Introduction

The terrorist mastermind had slipped through their fingers before, and American forces were not about to let it happen again. At one point the previous year, they had actually arrested him but, not realizing who he was, had let him go. Unable to track him down now, they managed instead to locate and detain his wife, who was living in a remote mountainous region. For several days, they interrogated her at an air base, but she repeatedly insisted that he was dead. Finally, they tried a new tactic. They noisily put a plane on a nearby runway, its engines running. As the commanding officer later recalled: "We then informed [her] that the plane was there to take her three sons to [a repressive country nearby] unless she told us where her husband was and his aliases. If she did not do this then she would have two minutes to say goodbye to her sons. . . . We left her for ten minutes or so with paper and pencil to write down the information we required." Having threatened, in essence, to kill her sons—for nobody doubted what the secret police would do to them when they arrived at their destination—the interrogators got the information they wanted. And they got their man, disguised as a farm laborer, that evening.

What followed was a protracted habeas corpus action. Lawyers represent-

ing the high-value detainee decried the coercive interrogation of his wife, the threat to his children, and the savage beating he incurred on his arrest. (The medical officer accompanying the troops that detained him had shouted to the commanding officer to call his men off "unless you want to take back a corpse.") Human rights groups uniformly condemned the interrogation tactic as torture; major newspapers weighed in on their side. The military, meanwhile, insisted that the courts had no jurisdiction over any such overseas military action, which had in any event been lawful and had yielded essential intelligence and the capture of a very big fish. As of this writing, the lower courts have deemed themselves powerless to hear the case; the Supreme Court is considering the matter.

Should the courts hear the case, notwithstanding an act of Congress that explicitly precludes review? If so, how should they rule? Is such a tactic—garnering information from a mother by threatening to have her sons beheaded by a totalitarian regime—ever legitimate? And in a society committed both to law and to victory in a global struggle against terrorism, who should judge?

In the years since September 11, 2001, a gulf has opened up between the views of elites, mostly but far from exclusively liberals, and majority opinion on such questions of presidential power as detention, surveillance, interrogation, and trial of suspected terrorists. This gulf involves both the scope of these authorities—call them the powers of presidential preemption—and, perhaps more importantly, their source. This gulf was only accentuated by the Supreme Court's opinion in *Hamdan v. Rumsfeld,*[1] the resulting Military Commissions Act,[2] President Bush's disclosure of the CIA's secret prisons for high-value detainees in September 2006,[3] the National Security Agency's warrantless wiretapping program and the resulting legislative battles over electronic surveillance, and continuing Supreme Court litigation over detentions at Guantánamo Bay, Cuba. Public opinion has tended to regard these issues pragmatically—tolerating tough measures and contemplating with relative equanimity the deprivation of certain rights to terrorist suspects that are nonnegotiable in a civilian context. For prevailing opinion in the academy, the press, and the human rights world, however, the standards of international

humanitarian law represent moral absolutes, the administration's flexible approach to them an affront to the rule of law, and the courts the principal line of defense against excessive executive power and its abuse. In functioning democracies, the argument goes, victims of uncivilized government conduct, no matter how odious these victims may be, must have access to the courts for redress—the threat of tyrannical government being ultimately greater than whatever threat even the worst criminals or terrorists may pose. In the end, the rules that limit governmental power have to be tough and the courts have to be available to make them meaningful.

But let me now confess that I have adjusted somewhat the facts of my opening anecdote, which is indeed the true story of the capture of an uncommonly evil and dangerous man: The plane was really a train; the country was Germany; the soldiers were British, not American; the year was 1946. And the high-value detainee was no Al Qaeda figure, not even a figure who posed a great prospective danger, but one of the great mass murderers of all time: Rudolf Hoess, the commandant of Auschwitz. The resulting habeas litigation, de rigueur today, was beyond anyone's wildest imagination then.[4] The stark reality is that absent an interrogation tactic that "shocks the conscience,"[5] Hoess—like his colleague Josef Mengele—might well have escaped justice, Nuremberg lost an important witness, and history denied his crucial accounts of the factory where more than a million people died.

If the tactic—and the absence of any judicial review of its use—does not suddenly seem more defensible, you have proven yourself both a principled opponent of abusive interrogation and truly committed to judicial oversight of legally dicey wartime practices. My purpose in this book is to shake somewhat the certainty of your nonconsequentialism and, in particular, your faith in judges as the essential check on such executive behavior. I share neither your certainty nor your faith and can only thank God that neither did the British soldiers who captured Rudolf Hoess. For those wholly comfortable with the operation morally or legally—those who would breezily defend it as a matter of unreviewable military discretion—my purpose is also to shake your certainty, albeit in a somewhat different manner. I wish to convince you that strong presidential action in the current conflict cannot rely exclusively—

or even chiefly—on the president's own constitutional powers. In the fight against global terrorism, the powers of presidential preemption will not remain vital without support from outside the executive branch.

This book is about that gulf between the centers of gravity of elite and mass opinion, the space in which the realities of America's genuine security needs meet the inadequacy of its laws and put stress upon the liberalism of its values. It is for those not content to give the president a free hand in a long war but also suspicious that courts can and should supervise detentions and interrogations and doubtful that such operations are, in any event, easily subjected to absolute moral rules. This is uncomfortable territory, for the slope is indeed as slippery as slopes get—and slippery, I should say, on a hill with two distinct bottoms. At one lies a government capable of torture with impunity, the very essence of tyranny. At the other lies a government incapacitated from expeditiously taking those steps necessary to protect the public from catastrophic attack. Those of us who occupy this space stand vulnerable at once to the charge of having forsaken American values and to the charge of having done so with insufficient vigor to enable the executive branch to win.

In reality, however, this is the intellectual and practical territory in which wars have been won with liberty preserved. If the United States is to win the current war on terror in the context of stable, democratic, constitutional government, I venture the guess that it is within this space—not with either a dogmatic commitment to executive power or an undying faith in the wisdom of judges—that it will do so.

Nearly six decades after Hoess's capture, an American military panel at Guantánamo Bay, Cuba, considered the case of a man named Ghassan Abdallah Ghazi Al Shirbi. The panel was a Combatant Status Review Tribunal (CSRT), a peculiar creature set up by the military in Guantánamo not, like military commissions, to try detainees for crimes but to determine whether the government had properly classified each detainee as an enemy combatant. In its public summary of the evidence against Al Shirbi, the government made some serious allegations: He was associated with Al Qaeda. He had traveled

from his native Saudi Arabia to Faisalabad, Pakistan, where he lived in a safe house with a senior Al Qaeda operative. He taught English to the other residents of the safe house and "received specialized training on remote control devices for use in explosives to detonate bombs against Afghani and United States forces." He was observed "chatting and laughing like pals with Usama bin Laden during a face-to-face meeting at [a] terrorist training camp." His nickname among the Guantánamo detainees is the "electronic builder" and "is known as 'Abu Zubaydah's right hand man' "—a reference to an Al Qaeda bigwig whom U.S. forces had captured.

At his hearing, Al Shirbi made no secret of who he was. "Honestly I did not come here to defend myself," he began. The tribunal, he said, "gathered here to look at what you have written and you will come up with a classification if this is an enemy combatant or not. If they come up with the classification enemy combatant, it is my honor to have this classification in this world until the end, until eternity, God be my witness." After a long rant against capitalism, Al Shirbi began chanting in Arabic: "May God help me fight the infidels. . . ."[6] Before one of the special military tribunals set up after September 11 to try enemy fighters for war crimes, the government charged Al Shirbi with conspiracy to murder and attack civilians and to commit terrorist acts.[7] He rejected legal representation and freely admitted the allegations against him. "I fought against the United States, I took arms. . . . I'm going to make it short and easy for you guys. I'm going to say what I did . . . without denying anything. I'm proud of what I did and there isn't any reason of fighting what I did," he told the military commission. "I came here to tell you that I did what I did and I'm willing to pay the price no matter how much you sentence me even if I spend hundreds of years in jail. In fact, it's going to be an honor—a medal of honor to me."[8] Despite such admissions, the government has been unable to convict Al Shirbi of any crime. His criminal case died when the Supreme Court tossed out the administration's original military commission system, and, as of this writing, a new case has not yet materialized. He remains at Guantánamo with no charges pending against him.

