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IN THIS ISSUE:

CRIME VERSUS WAR: GUANTÁNAMO

From the Editor

HEIGHTENED INSECURITY

We are told repeatedly these days that the war on terror is upon us, making "our greatest responsibility…the active defense of the American people." The words are those of President George Bush in his 2004 State of the Union Address. The new era, the one for which defense is paramount, is an age of increased fear and increased instability, one which has made shaky the very ground beneath our feet. The question is, then, what are the demands of this new era, both for the government and for the private sector?

Changes in policy have abounded since September 11 as public servants, lawmakers, and policy experts have raced to exert some control, some protection and some defense against terrorists at home and abroad. The passage of the Patriot Act, the creation of the Department of Homeland Security, the revision of INS regulations, and a host of private and public security measures are the most concrete instances of the attempts in the U.S. to quickly reorganize in order to most effectively conduct the war on terror. Police departments have reoriented their activities, often without the benefit of time for thinking through the long term ramifications of such policy changes. International institutions have developed new means of identifying threats and sharing information. And the courts, lawyers and judges have attempted to make policy by addressing the fragile balance between national security and the full panoply of constitutional issues.

Issues Number Two and Three of *The NYU Review of Law and Security* explore some of the more visible domestic measures and strategies that have been undertaken in the name of protecting the American people. These issues of *The Review* attempt to explore the patterns and precedents that the new policies have engendered, both intentionally and inadvertently. Many questions emerge as one looks to understand the legal innovations of the Bush Administration. Citizens, experts, law enforcement officials and others must consider anew whether or not the new policies and procedures have spawned adequate mechanisms for accountability. They must also judge the importance of safeguarding America's international reputation, as well as the preference where it exists for secrecy as opposed to transparency in affairs of state when public protection is a stake. Nor can Americans avoid contemplating the way in which counterterrorist strategies may affect other areas of law enforcement.

One interpretive principle with which to consider these questions is whether or not American security is being conducted in the context of Crime or of War. Issue Number Two, "Crime Versus War: Guantánamo" focuses on the Camp Delta maximum security facility at Guantánamo Bay as a way of navigating the waters between the customs and regulatory mechanisms of criminal law and those pertaining to law. When do authorities invoke the models of war? When do they consider acts of terror to be crimes? How will lower court decisions and law enforcement policies be affected by the decisions of the Supreme Court in the matter of Guantánamo? How does the rest of the world conceptualize our efforts to decide the issues involved in the Guantánamo cases? To address these questions, we have assembled a wide group of experts, including Ruth Wedgwood, George Fletcher, Stephen Holmes, David Golove, Keith Weston and others, experts who have endeavored to step a bit outside of today's tensions and ask, what is happening to our society and how do the lessons of our professions counsel us to go forward? In these pages they look at issues such as accountability, sovereignty, reciprocity, international affairs, and secrecy. Together, their thoughts provide sober yet inspiring avenues for approaching our world in the Age of Terror.

- KAREN J. GREENBERG

Table of Contents

A prisoner being escorted by military personnel. In November, the Supreme Court agreed to hear a case filed on behalf of Kuwaiti and British prisoners held at Guantánamo, challenging the Bush Administration's ability to hold them without due process. Photo: GlobalSecurity.org

Terrorism and Accountability: Why Checks and Balances Apply Even in "The War on Terrorism"

BY DAVID GOLOVE AND STEPHEN HOLMES

Executive power, by its very nature, seeks to undercut constitutional rules that make it accountable to other branches of government. This is a universal tendency, not unique to the Bush administration. It derives from the executive's conviction that it can solve important problems most effectively when unconstrained by meddling courts and many- headed debating societies such as Congress. The executive believes in itself, quite sincerely, and sees no reason why it should be second-guessed by judges and legislators whose familiarity with the issues at hand is amateurish at best. Still, by any standard, the current administration represents an extreme version of this common conceit.

Even before September 11, the administration's fondness for executive-branch unilateralism was visible in its claims of executive privilege and its devotion to secrecy. But its aversion to legislative and judicial (not to mention public) oversight has markedly increased since September 11. Examples are legion. By artfully "embedding" reporters inside American military units, the Pentagon's truth machine spoon-fed the public a picture of the Iraq war unfailingly flattering to the administration. The White House has also been relentless in granting access to friendly reporters while denying it to critics. Nor has it been above employing McCarthyite tactics, impugning the loyalty and patriotism of critics, implying that routine questions about administration competence and foresight amounted to disrespect for the September 11 victims or betrayal of soldiers in the field. Its rough treatment of whistle-blowers such as Ambassador Wilson, apparently designed to discourage "turncoats," falls into the same category.

The novel doctrine of preemptive self-defense is also designed to make oversight extremely difficult. It empowers the executive branch to make life-and-death decisions on the basis of secret information from dubious sources that the other branches cannot possibly verify or double-check. The administration's refusal to countenance any significant role for allies and the United Nations in making decisions about U.S. actions is perfectly consistent, therefore, with its stonewalling of the legislative and judicial branches domestically. Serious involvement of actors outside the U.S. executive branch is undesirable not only because it would limit administration flexibility but also because it would require the administration to provide persuasive justifications for its actions.

Unchecked and unbalanced executive authority is especially prominent in the war on terrorism. It is sometimes difficult to identify the guiding principles behind administration counterterrorism policy. No one can be sure what principles are being used to set priorities for the strategic allocation of scarce resources. But we can easily discern a political impulse behind the Patriot Act, the mass detentions of

immigrants in the immediate aftermath of September 11, the extra-legal treatment of detainees in Guantánamo Bay, and the military detention of U.S. citizens within the United States. Behind all these policies, once again, is the executive branch's compulsive desire to avoid oversight by, or accountability to, any body outside the executive branch.

In the war on terrorism, the administration has sought to justify this bold arrogation of authority by invoking what might be called the *war model* of presidential powers. The United States is "at war," and wartime presidents deserve extensive deference from the other branches of government, for neither legislators nor judges are in a position to micromanage the U.S. response to swiftly evolving national-security threats. To understand the administration's efforts to enfeeble the constitutional system of checks and balances, we need to examine the way it uses (or misuses) the war model or, more accurately, the underlying distinction between crime and war.

International terrorism is obviously neither war nor crime in the traditional senses of those terms. It is rather some combination of both, or perhaps an altogether new phenomenon. The Bush administration has nevertheless insisted that it is engaged in "war" *tout court* – hence the phrase "war on terrorism." It embraces the war paradigm because it frees the executive from the ordinary checks and balances that constrain its conduct in peacetime. To be sure, administration defenders argue that a paradigm shift, far from being chosen, was compelled by September 11. Criminal procedure places restraints on executive power that, although acceptable in ordinary circumstances, become suicidal in the face of a terrorist conspiracy, say, to smuggle a nuclear suitcase into an American city. It may have been impeccable legally, but the trial of the perpetrators of the 1993 attack on the World Trade Center obviously had no deterrent effect. The administration argues, therefore, that in undertaking a major initiative in counterterrorism, it had to shed the crime-fighter's concern with punishing individual violators of law and embrace the war-fighter's logic of destroying the sworn enemy by any means at our disposal. Nor, in the administration's view, is it possible to wait for Congress to deliberate and hammer out a consensus on what measures are justified by the new threats. Congress has neither

"EVEN BEFORE SEPTEMBER 11, THE ADMINISTRATION'S FONDNESS FOR EXECUTIVE-BRANCH UNILATERALISM WAS VISIBLE IN ITS CLAIMS OF EXECUTIVE PRIVILEGE AND ITS DEVOTION TO SECRECY. BUT ITS AVERSION TO LEGISLATIVE AND JUDICIAL (NOT TO MENTION PUBLIC) OVERSIGHT HAS MARKEDLY INCREASED SINCE SEPTEMBER 11."

definition

POSSE COMITATUS ACT

LAW OF JUNE 18, 1878, CH. 263 §15, 20 STAT. 152 (ARMY APPROPRIATIONS)

A *posse comitatus* is a group of citizens called together to assist with law enforcement. The Posse Comitatus Act was originally passed as a rider to a June 18, 1878 Army appropriations bill. It states that "it shall not be lawful to employ any part of the Army of the United States, as a posse comitatus, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress." After the Civil War, federal troops were stationed at voting booths to ensure universal suffrage and to prevent Confederate officers from voting. They also performed civilian law enforcement duties when such services were unavailable in the Western frontier of the U.S. The end of Southern reconstruction and abuse by the military of their police powers in the West led to the Posse Comitatus Act. The Act has been suspended by Congress several times. In 1919, federal troops were used to suppress riots in Chicago. President Truman used Posse Comitatus to temporarily nationalize the railroads, placing them under the Army Corps of Engineers, in order to suppress a railroad workers' strike. The Posse Comitatus Act survived the reorganization of the War Department into the Department of Defense under the 1947 National Security Act. Originally located in Title 10 of the U.S. Code (Armed Forces), Congress amended the Act in 1956 to include the Air Force. Congress also created numerous exceptions to the Act, including those for training local law enforcement and for emergencies involving weapons of mass destruction.

the resources, the expertise, nor the institutional capacity necessary to reach the right results in a timely fashion. Decisive executive action is necessary to uphold the national interest.

Emergencies unquestionably require the executive to act with intensified secrecy and dispatch. In the heat of battle, for similar reasons, military commanders cannot be excessively concerned with due process. They routinely unleash lethal force on the basis of hearsay testimony and circumstantial evidence. They do not always have the luxury of double-checking reports about the intentions of an approaching armed formation. The war paradigm and the crime paradigm, in other words, dictate different attitudes toward false positives and false negatives. The presumption of innocence suggests that crime fighters, in a constitutional system, must make every effort to avoid punishing the innocent. Such liberal scruples obviously have less force in the heat of battle. Military commanders know that the failure to identify hostile parties in a timely fashion can be fatal. The fog of war makes it impractical to require soldiers to establish individualized guilt beyond a reasonable doubt. Killing suspects is accepted on a foreign battlefield, even though it provokes outrage when it happens on the streets of American cities. Similarly, crime fighters are not ordinarily allowed to mistreat or kill innocent bystanders, while soldiers are given much greater leeway in this regard. For instance, dropping bombs on "military targets" may be justifiable even though there will be considerable loss of life to innocent bystanders. *A fortiori*, this implies that mistakenly detaining innocent persons may be acceptable collateral damage if it enables the executive more effectively to avoid (potentially catastrophic) false negatives.

> "WHEN IT SUITS THE ADMINISTRATION'S POLICY NEEDS, ENEMY COMBATANTS CAN BE TREATED AS COMMON CRIMINALS AND SUBJECTED TO TRIAL AND PUNISHMENT FOR ACTS THAT WOULD TRIGGER NO PUNISHMENT IF COMMITTED BY LEGITIMATE SOLDIERS BUT FOR WHICH NO IMMUNITY ATTACHES IF THE PERPETRATORS ARE NON-SOLDIERS."

This brief overview of the crime/war distinction makes it obvious why the administration, in search of maximum flexibility, wants to classify counterterrorism as war fighting rather than crime fighting. The executive branch has much greater freedom of action when fighting enemies than when pursuing and punishing criminals.

