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978-0-521-71120-3 - Beyond the Law: The Bush Administration's Unlawful Responses in the "War" on Terror

Jordan J. Paust

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BEYOND THE LAW

This book provides detailed exposition of violations of international law authorized and abetted by secret memos, authorizations, and orders of the Bush administration – in particular, why several Executive claims were in error, what illegal authorizations were given, what illegal interrogation tactics were approved, and what illegal transfers and secret detentions occurred. It also provides the most thorough documentation of cases demonstrating that the President is bound by the laws of war; that decisions to detain persons, decide their status, and mistreat them are subject to judicial review during the war; and that the commander in chief power is subject to restraints by Congress.

Tests for combatant and prisoner of war status are contrasted with Executive claims and the 2006 Military Commissions Act. Special military commissions contemplated by President Bush are analyzed along with the Supreme Court's decision in *Hamdan* concerning their illegal structure and procedures, as well as problems created by the 2006 Military Commissions Act.

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PREFACE

Within a few months after al Qaeda's unlawful terroristic attacks inside the United States on September 11, 2001, the Bush administration embarked on a "dirty war" response to terrorism involving methods of detention, treatment, and interrogation that Vice President Cheney had generalized as responses on "the dark side." The "dirty war" would involve at least cruel and inhumane treatment of captured human beings and the forced disappearance of various detained persons, despite the fact that cruel and inhumane treatment and forced disappearance are well-known examples of conduct that is absolutely proscribed under several treaties of the United States and customary international law. In fact, both forms of manifest illegality are among recognized peremptory prohibitions of the highest sort that apply in all contexts without exception.

The "dark side" methods, Cheney had argued, should be "done quietly," but they were used so widely and for so many years that complete secrecy was not possible. Opposition by various U.S. military, Federal Bureau of Investigation (FBI), and Central Intelligence Agency (CIA) personnel contributed to increased public exposure. When pictures of outrageous abuse of detainees at Abu Ghraib, Iraq, became widely publicized, the secrecy of Executive plans and authorizations, despite vigorous denial of their existence, began to unravel. Soon a series of classified memos and letters were leaked that demonstrated the role that several lawyers and others had played in attempts to deny international legal protections to al Qaeda and Taliban detainees, to reclassify their status, and to subject them to unlawful coercive interrogation tactics with alleged impunity. Yet, even as these and other evidence of a common plan had been disclosed, the denials, falsehoods, and misdirections continued – a few bad apples at the bottom; we do not

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"torture"; conduct depicted in the Abu Ghraib photos (e.g., stripping persons naked, hooding, and use of dogs) was not approved; everyone held at Guantanamo has been properly screened and they are all "terrorists"; there are no secret detention sites; water-boarding is a professional interrogation technique.

One of the memos was a February 7, 2002, memorandum by President Bush that authorized the denial of protections under the 1949 Geneva Conventions to every member of al Qaeda and the Taliban. The existence of other presidential memos and directives authorizing at least cruel and inhumane treatment and the secret detention and disappearance of human beings was reported in 2004, but greater details had emerged by the time President Bush publicly admitted in September 2006 that, indeed, "tough" interrogation tactics and secret detentions had been approved and would be continued by the CIA. These and other actions by the Bush administration sparked debate and litigation with respect to several matters of great significance under international, constitutional, and federal statutory law. In addition to creating individual civil and criminal responsibility for violations of international law, dirty war tactics have degraded this country, its values, and its influence. They have degraded those who used them and degraded those who did not oppose their use. As patriots of democratic freedom understand, they threaten our democracy and the rule of law.

