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Downgrading rights and expanding power during post-9/11 panic

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The war on terrorism and the end of human rights

Preface

This chapter was written in spring and summer 2002, responding to momentous developments in the previous six months, both "on the ground" and in the US government's legal strategy. When I wrote it, the ashes of the World Trade Center had not yet settled. Speaking personally, I can report daily fear of another attack as I drove to work on Capitol Hill in Washington; it felt as though I had a target painted on the roof of my car. I was not the only one; public fear was palpable and pervasive. So were the grief and the anger. I shared, and share, that grief and anger.

Five people in my own tiny neighborhood in suburban Maryland died in the September 11 attack. It seemed clear that ideological suicide bombers cannot be deterred by the threat of criminal punishment, and that fact lent force to the government's aggressive, military-focused strategy. Facing the nightmare scenario in which terrorists acquire weapons of mass destruction, no possible step seemed too drastic.

Of course, this was an entirely me- and us-centered reaction. (More on this point in Chapter 2.) Reading news reports in a more objective spirit, I saw mounting evidence that the government's response posed a menace to human rights wherever the global war on terrorism was being waged. Within the United States, it began with a post-9/11 dragnet of young men from Muslim countries, some held incommunicado for months, and none of whom ever received an apology after their release. Outside the United States, it was hard to ignore news of civilian casualties in Afghanistan and initial reports of harsh treatment of captives. I wanted to present both sides of the argument – the reasons for a militarized policy and the dangers it posed to human rights – as fairly as possible.

On the ground, the United States had recently opened the Guantánamo Bay prison for men suspected of being Al Qaeda or Taliban fighters. The image of prisoners stepping off the planes in orange jumpsuits, blinded by hoods and deafened by headsets, was horrifying. The aim of sensory deprivation, we

The main text of this chapter was first published in 2002 – see Acknowledgments.

already understood, was to disorient the men; a few years later, journalists and academics discovered that the US government had adopted a strategy of psychological torture based on research into how to break down a human personality for interrogation purposes.[1] Sensory deprivation was part of that program. Although I wrote this chapter before the first intimations of torture at Guantánamo, or any hint of CIA "black sites," the media was already filled with talk of torture. Vice President Dick Cheney warned early on that US strategy would move to the "dark side."[2] Everyone knew what Cheney meant.

The US Congress's Authorization for the Use of Military Force (AUMF) granted the president authority "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."[3] This is a limited authority, subsequently interpreted by the US government to include Al Qaeda and "associated forces." But two days later, President Bush announced in a famous speech before both houses of the US Congress, "Our war on terror begins with Al Qaida, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated."[4] This speech originated the famous phrase "war on terror," and it is why I wrote in this chapter that "terrorists who had nothing to do with September 11, even indirectly, have been earmarked as enemies."

The chapter also responds to legal developments. In early 2002, the government adopted a maximally hard line, stripping away all the detainees' rights. This was the "limbo of rightlessness" I speak of in the chapter. In February, a secret memorandum from the Office of Legal Counsel (OLC) in the Justice Department argued that the Geneva Conventions do not cover either Al Qaeda or Taliban captives. President George W. Bush accepted this conclusion. The president publicly issued an order to that effect, which cleared the path to the harsh interrogation strategies that followed by removing Geneva

[1] See Chapter 7 below.

[2] Interview of Vice President Dick Cheney by Tim Russert, NBC, *Meet the Press*, Sept. 16, 2001: "I'm going to be careful here, Tim, because I – clearly, it would be inappropriate for me to talk about operational matters, specific options or the kinds of activities we might undertake going forward . . . We also have to work, though, sort of the dark side, if you will. We've got to spend time in the shadows in the intelligence world. A lot of what needs to be done here will have to be done quietly, without any discussion, using sources and methods that are available to our intelligence agencies, if we're going to be successful. That's the world these folks operate in, and so it's going to be vital for us to use any means at our disposal, basically, to achieve our objective."