That it also deserves greater freedom of action seems indisputable. But how much immunity to oversight can it be safely granted? The terrorist threat may require some rollback of ordinary due-process restraints. But does it require the administration to curtail the executive's accountability to the legislative and judicial branches of government to this degree?

Consider a few examples of the ways in which the administration has sought to limit its accountability to the other branches. The Patriot Act, which the administration has so strongly advocated, significantly loosens restrictions on domestic surveillance in a wide variety of respects, particularly by weakening the role of independent judicial officers in overseeing executive discretion. This lifting of restraints allows the executive to widen its investigative net notwithstanding potentially harmful effects on those who are in reality uninvolved. The public and the press have been excluded from immigration hearings following the administration's September 11 immigration sweeps, even though secrecy undermines the public's ability to hold the executive accountable or even to know what the executive is doing. And, perhaps most dramatically, U.S. citizens are being detained for extended periods of time – indeed, indefinitely – and held incommunicado solely on military authority. The executive claims that the courts simply have no oversight role (or only the most minimal role) over its conduct in relation to "enemy combatants" (meaning those it has unilaterally deemed to be such, even in the absence of any statute defining the term). Indeed, contrary to the underlying philosophy of the Posse Comitatus Act (see sidebar, page 3), the executive has claimed

web sites

WEBSITES OF INTEREST ON GUANTÁNAMO

www.guantanamo.com/
WorldNews Network's digest of information on Guantánamo Base, including up-to-date news on court cases, prisoners and world reaction to events and circumstances at the base.

www.guardian.co.uk/guantanamo
Information on the legal cases involving British prisoners at Guantánamo.

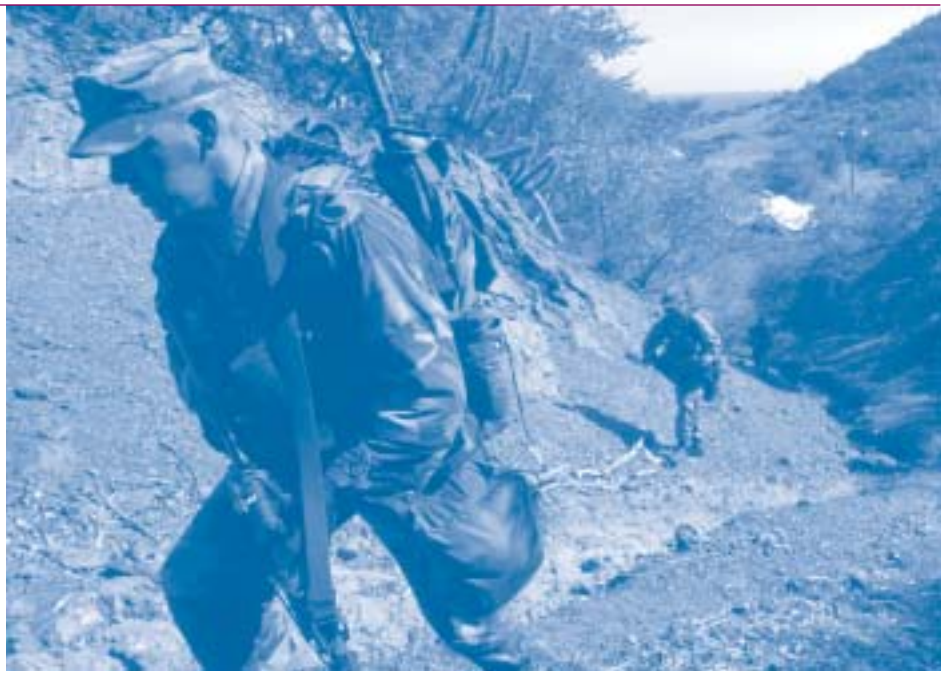
www.globalsecurity.org/military/facility/guantanamo-bay.htm
Images, satellite photos and general factual information on Guantánamo Bay.

web.amnesty.org/pages/guantanamobay-index-eng
Website of Amnesty International, including information and analysis on human rights violations at Guantánamo.

www.nsgtmo.navy.mil/
Official U.S. Government website for families residing at Guantánamo.

that the military may detain U.S. citizens in this manner, even when they are "captured" on U.S. soil, arguing that U.S. territory is a zone of war in the global war on terrorism. Finally, the administration is holding large numbers of prisoners in the war on terrorism in Guantánamo Bay, again incommunicado and for an indefinite duration, and it claims that the detainees have no right to seek relief in the U.S. courts and, indeed, no right to any mechanism to ensure either that their treatment is lawful or that their detention was initially or continues to be warranted. Such measures are justified by the suggestion that, in an emergency (which may last decades), false negatives are infinitely more dangerous than false positives. Given the terrorist threat, the administration implicitly argues, the downside of punishing the innocent is much less acute than the terrible consequences of failing to incapacitate the fanatical conspirators. If we end up wrongly incarcerating 100 innocent people in order to get one potential bioterrorist off the streets, so be it. Those who defend this anti-legalistic approach urge us to relax about the three youths recently released from Guantánamo after a year and a half in detention and about the many others who have now been set free and who had no apparent connection to terrorism or Al Qaeda. The advantage to us, the administration implicitly argues, is well worth the price paid by those who have no political voice inside our democratic system.

At the same time, the administration has refused to follow even the war paradigm when it imposes mechanisms of accountability that might prove inconvenient or embarrassing. The Guantánamo detainees are not, according to the administration, POWs and are not, as a consequence, being deprived of legal protections under the war paradigm as it is usually understood. Indeed, we should not understand Guantánamo as the straightforward result of the administration's attempt to locate counterterrorism within the war paradigm rather than the crime paradigm. What Guantánamo represents, instead, is the administration's opportunism; that is, its artful shifting back and forth between the two paradigms whenever expedient. Its "paradigm shopping" seems unprincipled, it should be said, driven by the administration's one consistent aim, namely its desire to limit accountability and oversight.



Soldiers at Guantánamo Bay provide perimeter security for the naval station where hundreds of terrorism suspects are held. Photo by Chief Petty Officer John F. Williams, U.S. Navy. (Released)

It would be a mistake to think that the modern war paradigm is entirely unconcerned about accountability. It too has mechanisms of accountability, albeit more limited than those associated with the crime paradigm. Principally, these are found in international law, whether it be international humanitarian law and the Geneva Conventions or the international law of human rights, as well as in the institutional mechanisms that those bodies of law have created or require states to create to ensure their enforcement. (For example, Article 5 of the Third Geneva Convention requires the detaining power to afford detainees access to military tribunals that can adjudicate, on their status on an individualized basis). To avoid even these forms of accountability, the administration claims that terrorists are not legitimate soldiers; hence, they are not entitled to the protections international humanitarian law accords to POWs. As a result, when it suits the administration's policy needs, they can be treated as common criminals and subjected to trial and punishment for acts that would trigger no punishment if committed by legitimate soldiers but for which no immunity attaches if the perpetrators are non-soldiers. This is not to suggest that the administration has shifted back fully to the crime paradigm. Rather, it argues that the crime paradigm must be modified by the war context. As a result, these enemy combatants, while not deserving POW status, can be subjected to harsh conditions of confinement and can be tried by special military commissions that do not afford the accused the ordinary rights of criminal defendants.

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Furthermore, the administration still retains the option of abandoning the crime paradigm and having recourse solely to the war paradigm. If it ultimately prefers to avoid the accountability that inheres in an individualized adjudication, albeit one conducted as a purely military proceeding, it can simply continue to hold the detainees indefinitely without trial of any kind. Moreover, it claims not only that international humanitarian law does not apply or afford substantial protections to the detainees, but also that human rights law is inapplicable as well, on the ground that detainees in Guantánamo are not being held in territory over which the U.S. is sovereign, which, according to the administration, is a requirement for the application of human rights law.

Taken together, these various claims result in a remarkable legal situation, unique in a society dedicated to the rule of law: Detainees held in Guantánamo have been placed in a virtually law-free zone. Domestic law including the U.S. Constitution does not apply and, in any case, cannot be enforced by courts, and international law does not apply, because in the administration's view it is either inapplicable altogether or only weakly applicable and almost entirely permissive; to the extent it may apply, it too cannot be enforced by courts for jurisdictional or other reasons, and compliance is thus left entirely to executive discretion. In other words, the executive may simply do whatever it likes, subject to the checks and balances of no other actor, domestic or international. Moreover, if this is true of Guantánamo, so closely assimilated to U.S. territory and at least under the scrutiny of the U.S. and world press, it is emphatically so of the sometimes undisclosed off-shore locations where other prisoners in the war on terrorism are being held and interrogated.

Still, it is fair to ask, what is so important about accountability? And, more importantly, why is the Bush administration not right in arguing that the kinds of mechanisms of accountability associated with normal times must yield in times of emergency or war? No doubt there is considerable force to the argument that emergency situations require adjustments to the normal operation of the checks and balances system. This is particularly the case with regard to battlefield decisions and in contexts where threats to national security leave no time for critical reflection by multiple institutional actors. But once we move outside of these core areas, where urgent action cannot be avoided, it is crucial to bear in mind the benefits that accountability promotes.

"REQUIRING THE EXECUTIVE TO SUBMIT TO CONGRESSIONAL OR EVEN BUREAUCRATIC OVERSIGHT OF ITS FACT-FINDING PROCEDURES AND POLICY JUDGMENTS AND DECISIONS, AND TO DEFEND ITS ACTIONS BEFORE NEUTRAL JUDICIAL OFFICERS, ARE THE BEST MECHANISMS WE HAVE FOR ENSURING THAT EXECUTIVE POLICY DOES NOT VEER OFF ON ILL-CONSIDERED TANGENTS, IMPERILING THE VERY NATIONAL INTERESTS THAT IT CLAIMS TO BE ADVANCING."

First and foremost is intelligent decision making and midstream readjustments to policies that prove ineffective or self-defeating. Unless forced to articulate public justifications that can be tested and evaluated by independent actors, executive branch officials tend to operate in a vacuum, without reality checks. They run the risk of being autistic. Some sort of disconnect from reality would hardly be surprising, especially in a highly partisan administration where like-minded sectarians reinforce each other's preconceived notions and a bunker mentality filters out doubts and contrary voices. By evading ordinary mechanisms of accountability and oversight, the administration may think it is gaining flexibility to deal with daunting problems. But it also risks overlooking crucial facts and making judgments influenced by cognitive biases and perhaps hidden agendas. The point is that accountability mechanisms are designed not to block the executive from achieving important policy goals supported by the public, but rather to enhance the effectiveness of executive decision-making by forcing executive officials to offer public justifications for their policy choices and thereby compelling them to act with more consistency and on the basis of publicly acceptable reasons. Requiring the executive to submit to congressional or even bureaucratic oversight of its fact-finding procedures and policy judgments and decisions, and to defend its actions before neutral judicial officers, are the best mechanisms we have for ensuring that executive policy does not veer off on ill-considered tangents, imperiling the very national interests that it claims to be advancing. As an obvious example, consider the intelligence failures in connection with Iraq. Left to its own devices, the executive will inevitably commit serious blunders, sometimes with consequences profoundly deleterious to the national interest.