This book provides a detailed exposition of the types of violations of treaties of the United States and customary international law authorized and abetted by previously secret memos, letters, directives, authorizations, and orders of President Bush, Secretary of Defense Rumsfeld, White House Counsel Gonzales, and various other lawyers and officials within the Bush administration – especially in Chapters One and Two. These chapters demonstrate why several of the claims in such memos were in serious and manifest error; what type of illegal authorizations and orders were actually given by the President, the Secretary of Defense, and various military commanders at Guantanamo and in Iraq; what type of other memos and authorizations existed in support of a common plan to violate the Geneva Conventions, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and human rights law; what type of illegal interrogation tactics were approved and used; what type of illegal transfers of persons occurred; and what type of unlawful secret detentions occurred. Chapter One also provides detailed attention to various

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laws of war and human rights relevant to treatment and interrogation of detained persons and discusses why relevant rights and duties are absolute and remain so regardless of claims by the President and others to deny coverage to alleged terrorists and to all enemy combatants; why there can be leader responsibility for dereliction of duty in addition to the responsibility of direct perpetrators, aiders and abettors, and those who issued illegal authorizations or orders; and why under our Constitution and venerable judicial decisions and recognitions the President and all within the Executive branch are and must continue to be bound by the laws of war and other relevant international law. As noted, during the long history of the United States, no other President is known to have authorized violations of the laws of war concerning the transfer, treatment, and interrogation of human beings.

Chapter Two documents additional roles played by the President and several members of his administration and additional insight into the history of the inner-circle decisions to use the "dirty war" responses to terrorism that have already partly shaped the President's legacy. It also pays further attention to the details of relevant international legal restraints, the ultimate defeat of those within his administration who sought to make room for "dirty war" tactics in U.S. military manuals, the role of the McCain Amendment attached to the 2005 Detainee Treatment Act, and the role of other binding laws of the United States.

Chapter Three provides detailed inquiry into actual treaty-based and customary international legal tests for combatant status, combatant immunity, and prisoner of war status that should be applied with respect to persons detained during an actual war, such as those in Afghanistan and Iraq. These are contrasted with some of the claims made by the Executive to deny any such status and resultant protections to members of the regular armed forces of the Taliban – claims that are not in the interest of U.S. and foreign military personnel who might be captured today or in any future war. Attention is also paid to the fact that the United States cannot be at "war" with al Qaeda as such or with a tactic of "terrorism," certain dangers that can arise if the tests are changed, and relevant misconceptions and confusion evident in the 2006 Military Commissions Act.

The fact that the President is not above the law; that Executive decisions to detain persons, to decide their status, and to mistreat them are subject to judicial review even during actual war; and that the President's commander

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in chief power is subject to certain restraints by Congress and to absolute restraints under the laws of war, among other international laws, provide general bases for the detailed inquiry set forth in Chapters Four and Five. Like Section E of Chapter One, these chapters provide pivotal details of law and the numerous judicial decisions that are in complete contrast to the Bush administration's unconstitutional and autocratic commander-above-the-law theory that the President should be able to engage in a "dirty war" unbound by any inhibiting domestic or international law and free from either any or any meaningful judicial supervision. Chapter One, Section E; Chapter Two, Sections C.2 and D; and Chapter Five, Section A provide the most thorough documentation of relevant trends in judicial decision known to date concerning such matters. Because international law is part of the law of the United States, has constitutional moorings, is relevant to the limits of presidential and congressional power, and can influence the content of constitutional and statutory law, some of the legal norms and trends in judicial decision identified are of interrelated and historic concern. They also should provide a basis for analysis of lawful responses to terrorism in the future and law's limitations on Executive power. During war and threats to national security, it is often the judiciary that has maintained the line between lawful and unlawful exercises of Executive power, a line that the Supreme Court maintained in *Rasul*, *Hamdi*, and *Hamdan*.

Chapter Six provides legal analysis of the special military commissions that the Bush administration contemplated for use in a "war" against al Qaeda and the Taliban. Serious shortfalls in the President's 2001 Military Commissions Order and 2002 Department of Defense Rules of Procedure and Evidence are analyzed along with the Supreme Court's landmark decision in *Hamdan* concerning the illegal structure of the military commissions and their unlawful procedures. Finally, structural and procedural problems with the commissions envisioned in the 2006 Military Commissions Act are addressed along with the reasons why Supreme Court decisions require that the Act be interpreted wherever possible in ways that comply with international law and, in any event, require that treaty law of the United States have primacy.

In this world, dark enough in places, we need not walk against the light. The "dirty war" and its dirty consequences should end.

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Utah Law Review

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