Faruq Ali Ahmed, a teenage Yemeni, also traveled to Afghanistan in 2001—and he also ended up facing a CSRT at Guantánamo Bay. Unlike Al Shirbi, Ali

Ahmed did not effectively admit to being an Al Qaeda operative, a Taliban fighter, or anything else. He had come to Afghanistan, he told the tribunal, "to teach the kids" the Koran. He conceded that he had turned over his passport to someone he thought might be Taliban, and he had stayed in a house run by people he "assumed" were Taliban. But he denied belonging to the group. He denied taking military training, and he denied traveling with a large group of mujahadeen fleeing the fighting at Tora Bora—some of whom, the government later alleged, he had met in high school. At least some of the government's other evidence against him seems to have come from a detainee who—after a very rough interrogation—implicated a lot of people. All of this troubled Ali Ahmed's personal representative, a nonlegal military officer assigned to assist him before the CSRT. The personal representative appended a brief memo to the tribunal's unanimous decision that Ali Ahmed was, in fact, detainable forever. "I do feel with some certainty," the personal representative wrote, that the detainee who gave evidence against Ali Ahmed "has lied about other detainees to receive preferable treatment and to cause them problems while in custody."

"Had the Tribunal taken this evidence out as unreliable, then the position we have taken is that a teacher of the Koran (to the Taliban's children) is an enemy combatant (partially because he slept under a Taliban roof)."[9] In later hearings, the military suggested that some of Ali Ahmed's high school acquaintances had become close to Osama Bin Laden and that his own name had appeared on a list of Al Qaeda operatives.[10] But all public documents relating to his case do not come close to answering the question of whether he is a dangerous operative or an innocent teacher.

How should the law consider cases of men like Al Shirbi and Ali Ahmed? According to the military, they are simply "enemy combatants," detainable at the administration's discretion until the war on terrorism is over—whatever that might mean and whenever it might come about. According to human rights groups, by contrast, they are both by dint of their incarcerations victims of human rights abuses. This country's legal obligation, to the extent it cannot prove criminal charges against them, is to set them free. As Amnesty

International put it, "the solution in principle is simple, and the government must turn its energies to this end. It should either charge the detainees with recognizable criminal offences and bring them to trial in the ordinary civilian courts, or it should release them with full protections against further abuses."[11]

The solution, even in principle, is actually not simple at all.

Al Shirbi is a man whom no society with an instinct for self-preservation would release blithely. Yet our legal system has at best an underdeveloped vocabulary for discussing men like him. We don't quite know how to put them on trial, but they are not quite like enemy soldiers, whom armies routinely detain without trials, and they are potentially more dangerous to the population at large than either soldiers or criminals. What's more, the legal system's vocabulary for distinguishing between people like Al Shirbi and those whose cases are murkier—and Ali Ahmed's case is one of many that is far murkier—is less developed still. Simply labeling them both "combatants" is inadequate, and seeing their detentions as raising comparable human rights questions absurd. Confronting these cases seriously requires more than interpreting existing law, the job of the courts, or carrying out existing law, the job of the president. It involves the crafting of new legal frameworks altogether; rethinking questions of why we lock people up, under what authority, and with what sort of review; and hybridizing intellectual and legal categories American and international law has traditionally kept distinct.

THIS IS THE STORY of the legal architecture of the war on terrorism—the rules that govern the American side of the fight and, perhaps more importantly, the rules that govern how those rules get made. It is, at one level, a story of failure: how this country has thus far failed to build a viable legal structure for its war; how it has failed as a political and legal culture to address seriously the questions of what to do with the modern Rudolf Hoesses (and the many more would-be Rudolf Hoesses) and how to distinguish them from the peasants, teachers, students, and other civilians among whom they hide; and how

the legal battles it has fought with itself over the past several years have collectively avoided the hard project of designing new legal systems for a conflict unlike any that this country has ever faced.

In important respects, this is a critique of the Bush administration, whose consistent—sometimes mindless—aggressiveness and fixation on executive authority consistently blinded it to the need to solicit the backing of Congress and the courts for actions that were bound to be controversial. It is also a defense of the Bush administration, many of whose tactics in the fight were better grounded in precedent and more defensible than its legion of critics allowed. As such, it is also a critique of the administration's critics, who often failed to distinguish between human rights norms to which this country has actually committed itself and those to which human rights groups wished it had committed itself; they have thereby denied the administration the flexibility it legitimately required. It is a critique of the Supreme Court, which has used the legal disputes over the war on terrorism to carve itself a seat at the table in foreign and military policy matters over which it has, for good reasons, a historically limited role. Perhaps most of all, it is a critique of the Congress of the United States, which has sat on its hands and refused to assert its own proper role in designing a coherent legal structure for the war; to this day, America's national legislature continues to avoid addressing the questions only it can usefully answer.

At another level, the book is also a plea for a different approach in the future, an effort to begin putting the powers of presidential preemption on a solid legal foundation for the long term. Like the conflict itself, this approach is messy and inelegant, lacking all of the purity of either the administration's infatuation with presidential power or the civil libertarian love affair with judicial power. It also lacks completeness, for the ideas I advance are predicated explicitly on the notion that we have not yet built the legal and doctrinal architecture that will govern this area. I do not pretend to know in full those details, and I mistrust grand claims as to the ultimate design. I have provided here a sketch, an outline of a first draft of the statutory regimes that might undergird a sound long-term structure for a conflict that is not going away any time soon.

Animating this outline are two convictions born of the failures of the last six years: The first is that any proper legal architecture for this war will at once restrain the executive branch far more than the Bush administration has wanted to be restrained yet at the same time enable it far more than civil libertarians and human rights groups find congenial. It will empower judges to review executive behavior more robustly than the Bush administration finds comfortable, and far less robustly than human rights groups wish to see. It will also, almost invariably, contain significant holes of the type that permit aggressive, flexible executive action—which, as the Hoess example vividly illustrates, is not always pretty. International conflict stubbornly resists the concept of law as people generally understand it in more civilized settings. This point is an uncomfortable one. How satisfying it is, after all, to talk about war and military actions in the language of international conventions, statutes, war crimes, and customary international law. Yet if we face the matter entirely honestly, we cannot escape the fact that legal rules are inevitably less absolute, less truly legal, in this context than, for example, in the domestic civilian context. The Nuremberg trials, after all, involved *ex post facto* prosecutions of the sort most condemned by the American Constitution—yet we see them as a great victory for international justice. In the name of that higher justice, the world proclaimed rape a crime of genocide and torture after the fact in evaluating criminality in Rwanda and the former Yugoslavia.[12] Even some of the most committed human rights advocates will allow that with a ticking nuclear bomb in New York City and a suspect in custody, all bets are off as to interrogation tactics; they contend in this situation merely that the law should not countenance the step that any patriot or humanitarian would take to avert a catastrophe. Abraham Lincoln defied the chief justice of the United States over habeas corpus, and history views Lincoln as the country's greatest president and Chief Justice Roger Taney as one of the villains of his era. The subject matter of warfare has a way of making—and not only in extreme cases—legal principles look a bit flabby.

Discerning the reason requires no great imagination: The stakes are too high for anything else. A society can accept in the name of liberty the consequences of allowing even the worst criminal the rights we would all want were

we facing trial. The worst that will happen is he escapes justice and goes on to commit additional crimes. While those crimes may be horrible, even the worst individual crimes represent manageable horrors from a societywide point of view. Terrorism, by contrast, involves horrors on an altogether different scale. And international conflict at its core is about avoiding harms—particularly catastrophic harms—prospectively, not retroactively accounting for them. No society can afford inviolable principles and inflexible rules concerning those steps on which its ultimate fate or interests depend. In a mature legal architecture for the war on terror, the principles themselves will somehow have to recognize this reality.

The second point is that the eventual design of a mature legal architecture for this war cannot come into being chiefly through dialogue between the executive and judicial branches of government—the president grasping and the courts slapping his hand. Neither unilateral rule making on the part of the president nor judicial review of whatever rules he makes up can mold a stable long-term architecture for a war that defies all of the usual norms of war. The only institution capable of delivering such a body of law is the Congress of the United States—the very branch of government that has been, in the years since September 11, 2001, least active and involved in the process of designing the rules.

In the years since the attacks, Congress has roused itself a few times, always in response to the president's call; the USA PATRIOT Act, the Detainee Treatment Act, and the Military Commissions Act present the most significant examples. But these are the exceptions. The broad mechanism for decision making about the legal structure of the war has consisted of executive actions followed by review in the courts of the validity of those actions, invariably contested under extant statutes and precedents. The absence of the national legislature from some of the most significant policy discussions of our time has brought about deleterious consequences at a number of levels. At a theoretical level, it has been unfortunate because Congress has its own independent duty to legislate in response to problems that arise in the course of the nation's life. After all, America's constitutional design presupposes that each branch of government will *assert* its powers, that those powers will clash, and that this clash

will prevent the accumulation of power in any one branch. Yet in the war on terrorism, Congress has done very nearly the opposite of countering the executive's rather considerable ambitions. It has run from its own powers on questions on which its assertion of rightful authority would be helpful, and it has sloughed off the difficult choices onto the two branches of government less capable than itself of designing new systems for novel problems.