[3] Joint Resolution to authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States, Public Law 107-40 (Sept. 18, 2001), 115 Stat. 224.

[4] Address to a Joint Session of Congress and the American People, Sept. 20, 2001 (http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html).

protections against abusive treatment. The government also asserted half a dozen other hyperaggressive legal positions designed to maximize presidential power over the detainees and minimize their rights and recourse. These maintained:

(1) that Guantánamo lies entirely outside the jurisdiction of the federal courts, so no court could hold legal proceedings on behalf of the detainees;
(2) that even though the detainees do not enjoy prisoner-of-war (POW) status and the protections associated with it, they are indeed military captives who can be detained without charges or trial until the war is over – whenever that might be;
(3) that they are entitled to no process to review their status, even if some protested that they were cases of mistaken identity or even innocent victims of mercenary Afghans who denounced them to the United States for financial bounties;
(4) that the detainees have no right to counsel or to visits by the Red Cross;
(5) that the US government lay under no obligation to reveal their identities (and in fact their identities were not revealed until an outraged military lawyer leaked them);
(6) and that those detainees charged with crimes would be tried before special, newly created military commissions, with minimal procedural protections, rather than domestic courts or military courts-martial. Notably, the military commissions would not need a unanimous jury vote to impose the death penalty.

According to the government, the cases even of two US citizens held within the United States – Yaser Hamdi and Jose Padilla – were not justiciable, and the courts must butt out.

In short, the detainees disappeared into a legal black hole, possessing no rights either as POWs or criminal suspects; and no form or forum of legal recourse was available to them.

The US interpretation of the Geneva Conventions put it at odds with the International Committee of the Red Cross (ICRC) and human-rights organizations. According to the ICRC, everyone captured in a combat zone is either a combatant or a civilian, and therefore protected either by the Third Geneva Convention (governing treatment of POWs) or the Fourth Convention (governing treatment of civilians). The ICRC and human-rights groups view the Geneva regime as gapless, protecting every captive in an armed conflict.

The OLC saw matters differently. They noticed that the Geneva Conventions provide broad protections for POWs and civilians in international armed conflicts (IACs) – armed conflicts among states. The Geneva Conventions also provide more minimal but still significant protections in "armed conflicts not of international character" (noninternational armed conflicts (NIACs)). But in their view, the global war on terrorism was neither. Al Qaeda is not a state,

and NIACs, in the OLC's view, include only internal armed conflicts like civil wars, within the borders of a single state. The war on terrorism was novel and unique: an armed conflict with a nonstate organization operating across borders. Reportedly, Al Qaeda had operatives in sixty countries, and all these countries were potential battlefields.

Today, such conflicts are sometimes called *transnational armed conflicts*. This is not terminology recognized by international law, but it is a useful way of distinguishing internal from cross-border NIACs. In the OLC's legal theory, transnational armed conflicts are neither IACs nor NIACs, and therefore none of the Geneva Conventions apply to them.[5] As it concerns Al Qaeda, this was by no means a frivolous position. A fair (if debatable) reading of the Geneva text and negotiating history could be marshaled in its support, and the question of how to classify the "global war on terrorism" remained unanswered for the next four years, at least in US law. Eventually, the landmark 2006 Supreme Court decision *Hamdan* v. *Rumsfeld* rejected the OLC's theory and declared the war on terrorism to be a NIAC, covered by the Geneva Conventions.[6]

As for the Taliban, which had some claim to being Afghanistan's national army, the OLC argued that Afghanistan was a failed state that could no longer be counted as a party to the Geneva Conventions. Unlike the OLC's theory about Geneva protections for Al Qaeda, the failed-state argument was absurd, as the State Department legal adviser argued in an angry and frustrated secret memorandum, because international law does not recognize a category of "failed states," and does not allow one state to declare that another is no longer party to a treaty. But the White House, bent on asserting its own power to do what it wished in the name of national security, sided with the OLC against the State Department.

