to prosecute GWOT ought to issue *from* LOAC if the President determines that LOAC is inapplicable to the conflict. The tight coupling of rights and obligations in LOAC canvassed in the text supports this view. This is one way to understand Justice Souter’s opinion in *Hamdi*. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2652 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment). Justice Souter concluded that substantial evidence suggests the President has decided not to operate within the LOAC framework. *Id.* at 2657–59. He reasoned that the President may not claim authority to detain from a legal framework that he has decided not to utilize in this conflict. *Id.*

dural requirements.³⁶ Detention of civilians is authorized only if these procedures establish (or, in the case of review, confirm) that “the security of the Detaining Power makes it absolutely necessary.”³⁷ Indeed, even before the close of hostilities, an internee must be released “as soon as the reasons which necessitated his internment no longer exist.”³⁸ In other words, the Conventions prescribe procedures for determining whether individuals may be detained *in the first place* and procedures to determine whether their *continued* detention is lawful.³⁹

Second, the power to detain is predicated, in many respects, on the treatment of detainees. For example, the Third Geneva Convention obligates parties to ensure the “maintenance” of detainees, that is, food, water, medical attention, hygiene, protection against the climate, and other provisions that are “necessary for the life and continuing physical health of prisoners of war.”⁴⁰ As the International Committee of the Red Cross explains, “[i]f the Detaining Power is unable or unwilling to fulfill its obligations in respect of maintenance, it should no longer detain any prisoners of war.”⁴¹ The leading treatise on the Convention states flatly that those unable to comply with basic maintenance re-

³⁶ Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, *opened for signature* Aug. 12, 1949, art. 79, 6 U.S.T. 3517, 3568, 75 U.N.T.S. 287, 338 [hereinafter Fourth Geneva Convention] (emphases added). These requirements include notice to outside powers (for example, the International Committee of the Red Cross), appellate review, and periodic reconsideration “with a view to the favourable amendment of the initial decision.” *Id.* art. 43, 6 U.S.T. at 3544–46, 75 U.N.T.S. at 314–316; *id.* art. 78, 6 U.S.T. at 3566–68, 75 U.N.T.S. at 336–38.

³⁷ *Id.* art. 42, 6 U.S.T. at 3544, 75 U.N.T.S. at 314.

³⁸ *Id.* art. 132, 6 U.S.T. at 3606, 75 U.N.T.S. at 376; *see also* Protocol I, *supra* note 6, art. 75(3), 1125 U.N.T.S. at 37 (applying this regime to all internees). Also, the Third Geneva Convention requires repatriation, even before the close of hostilities, of seriously sick and wounded prisoners. Third Geneva Convention, *supra* note 17, art. 109, 6 U.S.T. at 3400, 75 U.N.T.S. at 218. The Convention further requires that special medical commissions be established to determine whether individual detainees are entitled to release and repatriation pursuant to this requirement. *Id.* art. 112, 6 U.S.T. at 3402, 75 U.N.T.S. at 220.

³⁹ Much of the controversy surrounding the adequacy of procedures in GWOT has centered on Article 5 of the Third Geneva Convention — the provision requiring, in all cases of doubt, court-like procedures to divest detainees of POW status. *See* Bradley & Goldsmith, *supra* note 1, at 2094–96, 2122 (discussing the issue). Professors Bradley and Goldsmith rightly note that the authority to detain is not conditioned on this procedural requirement because LOAC permits detention of enemy combatants irrespective of whether they are entitled to POW status. *Id.* at 2096. Article 5 is best understood as a second-order procedural protection to ensure detainees are not improperly excluded from an important status category. In addition, compliance with Article 5 is a condition of exercising other asserted war powers. For example, POWs may not be tried by special military commission. Third Geneva Convention, *supra* note 17, art. 102, 6 U.S.T. at 3394, 75 U.N.T.S. at 212; *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 155 (D.D.C. 2004).

⁴⁰ Third Geneva Convention, *supra* note 17, art. 15, 6 U.S.T. at 3330, 75 U.N.T.S. at 148; INT’L COMM. OF THE RED CROSS, COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 152 (Jean S. Pictet ed., A.P. de Henry trans., 1960); INT’L COMM. OF THE RED CROSS, *supra* note 9, at 1387.

⁴¹ INT’L COMM. OF THE RED CROSS, *supra* note 40, at 153; *see also* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 351 (Dieter Fleck ed., 1995).

quirements have only two options: they may release and repatriate prisoners directly to the enemy, or they may conclude agreements whereby affected prisoners will be detained in a neutral state.⁴² Indeed, the Convention provision establishing the framework for the latter option was designed to remedy situations in which “the Detaining Power is not in a position, for any reasons, to conform to certain minimum standards as regards the treatment of prisoners of war.”⁴³ The drafting history of other provisions also clearly illustrates that observance of minimum standards is a condition of the power to detain.⁴⁴

B. *The Power To Convene Military Commissions*

Professors Bradley and Goldsmith argue that statutory provisions *other than the AUMF* authorize the President to conduct trials by military commission.⁴⁵ The importance of the AUMF, on this view, is that it satisfies a condition precedent to the invocation of these statutory authorizations — namely, it expresses the consent of Congress to the exercise of certain wartime powers, including the use of commissions. The interpretive significance of LOAC is quite limited on this view — it is strictly confined to the role Congress assigned to LOAC in the statutes in question.