Second, democratic electoral processes systematically produce incentives for public officials to act contrary to the public interest, and accountability mechanisms are essential precisely to ameliorate this dysfunctional side effect of democratic institutions. Most important, incumbents have powerful personal and partisan interests for hiding past mistakes, and executive secrecy provides perhaps the single most effective means for accomplishing just this purpose. For example, it is fair to ask why the administration opted for a highly visible but seemingly brutal policy towards the Guantánamo detainees, notwithstanding the strong international criticism that its actions predictably aroused and the large number of false

news digest

FROM THE MIDDLE EAST

"In its 'war on terror', the Bush administration has effectively excluded the legislative and judicial branches of the government by exacting consent from the former for broad presidential powers and blocking intervention from the latter on national security and jurisdiction issues."

- Ramsey Al-Rikaby in the Al-Ahram Weekly Online*: 20-26 November 2003 (Issue No. 665) http://weekly.ahram.org.eg/2003/665/in2.htm*

positives that its policy of refusing individualized determinations may possibly have created. Was it because denial of any independent scrutiny was necessary in order to combat Al Qaeda, or was it because creating the appearance of bold action in the war on terrorism was politically important to assuage public concerns after the failure to capture Osama bin Laden in the battle of Tora Bora? The latter is not necessarily the better explanation, but its near plausibility is a serious problem. Unaccountable executive action naturally engenders politically corrosive speculations. This is another reason to resist the administration's exaggerated requests for "flexibility," that is, for freedom from accountability.

Third, accountability is necessary to ensure not only that decisions are prudent and motivated by the public good, but that they actually conform to the structure of widely held public values that underlie our institutions. Executive officials have powerful incentives to achieve politically eye-catching results and to disregard other competing values if they pose any potential obstacle in the executive's path. Holding Afghani and Arab youths incommunicado under harsh conditions for extended periods of time away from their families, for example, may not even register as a cost worth considering to executive officials intent on displaying their prowess in the war on terrorism. And it will likely remain under the radar screen given executive secrecy. The same is true of the extralegal transfer ("rendition") of non-U.S. nationals, loosely suspected of terrorist ties, to countries like Syria where it is known in advance that they will be tortured. But these practices may do serious long term damage to the public political culture as well as sullying the wider reputation of the nation in the international community.

Guantanamo Bay, also called "Gitmo," is the navy's oldest base outside of the U.S. Photo: GlobalSecurity.org.

Moreover, the claim that the suppression of international terrorism is "war" and thus justifies the wholesale adoption of the war model of presidential powers is seriously misguided. International terrorism is neither war nor crime. Although it shares some features with both, it can be reduced to neither. What we need to do, therefore, is to come up with a new model that applies specifically to international terrorism as we now face it. Such a model would necessarily include mechanisms for holding the executive branch to account. Importing doctrines developed in the different contexts of crime and war without critical examination is a recipe for opportunistic paradigm shopping and unhealthy avoidance of oversight. The U.S. Constitution, among other things, is a mechanism for helping fallible officials, in a timely fashion, correct the mistakes they inevitably make in the course of managing public affairs. The terrorist threat, presumably, has not made the executive branch infallible. Hence, the administration's efforts to weaken the system of checks and balances cannot possibly serve the national interest in the long run.

> "THE ADMINISTRATION'S WAR PARADIGM ALSO HAS POTENTIALLY GRAVE IMPLICATIONS FOR TRADITIONAL UNDERSTANDINGS OF THE NATURE OF LIMITED GOVERNMENT. IF COUNTERTERRORISM IS WAR, AND THE WAR IS GLOBAL, THEN U.S. TERRITORY IS PART OF THE WAR ZONE, AND THE WAR POWERS APPLY IN FULL AT HOME AS WELL AS ABROAD."

Two additional points can be made by way of conclusion. First, the criminal trial developed historically as a means of cauterizing the spiral of violence that blood feuds routinely create. By forcing an individualization of guilt, the very idea of crime discourages the taking of reprisals on a collective basis. The war model has precisely the opposite effect. It encourages us to think that we are at war with a hostile collectivity. The idea of collective guilt leads easily to the idea of guilt by association as well as to the possibility of collective punishment. It may not be farfetched to suggest that the American public has acquiesced in the legally questionable situation in Guantánamo because it has implicitly accepted the idea of collective guilt. Nor is it farfetched to think that the administration's refusal to commit to individualized determinations of guilt is exacerbating the rage felt against the United States, as a collectivity, in many parts of the world. This is an extremely dangerous path to pursue. Only the individualization of guilt, implying judicial oversight of executive action, can protect us from the unforeseeable consequences of a clash of civilizations.

The administration's war paradigm also has potentially grave implications for traditional understandings of the nature of limited government. If counterterrorism is war, and the war is global, then U.S. territory is part of the war zone, and the war powers apply in full at home as well as abroad. This is precisely the danger that Justice Jackson warned about in his famous opinion in the *Steel Seizure* case. The reconciliation of the war powers and domestic liberal democracy has historically depended on the existence of a firewall between the president's war powers and continental U.S. territory. Bush's actions threaten to breach this firewall in an unprecedented way and raise worries about what, if anything, will take its place.

Open Forum on Guantánamo

GUANTÁNAMO DETENTIONS: WHAT DO THEY MEAN?— A VARIETY OF OPINIONS

There are about 640 detainees from 38 countries remaining in Guantánamo, at least 160 of them from Saudi Arabia. Among the other nationalities are Yemenis (85), Pakistanis (82), Afghans (80), Jordanians (30), and Egyptians (30). Their names have not been released by the U.S. Government but a handful of names have been leaked through other sources. In the past few months, 87 have been let go. This spring, the Supreme Court will hear the cases of some of the detainees from Kuwait, Britain, and Australia.

On February 4, The Center on Law and Security hosted an Open Forum on Guantánamo Bay. The moderator was Norman Dorsen, Stokes Professor of Law at NYU School of Law, counselor of New York University, and former president of the ACLU. The participants were: Rachel Barkow, Assistant Professor, NYU School of Law; George Fletcher, Cardozo Professor of Jurisprudence, Columbia University School of Law; David Golove, Professor, NYU School of Law; and Ruth Wedgwood, Edward B. Burling Professor of International Law and Diplomacy, professor at SAIS at Johns Hopkins, and former adviser to the Pentagon on implementing rules for war crimes trials in the military commissions.

At this event, Professor Norman Dorsen summed up the matter before the Court. "The United States Supreme Court will hear habeas corpus petitions (see sidebar on *Al Odah v. Bush*, page 10 and *Gherebi v. Bush*, page 9) from prisoners captured in Afghanistan and turned over to the United States by friendly countries. The interned men wish to be able to show that they are being held unlawfully. The main question facing the Court is whether or not the U.S. has sovereignty over Guantánamo Bay. Behind the question of jurisdiction lies a series of other questions, some legal, some political, and some a mixture of the two. For example, does U.S. domestic law permit the holding of these people in prison in these circumstances, whether or not the Geneva Convention (see sidebar, page 13)—a treaty

JOHNSON V. EISENTRAGER, 339 U.S. 763 (1950)

In 1945, after Germany's unconditional surrender, 21 German nationals were arrested by U.S. forces in China. After hostilities ceased, they were tried in China by a U.S. military tribunal for violations of the laws of war, including continuing intelligence activities for Japanese forces after Germany's surrender. After conviction, the prisoners were sent to Germany to serve their sentences. They petitioned for a hearing in the D.C. District Court. The petition was denied on the basis that the court lacked jurisdiction over the prisoners. The Court of Appeals reversed the decision, saying that in cases where a person's constitutional right to liberty is deprived by the United States, jurisdiction is a necessary part of the United States' judicial power.

The Supreme Court overturned the decision, holding the Federal Courts did not have jurisdiction over foreign enemy aliens whose crimes had not been committed in and who were not held in the territorial jurisdiction of the United States. While the Court recognized that many constitutional liberties had been extended to resident aliens in the U.S., it stated "in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act." The Court also distinguished war time from times of peace, and held that even resident alien rights may be subject to limitations of their Constitutional rights under the Alien Enemy Act. The Court was hesitant to extend rights to foreign enemy aliens that were denied to resident aliens. In addition, the Court stated such a requirement would grant foreign enemy aliens a right not given to our own soldiers. The 5th Amendment does not apply to U.S. soldiers, which exempts Army, Navy, and militia members from its protections.

The Fifth Amendment exempts land and naval forces as well as members of the militia who are in service during times of war or public danger. (Photo from: www.nsgtmo.navy.mil/jtfgtmo/)

Professor Norman Dorsen introduces the issue of U.S. sovereignty in Guantánamo Bay.

signed by the U.S.—does so? Should the trials take place before military commissions and not civilian or ordinary military courts? Is the U.S. in a war in a constitutional sense? And finally, what is the relevance of a constitutional case which the Supreme Court will soon hear on the legality of holding U.S. citizens in solitary confinement without access to a lawyer and without a trial on the grounds that they are enemy combatants?"

Dorsen then went on to consider the effects that opinions from abroad will have on the cases.

"As some of you may know, when *Brown v. Board of Education* — the great desegregation case — was argued in the Supreme Court, the U.S. government brief on the side of the petitioners against segregation had a section saying, 'We're engaged in a world-wide struggle.' What they meant, of course, was the Cold War. This was 1954, right at the heart of it. 'And what we do to our racial minorities is going to have an impact on the way the rest of the world thinks about us.' There are those who think that the argument was persuasive with some members of the Court. They didn't want to do anything that would put down African Americans at a time when we were struggling to get our own authority established in Africa, Asia, and other places. Related to this, in the Guantánamo case, several members of the British parliament wrote an *amicus* brief objecting to the confinement of U.K. nationals.

"Should the Supreme Court be swayed by these arguments? Should what other countries think of us be a consideration of substantial importance to the Court? Or is there a matter of principle that the Court should stand no matter what people think in other countries (in the U.K. or anywhere else)?"

The first person to consider some of the questions posed by Professor Dorsen was Professor George Fletcher, who highlighted the importance of considering enemy combatants with a due regard for their potential danger, as well as the importance of using military courts to try enemy combatants. These were his remarks:

"What precisely is the issue at stake in the Guantánamo case? The issue is whether or not it is possible for the executive acting alone without judicial supervision to make a determination that someone should be subject to confinement and detention under the auspices of the United States military. Should there be any judicial supervision over this executive decision?

"The answer is that there is no Supreme Court precedent for an exclusively executive determination that people are subject to confinement without a hearing, without counsel, and without supervision.

"Much is made of the case of *Johnson vs. Eisentrager* (1950) (see sidebar, page 8). In *Eisentrager* the question was whether or not Germans who were confined in Germany on the basis of crimes allegedly committed in China during World War II could bring a writ of habeas corpus to the Supreme Court. The Supreme Court decided no, the courts were barred to 'enemy aliens.' German nationals were enemy aliens at the time they committed the alleged offenses in China.

"*Eisentrager* was tried by a military commission, so there was some form of process. Six of the alleged were acquitted; it was an honorable and honest process in which there were factual determinations made by something that is not exactly an Article Three Court (see sidebar, page 15) but that at least has some resemblance to a judicial proceeding. In the Guantánamo case we have nothing

GHEREBI V. BUSH 352, F.3D 1278 (9TH CIRCUIT) 2003

In Gherebi, the 9th Circuit considered the application of *Eisentrager* to the current detainees in Guantánamo Bay. Gherebi was a detainee in Guantánamo seeking a writ of habeas corpus to appeal before a U.S. District Court (The Central District of California). The question before the court was whether Guantánamo Bay Naval Base was within the "territorial jurisdiction" of the United States.