Given the boldness of the government's legal positions – not to mention the seeming indifference of the American public to civilian casualties in Afghanistan – at the moment I wrote this chapter, "the end of human rights" was not merely a rhetorical flourish. On the surface, everything has changed since then, so readers may think that the concerns I raised in 2002 no longer need trouble us. Alas, it is not so.

To be sure, almost all of the hyperaggressive Bush legal positions have fallen in the courts. Lower courts quickly rejected the claim that they lack authority to hear detainee cases, and one federal judge also rejected the administration's fallback position that courts must defer to the commander in chief's factual

[5] Curiously, some human-rights groups agreed with the Bush administration that the conflict with Al Qaeda is not an IAC or NIAC, but for different reasons. Where the OLC saw the conflict as a novel kind of war not anticipated or covered by the treaties, human-rights groups were skeptical that the campaign against Al Qaeda should be thought of as an armed conflict at all. They still are. In their eyes it is a matter for law enforcement. Of course, none doubted that the Afghanistan war was an armed conflict.

[6] *Hamdan* v. *Rumsfeld*, 548 U.S. 557 (2006).

representations about detainees. A few cases began winding their way through the judicial system, and eventually they reached the Supreme Court. Dramatically, in 2004, the Supreme Court rebuffed the administration. The Court held that Guantánamo falls under US jurisdiction, and that the habeas corpus statute applies to the detainees there (*Rasul* v. *Bush*).[7] The same day, the Court held that Guantánamo detainees deserve some form of process to review their detention (*Hamdi* v. *Rumsfeld*).[8] Guantánamo was rescued from limbo and moved back into a legal system of sorts.

The Republican-controlled Congress responded by stripping habeas corpus jurisdiction over Guantánamo from the federal courts, but in 2006 the *Hamdan* court held that this legislation applied only to future detainees, not those currently in Guantánamo. Their cases remained alive. Again, Congress responded with jurisdiction-stripping legislation, but in 2008 the Supreme Court found a constitutional right to habeas corpus that no legislation could extinguish (*Boumediene* v. *Bush*).[9] The dynamic was striking: each time the Court determined that the president had overreached, the Congress – controlled by President Bush's party – rebuked the Court and tried to wrest the Guantánamo cases out of its hands, only to have the Court push back. What remained unclear was whether any of this had to do with the detainees rather than with competition among the branches of the US government.

Shortly before the 2004 oral arguments in *Hamdi* and *Rasul*, the government permitted Yaser Hamdi and Jose Padilla to meet with lawyers (after nearly two years of isolation); this concession was an unavailing public-relations effort to reassure the Court that the detention policy was not the cesspool of lawlessness that its opponents portrayed. After the *Hamdi* decision granted Yaser Hamdi review of his detention, the government in effect conceded that it never had a factual basis for holding him. Instead of submitting his case for review and fighting his release, the government sent Hamdi home to Saudi Arabia, on condition that he renounce his US citizenship.

After the 2004 decisions moved the Guantánamo detention facility back into the ambit of the courts, the other detainees were grudgingly given access to lawyers. The lawyers never succeeded in litigating any of them out of Guantánamo, but they did something else that was immensely valuable: they told the detainees' stories to the outside world. The black hole had become less black. Now, for the first time, news of torture and inhumane treatment filtered out of Guantánamo, and the world learned of the sleep deprivation, temperature manipulation, bombardment with loud offensive music, and force-feeding the detainees were subjected to.