This abandonment of the field has also been unfortunate at a policy level, where it has inevitably lost nuance, flexibility, and imagination in envisioning the appropriate regime. Congress has left the courts to split the difference between polar arguments to which few Americans would actually sign on and others that badly frame the terms of what should be a much broader debate. To cite only one example, one can imagine a world of legitimate policy options to handle the detention of American citizens caught fighting for Al Qaeda. But instead of exploring those options, Congress has left the judiciary to seek the "right answer" by groping its way between a few Civil War–era precedents and a few World War II–era precedents—none of which obviously controls the current situation. Ultimately, the task of imagining the regime must become the legislative task it has so obviously been for so long.

The notion that Congress ought to play a substantial role in writing the law of the American response to terrorism would not surprise a middle-school civics class. Designing legal systems for complex and novel circumstances that preexisting law addresses inadequately is perhaps the quintessential legislative function. At its core, it is decidedly neither an executive nor a judicial one. Yet somehow, in the years since the attacks, America has become bogged down in a heartfelt, earnest, passionate debate over what the law already is, rather than over what it should be. It is a discussion of past precedent, instead of future needs, a legalistic debate about the issues at stake, rather than a policy debate about them, and it forsakes the political and legal burden of writing law with which to govern ourselves. This debate has obscured an important fact: We do not have a lot of law here. We have, rather, underdeveloped strands of law intended for other purposes, interacting in peculiar and

often perverse ways. Both sides in this debate like to pretend these strands answer the questions at hand—and answer them in accord with their own favored approaches. That both sides can claim as much with equal good faith suggests that the law is more of a sphinx than either admits.

In the initial aftermath of the attacks, the Bush administration quite reasonably chose to see the confrontation with Al Qaeda as a legal war—that is, as a military conflict under international and domestic law that triggered the president's extensive constitutional war powers. Congress bought this premise, passing at President Bush's request a broad Authorization for the Use of Military Force.[13] In so doing, it tapped into a preexisting and largely moribund body of law the executive branch had last taken advantage of during the aftermath of World War II. This body of law allowed the detention and trial of enemy fighters with the barest minimum of judicial oversight. The administration used it to justify nonstatutory orders authorizing military commission trials, extensive detentions at Guantánamo Bay, Cuba, and elsewhere, and even detentions of citizens domestically. In addition, the administration tapped the president's war powers in its aggressive approach to interrogations and to domestic surveillance. In all these areas, the shift to the war paradigm allowed the administration to make its own rules, rather than to go to Congress to seek permission and legitimization for controversial steps that seemed in tension with preexisting statutes and international norms.

In the short term, the war model seemed to involve a relatively precise analogy, and the flexibility it gave the administration was undoubtedly useful. After all, the initial action in the war on terror involved a major overseas military deployment, alliances with armed groups, and hostilities with other armed groups. It involved the toppling of a government and the installation of a new one. More generally, it involved the projection of American force all over the world and followed a major attack on American soil—including on the seat of the American military itself.

But the model was always imperfect. And the war on terror has, in any event, now entered a different phase, one in which the spasmodic bursts of overt military power that characterized the earlier phase and looked most like traditional warfare have given way to something more elastic that takes place

in slower motion and requires more innovative, long-term legal approaches. Particularly with respect to detention rules, the laws of war just do not fit very well. While they sufficed in a pinch, they have come to resemble an old worn overcoat draped over a shivering child who walked outside underdressed. The tailoring for another wearer is obvious. The overcoat's age combined with the child's youth makes it seem almost like a costume. The flaws in the fit create gaps which the cold air rushes to fill. Nobody looking at this child would imagine his parents wanted him to wear that coat for the rest of the winter. Indeed, there would be costs for doing so.

The costs to America of persisting with the war model after the initial crisis passed have been hard to overstate. Yes, the war's legal structures have proven adequate to their main function; we have not suffered any more domestic attacks, and that is no small thing. Yet America has continued, as it were, to wear this coat, rather than getting one that actually fits, at great cost to its international image and to the confidence many of its own citizens have in its justice. Relying on the laws of war has required endless litigation—litigation that has made the courts into arbiters of counterterrorism policy. The unity of purpose that prevailed in America in the period immediately following the 2001 attacks has eroded, giving the conflict with Al Qaeda a partisan sheen that it ought not have. The question is whether a legal architecture for the war that reflected greater societal consensus in the form of the blessing of the nation's legislature, and thereby the consent of the public, would have delivered the same results at lower cost. I believe it would have, and that it still could.

Enhanced presidential powers during wartime are defensible conceptually in large measure because they are temporary; they last only as long as the crisis. Because of the indefinite nature of the long war on terror, allowing the president to exercise for its duration the traditional powers his office accrues during wartime involves permitting those powers to attach perhaps permanently. What's more, as the war on terror progressed, it became clear that a lot of its major operations were not, in fact, military in nature. Prosecutions of some important terrorist defendants have taken place in civilian courts, for example. And much of the international conflict has taken place not in battlefield combat in Iraq or Afghanistan but through the operation of foreign law

enforcement in Europe and elsewhere. Indeed, for all its insistence on war as the appropriate model for the conflict with Al Qaeda, the Bush administration has not been consistent in practice at all. For all of these reasons, the longer the conflict has gone on, the less apt the pure war model has become, and the less comfortable the public—and particularly the courts—has become with the exertion of presidential powers not specifically authorized by the legislature, much less actions taken in active tension with laws the legislature has passed.

The result has been a series of confrontations between the executive branch and the judicial branch, which has sought to rein in unilateral executive action as the war has gone on. The first of these was a pair of Supreme Court cases in 2004—*Rasul v. Bush*[14] and *Hamdi v. Rumsfeld*[15]—in which the Court declared that it had jurisdiction over detainees at Guantánamo Bay and could therefore hear their habeas corpus petitions; the justices also, while acknowledging the war as a legal war, demanded that the military grant some form of due process to a citizen it was holding domestically as an enemy combatant. In response, the administration sought and received from Congress a law stripping the courts of jurisdiction over Guantánamo in an attempt to restore the status quo that existed before the decision.[16] The court, however, was not done. In 2006, it decided in *Hamdan v. Rumsfeld*[17] that this new law did not apply to cases pending on its date of passage—that is, to the hundreds of cases filed between the time the Court decided the first case and the time Congress acted to overturn it. In the same decision, the justices struck down President Bush's administrative plan for trials at Guantánamo by military commission, ruling that the plan deviated from military and international law and had not been specifically authorized by the legislature. *Hamdan* forced the administration once again to go to Congress—and once again it got more or less what it wanted. In the Military Commissions Act, Congress again sought to wipe out the court's habeas jurisdiction—including over pending cases—and it authorized the military commission trials. The country now finds itself in a third round of litigation, with the Supreme Court poised to rule on whether the statute's efforts to deny it jurisdiction over Guantánamo Bay violate the Constitution. If the justices determine again that they have the power to hear these

cases, the courts will then turn to whether the processes Congress and the administration have set up pass muster.

The litigation to date has been at once momentous and, well, something less than momentous. This dichotomy reflects a peculiarity in the Supreme Court's work in the counterterrorism arena, which has set the table for a judicial posture in warfare far more aggressive than anything the Court has actually done so far. Taken on their own, the Court's specific pronouncements have been far less consequential than many commentators imagine. In neither *Rasul* nor *Hamdan* did the Court act on constitutional grounds, leaving Congress free in both instances to change the laws the Court interpreted—which the legislature promptly did. In neither case did the Court forbid the policy course the administration had chosen to take; for all the attention the cases garnered, they precluded neither military detentions at Guantánamo without charge nor trial by tribunals lacking the normal safeguards of both the civilian justice system and the general court martial. In both decisions, the administration suffered dramatic setbacks that amounted in practical terms merely to a requirement to seek congressional permission for what it wanted to do—congressional permission that proved, in both cases, relatively easy to obtain. Such is the oddity of these celebrated victories for the rule of law—for so all right-thinking people proclaimed them—that, should a similar situation arise again, they collectively would not prevent the administration from acting more or less as it did in detaining and interrogating, sometimes brutally, such a bevy of terrorist suspects as it rounded up in Afghanistan in 2001 and 2002.

What the Supreme Court has done is carve itself a seat at the table. It has intimated, without ever deciding, that a constitutional basis for its actions exists—in addition to the statutory bases on which it decided the cases—meaning that its authority over overseas detentions may be an inherent feature of judicial power, not a policy question on which the legislature and executive can work their will. Whether the votes exist on the Court to go this extra step we will find out soon enough. But the specter of a vastly different judicial posture in this area now haunts the executive branch—one in which the justices assert an inherent authority to review executive detention and in-

terrogation practices, divine rights to apply with that jurisdiction based on due process and vaguely worded international humanitarian law principles not clearly implemented in U.S. law, and allow their own power to follow the military's anywhere in the world. Such a posture would constitute an earthquake in the relationships among all three branches of government, and the doctrinal seeds for it have all been planted. Whether they ultimately take root depends on factors extrinsic to the war on terror—particularly the future composition of a Supreme Court now closely divided on these questions. It also will pivot on the manner in which the political branches posture the legal foundations of the war in the future. Building a strong legislative architecture now may be the only way to avert a major expansion of judicial power over foreign policy and warfare.