The government argued that *Eisentrager's* requirement that a person be within the "territorial jurisdiction" of the United States meant that the United States must have sovereignty over the place in question. Gherebi argued that the nature of the United States' near absolute control of Guantánamo was sufficient. The 9th Circuit ruled for Gherebi.

The court held that the Supreme Court had not needed to make a distinction between sovereignty and territorial jurisdiction, as it was not an issue in the case. Citing dictionary definitions of territorial jurisdiction as meaning the "power to proscribe, prescribe, adjudicate, and enforce the law ," the court found that the U.S. had territorial jurisdiction over Guantánamo. The United States had continually operated as if it was in complete control of Guantánamo for over 100 years, including exclusive jurisdiction over criminal matters committed on the base.

After finding that these issues were sufficient to decide the issue of habeas corpus, the court went on to examine whether the U.S. had "sovereignty" over Guantánamo Bay, and found that for the purpose of habeas corpus, the U.S. did have sovereignty there.

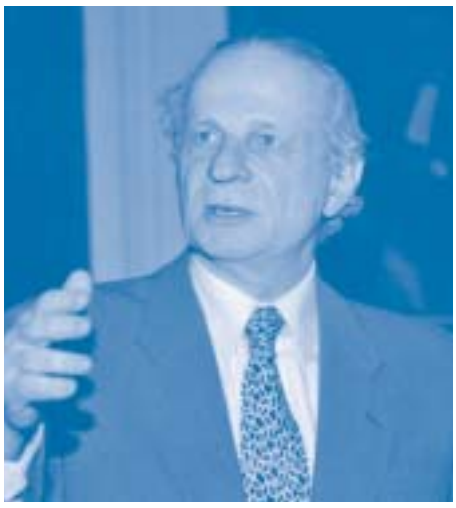
that comes close to a controverted proceeding based upon the adversarial system in which opposing counsel make arguments, test the facts and determine whether or not the suspects are properly confined.

The Ninth Circuit decision in *Gherebi v. Bush* (see side bar, page 9) considered *Eisentrager* and found in favor of the detainees as well as *Al Odah v. United States* (see sidebar, this page) which found in favor of the government. The thing that disturbs me about these cases is the totally formalistic approach toward *Eisentrager*. There is absolutely no attention paid to the question, 'What was the historical and philosophical and jurisprudential context in which *Eisentrager* was decided?'

"In *Eisentrager* the court relies primarily on precedents that were decided at the time of the War of 1812. In the 19th century we had a different conception of what it meant to go to war. In the War of 1812 the entire nation went to war. There was no clearly understood distinction between combatants and civilians. It wasn't until the Geneva Conventions in 1949 that we began to take seriously the distinction between civilians and the military. In 1812, there were a series of decisions barring the courts from enemy aliens.

"In essence, the entire ideological structure that supports the *Eisentrager* case is dead. All that's left is a formal holding that in some circumstances enemy aliens will not have access to the courts.

"But that is not by any stretch of the imagination a precedent for what is going on today in the *Al Odah* appeal to the Supreme Court. Now what is particularly disturbing to me is that there is no discussion in any of the briefs that I've seen about the historical context or about the theory of war that was present in the 19th century and that led to the *Eisentrager* decision. Instead people have read this formal holding and manipulated it for certain political ends.



George Fletcher places the Guantánamo cases in historical perspective.

"Now the same thing strikes me as significant and controlling with regard to the other big issue in the case; namely, whether the United States must recognize a writ of habeas corpus in areas where it does not exercise 'sovereignty.' Now there's a long history of insular cases and other cases dating back at least 100 years supporting limitations on the extension of constitutional rights to particular possessions of the United States.

But the best reading of those cases is that in situations where there were local cultures to be respected — eg. Puerto Rico and the Philippines — the United States refused to extend the Constitution in all its details. This was, of course, before the due process revolution that lead to the incorporation of the Bill of Rights and the due process clause. It was before the enormous transformation of American law that led to the extension of constitutional rights even to American states.

"But one of the inferences that people make from these old cases is that the United States recognizes the writ of habeas corpus only in those places that are incorporated in the United States or where there is sovereignty. Now the fact that disturbs me is that I have not seen anybody asking 'Why are you talking about sovereignty? What *should* be the theory? What *should* be the fundamental argument that

AL ODAH V. UNITED STATES OF AMERICA, 321 S.3D 1134 (D.C.CIRCUIT 2003)

Al Odah is a case similar to *Gherebi* brought in the D.C. Circuit Court of Appeals. The D.C. Circuit found that *Eisentrager* was dispositive of the issue. It stated "[n]onetheless the Guantánamo detainees have much in common with the German prisoners in *Eisentrager*. They too are aliens, they too were captured during military operations, they were in a foreign country when captured, they are now abroad, they are in the custody of the American military, and they have never had any presence in the United States."

The D.C. Circuit extended *Eisentrager's* analysis that the right to habeas corpus is a procedural right that comes from the substantive protections of the Constitution. Citing the *Eisentrager's* court's refusal to extend the 5th Amendment to foreign enemy aliens and subsequent decisions refusing 4th Amendment rights to nonresident aliens, the D.C. Circuit found that the aliens in detention in Guantánamo Bay did not have the right to habeas corpus in U.S. Courts. "If the Constitution does not entitle the detainees to due process, and it does not, they cannot invoke the jurisdiction of our courts to test the constitutionality or the legality of restraints on their liberty."

The D.C. Circuit also found that Guantánamo Bay was not under the territorial jurisdiction of the United States. The United States' lease on Guantánamo still vests ultimate sovereignty in Cuba (an issue also argued between the majority and the dissent in *Gherebi*). The Circuit found that U.S. criminal jurisdiction there comes from special maritime jurisdiction and is not an extension of U.S. sovereignty. The D.C. Circuit held that *Eisentrager* did maintain a distinction between territorial jurisdiction and sovereignty, and that as no court currently exercises "territorial jurisdiction" over Guantánamo Bay and the U.S. does not have sovereignty there, habeas corpus cannot be extended to the detainees.

determines where and when the principle of due process applies and when it does not?'

"What kind of a profession is it that will resolve the most fundamental questions of the nature of America — the American constitutional system, the nature of American democracy — by asking questions that fail to go to the heart of the matter? That fail to ask the fundamental questions, 'What should be the proper understanding of the precedents in the past? What should be the theory that governs the question of where the Constitution applies abroad?'

Professor Rachel Barkow spoke about a select number of *amicus curiae* briefs and pointed to the fact that the world community is watching the Guantánamo cases very closely.

"I want to tell you a little bit about some of the *amicus curiae* briefs (see sidebar, this page) in this case because I think you'll find interesting some of the issues that these parties want the Court to consider. There's a brief filed by retired military officers — in this case American military officers — that aims to explain to the Court the profound ramifications from a military point of view of the government's position that no court can decide what's going on in Guantánamo. [*Amicus Curiae* Brief of Retired Military Officers in Support of Petitioners] The brief goes on to explain that the Court should take into account what this will mean for American soldiers if they are taken captive in other countries. And in particular we might not have the same kind of reciprocity that we'd like because then we won't have the Geneva Convention applied to our soldiers.

Professor Rachel Barkow speaks on *Amicus Curiae* briefs.

GUANTÁNAMO BAY *AMICUS CURIAE* BRIEFS

Brief of Former American Prisoners of War, Filed by Jones Day.
This brief argues that the courts ought to assert review power over the inevitable disputes about application of the Geneva Conventions, in order to shape future application and enforcement of them. This brief is based on concern over how American soldiers might be treated if captured by enemy nations in future conflicts. It also argues that the D.C. Circuit decision has left unclear the jurisprudence in the area of foreign habeas petitions, and the Supreme Court should step in to review and clarify.

Brief of 175 Members of Both Houses of the Parliament of the United Kingdom, Filed by Coudert Brothers LLP, Clifford Chance LLP, Blackstone Chambers, and Peter Carter QC.
This brief notes that U.S. law grew out of U.K. traditions promoting the rule of law, and both countries have since been leaders in promoting the rule of law internationally. It argues that observance of the rule of law requires that independent judicial bodies have a chance to review disputes such as that of the petitioners.

Brief of Fred Korematsu, Filed by the Brennan Center, Cravath Swaine & Moore LLP, Minami Lew & Tamaki LLP, Geoffrey Stone, and Eric Yamamoto.
This brief argues that the Unites States has unnecessarily restricted civil liberties in times of perceived crisis throughout its history, and discusses numerous examples from the Alien and Sedition Acts of 1798 to McCarthyism during the Cold War. It argues that such restrictions have generally been regretted in hindsight, and therefore that current assertions of military necessity should be carefully scrutinized.

Brief of Legal Historians, Filed by New York University School of Law, Saint Louis University School of Law, and Georgetown University Law Center.
This brief aims to make sure that the Court is fully informed as to the historical application of the Writ of Habeas Corpus. It argues that in the histories of Britain and America, the Writ extended not just to territories over which the government had formal sovereignty but to all lands under its control. It also argues that people designated "enemy aliens" historically have had the right to challenge that designation under the Writ.

Brief of the National Institute of Military Justice, Filed by Cowan Liebowitz & Latman PC.
This brief argues that a substantial body of law has developed and has been used by the American military since the *Eisentrager* decision (which the Government and the D.C. Circuit relied on). It also notes that a Writ of Habeas Corpus has been issued for a prisoner at Guantánamo Bay before, by a military court (*Burt v. Schick*, 23 M.J. 140 (1986)).

"One important query to ask is, 'Is the Supreme Court in a good position to decide this case?' A second brief that is also very interesting is that of the sitting members of Parliament who have filed an *amicus curiae* brief for the first time in our history. [Brief of 175 Members of Both Houses of the Parliament of the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae* in Support of Petitioners] One thing that the very existence of their brief is saying to the Supreme Court is, 'Consider how you're going to look to the rest of the world when you decide this case. What will this mean for the United States' reputation? You're an adherent to the rule of law and if it doesn't look like the United States is adhering to the rule of law any more. Think about the consequences of that.'

"There are several other briefs in the case that are similar to that one; for example, briefs filed by former ambassadors and diplomats. [Brief of Diego C. Asencio, A Peter Burleigh, et al. as *Amicus Curiae* in Support of the Petitioners] They discuss the fact that if the Supreme Court decides that there's no jurisdiction, it'll make diplomatic efforts very difficult in the future. The United States won't be able to persuade other countries to do certain things because we'll lose our credibility with other countries because we ourselves won't be looking like we follow the rule of law.

"It is interesting that there are arguments that are being aired in the context of a court case as opposed to being made in the political realm. This raises the question 'Why is this happening before our Supreme Court? Why is this taking place in that forum as opposed to other forums?'

"One answer I want to submit tonight is that the Supreme Court basically asked for this by deciding any number of issues in the past few decades that don't seem very concerned with formal jurisdictional bounds. So from the perspective of these parties and the rest of the world, it doesn't seem at all odd to talk to the Court about international norms.

"The big elephant in the room in this matter would be *Bush v. Gore*. The Court has just decided the presidential election. So, you know, nothing really seems to be off the table in terms of the kinds of policy arguments you might want to make to the Supreme Court.