The 2006 *Hamdan* decision not only granted Geneva protections to detainees, but it also found that the Bush military commissions did not meet Geneva's

[7] *Rasul* v. *Bush*, 542 U.S. 466 (2004). [8] *Hamdi* v. *Rumsfeld* 542 U.S. 547 (2004).
[9] *Boumediene* v. *Bush*, 553 U.S. 723 (2008).

minimal standard of "a regularly constituted court . . . affording all the judicial guarantees which are recognized as indispensable by civilized peoples" and terminated them. (President Barack Obama subsequently resurrected them.) Since the 2008 *Boumediene* decision guaranteed habeas corpus to detainees as a matter of constitutional right, there have been regular habeas corpus hearings in the lower courts, which the detainees mostly won. And upon assuming office in 2009, President Obama banned torture and rescinded all the OLC's controversial interrogation opinions. Meanwhile, most Guantánamo inmates have been released to other countries.

And yet in reality not so much has changed. Even though detainees won most of their habeas corpus proceedings in lower courts, the District of Columbia (DC) Court of Appeals has reversed every decision that came before it. Indeed, one pugnacious judge on that court wrote in 2011 that

> candor obliges me to admit that one can not help but be conscious of the infinitely greater downside risk to our country, and its people, of an order releasing a detainee who is likely to return to terrorism. . . I doubt any of my colleagues will vote to grant a petition if he or she believes that it is somewhat likely that the petitioner is an al Qaeda adherent or an active supporter. . . [T]he whole process . . . becomes a charade prompted by the Supreme Court's defiant if only theoretical assertion of judicial supremacy, sustained by posturing on the part of the Justice Department, and providing litigation exercise for the detainee bar.[10]

"Defiant" Supreme Court decisions granting detainee rights do not matter – if we fear the detainees, we will never let them go. Hard words indeed from a judge who is legally obligated to follow, not defy, Supreme Court decisions.

Even if a court does order release, the detainee must remain in Guantánamo if no other country will accept him, because the US courts held that they lack authority to order his release within the United States.[11] Habeas corpus turns out to be a right with no remedy. Just as significantly, the DC Court of Appeals found that even though the courts have jurisdiction over Guantánamo, that is for reasons unique to Guantánamo, which the US government has leased in perpetuity from Cuba, and over which it has legislative authority. Conspicuously, the courts lack jurisdiction over the US prison in Bagram, Afghanistan, where more than a thousand men are detained, including prisoners captured in other countries and shipped to Bagram.[12] Bagram became the new Guantánamo. In 2012 plans were made to turn Bagram over to the Afghan government. That leaves the question of whether another site will become the new Guantánamo.

Meanwhile, the US Congress has forbidden the President to close the old Guantánamo – not that closing Guantánamo would help the remaining

[10] *Esmail* v. *Obama*, 639 F.3d 1075, 1078 (D.C. Cir. 2011) (Silberman J. concurring).
[11] *Kiyemba* v. *Obama*, 605 F.3d 1046, 1048 (D.C. Cir. 2010).
[12] *Maqaleh* v. *Gates*, 605 F.3d 84 (D.C. Cir. 2010).

prisoners, who would be transferred to harsher conditions in a super-maximum-security prison within the United States. President Obama himself has continued the policy of holding detainees deemed dangerous in indefinite preventive detention, although he has instituted periodic review of whether they still pose danger.[13] As I write this preface in May 2013, more than 100 Guantánamo prisoners are engaged in a prolonged hunger strike to protest their endless incarceration.

In other words, the chapter remains as relevant today as when I wrote it.

One further update: the chapter notes that Sweden – a supposed bastion of pro-human-rights sentiment – rendered an Egyptian asylum-seeker back to Egypt, where he was reportedly tortured. After I wrote the chapter it emerged that it was not Sweden but the CIA who rendered Mohammed al-Zari (or Alzery) to Egypt, although the Swedish government cooperated by turning him over to the CIA.[14]

THE WAR ON TERRORISM AND THE END OF HUMAN RIGHTS

In the immediate aftermath of 9/11, President Bush stated that the perpetrators of the deed would be brought to justice. Soon afterwards, the president announced that the United States would engage in a war on terrorism. The first of these statements adopts the familiar language of criminal law and criminal justice. It treats the 9/11 attacks as horrific crimes – mass murders – and the government's mission as apprehending and punishing the surviving planners and conspirators for their roles in the crimes. The war on terrorism is a different proposition, however, and a different model of governmental action – not law but war. Most obviously, it dramatically broadens the scope of action, because now terrorists who had nothing to do with 9/11, even indirectly, have been earmarked as enemies. But that is only the beginning.