It is also, I believe, the only hope for any kind of counterterrorism policy that a broad cross-section of both mass and elite opinion will support. Over the past few years, a large literature has grown up around the merits of the administration's and the judiciary's approaches to the conflict—most of it polemical, some scholarly, and only a little of it useful in guiding the future development of American law. Any number of commentators has denounced the administration's approach with varying degrees of sophistication. A smaller group has risen to its defense, attacking the Supreme Court for its intrusions into the executive's proper sphere. The literature debating whether the Bush administration presents a threat to American democracy or its best hope for effective confrontation with Al Qaeda is as large as it is unavailing.

Yet basic facts that should be at the core of any serious discussion of this subject are curiously missing from the debate. Most fundamentally, who are these detainees over whose fate we all so earnestly argue? The administration's sympathizers describe them confidently as terrorists or combatants; its critics no less confidently assure us that many are innocent laborers, students, and relief workers. Neither side cites much evidence for its view. Initially, the datalessness of the debate was unavoidable; there was no data to cite. The administration had released so little information about whom it was holding that some degree of speculation was inevitable. In the last few years, however, the available data has grown far richer as the administration has begun releasing

large volumes of material. Yet the debate has not kept pace.[18] Designing legal rules is difficult indeed if one has not seriously studied the population to whom those rules would apply.

Even under the best of circumstances, writing rules to at once authorize and regulate the powers of presidential preemption is a daunting project. One of the reasons, I suspect, that we have preferred as a society to pretend that the answers to our current questions lie in age-old precedents, in the text of the Constitution, and in the will of "the Founders" is that the prospect of writing our own rules intimidates us so. But our denial will not do any longer. The Founders in so many ways never imagined the situation their progeny would face, and we delude ourselves to the extent that we mine their work for the answers to problems that defy even analogy to any they considered. To make law for our current conflict, contemporary America will need to apply its own values, its own instincts, and its own evaluations of risk. And it will need to undertake this project in the institution of its government which exists in order to write new rules for new circumstances.

In these pages, therefore, in addition to analyzing how America came to its current legal impasse, I have tried to suggest legislative strategies to address the range of issues currently in controversy: new rules for the detention of America's enemies, for their trials and their interrogations and transfers to foreign governments, and new law to replace or supplement surveillance laws rendered obsolete by the march of technology. The level of specificity in these ideas varies a great deal—from a set of broad instincts about surveillance law, an area where rampant government secrecy precludes more granular proposals, to fairly detailed suggestions about the reform of detention practices. The idea here is not a kind of comprehensive legislative package, a Counterterrorism Reform Act of 2009. It is, rather, a set of ideas that emerges from a common instinct: the belief that Congress has yet to put its mark on the law of terrorism and that the maturation of this essential body of law will founder badly until it does so. It is an attempt to force the reader—and to force myself, frankly—to begin thinking about the powers of presidential preemption in pervasively statutory terms, to imagine how America might break its current stalemate and position its law for a long war with a dangerous foe.

One

The Law of September 10

Randy Moss is, perhaps, an unlikely man to have toiled at removing the executive branch's fetters in what later became the war on terrorism. For one thing, Moss did not serve in the Bush administration, but, rather, ran the Justice Department's Office of Legal Counsel (OLC) during the waning years of its supposedly weak-kneed Democratic predecessor. For another, he could hardly differ more in substance, style, or public presentation from the infamous John Yoo. A quiet, careful lawyer, Moss does not wear his politics on his sleeve, and in any event, he by no means qualifies as a conservative. He has spent a great deal of time since his return to private practice defending federal campaign finance laws. He is the picture of liberal moderation—a fact that makes his cameo appearance in the report of the 9/11 Commission all the more noteworthy.

In late 1998, President Clinton wanted to get Osama bin Laden, and the CIA had concocted a plan to use tribal mercenaries in Afghanistan to kidnap him, hold him for a spell, and then turn him over to the agency. As the 9/11 Commission recounts the incident, then-current legal authority "instructed the CIA to capture Bin Ladin and to use lethal force only in self-defense. Work now began on a new memorandum that would give the tribals more latitude.

The intention was to say that they could use lethal force if the attempted capture seemed impossible to complete successfully." The early drafts "emphasized that [they] authorized only a capture operation"; assassinations, after all, would violate a presidential executive order. But "the CIA's leaders urged strengthening the language to allow the tribals to be paid whether Bin Ladin was captured *or* killed." Then they pushed even further:

> They finally agreed . . . that an extraordinary step was necessary. The new memorandum would allow the killing of Bin Ladin if the CIA and the tribals judged that capture was not feasible (a judgment it already seemed clear they had reached). The Justice Department lawyer who worked on the draft [Moss] told us that what was envisioned was a group of tribals assaulting a location, leading to a shoot-out. Bin Ladin and others would be captured if possible, but probably would be killed. The administration's position was that under the law of armed conflict, killing a person who posed an imminent threat to the United States would be an act of self-defense, not an assassination.[1]

Details of the plan and of Moss's precise legal theory remain classified. The operation in question never took place, in part because Attorney General Janet Reno harbored anxieties about its proximity to an assassination, in part because the CIA deemed the likelihood of success low and the likelihood of substantial civilian casualties high. Still, even this bare outline of a still-born operation significantly complicates the caricature that both sides of the legal war on terror have sought to paint. Here, after all, was the Clinton administration thinking aggressively about the powers of presidential preemption with respect to Al Qaeda violence. Pivotally, it was not contemplating action in the narrow confines of criminal justice but under the law of armed conflict as well. The operation Moss reviewed appeared to contemplate something in between what we have since learned to call a "rendition"—a kidnapping orchestrated by the CIA—and a targeted killing. It was the Clinton administration, not the Bush administration, that put these themes in play—and long before September 11. When lawyers at the National Security Council later

presented a document for Clinton's signature authorizing a shoot-down of Bin Laden's helicopters or planes, journalist Steve Coll recounted, "there was no pretense . . . that bin Laden would be captured for trial. Clinton signed it."[2]

That September 11 triggered a seismic shift in America's legal approach to terrorism has become a kind of article of faith both for the administration and its critics. The significance of the shift differs according to the speaker. From the administration's perspective, it took America from an anemic law enforcement approach to terrorism to an approach premised on an actual state of war between this country and Al Qaeda—one that triggered the full panoply of presidential war powers. "For decades, the United States had dealt with terrorism primarily as a crime subject to the law enforcement and criminal justice systems," wrote John Yoo, one of the architects of the administration's approach. "In response to previous al Qaeda attacks, the United States dispatched FBI agents to investigate the 'crime scene' and tried to apprehend terrorist 'suspects.' . . . Efforts to capture or kill al Qaeda leader Osama bin Laden throughout the 1990s were shelved, out of concerns that the Justice Department did not have enough evidence to satisfy the legal standard for a criminal arrest." By contrast, Yoo wrote, "Here is how we at the Justice Department sat down to think about September 11. On that clear, sunny day, four coordinated attacks had taken place in rapid succession, aimed at critical buildings at the heart of our national financial system and our nation's capital." If, he concluded, "a nation-state had carried out the same attacks on the same targets, there would have been no question about whether a state of war would have existed. . . . Why should status as an international terrorist organization rather than a nation-state make a difference as to whether we are at war?"[3]

Such accounts play on certain favored conservative themes, portraying Democrats as soft on things about which leadership requires steadfastness. They mingle Cold War–era criticisms that liberals are "soft on communism" with the more domestic theme that they are "soft on crime"—although with the twist that they accuse liberals of wanting to treat America's enemies as

mere criminals, rather than as military opponents. In contrast, the administration's narrative portrays itself as having taken a tough approach, one that for the first time took the threat seriously and saw it for what it was. September 11 marked the turning point, after which America went on a war footing.

The critics tell a different story. In their account, America went from a society committed to the rule of law, even in tough situations, to one unbounded by it. Following the attacks, in this version, the administration tossed out long-settled understandings of international law concerning the detention, interrogation, and trial of terrorists; brushed aside the historic role of the courts in overseeing government action; and otherwise ran roughshod over civil liberties and human rights. The result, as Joseph Margulies—who represented Guantánamo detainees in the *Rasul* case—put it, "has created a human rights debacle that will eventually take its place alongside other wartime misadventures, including the internment of Japanese-Americans during World War II, the prosecutions under the Espionage and Sedition Acts during World War I, and the suspension of the writ of habeas corpus during the Civil War."[4] After September 11, Margulies contended, the administration has claimed "all the authority that could conceivably flow to the executive branch during a time of armed conflict, but accept[ed] none of the restrictions. The result is unchecked, almost imperial power. . . . All of this power is limited only by the president's promise to exercise it wisely."[5] This version too plays on preexisting themes—specifically, the post-Watergate fear of unchecked presidential power, particularly among liberals concerning conservative administrations.