Guantánamo contains many of the trappings of American culture. Here, U.S marines are at the McDonald's in Guantánamo Bay. (AP Photo/Tomas van Houtryve)

"I think the decision will hinge on the fact that this is not sovereign territory. That Guantánamo Bay — despite the fact that it's a large area — looks like America in every fundamental way that you might think. We control it. Our laws apply there. There's a McDonald's and a Pizza Hut and a Kentucky Fried Chicken there. It's got all the comforts of home.

"It will likely be a formalistic argument that the lease does not give sovereignty to the United States, that Cuba retains that sovereignty. So the Supreme Court could say that that is in fact the basis on which it's going to decide this case. It could adopt a very narrow reading of *Eisentrager* (which would be an ill-advised reading of the case because there are fundamental differences).

"In this case the Supreme Court is being asked to consider whether or not the executive branch has taken someone's liberty away without any process at all and whether or not the executive branch can do that without any court review at all. It's hard to think of a more fundamental judicial task than this kind of review on habeas.

"It's obvious from these briefs that the world is watching this case very seriously. The world knows how this Supreme Court has decided other cases. So for the Court in this case to push them all aside and say, 'No, actually, this is really a very strict jurisdictional boundary. There's a formalistic argument here that we're going to follow that will, I think actually undermine the Court's legitimacy quite a bit in the eyes of the world community.

"My main conclusion is that because of the nature of these arguments, the fundamental judicial character of them, and the fact that

GUANTÁNAMO BAY *AMICUS CURIAE* BRIEFS

Brief of Military Attorneys Assigned to the Defense in the Office of Military Commissions, Filed by Lt. Col. Sharon Schaffer, Lt. Com. Charles Swift, Lt. Com. Philip Sundel, Maj. Mark Bridges and Maj. Michael Mori of the Office of Military Commissions, and Neal Katyal.

This brief argues that the Court should not employ a blanket approach to jurisdiction that would preclude case-by-case habeas review for those facing military commissions, and that such case-by-case review is proper under *Eisentrager*. It also notes that developments since the *Eisentrager* decision have increased the jurisdiction of civilian courts in military matters.

Brief of 23 Former American Diplomats, Filed by Schiff Hardin LLP.

This brief argues that the decision of the D.C. Circuit has been criticized by governments and international organizations. The effect has been both to disadvantage our diplomats and to give dictatorial regimes perceived license to wrongly incarcerate their own citizens in the name of fighting terrorism.

Brief of Nine Former Federal Appellate Judges, Filed by Jenner & Block LLP.

This brief argues that the position advanced by the Administration and accepted by the D.C. Circuit, restricting the jurisdiction of civilian courts, threatens the role of America's judiciary in safeguarding the rule of law.

our Supreme Court has been so willing to overlook jurisdictional boundaries and other contexts, it will be difficult for the Court to say, 'This is the case where we are going to cry jurisdictional wolf.'

Professor David Golove, meanwhile, distinguished between the traditional wartime model and the military trial model in thinking about the court cases.

"Actually, there is a whole group of cases that is now before — or coming before — the Supreme Court. There is the Guantánamo case, which we've been discussing. There is also the *Hamdi* case, which involves an American citizen who was captured in Afghanistan and is being held in detention in the United States. Hamdi has been held incommunicado until quite recently when he was finally allowed to see a lawyer. A third case before the Court is the *Padilla* case which involves another American citizen, this time one who was actually captured in O'Hare Airport.

"Each of these cases deals with military detentions and military trials. The American constitutional tradition offers two ways of thinking about the problem. One is a traditional war model or military trial model: the wartime model. The other is a peacetime model, an ordinary criminal law model.

"The war model involves a great deal more discretion by the executive. No one will be surprised to hear that the Bush administration has taken an extremely aggressive view on this, what the administration calls the war on terrorism. The Bush administration has asserted a very aggressive interpretation of the war model and the nature of the President's powers. So, for example, constitutional rights as we know them don't apply under the war model that the executive is currently applying to individuals.

"The Bush administration has adopted a very strict interpretation of international humanitarian law such that the normal Geneva Convention (see sidebar, this page) protections do not apply to the detainees in Guantánamo whether they were connected in some way with Al Qaeda or with the Taliban. More, they argue that international human rights law doesn't apply because the detainees are being held in Guantánamo and therefore not in the United States. This amounts essentially to the creation of a kind of offshore territory which might be described, and some have described, as a kind of rights-free zone, a zone in which the executive can act without consideration of either judicial involvement or any kind of legal constraints at all.

"In addition, the administration has pushed very far to argue for other aspects of the laws of war and even for the jurisdiction of military tribunals. So, for example, some of the crimes that are contemplated being tried by military commissions according to the documents that the administration itself has produced suggest that it's possible that the administration may prosecute some Taliban soldiers who are in Guantánamo essentially for murder, and that the charges are made on the grounds that the accused weren't wearing the proper uniforms and therefore weren't entitled to a belligerence privilege. In this case, any military activity that they undertook either against an individual or even against property would be a crime punishable by a U.S. military commission in Guantánamo.

"One last element of this aggressive interpretation of the war model has been that the administration has argued strongly for a diminishing distinction between U. S. nationals caught up in the war on terrorism and foreign nationals. This is something that's been taken from the *ex parte Quirin* case (see sidebar, page 14).

"The war model comes principally out of the long history of U.S. involvement in various wars, but perhaps at least from a judicial point of view, most importantly the Civil War and World War II. These were total war situations.

definition

GENEVA CONVENTIONS

The Geneva Conventions are treaties that form the basis of international law governing armed conflict. Their foundation dates to 1863 when Henri Dunant formed the Red Cross to take care of wartime casualties. In fear of its workers' safety, Dunant persuaded the Swiss government to convene 16 countries in Geneva and grant international recognition to the Red Cross. From this meeting in 1864 came the first piece of the international laws of war, the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. By WWII, there were two more conventions which applied to war at sea and prisoners of war. In 1949, these conventions were revised, a fourth on civilians during war was added, and the lot was combined as the "Geneva Conventions of 1949." Nearly 190 countries, including the U.S., have ratified the Geneva Conventions and made them a binding treaty. In part, the conventions aim to protect prisoners of war by ensuring that they "must at all times be humanely treated." Those nations that violate the conventions may be tried by the International Criminal Court as war criminals. In 1977, protocols augmenting the Geneva Conventions provided prisoner of war status to those fighting against "colonial domination" and "alien occupation." The U.S. has not ratified these protocols, but does consider some of them as "customary international law."

EX PARTE QUIRIN, 317 U.S 1 (1942)

In 1942, a group of German soldiers snuck into the United States by submarine with explosives and detonators. Upon landing, they buried their uniforms and proceeded into the United States with plans to attack U.S. military infrastructure. They were apprehended by the FBI. President Roosevelt appointed a Military Commission to try the prisoners. On the same day the President declared "all persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States…through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals."

The defendants challenged the constitutionality of the President's proclamation. They argued that domestic courts, with their due process protections and jury trials, should have jurisdiction over the case and that the President lacked the authority to call the commission.

The Supreme Court found for the government. In times of war and grave public danger, the court found that decisions regarding the detention and trial of prisoners are "not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted." In this case, the Court found that Congress, in the Articles of War, had specifically found that violations of the laws of war could be tried by military tribunal. The Court reserved the question as to whether the President could appoint a commission without direct statutory authority. The Court then examined whether the defendants' acts violated the laws of war, and found that they did. Thus, the military tribunal, and not the civil courts, had jurisdiction over the defendants.

Regarding the constitutionality of military tribunals, the Court found that although military tribunals do not include all the 5th and 6th Amendment protections provided by civil courts, they were not unconstitutional. The Court stated that military tribunals existed at the time the Constitution was enacted, and that the 5th and 6th Amendments were not enacted to expand the right to a jury trial that existed under Article III Section 2. The Court held that the Constitution meant to ensure a continuance of jury trials in civilian courts (which already existed at its enactment), but did not intend to expand jury trials to areas where they did not exist.

Professor David Golove discusses the laws of war.

And there's a serious question I think about whether or not one wants to apply the model developed in this context to what we now call the war on terrorism.

"There are a number of very important distinctions between the current war and past wars. The likelihood in this war is that innocent bystanders will be mistakenly implicated. The enemy consists not of a regular army but is a conspiratorial organization that works secretly and in a decentralized way, geographically and even organizationally.

"Secondly, the principle of nationality doesn't apply in the same way. In the traditional war model, the fact that a person is a national of the state with which you are at war makes them in law presumptively hostile just by virtue of their nationality. This doesn't apply in the war on terrorism because there is no nationality with which the United States is at war.

"Third, in a traditional war the duration of the war is more easily predictable than in the war on terrorism, which may last forever or at least for generations. Therefore, the possibility of mistaken actions takes on a heightened significance.

"A final important difference lies in the nature of the principle of reciprocity. In traditional wars states have reasons to moderate the way they treated their detainees because of the concern about how their own detainees would be treated in turn by the other state with which they're engaged in conflict. That, too, is absent in this context and weakens traditional protections of individual rights."

Professor Ruth Wedgwood then spoke on both the importance of considering enemy combatants with due regard for their political danger and the significance of using military courts to try enemy combatants.

"Let me point out an instance of not using what David [Golove] calls a model, and what I would call a legal regime of war, a very well developed, historically grounded legal regime of war. That instance would be the moment in 1996 when, at least allegedly, Sudan offered to turn over bin Laden to us or to the Saudis. And Louis J. Freeh reportedly told Janet Reno that we didn't have the evidence to hold him as a criminal defendant.

"Prosecutors know that you have to be prepared to go to court and prove your facts

beyond a reasonable doubt by a very narrow range of evidence. And if you can't do that quickly, you don't hold the person. So that's what Louis J. Freeh said. We let bin Laden go and he went to Afghanistan and the rest is a very sad history. And we weren't perhaps in the White House aware of who bin Laden was at the time. More, his reputation, which had suffused the Grand Juries investigating the 1993 World Trade Center attack, could not be revealed to the White House because you couldn't share criminal justice information and intelligence information. All of our firewalls, all of our well-intended safeguards of the seventies had a kind of unhappy synergistic effect.

"We are in a war. We still have troops on the ground in Afghanistan. The Taliban is coming back over the border from Pakistan trying to run the U.N. out of the southeast of the country. This is not a notional war, it's not a metaphor, it's not the war on drugs or the war on poverty. It's a war on the ground with soldiers being shot at. And certainly the acts of September 11th were recognized by NATO, by the Congress, and by the U.N. Security Council as acts of war. These were armed attacks upon the U.S. that warranted the U.S. legally going to war against both the Taliban and Al Qaeda. And Congress voted an authorization for the use of force to George Bush to say that he could use force against the nations, organizations and persons he determines are responsible for the 9/11 attacks. It is a war.

"It's a different war in the sense of how you fight it and how you quash Al Qaeda's network but in its destructiveness to innocent civilians, it is a war. In the attempted harm of decapitating major national institutions, it is a war.

Ruth Wedgwood defends the Bush Administration.