The hybrid war–law approach

The model of war offers much freer rein than that of law, and therein lies its appeal in the wake of 9/11. First, in war, but not in law, it is permissible to use lethal force on enemy troops regardless of their degree of personal involvement with the adversary. The conscripted cook is as legitimate a target as the enemy general. Second, in war, but not in law, "collateral damage," that is, foreseen but unintended killing of noncombatants, is permissible. (Police cannot blow up an apartment building full of people because a murderer is inside, but an air force

[13] Executive Order 13567, Mar. 7, 2011.
[14] *Mohammed Alzery* v. *Sweden*, CCPR/C/88/D/1416/2005, UN Human Rights Committee (HRC), Nov. 10, 2006 (www.unhcr.org/refworld/docid/47975afa21.html).

can bomb the building if it contains a military target.) Third, the requirements of evidence and proof are drastically weaker in war than in criminal justice. Soldiers do not need proof beyond a reasonable doubt, or even proof by a preponderance of evidence, that someone is an enemy soldier before firing on him or capturing and imprisoning him. They do not need proof at all, merely plausible intelligence. Thus, the US military remains regretful but unapologetic about its January 2002 attack on the Afghani town of Uruzgan, in which twenty-one innocent civilians were killed, based on faulty intelligence that they were Al Qaeda fighters.[15] Fourth, in war one can attack an enemy without concern over whether he has done anything. Legitimate targets are those who in the course of combat *might* harm us, not those who *have* harmed us. No doubt there are other significant differences as well. But the basic point should be clear: given Washington's mandate to eliminate the danger of future 9/11s, so far as humanly possible, the model of war offers important advantages over the model of law.

There are disadvantages as well. Most obviously, in war but not in law, fighting back is a *legitimate* response of the enemy. Second, because fighting back is legitimate, in war the enemy soldier deserves special regard once he is rendered harmless through injury or surrender. It is impermissible to punish him for his role in fighting the war. Nor can he be "unpleasant[ly]" interrogated after he is captured. The Third Geneva Convention follows the Hague Convention in requiring POWs to tell their captors their name, rank, and serial number. Beyond that, it provides: "Prisoners of war who refuse to answer [questions] may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind."[16] And, when the war concludes, the enemy soldier must be repatriated. Third, when nations fight a war, other nations may legitimately opt for neutrality.

Here, however, Washington has different ideas, designed to eliminate these tactical disadvantages in the traditional war model. Washington regards international terrorism not only as a military adversary but also as a criminal activity and criminal conspiracy. In the law model, criminals do not get to shoot back, and their acts of violence subject them to legitimate punishment. That is what we see in Washington's prosecution of the war on terrorism. Captured terrorists may be tried before military or civilian tribunals, and shooting back at Americans, including American troops, is a federal crime (for the statute under which John Walker Lindh was indicted punishes anyone who "outside the United States attempts to kill, or engages in a conspiracy to kill, a national of the United States" or "engages in physical violence with

[15] John Ward Anderson, "Afghans Falsely Held by U.S. Tried to Explain; Fighters Recount Unanswered Pleas, Beatings – and an Apology on Their Release," *Washington Post*, Mar. 26, 2002, p. A14. See also Susan B. Glasser, "Afghans Live and Die with U.S. Mistakes; Villagers Tell of Over 100 Casualties," *Washington Post*, Feb. 20, 2002, p. A1.

[16] Geneva Convention (III) Relative to the Treatment of Prisoners of War, 6 U.S.T. 3317, signed on Aug. 12, 1949, at Geneva, Article 17.