Yet these two irreconcilable stories have one critical feature in common: the notion that a tremendous shift occurred on September 11, one that represented a dramatic break with the past—not one merely of degree or of emphasis but one of kind. This point no doubt contains elements of truth; the operative fabric of American law did change enormously in the wake of the attacks. But as the example of Randy Moss illustrates, it changed somewhat less enormously than the common wisdom on both sides imagines. America has never taken a pure law enforcement approach to terrorism, and it does not now take a pure wartime approach. Indeed, from the use of Guantánamo

Bay to evade judicial scrutiny, to indefinite detention, to extraordinary rendition, to military commissions, to the scope and meaning of the Geneva Conventions, to the interrogation of military and CIA detainees, the law of September 11 has much deeper roots in the law that preceded it—call it the law of September 10—than either the administration or its foes like to pretend.

On September 10, 2001, the United States had no consistent legal approach for thinking about terrorists. To be sure, the federal government had chiefly deployed the criminal law in its confrontation with Al Qaeda. Federal prosecutors had convicted the first World Trade Center bombing conspirators.[6] They had brought down as well the terrorist cell around Sheikh Omar Abdel Rahman.[7] And they had garnered a conviction against a would-be Al Qaeda attacker named Ahmed Ressam, whom authorities had caught carrying explosives across the Canadian border for an intended bombing at Los Angeles International Airport on New Year's Eve 1999.[8] A grand jury in New York had even indicted Osama bin Laden himself.[9]

Yet the United States prior to September 11 by no means confined itself to the use of law enforcement tools in confronting terrorism in general or Al Qaeda in particular. Rather, policy makers, regarding counterterrorism as a priority but not considering it a fundamental or overarching orientation for American foreign policy and power, used the variety of powers at the government's disposal without belaboring the question of what paradigm they were employing.

The military's role in counterterrorism operations, for example, long predated the 2001 attacks. Ronald Reagan ordered air strikes on Libya following terrorist operations sponsored by that regime in 1986. Clinton, in the wake of the African embassy bombings in 1998, famously launched cruise missile attacks on suspected Al Qaeda targets in Afghanistan and the Sudan. This latter response required a specific legal understanding of the conflict with Al Qaeda as something more than a law enforcement problem. We don't, after all, attack mere criminal suspects with Tomahawk missiles.

The 1998 operations bear particular attention. Clinton's choice of targets,

specifically the decision to attack a Sudanese pharmaceutical plant suspected of producing chemical weapons components, garnered a great deal of criticism. Coming as the strikes did in the midst of the Monica Lewinsky scandal, Clinton's motives as well drew fire; many people dismissed the action as a "*Wag the Dog* scenario"—a reference to a movie in which a president mired in a sex scandal manufactures an overseas military confrontation to distract attention from his problems. But it is important to note as well what was *not* controversial about these strikes: the conceptual framework in which they took place. Within the administration, officials had begun thinking about Al Qaeda operatives as—in addition to criminals—legitimate military targets.

"There was little question at either the National Security Council or the CIA that under American law it was entirely permissible to kill Osama bin Laden and his top aides, at least after evidence showed they were responsible for the Africa attacks," wrote Coll. "The ban on assassinations . . . did not apply to military targets, the Office of Legal Counsel in Clinton's Justice Department had previously ruled in classified opinions." And terrorist camps "in Afghanistan were legitimate military targets under this definition, the White House lawyers agreed."[10] This idea of fighting terrorism on parallel tracks—a law enforcement track and a military and intelligence track—predated even the Clinton administration. From its creation during the Reagan administration, the CIA's Counterterrorism Center had an interdisciplinary quality. It imagined capturing terrorists when possible and bringing them to justice or neutralizing them by other means when doing so would preempt an attack.[11]

Indeed, the parallel use of criminal and military authorities in 1998 struck almost nobody as eccentric. Whatever else they may be, after all, terrorist acts clearly involve crimes of all sorts—from mass murder to frauds, identity thefts, and financial crimes. Attacks on American embassies or other official targets, however, are also presumptively acts of war, and Bin Laden had self-consciously and very publicly declared war on the United States. What's more, he located his bases of operations far beyond the normal reach of American law enforcement. Any serious effort to get him, therefore, would necessarily implicate presidential powers beyond those of civilian law enforcement.

September 11 certainly accelerated the change. After the attacks, the weight of the American response to Al Qaeda shifted decisively towards American military power—by then bolstered legally by Congress's Authorization for the Use of Military Force (AUMF)—and away somewhat from law enforcement powers. During the Clinton era, some operations against Bin Laden were halted or hampered because of legal concerns; the administration was still betwixt and between legal paradigms.[12] But it's important to understand the shift that has taken place, rather than as some dramatic break with the past on a particular day, as movement along a spectrum over time. September 11 catalyzed a change that had begun a long time earlier and that had already progressed remarkably far.

The overarching conception of the fight against Al Qaeda as, at least in part, a matter of warfare is by no means the only area in which the Bush administration's response to the attacks drew on the legal approaches of its predecessors. One can see the connective tissue far more broadly. After September 11, for example, the roundup and deportation of large numbers of Arab and Muslim aliens under immigration laws raised many hackles. But immigration authorities under both parties had long used the power of deportation to remove aliens suspected of terrorist ties from the country—sometimes using secret evidence of those affiliations to do so.[13] The Bush administration's innovation here lay only in using these powers sweepingly and secretively.[14] Similarly, after Hamas started its campaign to disrupt the Palestinian-Israeli peace process in the mid-1990s, a series of laws and executive orders sought to interrupt terrorist financing by prohibiting domestic "material support" for designated terrorists abroad. In the wake of September 11, the Bush administration made aggressive use of these powers; it did not, however, create them.

Even the most controversial and seemingly innovative of the administration's actions turn out, on closer inspection, to elaborate on, amplify, or revive preexisting currents of American law and practice. Consider, for example, the tactic of so-called extraordinary rendition, in which the CIA snatches a terror suspect abroad and turns him over to a foreign government for interrogation or detention. This program became infamous in the years that followed Sep-

tember 11 because of allegations that the administration was subcontracting torture to authoritarian-allied governments. According to the man who ran the program initially at CIA, however, it actually began back in 1995.

Michael Scheuer ran the agency's Osama bin Laden unit from its creation until 1999. In his account, given in congressional testimony in April 2007, "The rendition program was initiated because President Clinton and [National Security aides Anthony] Lake, [Sandy] Berger and [Richard] Clarke requested that the CIA begin to attack and dismantle al Qaeda. These men made it clear from the first that they did not want to bring those captured to the United States or to hold them in U.S. custody." Instead, "President Clinton and his national security team directed the CIA to take each captured al Qaeda leader to the country which had an outstanding legal process for him." Under Clinton, Scheuer testified, interrogation was never a priority, and there was a hard and fast rule that "we could only focus on al Qaeda leaders who were wanted somewhere for a legal process." Still, it was understood that rendered suspects would not be treated with kid gloves. The "CIA warned the president and his National Security Council that the U.S. State Department had and would identify the countries to which the captured fighters were being delivered as human rights abusers," Scheuer testified. "In response, President Clinton and his team asked if CIA could get each receiving country to guarantee that it would treat the person according to its own laws. This was no problem, and we did so." And while officials of both the Clinton and Bush administrations have emphasized that these diplomatic assurances were meaningful promises of humane treatment, Scheuer regarded them as something of a farce: "There [were] no qualms at all about sending people to Cairo and kind of joking up our sleeves about what would happen to those people in Cairo—in Egyptian prison," he said.[15]

Richard Clarke, the National Security Council's key counterrorism official, dated the rendition program even earlier, as did another former NSC official, Daniel Benjamin.[16] Defining "extraordinary renditions" as "operations to apprehend terrorists abroad, usually without the knowledge of and almost always without public acknowledgment of the host government," Clarke cited a "terrorist snatch" during the Reagan administration. "By the mid-1990s

these snatches were becoming routine . . . activity. Sometimes FBI arrest teams, sometimes CIA personnel, had been regularly dragging terrorists back to stand trial in the United States or flying them to incarceration in other countries." In Clark's account, it was the military establishment, not timidity on the part of the White House, that stood in the way of more aggressive use of renditions back then. "The fact is," he wrote, that "President Clinton approved every snatch that he was asked to review. Every snatch CIA, Justice, or Defense proposed during my tenure as [Counterterrorism Security Group] chairman, from 1992 to 2001, was approved."