ARTICLE III COURTS

Article III courts are courts established by Article III of the Constitution. Article III vests the judicial power of the United States in the Supreme Court and "such inferior courts as the Congress may from time to time ordain and establish." Article III courts are of limited jurisdiction. The federal judicial power is limited by Article III Section 2, which states that it extends to 1) cases arising under the Constitution, federal laws, or treaties 2) cases affecting Ambassadors 3) cases of admiralty and maritime jurisdiction 4) controversies in which the U.S. is a party 5) controversies between States 6) controversies between a State and citizens of another State 7) controversies between citizens of different States 8) controversies between citizens of the same State claiming lands under grants of different States and 9) controversies between a State or its citizens against a foreign State or its citizens. District Courts, United States Circuit Courts of Appeals and the Court of International Trade are some of the "inferior courts" that Congress has established.

"The fourth plane was supposed to hit either the White House or the Congress. I think we'd have a very different gestalt about the whole thing if that had happened. It's a legal war. No one declares war any more to be sure. But all of us who do international law know that Congress never declares war any more because war as a word is illegal, some would say, after the U.N. Charter and the Kellogg-Briand Pact. So all that Congress ever does now is to authorize the use of force.

"I will join with everybody in saying we should take international law seriously. And courts should look to international law. There is a regime of law out there. It depends upon a deeply embedded practice of reciprocities; countries are afraid to deviate from the orthodox treaty language because they fear what will happen to their own troops. Under that law of war even a lawful combatant, a German soldier wearing a uniform, is subject to internment until the conflict is over, even when you don't know how long it is going to take. He doesn't get a court date. He doesn't get a lawyer. He has the blessing of not being shot on the battlefield.

"In World War II we had 418,000 German and Italian POWs, lawful combatants, held in the continental U.S. No black hole of the Rights Free Zone there. But as far as I can tell, not a single POW in World War II had a petition of habeas corpus entertained in U.S. courts. Yes, if they were tried for criminal offenses. But no, if they were challenging their civil internment whose purpose is two-fold. The first purpose is to keep them from returning to the fight so the war can ultimately be over. The second is to save their lives on the battlefield. Believe it or not the internment rule is designed as a humanitarian rule. Because with most armies and most wars, if they couldn't be sure that taking the surrender of their adversary would take that adversary out of the fight, you know what they would do? Just what happens in the first scene of *Saving Private Ryan*. They would shoot them. So the object of the internment rule is to try to make it easier to create an incentive system, if you like, for armies to take surrenders to save the lives of soldiers who want to surrender. If you deviate from an incentive system I think you'll not like the results.

"George [Fletcher] and I used to have battles over whether Al Qaeda and the Taliban were lawful combatants. Even if they were lawful and were interned until the end of the conflict, that's what you do when you go to war. You don't have Article Three Court (see sidebar, page 15) judges roaming the battlefields, no matter where the combatants are ultimately interned. This is a matter of Article Five of the Third Geneva Convention (for details on the Geneva Conventions, see sidebar, page 13). The claim is that in the case of doubt you have to have a competent tribunal and isn't that an Article Three Court?

"It doesn't have to be a civilian court. It's not a court martial in the U.S. traditional practice. Here it's much harder to show who's a combatant. What the U.S. has tried to do to adapt the norm to the situation is to have very serious screening processes.

"The 10,000 original people who were either caught or turned over were screened down to 600 in double screenings in Afghanistan, first in Guantánamo, and then on a periodic basis thereafter. I'd also note that the International Red Cross position is that if you're an unlawful combatant then you are not included in the Third Geneva Convention; you're under the Fourth Geneva Convention. Under the Fourth Geneva Convention, anybody who is definitely suspected of hostile activity can be interned preventively until that danger has passed. And the review process must be done by a confident body.

"The *Valesquez-Rodriquez* case of the Interamerican Human Rights Commission, which was about Honduran death squads, reminded every government that they have an affirmative duty to police not only against their own misconduct but against the misconduct of private actors as well.

"And if you have a private network like Al Qaeda that's killing innocent people, it is engaging in a truly catastrophic human rights violation. To all of us, I think the word *human rights*, or *rights* is almost a debate stopper. I think that we have to understand that there are rights claims on both sides of the equation here. My closing point is that if lawful combatants can be interned until the end of the war, then almost by definition, unlawful combatants can be interned as well.

U.S. Army Maj. Gen. Geoffrey Miller at Guantánamo Bay Naval Station. (AP Photo/Alan Diaz)

A Visit to Guantánamo Bay: One Journalist's Attempt To Find Answers

Emma Reverter is a Spanish journalist who runs her own foreign news agency called NY News and Research. This fall, she spent four days visiting the Guantánamo Bay Detention Center as part of a press pool run by the Foreign Press Center. While there, she conducted interviews with some of the military officials. Below is an excerpt of an interview that Emma and fellow journalists Reiner Lukyen and Bill Cameron conducted with Geoffrey Miller, who is Joint Task Force (JTF) Guantánamo's overall commander.

EXCERPTS FROM INTERVIEW:

Q: Could you tell me how many of the prisoners that are being held here were picked up in Afghanistan and how many in other countries?

A: The enemy combatants who have been detained here at JTF Guantánamo were all picked up on the battlefield in the Afghanistan theater, so all came from Afghanistan.

Q: There is certainly one case confirmed by the British government of an Iraqi who lived in Great Britain and was picked up in The Gambia and was transferred from The Gambia* to Guantánamo…

A: Every enemy combatant who is held in JTF Guantánamo was captured in the Iraqi, pardon me, in the Afghanistan theater and came from Afghanistan to JTF Guantánamo.

Q: So the British government is misinformed in this case?

A: I just told you exactly what I said. That is the correct fact.

Q: Nobody picked up in Pakistan?

A: That is in the Afghanistani theater.

Q: The Gambia is not in Afghanistan, not in the Afghani theater.

A: Every enemy combatant who is held in JTF Guantánamo at Camp Delta came from the Afghanistani theater.…

Q: I wondered whether you could tell me how you personally feel about the fact that the detention facility that you are running is being regarded by a lot of people in Europe and your own country as a Gulag, a Concentration Camp?

A: JTF Guantánamo's mission is to detain enemy combatants to be able to develop intelligence to help us win the global war on terror. We are detaining these enemy combatants in a humane manner. I am enormously proud of the mission that is ongoing in this JTF….

Q: Don't you feel in any way hurt by these accusations?

A: I am a professional soldier. The mission of my country is to help win the global war on terror and so I am doing this mission in accordance with these procedures that America uses….We are making you, your families, and our families, safer every day.…

Q: I am sure some of these people held here are probably the most courageous and bravest of their generation, just like Special Forces people would be in your country…Now, you would expect Special Forces soldiers captured in a theater of war to be held completely under the provisions of the Geneva Conventions (see sidebar, page 13). Do you think that these soldiers should be entitled to that as well?

A: They are suspected terrorists or suspected of supporting terrorism. They are not soldiers and they are not brave people. They are terrorists who go about attacking the innocent, and so you should never give them that right… They are not soldiers and not defending their country, they are attacking the innocent.

Q: So, therefore they should not be under the protection of the Geneva Conventions?

A: The United States is detaining enemy combatants in the ongoing global war on terror in accordance with the Geneva Conventions, except where military necessity dictates a difference. We are enormously proud of the detention operations that we have. We are detaining them in a humane manner.

**According The Guardian, Bisher al-Rawi, an Iraqi national, lived in Kingston in Southwest London. He was arrested in The Gambia in West Africa and handed over to the U.S. by Gambian officials. He is now being held at Guantánamo Bay. (*The Guardian, *London, p.4, January 10, 2004)*

Profiles: Lawyers involved in the Military Tribunals at Guantánamo

The U.S. government has agreed to establish military tribunals to try six of the 640 detainees at Guantánamo Bay. According to the Department of Defense, these commissions will involve "the legal presumption of innocence; a requirement for proof of guilt beyond a reasonable doubt; representation by a military defense counsel free of charge, with the option to retain a civilian defense counsel at no expense to the U.S. government; an opportunity to prevent evidence and call witnesses; and a prohibition against drawing an adverse inference if an accused chooses not to testify." Australian detainee David Hicks is among those designated for military tribunal, although no specific charges have been made against him. So far, only two of the six have been charged: Ali Hamza Ahmed Sulayman al Bahlul of Yemen and Ibrahim Ahmed Mahmoud al Qosi of Sudan. Both men were allegedly bodyguards and propagandists for Osama Bin Laden and were charged with conspiracy to commit war crimes.

The following are profiles of three lawyers involved in the tribunals:

Colonel Frederic L. Borch III

Colonel Frederic L. Borch III is the chief prosecutor for the Department of Defense's Military Commissions. He is in charge of directing the overall prosecution efforts of the United States in Military Commissions. He is a career army lawyer who supervised the successful prosecutions of 13 drill sergeants accused of sexual misconduct at Aberdeen Proving Ground in 1997. Borch graduated from Davidson College and received his law degree from the University of North Carolina and an LL.M. from the University of Brussels in Belgium.

Colonel Will A. Gunn

Colonel Will A. Gunn is the Chief Defense Counsel for the Department of Defense's Military Commissions. Gunn supervises a staff of six lawyers in "all defense activities and the efforts of Detailed Defense Counsel to ensure zealous representation of all Accused referred to trial before a military commission." He is a graduate of the U.S. Air Force Academy and Harvard Law School. He was a White House Fellow during the presidency of George H. W. Bush.

Joshua Dratel

Joshua Dratel is assisting in the defense of Australian detainee David Hicks, joining Hicks' military lawyer Major Michael Mori and his Australian advocate Stephen Kenny. Dratel, a Harvard graduate, defended Osama bin Laden's personal secretary after the 1998 U.S. Embassy bombings in Africa. Dratel also defended Al Qaeda member Wadih el Hage after the bombings in Tanzania and Kenya. (In 2001, Hage was convicted and sentenced to life without parole and his case is on appeal). Dratel serves on the Board of Directors of the National Association of Criminal Defense Lawyers.

news digest

FROM THE MIDDLE EAST

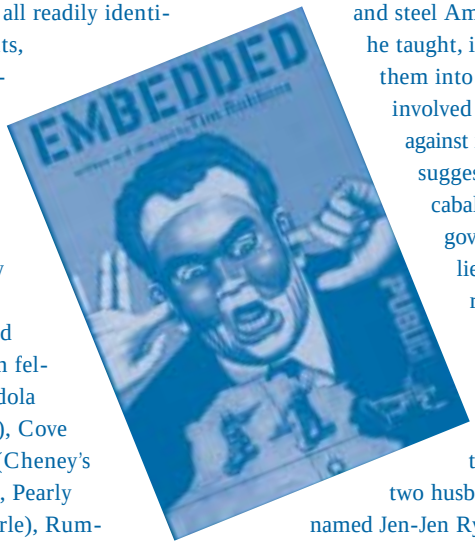
"The suppression of information about the recent arrests at Guantánamo has fed [an] already growing mistrust of the military establishment and crumbling faith in the justice system."