Professors Bradley and Goldsmith, drawing heavily from the Supreme Court’s reasoning in *Ex parte Quirin*,⁴⁶ suggest that LOAC is relevant only to the scope of the subject matter jurisdiction of the commissions. In framing their analysis this way, they imply that the power to convene ad hoc military commissions is not conditioned on the adequacy of the procedures prescribed for these special tribunals.

In our view, this line of reasoning is subject to two important qualifications. First, *Quirin* does not render irrelevant the procedural requirements of LOAC. In *Quirin*, the Court held only that “Congress

⁴² HOWARD S. LEVIE, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICTS 127–28 (U.S. Naval War Coll., Int’l Law Studies, Vol. 59, 1979).

⁴³ INT’L COMM. OF THE RED CROSS, *supra* note 40, at 521 n.1 (quoting II-A FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 292 (1949) (quoting Major Armstrong of Canada)).

⁴⁴ Consider, for example, the prohibition on detention in “unhealthy areas.” Fourth Geneva Convention, *supra* note 36, art. 85, 6 U.S.T. at 3570–72, 75 U.N.T.S. at 340–42. The drafting history makes clear that the provision was amended to permit *temporary* detention facilities to be located in unhealthy areas because, had it not been, parties to a conflict might, in some situations, not be permitted to detain individuals *whatsoever*. II-A FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, *supra* note 43, at 837.

⁴⁵ Bradley & Goldsmith, *supra* note 1, at 2129. They also argue that other interpretive factors, such as past executive practice in the Civil War and World War II, support the view that the AUMF authorizes the use of commissions. *See id.* at 2131. This claim, however, fails to account for the breathtaking developments in LOAC since those prior conflicts and the degree to which these developments have been incorporated into domestic law and military policy.

⁴⁶ 317 U.S. 1, 29 (1942).

[in what is now 10 U.S.C. § 821] has authorized trial of offenses against the law of war before such commissions."⁴⁷ The Court was not asked to construe, and did not construe, the procedural requirements of LOAC.⁴⁸ More importantly, section 821 does not address the procedures to be used in military commissions.⁴⁹ In short, neither *Quirin* nor section 821 provides any reason to disregard the procedural requirements of LOAC when construing the scope of congressional authorization to convene military tribunals. Second, LOAC now imposes a robust array of procedural rights as a condition precedent to the trial and punishment of war detainees. We need not catalogue these protections here — we note only that every post–World War II LOAC treaty governing the treatment of detainees requires, as a condition of punishment, substantial fair trial protections.⁵⁰

III. CONCLUSION

The canvassed features of LOAC reflect, in many respects, the “humanization of humanitarian law” that has accelerated over the past half century.⁵¹ When these developments are taken into account, it is questionable whether the AUMF is a historically broad authorization. Indeed, it is unclear whether comparative textual analysis of temporally remote AUMFs is terribly instructive, given that they are issued against the backdrop of, and best interpreted in light of, an evolving international regime. Professors Bradley and Goldsmith overstate the ambiguity of modern LOAC and understate the range of rules that condition the exercise of controversial war powers. At bottom, LOAC should assume a more central role in the interpretation of the AUMF. This body of law, properly understood, suggests several meaningful, strategically viable constraints on executive action in GWOT.

⁴⁷ *Id.*

⁴⁸ Indeed, the defendants could not have obtained relief based on a claim that the commissions failed to satisfy the procedural rights recognized in LOAC. Then-existing LOAC did not expressly confer protection of any sort on unlawful combatants. See, e.g., Richard R. Baxter, *So-Called “Unprivileged Belligerency”: Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT’L L. 323, 326–27 (1951). The defendants instead unsuccessfully invoked procedural rights provisions of the U.S. Constitution. *Quirin*, 317 U.S. at 38–40.

⁴⁹ Congress has authorized the President to prescribe procedures for trials by military commission, but these procedures may not be “contrary to or inconsistent with” the Uniform Code of Military Justice. 10 U.S.C. § 836 (2000). Whatever else this language may require, we submit that it certainly requires procedures that accord with the fundamental guarantees of LOAC.

⁵⁰ See generally Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT’L L.J. 367 (2004) (detailing the procedural inadequacies of these protections).

⁵¹ Theodore Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239, 239 (2000).