The Clinton administration at the highest levels undertook these operations fully aware that they posed legally dicey problems. Clarke recalled:

> The first time I proposed a snatch, in 1993, the White House Counsel, Lloyd Cutler, demanded a meeting with the president to explain how it violated international law. Clinton had seemed to be siding with Cutler until Al Gore belatedly joined the meeting, having just flown overnight from South Africa. Clinton recapped the arguments on both sides for Gore: Lloyd says this. Dick says that. Gore laughed and said, "That's a no-brainer. Of course it's a violation of international law, that's why it's a covert action. The guy is a terrorist. Go grab his ass."[17]

These operations were not pretty, and they were not all that different—except in frequency—from the ones the Bush administration undertook after the advent of the war on terrorism. In 1995, for example, American agents operating in Croatia helped abduct Talaat Fouad Qassem, an Egyptian terrorist who had been sentenced to death in absentia and was suspected of being involved in the assassination of former Egyptian President Anwar Sadat. After Croatian authorities nabbed Qassem in Zagreb and turned him over to U.S. agents, they interrogated him on a ship and then passed him on to the Egyptians. His fate is unknown, but Egyptian human rights monitors believe he was executed. In 1998, working in Albania, CIA operatives helped Albanian security officials wiretap a group of militants. After discovering that the militants were having substantial communications with Ayman al Zawahiri, Al

Qaeda's number two official, they convinced the Egyptians to issue a warrant for one of the militants. Over the succeeding months, Albanian officials—with the CIA's assistance—captured five of the suspects and killed a sixth. As *New Yorker* writer Jane Mayer recounted the incident, "These men were bound, blindfolded, and taken to an abandoned airbase, then flown by jet to Cairo for interrogation. [One of them] later alleged that he suffered electrical shocks to his genitals, was hung from his limbs, and was kept in a cell in filthy water up to his knees. Two other suspects, who had been sentenced to death in absentia, were hanged."[18] Then–CIA director George Tenet testified in 2002 that the agency "had rendered 70 terrorists to justice" before September 11.[19]

The rendition program, to be sure, changed under the Bush administration after September 11. For one thing, its use surely grew more frequent, giving rise to a greater likelihood of errors, some of which appear to have happened.[20] Another difference was that the CIA was keen after September 11 to interrogate the captives, whereas interrogation had not been a previous priority. The result, according to Scheuer, is that the agency ended up holding detainees itself, whereas it had previously limited its role to shipping them to allied governments.[21] But again, it is important to appreciate what didn't change. The core of the policy was already in place.

On its face, the administration's policies concerning detention and interrogation of terrorist suspects appear to offer a decided contrast. These policies were not in place prior to September 11. They were new. They were different. And they shocked the world.

As was the case with rendition, however, they were at least a little bit less new and less different than the common wisdom imagines. Consider interrogation first. On the surface, the law of September 10 gave little quarter to harsh interrogation tactics. The Geneva Conventions forbid them in sweeping language.[22] And in a string of cases, the Supreme Court made clear not merely that abusive interrogations were out of bounds in law enforcement and that statements obtained improperly were inadmissible, but that authorities had an affirmative obligation to warn suspects of their rights to counsel and to

keep silent.[23] In the international arena, the United States signed the U.N. Convention Against Torture, which bans not merely torture but also "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture."[24] The convention specifies as well that "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."[25] Congress enacted legislation to implement America's obligations under the treaty.[26] And in 1996, it also passed the War Crimes Act, which generally made a crime out of any "grave breach" of the Geneva Conventions—including the requirements of Article 3, common to all of the conventions, to eschew "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" and "outrages upon personal dignity, in particular, humiliating and degrading treatment."[27] In the years before September 11, nobody was arguing—as the Justice Department claimed in the infamous "Torture memo" of August 2002—that the legal definition of torture was limited to pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death" or that enforcing the statute in the context of fighting terrorists could "represent an unconstitutional infringement of the president's authority to conduct war."[28]

At the same time, as a young scholar named William Levi has shown, American interrogation policy has always existed at two levels: High-minded prohibitions of all coercive tactics have coexisted with policies that, in the granular terms of actual implementation, have allowed a great deal more flexibility than the top-line rhetoric would suggest. What's more, the CIA has always had more permissive guidelines than the military, which in any event did not always interpret the Geneva Conventions to forbid unpleasant interrogation behavior. In Levi's account, based on declassified interrogation manuals both from the Defense Department and from the agency, both military and intelligence interrogators—even after ratification of the Geneva Conventions—used techniques including drugs and physical pressure short of overt torture. The military considered slaps and techniques to induce disorientation as consistent with the conventions, and CIA manuals encouraged

the use of sensory deprivation to lower the resistance of detainees to the approaches of their interrogators. Levi remarkably found that "almost without exception, the techniques approved at any one time post-9/11 for military interrogations of *unlawful combatants* . . . would have been understood to fall *within* the constraints of the Geneva Conventions for protected Prisoners of War at one point or another before 1969." Levi showed that over the course of the 1960s and early 1970s, the rules gradually tightened, particularly in the case of the military. But in the CIA's case, interrogation standards never entirely forbade tactics that would be categorically barred in the domestic criminal justice setting. What's more, as American policy moved towards greater restrictiveness, the CIA also started encouraging the use of allied foreign governments as proxies. American forces trained Latin American governments in the use of tactics forbidden to themselves, and the advent of the rendition program gave CIA personnel access to the fruits of interrogations they could never have lawfully carried out. America's interrogation rules, in other words, may have condemned torture and other cruel treatment, but they always seemed to have left stopgaps to deal with the Rudolf Hoesses of the world.[29]

Detention is a somewhat different story. The Bush administration probably took no step more controversial than holding captives neither as criminal suspects nor as prisoners of war but in indefinite detention as unlawful enemy combatants—and holding them in this status at Guantánamo Bay, Cuba, in the belief that the base there, in addition to ensuring security and isolation, would sit beyond the reach of the American court system. No decision the administration has made, except perhaps the decision to loosen interrogation standards, has drawn more opprobrium or more impassioned charges of lawlessness and outright tyranny. And, to be sure, it was a highly aggressive move—as carried out, foolishly so. That said, every component of it had a stronger basis in the law of September 10 than the administration's critics allow.

Start with the use of the base itself. The idea of holding aliens at Guantánamo by way of impairing their access to American courts was by no means new. Rather, it had recent and bipartisan pedigree, and some degree of judicial backing as well. In late 1991, following a coup in Haiti, large numbers of refugees took to rickety boats and tried to make the dangerous crossing to

Florida. The first Bush administration, keen to avoid a refugee influx during an election year, sent the Coast Guard out to interdict the incoming boats, and it shipped the thousands of refugees it picked up to Guantánamo. The base in the years before September 11 had much the same appeal it sported after the attacks. As Brandt Goldstein wrote in his history of one piece of Haitian refugee litigation,

> the base had the necessary infrastructure and an advantageous location. It was less than 125 miles from Haiti but well beyond U.S. borders, with severely limited access from the mainland. That gave the government effective control over the press and any other group that might seek contact with the refugees.
>
> But the most important factor behind the decision was a legal one: Justice Department officials believed that American law didn't apply to foreigners on an overseas military base. Assuming that Justice was right, [immigration officials] could process the asylum seekers on Guantánamo without following all the requirements of domestic immigration law. And the government would have a strong argument for getting [a] lawsuit thrown out of court.[30]

The administration's arguments in the lawsuits that developed over the Guantánamo Haitians have a familiar ring. Asked by one federal judge whether the American lease of Guantánamo, which gives this country "complete jurisdiction and control" there for as long as it wants but reserves ultimate sovereignty to Cuba, means that American law must apply, a government lawyer argued that "Guantánamo is a military base in a foreign country" and insisted that "it is not United States territory." Detainees there are "outside the United States and therefore they have no judicially cognizable rights in United States courts." Incredulous, the judge asked, "You're saying, if I hear you correctly that [the government], assuming that they are arbitrary and capricious and even *cruel,* that the courts would have no jurisdiction because the conduct did not occur on U.S. soil? That's what you're saying?" Responded government counsel, "That's correct, Your Honor."[31]

The first Bush administration wasn't interested in holding the Haitians long term. In fact, it wanted nothing more than to be rid of them and forcibly repatriated most within a matter of months, while bringing to the United States those whose asylum claims it could not ignore. To discourage the flow of refugees, it ultimately adopted a policy of immediate return: Those it picked up on the high seas went directly back to Haiti with no asylum hearings at all. But one group at Guantánamo caused a particular problem: those whom the Coast Guard brought to the base before the direct-return policy, who had credible asylum claims yet who tested positive for HIV. At the time, American law barred entrance to those carrying HIV, and while the administration had latitude to waive that restriction, bringing HIV-positive Haitians to the United States during an election year was not in the cards. So the administration placed these people and their families in a makeshift camp for indefinite detention. These Haitians were not, it bears emphasis, enemies of the United States: They were political refugees with a devastating illness.