Ramsey Al-Rikaby in Al-Ahram Weekly Online*: 27 November – 3 December 2003 (Issue No. 666) http://weekly.ahram.org.eg/2003/666/in2.htm*

Leo Strauss Onstage: *Embedded*, A Play Written and Directed by Tim Robbins

The Program Notes to Tim Robbins' play *Embedded* — notes which consist of quotes intended to illuminate the play's irony before the actors even take the stage — begin with a quotation from Bertold Brecht. "War is like love, it always finds a way." The reference to Brecht provides one way to appreciate this rather pedantic play. Brecht used theater to provoke his audiences into rethinking the world in which they were living, that is, the decades that saw two world wars and successive German governments that varied between incompetence and fascism. To wake up his audiences to the political absurdities that surrounded them, he developed his own brand of the Greek chorus, his own version of the modern musical and a host of didactic techniques aimed more to educate than to seduce with plot or emotion.

Robbins has written and directed *Embedded* in a Brechtian spirit, to expose the way that lies were used to con the American people into what he sees as an unnecessary war in Iraq. The play is set in the land of the Bible, where Babylon substitutes for Baghdad and Gomorrah for Iraq. For his agit-prop chorus, wearing masks, yet all readily identifiable public servants, Robbins has assembled a group of six, meant to comprise the Pentagon's infamous Office of Special Plans. They include barely disguised neo-cons and their administration fellow-travelers: Gondola (Condoleezza Rice), Cove (Karl Rove), Dick (Cheney's own name suffices), Pearly White (Richard Perle), Rum-Rum (Donald Rumsfeld), and Woof (Paul Wolfowitz). Together, they chant homage to political theorist Leo Strauss, a professor at the University of Chicago who taught, among others, Wolfowitz as well as Abram Shulsky, the actual head of the Office of Special Plans, but a functionary presumably too obscure for Robbins to caricature effectively. The Office of Special Plans is presented, with presumably deliberate absurdity, as a Straussian cult. The glimmer of truth in this wild caricature lies in Strauss's idea that, in the midst of a dangerous geopolitical struggle against a lethal foe, foreign policy elites are fully justified in lying to the public to achieve a higher purpose. Strauss also believed that Americans were weakened in their confrontation with the Soviet Union by a debilitating "moral relativism" that he associated with liberalism. To cure this moral relativism and steel Americans for the Cold War, he taught, it was necessary to deceive them into believing that they were involved in a battle of pure Good against infinite Evil. What Robbins suggests with his Straussian cabal, needless to say, is that a government that habitually lies for a higher cause corrodes the basis of democratic politics.



At the emotional center of the play are three soldiers sent off to war by their families; two husbands and a young woman named Jen-Jen Ryan. One soldier, culturally illiterate and therefore unable to distinguish threatening behavior from ordinary Iraqi behavior, shoots and kills an entire family. Jen-Jen suffers the fate of Jessica Lynch, captured by Gommorah's fedayeen.

To connect the story of the soldiers and the elitist strategizing of the Office of Special Plans, Robbins introduces a cadre of embedded journalists. Overseen by Colonel Hardchannel, the reporters are given strict rules designed to perpetuate the lies of the war's creators. "You're my bitch," Hardchannel tells one of them. The rules for the embeds insist that the fighting forces are to be referred to solely as coalition forces, never as American troops; that friendly fire is not be mentioned; and that discontent on the part of the liberated Babylonians is off limits. For example, the use of a tank to bring down the statue of Saddam Hussein, and the small size of the crowd that watched, is forbidden knowledge to American audiences back home. Fresh from the war in Bosnia and eager to be part of the action, the embeds agree at first to adhere to the rules. The story of the play is the story of their growing disillusionment and their eventual insistence on telling at least bits and pieces of the story of death, destruction and ingratitude in Gommorah.

> "ROBBINS HAS WRITTEN AND DIRECTED *EMBEDDED* IN A BRECHTIAN SPIRIT, TO EXPOSE THE WAY THAT LIES WERE USED TO CON THE AMERICAN PEOPLE INTO WHAT HE SEES AS AN UNNECESSARY WAR IN IRAQ."

As further commentary on the political and military debacle that Robbins presents, a video screen backdrop juxtaposes American music and references to popular culture with the events in Babylon. In other words, the American predilection for fun has contained its own narrative of American culture all along. He takes us from the foxtrotting American bandstanders through the music of the sixties ("War: What Is It Good For?") as if to say that the innocent can become aware. Like the soldiers, the embeds learn in Babylon that the sweetness of their lives has been betrayed, intentionally and with complete disdain, by the powers that be.

As the play winds towards its all too precious in-medias-res ending, Robbins's didacticism becomes increasingly strident. "The brilliance of terror" lies in its ability to be "a never ending utility." "Terror is a religion." Americans, it seems, will do anything to com-

bat the boredom of loneliness in search of "trustworthiness" and constancy, even if it comes in the form of lies, even if it is war that has arrived to distract and entertain them. Above all, they will willingly accept the dramas that the war has packaged for them, as the story of private Jen–Jen makes clear. The real life version of Stephen Spielberg's emotionally overcharged war story *Saving Private Ryan* screams out that her story has been romanticized, politicized, TV-dramatized and above all, grossly distorted. She was not really rescued, or not in the way the Pentagon wanted Americans to believe, and she was protected, not abused, by her Western-educated Iraqi doctor. Moreover, in conversations between Jen-Jen and her parents, it becomes clear that Bush's "volunteer" army consists largely of young men and women, driven to enlist by lack of economic opportunity.

The increasing anger of the music crescendoes along with the growing morality in the sounds of Bob Dylan's "Masters of War," a song written to protest the Vietnam War. The lyrics impugn the shameless duplicity, disregard for bloodshed and undisguised imperialism of the American government. "I can see through your masks," Dylan cries. "You play with my world like it's your little toy…Like Judas of old, You lie and deceive/A world war can be won, you want me to believe."

Robbins wrote *Embedded* even as the fact of the lies about weapons of mass destruction, about the Iraqi attitudes towards their "liberators", and about the death toll on both sides were just beginning to grace the headlines of the country's major media outlets. In criticizing the Germans in WWI, Brecht had an answer: a socialist society. In his song, Dylan foresees cosmic justice - "All the money you make will never buy back your soul." Whereas for Brecht, while justice comes in the form of the triumph of the common man, and for Dylan it comes in eternal punishment: "Even Jesus would never forgive what you do." For Robbins, there is no easy recompense for the problem of a society so full of admiration for the lie, so willing to be duped as to sell its soul and its future. And it is for this reason, in part, that the play has no ending, merely fades into the silence and empty stage that precede the curtain call. A work in progress, *Embedded's* only hopeful sign, perhaps, is its lack of an ending.

- Reviewed by Karen J. Greenberg and Stephen Holmes

Recommended Articles on Guantánamo Bay

1. Evan J. Wallach, "Afghanistan, Quirin, and Uchiyama: Does the Sauce Suit the Gander?" *Army Lawyer* 18 (2003).

2. Amy E. Eckert and Manooher Mofidi, "Unlawful Combatants" or "Prisoners of War": The Law and Politics of Labels," 36 *Cornell International Law Journal* 59 (2003).

3. Michael Beattie and Lisa Yonka Stevens, "Comment: An Open Debate on United States Citizens Designated as Enemy Combatants: Where Do We Go From Here?" 62 *Maryland Law Review* 975 (2003).

4. Jordan J. Paust, "Postscript: Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure" 23 *Michigan Journal of International Law* 677 (2002).

5. Daveed Gartenstein-Ross, "Note: A Critique of the Terrorism Exception to the Foreign Sovereign Immunities Act" 34 *New York University School of Law Journal of International Law and Politics* 887 (2002).

6. Jesselyn A. Radack, "United States Citizens Detained as "Enemy Combatants": The Right to Counsel as a Matter of Ethics" 12 *William & Mary Bill of Rights Journal* 221 (2003).

7. Stephen I. Vladeck, "Note: The Detention Power" 22 *Yale Law & Policy Review* 153 (2004).

8. Thomas F. Powers, "Due Process for Terrorists?" *The Weekly Standard*, January 12, 2004, p. 17.

9. David Rose, "Guantánamo Bay on Trial," *Vanity Fair*, January, 2004, p. 88.

10. Jenny S. Martinez, "Towards an International Judicial System" 56 *Stanford Law Review* 429 (2003).

Journalist Emma Reverter took this photo of the navy base at Guantanamo Bay during her visit this fall. See Emma's interview with Geoffrey Miller on page 16.

The View from Abroad

FROM CARLOS THE JACKAL TO OSAMA BIN LADEN: THE BRITISH POLICE RESPONSE TO THE TERRORIST THREAT

Keith Weston is the Detective Chief Superintendent for the Metropolitan Police Anti-Terrorist Branch at New Scotland Yard. Below are his thoughts on law enforcement and the move towards a war model in the fight against terrorism.

Measures used to combat terrorism have much in common with those that are used to deal with serious crime. The modern-day serious criminal can now achieve a level of harm that twenty years ago was almost exclusively the preserve of terrorists. It follows therefore, that law enforcement agencies developed similar methodologies to deal with both terrorists and serious criminals.

Keith Weston

Twenty years ago the main suspects for international terrorism were the state sponsors who used the services of surrogate operators. The critical importance of state sponsorship was that it elevated the capability and operational impact of small groups to deliver deadly force, whilst overcoming the traditional defenses of counterterrorism. State sponsors utilized intelligence services, embassies, and state airlines and provided training, financing and equipment. Although there were other non-state-sponsored terrorist groups active during the 1980's, research by Bruce Hoffman of the RAND Corporation noted that the identifiable state-sponsored terrorist acts at that time were eight times more lethal than those carried out by groups without state support or assistance.

In the 1980's the motives of terrorists were also comparatively straightforward and mainly revolved around nationalist and separatist aspirations and revolutionary and ideological ambitions. Back then, the opportunities for terrorism took place against the backdrop of the Cold War and existed in the ethno-nationalist conflict.

The policing response to terrorism in London produced a strategic policy that was adopted by all U.K. police forces. This policy included intelligence-focused operations that relied heavily on the partnership between the security service (MI5) and the police; high visibility and targeted police operations intended to disrupt, detect or deter terrorist activity at the reconnaissance, execution or escape phases of terrorist operations; highly effective post-event investigations that made the most effective use of well-trained specialist investigators, with access to modern equipment and supported by expert forensic scientists; and community reassurance, partnership and consequence management.

> "MEASURES USED TO COMBAT TERRORISM HAVE MUCH IN COMMON WITH THOSE THAT ARE USED TO DEAL WITH SERIOUS CRIME. THE MODERN-DAY SERIOUS CRIMINAL CAN NOW ACHIEVE A LEVEL OF HARM THAT TWENTY YEARS AGO WAS ALMOST EXCLUSIVELY THE PRESERVE OF TERRORISTS."

news digest

STATISTICS FROM GUANTÁNAMO BAY

Detainees originally taken in Afghanistan: **approximately 10,000**

Detainees brought to Guantánamo: **approximately 800**

Charges filed against prisoners: **2**

Detainees Released*: **119**

Detainees Transferred for detention in home countries:
4 to Saudi Arabia, 1 to Spain, 7 to Russia

** as of March 24, 2004*

If we now apply the analytical techniques that have been developed over the last twenty years — suspect, means, motive and opportunity — to the terrorist threat of today, we can see a significant development of complexity, diversity and unpredictability. In personality terms we can see the shift from "Carlos the Jackal" to "Osama bin Laden."