As a candidate, Bill Clinton attacked Bush's Haiti policy. As president, he adopted it. He did not rescind the direct-return policy, and despite having announced that he would lift the HIV immigration ban, he did not close the camp at Guantánamo, which remained open until a federal district court in Brooklyn forced him to shut it down.[32] What's more, his Justice Department made sure that all court rulings applying American law on Guantánamo were stricken from the books. The Supreme Court itself vacated one ruling by the Second Circuit Court of Appeals in New York. And after the administration brought all of the HIV-positive Haitians to the United States following their victory in the Brooklyn court, the administration settled that case without an appeal by paying a large sum of money to the plaintiffs for court costs in exchange for their agreement to vacate their win in the district court.[33] As an anonymous presidential adviser told Goldstein, the administration wanted to preserve "maximum flexibility" on Guantánamo, "confident that they would do the right thing but not wanting to be forced by the law to have to do so."[34]

This decision turned out to be lucky for the administration, for shortly thereafter Clinton faced two new refugee crises, one from Haiti and one from Cuba. And once again, Guantánamo became the facility of choice for the

detention of people accused of no wrongdoing whom this country was unwilling either to admit or to forcibly repatriate. The matter ultimately came before the Eleventh Circuit Court of Appeals, which disagreed with the two other courts that had considered the question. The court held, as it had in an earlier case, that "we again reject the argument that our leased military bases abroad which continue under the sovereignty of foreign nations, hostile or friendly, are 'functionally equivalent' to being land borders or ports of entry of the United States or otherwise within the United States." The court explicitly rejected the notion "that 'control and *jurisdiction*' is equivalent to sovereignty" and therefore triggers the applicability of American law.[35]

In other words, by the time September 11 took place, two administrations of opposite parties had used Guantánamo for the indefinite detention of aliens who meant America no harm but merely wanted to seek its shelter from repressive regimes. The administrations had done so precisely to avoid the scrutiny of American courts, and they had argued directly to those courts that Guantánamo should be considered beyond their purview. While some judicial decisions had sought to impose American law, including American constitutional norms, on the base, those decisions had not survived. The only case law that remained on the books solidly supported the government's right to use Guantánamo in this fashion. Whatever one thinks of the morality of using a base abroad to warehouse foreign nationals suspected of association with Al Qaeda or the Taliban, it was hardly a stretch on the part of the second Bush administration in the wake of September 11 to use the base for a purpose so similar to those of its predecessors.

THE CONCEPT of indefinite detention also bears examination, for the American legal tradition does not, in fact, condemn it quite as strongly as does our civil libertarian rhetoric. The Haitian and Cuban detainees at Guantánamo in the 1990s are not the only groups of people this country has locked up for long periods without formally charging with any crime. I don't mean just those detentions America has, as a society, come to deeply regret—like the internment of Japanese Americans during World War II. I mean, rather, detentions the

U.S. legal system accepts and to which the public does not give much thought. It is part of our civic mythology that our system does not lock up people except when it can prove their guilt of a crime. The mythology is true in a few senses. In contrast to authoritarian societies, democracies avoid detaining people arbitrarily or punishing them to discourage political dissent. In general, the touchstone of legitimacy of any incarceration is suspicion of wrongdoing of some kind. But this is a rule with many exceptions.

Of most obvious relevance to the current struggle is the notion that the military detains the enemy during wartime. Prisoner-of-war detentions may not last long in practice; then again, they may. They are indefinite in the sense that they end only upon the termination of a military struggle that may go on at great length—and whose termination is fundamentally a political judgment, not a legal one. At the outset of World War II, the newly captured POW had no idea whether his detention would last six months, six years, or sixty years. While long-term military stalemates had not occurred in recent European history, the educated prisoner of war knew that such historical episodes as the Thirty Years War or, more ominously still for him, the Hundred Years War implied that—at least in theory—his detention could eat up most or all of the rest of his life.

To cite an example closer to home, it is a fairly routine matter—though not an easy one—to lock up the mentally ill based on the expectation that they will pose a danger to the community. All states authorize the detention of the mentally ill under some circumstances. And while the Supreme Court has placed considerable limitations on this practice, it has also repeatedly upheld its constitutionality.[36] Generally speaking, states are entitled to commit to detention those people whom they can prove by clear and convincing evidence—not necessarily proof beyond a reasonable doubt—suffer from a mental illness and, as a consequence, pose a danger to themselves or others.[37] The Court has even upheld laws that authorize the civil commitment of violent sexual offenders after they have completed their prison terms—effectively locking away people who have already served their time yet who seem likely to offend again if let loose in society.[38] The analogy to severe mental illness for

detentions in the war on terror may sound a bit strained, yet it is actually quite telling. In both instances, the government holds people based not on crimes they have committed but on violent acts that a condition in their lives—mental illness in one case, enemy combatant status in the other—may lead them to take in the future. In both cases, the detention goes on as long as reviewing authorities consider the detainee dangerous. In both cases, as well, that condition might persist permanently.

There are two major differences between enemy combatant detention and civil commitment of the mentally ill—and these differences cut in opposite directions. The first is that as a society, we attach no negative moral judgment to mental illness. A paranoid schizophrenic who, left free, may kill people properly warrants pity, not anger or hatred; he suffers, after all, from a disease he did not bring upon himself. The government detains him solely to protect society against the symptoms of that disease—much the way it also has the power to quarantine individuals with particularly dangerous communicable diseases. By contrast, most Westerners attach enormous negative moral judgment to membership in Al Qaeda or the Taliban. It's hard to see conceptually why locking up members of such groups, against whom Congress has authorized military force, based on their dangerousness should be forbidden when the detention of disease sufferers based on the circumstances of their victimhood is so accepted.

The second difference is that the legal process associated with a civil commitment is significantly more established, and more elaborate, than the still-developing and quite skeletal processes that govern enemy combatant detentions. Civil commitments are less controversial today than they were when they were easier, when they—and, indeed, the concept of mental illness itself—were criticized as a mechanism for punishing social deviance.[39] Enemy combatant detentions have likewise suffered from the suspicions that inherently accrue to legal processes lacking in transparency and rigor. But this distinction, it is important to note, is not a conceptual distinction, but a practical one. It would, after all, be possible to construct a more rigorous enemy combatant detention regime, even one in which the rights of the detainee were as

robust as the rights of the schizophrenic in the civil commitment proceeding. Many of the objections to enemy combatant detentions, however, have been objections in principle, not merely objections to the manner in which they take place.

Long-term detentions domestically have also occurred in the context of immigration law with surprising frequency. The government routinely detains aliens who are awaiting deportation. It also locks up aliens who arrive on this country's shores yet are both inadmissible under the law and, for one reason or another, impossible to return to their home countries. Traditionally, the courts have regarded this sort of detention as just the tough luck of the alien in question, no matter how long it has gone on. Courts have even tolerated the government's use of secret evidence in identifying people as excludable for national security reasons—and thereby consigning them to indefinite lockup while awaiting return to countries that won't take them. "Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control," the Supreme Court wrote in 1953 about one such case. "That exclusion by the United States plus other nations' inhospitality results in present hardship cannot be ignored," the Court majority bloodlessly stated. But ignore the hardship it did: "we do not think that respondent's continued exclusion" and resulting detention on Ellis Island "deprives him of any statutory or constitutional right."[40]

Long-term detention of inadmissible aliens has continued until quite recently. The most prominent modern example—though far from the only one—is the detention of large numbers of Cubans who came to the United States as part of the Mariel boat lift in 1980. During that episode, 125,000 Cubans set out for American shores; the vast majority of these people were permitted to settle in the United States, despite having arrived illegally. Because of past criminal records in Cuba or serious mental health problems, however, many hundreds were detained. When Cuba refused to take them back, they ended up in a kind of long-term limbo, although the government later "paroled" them into the United States—that is, released them into the country

without formally admitting them. When these and other Mariel parolees committed crimes and therefore rendered themselves inadmissible, the government detained them anew. For many years, the courts tolerated this situation. As of 2004, there were 750 Mariel Cubans in immigration detention. Approximately 300 people who could not return to other countries were detained as well.[41]

The Supreme Court began reining in indefinite detention in the immigration context a few short months before September 11. In the 2001 case of a stateless career criminal who was slated for deportation but whose government refused to take him back and who therefore got stuck in a kind of detention limbo, the Court interpreted the immigration laws so as to avoid authorizing such detentions to go on forever when the government had no prospect of actually effectuating its deportation order. Reading the law otherwise, the Court reasoned, would raise serious due process concerns.[42] In 2005, the Court extended this ruling to people like the Mariel Cubans, who had never been formally admitted to the United States at all.[43] The result is that immigration detentions of this sort are a lot more difficult than they used to be.