The one consistent element of all forms of terrorism is the intention to terrorize. In simple terms, that means creating *the fear of violence*. Given that fear of harm is also the essential ingredient of extortion, it was only a matter of time before terrorist-engendered fear was applied for profit. It is clear that the terrorist groups that survived the last two decades are those that have diversified their income sources and learned the tricks of money laundering.

The comparison of the nature of terrorism over the last twenty years has taught us that in order to defeat it, we must be aware of and study the complication, diversification and unpredictability of the phenomenon. It is also essential not just to concentrate on the suspects, means, motives and opportunities of terrorism, but also to consider the changing nature of the target.

The crucial issue of principle in the U.K., which is critical to the effective development of counterterrorism, is the commitment to criminal justice as the preferred route. The principle is that terrorists should be brought to justice for their crimes wherever this is possible. It therefore follows that official agencies engaged in counterterrorism must operate in compliance with the law and be accountable to the criminal justice process. It is important that law enforcement agencies seek, transparently, to uphold the law.

A consequence of counterterrorism operating within the constraints of a liberal democracy and in compliance with the criminal justice process is that there is a need for social realism as to what can be achieved. Put bluntly, *reduction and containment is realistic in these circumstances: the ambition of eradicating the threat is unrealistic.* Subject to the viciousness of the threat, most citizens recognize that there is a balance to be struck between enforcement effectiveness and personal freedom and risk.

The tactical implementation of a counterterrorism strategy should include a menu of security options designed to impact any or all of these areas. In the U.K. this has led to the adoption of Operation Rainbow. This operation has a menu of 26 high visibility policing initiatives that range from vehicle check-points to uniformed support to surveillance teams. Above all, the most important foundation for both an effective counterterrorism strategy and a serious crime strategy is the priority of intelligence collection. This is an absolutely critical investment, and it should be the last element to be adjusted (i.e. reduced), according to perceptions of the threat.

The Israeli Supreme Court. ©GPO Photos.

The world of emergency planning has produced the compelling concept of an 'all threats, all hazards' approach to draw together all the relevant resources to a particular challenge. This approach provides a continuum of threats and hazards supported by an integrated and cohesive structure to respond, manage the crisis and provide for a speedy return to normality.

The message for the future is that there will be ever greater demands for people and organizations to see beyond disciplinary boundaries, to challenge bureaucratic barriers and to learn from experience.

ADJUDICATING COUNTERTERRORISM: THE ISRAELI MODEL

On February 23, Dr. Yigal Mersel, Senior Legal Assistant to President Ahoron Barak, of the Supreme Court of Israel, an Emile Noel Fellow and Hauser Research Scholar at NYU School of Law, addressed a luncheon seminar on the topic of "Adjudicating Counterterrorism: The Israeli Model." The paper and the discussion afterwards focused on several issues including two points of note: 1) The tendency of the Israeli Supreme Court to defer to the decrees of the executive, thereby refusing to hear a broad range of cases, and 2) The fact that the Israeli Supreme Court is aware of international law and standards when it makes its decisions.

Below is a section from a paper that Dr. Mersel wrote on this topic.

Which Law? A Three-Step Doctrine

A critical question to ask is which standards and legal criteria the Court tends to employ in its counterterrorism jurisprudence. Indeed, the Israeli counterterrorism adjudication model is characterized not only by procedural features, such as standing and justiciability, but also by substantive ones. In most of the counterterrorism cases, the court applies a three-step analysis. It reviews the challenged state activity under three different normative frameworks. The first is international law. In cases involving the administrated territories the Court will almost always review the action under the Fourth Geneva Convention (see sidebar, page 13), as well as customary and conventional international law. For instance, when the Court ruled on the issue of the legality of using flechette shells, it

Dr. Yigal Mersel

referred to the United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (1980). When considering conditions in detention camps, it referred to the International Covenant on Civil and Political Rights (1966), the Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and Fight Against Terrorism and the The Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment (1988). When it established the proper timing for judicial review of detentions, it referred to the European Court of Human Rights' jurisprudence on Article 5 of the European Convention on Human Rights. The Court's perspective is that "Israel is not an isolated island. She is a member of an international system," and, therefore, international standards are applicable to counterterrorism adjudication.

The second set of laws the Court employs in these cases is Israeli administrative common law. The Court conceives of any Israeli military action — within state boundaries or outside — as an administrative action of Israeli officials. In other words, the Israeli soldier carries with him in his backpack, wherever he goes, not only international law but also the Israeli law. Any counterterrorism action should therefore be analyzed not only under international law but also under Israeli administrative common law. This body of law may include procedural rights like the right to be heard and also substantive rights like human dignity and liberty, as specified in the Basic Law: Human Liberty and Dignity and the Values of Israel as a Jewish and Democratic State.

The third set of laws the Court references are military laws or domestic Israeli laws that are applicable to the specific dispute. As an example, the Court analyzes the specific provisions of the Israeli detention laws or the laws issued by the military commander, in cases that involve the administrated territories.

FORMER DETAINEES SPEAK OUT:

"The whole point of Guantánamo was to get to you psychologically.

The beatings were not nearly as bad as the psychological torture.

Bruises heal after a week, but the other stuff stays with you."

– Jamal al-Harith, a British captive freed from Guantánamo Bay (Daily Mail, London, p.4, March 12, 2004.)

"'I am lucky I went there, and now I miss it. Cuba was great,'"

– 14 year-old Asadullah, one of three Afghan adolescents released from Guantánamo in January (The Guardian, London, p.18, March 6, 2004.)

"Of course they wanted to stay there. They had human rights and good living standards there."

– Fatima Tekayeva, mother of one of the seven Russians transferred from Guantánamo into Russian custody. (The Times, London, March 3, 2004.)

"I have been badly punished 107 times."

– Abdul Rehman, as told to Associated Press Television News in an interview at Kabul Central Jail. He said by "badly punished" he meant his captors chained his hands and feet and beat him with a metal rod on his legs and back.

Indeed, this three-step analysis sketches a few interesting characteristics of Israeli counterterrorism adjudication. First, the Court envisions the terrorist threat as an international, rather than solely domestic, problem. Accordingly, the standards for adjudicating counterterrorism cases, as well as those involving human rights and national security, are international standards. Second, the war against terrorism is an exceptional circumstance but has not been treated with exceptional law. The Court usually refers to existing international law of war and human rights conventions. It has not ruled that terror presents a unique situation outside the force of international law. Third, this three-step test actually reinforces human rights. In order to justify certain counterterrorism measures, the state must prove that the operation or action taken is in accordance not only with the relevant direct law (be it detention law, military order or other regulation) but also with the Israeli common law and international law. Legality under one set of laws does not imply legality per se under another set of laws.

Winter Events

January 26: The Center on Law and Security (CLS) hosted a screening of Robert Greenwald's documentary, *Uncovered: The Whole Truth About the Iraq War*.

John Brady Kiesling attended the screening and led a discussion afterwards. Kiesling, who is featured in film, was the first American diplomat to quit his job because of the Administration's policies in Iraq.

Abdol-Karim Soroush

February 20: CLS brought together experts in Iran and Turkey for a small workshop discussion on "*Muslim Secularism, Democracy and the Battle against Religious Fundamentalism.*" Participants included: Shaul Bakhash, Robinson Professor of History, George Mason University; Henri Barkey, Professor of International Relations, Lehigh University; Stephen Holmes, Walter E. Meyer Professor of Law, NYU School of Law; Farhad Kazemi, Professor of Politics, NYU; Nasser Hadian-Jazy, Professor of International Relations, Tehran University visiting professor at SIPA, Columbia University; Abdol-Karim Soroush, Visiting Lecturer, Institute for Transregional Study, Princeton University; and Jenny White, Associate Professor, Department of Anthropology, Boston University. The discussion included such topics as "Is secularism on the defensive throughout the Islamic world?" and "What are the future political prospects of Muslim secularism in the Middle East given the prominence of Islam as a rallying point for anti-American and anti-autocratic politics?"

February 23: Dr. Yigal Mersel, Senior Legal Assistant to President Ahoron Barak, Supreme Court of Israel, Emile Noel Fellow and Hauser Research School at NYU School of Law, addressed a luncheon seminar on the topic of "*Adjudicating Counterterrorism: The Israeli Model.*" (See page 21).

February 26: Open Forum on "*The USA PATRIOT Act: Where Do We Go From Here?*" This debate was moderated by Tom Gerety, Executive Director of the Brennan Center for Justice at NYU School of Law. The participants were Alice Fisher, who served as Deputy Assistant Attorney General of the Criminal Division in the U.S. Department of Justice from July 2001-2003, where she was responsible for managing the Counterterrorism Section; and Stephen Schulhofer, Robert B Mckay Professor of Law at NYU School of Law and author of *The Enemy Within: Intelligence Gathering, Law Enforcement, and Civil Liberties in the Wake of September 11* (2002). The proceedings of this event will appear in the next issue of *The NYU Review of Law & Security*.

Upcoming Events

April 27: "*Putting Al Jazeera in Perspective.*" Featuring Peter Bergen, CNN's terrorism analyst and author of *Holy War Inc.: Inside the Secret World of Osama Bin Laden*; Yigal Carmon, President of the Middle East Media Research Institute (MEMRI); Mamoun Fandy, President of Fandy Associates and author of *Saudi Arabia and the Politics of Dissent;* Abderrahim Foukara, UN Correspondent, Al-Jazeera Television and former correspondent for the BBC World Service. Event takes place at 6:00 pm in Vanderbilt Hall (40 Washington Square South), Room 210.

April 29: *Congressional Briefing on Guantanamo Bay*. CLS will hold this briefing in Washington, DC.

June 3-5: "*Prosecuting Terrorism: The Global Challenge.*" CLS will hold its summer conference at La Pietra, NYU's site in Florence, Italy.

Center on Law and Security's Research Assistants

Chris Barr is a second year law student at NYU. He lived and studied in Cairo prior to law school. His research has focused on the Arab media and the USA PATRIOT Act.

Brian McDonald is a second year law student at NYU. He has researched the domestic response to terrorism, including the USA PATRIOT Act, the Jose Padilla and Yaser Hamdi cases, and the Guantánamo Bay detainees.

James Mitre is a first year law student at NYU. He previously worked at the SITE Institute where he investigated terrorist organizations. His research focuses on the effectiveness that military, criminal, and civil law have on deterring terrorism.

Andy Peterson is a first year law student at NYU. His research primarily concerns the Department of Homeland Security and Chinese perspectives of the U.S. war on terror.

Yannic Yvon studied law at Geneva and Vienna University. Before coming to NYU School of Law as an LL.M. Fulbright Fellow, Yannic worked on current constitutional issues of European integration. His research for the Center focuses on transatlantic relations and European security policy.

COMING UP IN ISSUE #3:

Are We Safer? Updates on Homeland Security and the USA PATRIOT Act

DID YOU KNOW THAT...

- It costs the country an estimated **1 billion** dollars per week to go to Code Orange?
- New York City is at a **constant** state of Orange Alert?
- The cost to New York City to remain in a state of Orange Alert is roughly **5 million** dollars a week?

For updates, terrorist trials, current reading lists, upcoming conferences, and open forum proceedings, please visit our website at www.law.nyu.edu/centers/lawsecurity/

Thank You

Thanks go to our indefatigable and astute staff.

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