But while the Court signaled anxiety about such detentions, it did not bar them altogether. While a majority of the justices strongly suggested that such indefinite detentions might violate due process, they ruled on the basis of statutory law only—meaning that Congress could simply alter the law to authorize them if it chose. Given President Bush's new appointments to the Court, a revised statute might well pass muster.[44] What's more, even the Court's reading of the current statute does not clearly rule out *all* indefinite detentions. Justice Stephen Breyer seemed to carve out an exception for suspected terrorists and to suggest that the government might be able to justify holding them, as distinct from common criminals or mere visa violators.[45] Congress, as part of the USA PATRIOT Act, followed up with a new statutory provision designed to do just that.[46] To top it off, Breyer also made clear that the government was entitled to set and enforce conditions associated with the release of these aliens and that it could lock up anew, at least temporarily, those who did not fulfill those conditions.[47]

To put it simply, while the law of September 10 did not smile on indefinite, noncriminal detentions, the legal system tolerated it in a number of contexts far less pressing than the neutralization of sworn enemies of the country against whom Congress had authorized military force.

THE FINAL COMPONENT of the Bush administration's Guantánamo strategy was the decision to hold Al Qaeda and Taliban operatives neither as prisoners of war nor as criminal suspects but as unlawful enemy combatants. This decision represented a sharp break with past American practice in the modern era. It did not, however, constitute much of a break with American law, which had always preserved the option of holding enemies in a noncriminal status beneath that of prisoner of war.

Traditionally, the laws of war have distinguished between the prisoner of war—the privileged belligerent—and the unlawful combatant. The privileged belligerent, the soldier who fights honorably and in accord with the laws of war, is entitled, when captured, to a highly civilized detention, including the crucial benefit of immunity from criminal prosecution for any offense save war crimes. In other words, he is regarded as an honorable arm of his state, whose detention is a regrettable necessity but with whom the detaining state has no individual bone to pick. By contrast, the laws of war traditionally granted the unlawful combatant, the fighter who does not fight according to the laws of war or who hides among civilians, no such solicitude. The detaining state is entitled to prosecute unlawful combatants, and often shot them.[48] As the Supreme Court aptly summarized the difference in 1942:

> Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and

> communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals. . . .[49]

Since the signing of the Geneva Conventions in 1949, a significant gap has opened between American views of this difference and those of many other countries. The Third Geneva Convention specifies in great detail the protections and benefits owed the prisoner of war; it says nary a word about what states may do to unlawful combatants in international conflicts, save a requirement that they hold a "competent tribunal" before denying anyone POW treatment in circumstances of doubt as to his proper status. International law has tended to rub the category almost out of existence. Starting in the late 1970s, many nations ratified an addendum, colloquially known as Protocol I, to the convention that treats many members of guerrilla groups as prisoners of wars.[50] Prevailing international sentiment has also treated the prosecution of those not granted prisoner-of-war status as all but obligatory. In other words, under this view, any detainee must be a prisoner of war protected by the Third Convention, be put on trial for war crimes, or be treated as a civilian protected by the Fourth Convention, which deals with civilian protections in circumstances of conflict or military occupation. As Canadian law professor Marco Sassòli put it, critiquing the Bush administration's position, "The U.S. administration claims that the persons it holds in Guantánamo are neither combatants nor civilians, but 'unlawful combatants.' . . . However, according to the text, context, and aim of the Third and Fourth Conventions, no one can fall between the two conventions and thus be protected by neither of the two."[51]

American practice since World War II has tracked these developments. For example, the American military held no detainees as unlawful enemy combatants during the Vietnam War; despite the fact that many Viet Cong did not meet the criteria for prisoners of war, the military either afforded them POW treatment anyway as a matter of discretion or turned them over to the South

Vietnamese for prosecution.[52] And the U.S. Army's regulations for detentions have largely conformed to the sort of gapless coverage that Sassòli describes. Under the current version of these regulations, a detainee is categorized as a prisoner of war, an "innocent civilian who should be immediately returned to his home or released," or as a "civilian internee who for reasons of operational security, or probable cause incident to criminal investigation, should be detained." The regulations do not seem to contemplate anyone's detention as a combatant who is entitled neither to treatment as a POW nor to further criminal proceedings. "Persons who have been determined by a competent tribunal not to be entitled to prisoner of war status may not be executed, imprisoned, or otherwise penalized without further proceedings to determine what acts they have committed and what penalty should be imposed," the regulations state.[53]

American law, however, has also preserved a less generous approach. The United States did not ratify Protocol I, specifically because it might confer privileges on unlawful combatants. In his message to Congress announcing that he would not submit the treaty to the Senate for approval, Ronald Reagan described it as "fundamentally and irreconcilably flawed. It contains provisions that would undermine humanitarian law and endanger civilians in war. . . . [One] provision would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves. These problems are so fundamental in character that they cannot be remedied through reservations. . . ."[54] In other words, the United States had specifically guarded its right to maintain a distinct category of unprivileged belligerent for whom prosecution is an option but not a requirement.

The real innovation of the Bush administration lay not in reviving a category of detainees whose existence the military had allowed to lapse in practice while maintaining in principle. It lay, rather, in dispensing with the requirement of the Third Geneva Convention, to allow "competent tribunals" to make these judgments individually for each detainee.[55] Instead, Bush declared

as a blanket matter that no Taliban or Al Qaeda detainees could qualify as prisoners of war.[56] Though a close call legally, this decision was, without question, a thumb in the eye to international expectations. It was also a profoundly stupid decision tactically. It sent a message of contempt to the world for the Geneva Conventions, a body of international law the United States had always championed, simply to avoid holding tribunals that would have inconvenienced the United States far less than has failing to hold them. These tribunals are not trials. They are historically minimal affairs. The detainees do not get lawyers. They have no appeal. There is no obligation to give detainees extensive due process protections or access to evidence. They are just a kind of screening device, a chance for the detainee to tell his story in a quasi-formal setting—a chance to work out misunderstandings. Holding tribunals for detainees in this conflict should have been an easy call.

This is especially true because doing so would likely have had no substantive implications at all. Al Qaeda, after all, not only is not a signatory to the conventions but professes an avowed intention to target civilians and fight outside the constraints of the laws of war. It is unthinkable that any Al Qaeda operative could qualify as a POW. Taliban soldiers present a tougher case; the Taliban, after all, was the army of the closest thing that existed to a government of Afghanistan, a country that had ratified the conventions. Still, the Taliban was not by and large an internationally recognized government, and to qualify for POW status for its troops, a nongovernmental militia must meet four criteria: a responsible command structure, a "fixed distinctive sign recognizable at a distance," "carrying arms openly," and complying with the laws of war.[57] Taliban fighters do none of these things. So had the military held these tribunals, they would not have qualified for privileged treatment either. Holding these "Article 5 tribunals," however, would probably have identified a few noncombatants earlier and assuaged world anxieties about American intentions with respect to international norms.

Indeed, the hard question these detentions posed—and still pose—is not which detainee is entitled to POW status. It is how to distinguish *any* combatants from *noncombatants*—those unlucky civilians who found themselves in

the wrong place at the wrong time and got rounded up with the fighters. Assuming that wheat could be reliably separated from the chaff, detaining Taliban or Al Qaeda fighters as unlawful combatants had solid grounding in the law of September 10 and should not have been controversial.

This idea of revitalizing legal doctrines and propositions that had lapsed in practice yet persisted in law is perhaps even more visible in the administration's decision to try detainees accused of war crimes by military commission, rather than either by general court martial or in civilian courts. The military commission, a kind of ad hoc tribunal that historically meted out punishments during wartime, was for all real-world purposes a dead institution.[58] Used sporadically throughout American history, commissions had not shown up since the World War II era. As a formal legal matter, however, they seemed to remain available. When the Supreme Court okayed their use in 1942 for German saboteurs, including an American citizen, it cited several statutory authorities—direct parallels for each of which remained on the books in 2001.[59] While developments in American and international law after World War II arguably created rights that trial by commission would violate, the Supreme Court had never declared inappropriate the use of military commissions or forsworn the dramatic deviations from federal trial norms they involve and that the Court had once okayed. There was, in short, little reason to imagine that a commission trial at Guantánamo that lacked all of the procedural protections of a civilian trial or a general court martial would be legally impossible.

There is, in fact, only one major arena in which the administration's course after the attacks lacked some substantial grounding in the law of September 10: its decision to conduct electronic surveillance domestically outside of the authority of the Foreign Intelligence Surveillance Act (FISA)—the law that since 1978 has authorized and regulated domestic wiretapping in national security cases. Federal law, after all, specifies explicitly that FISA represents the "exclusive means" by which the executive branch can conduct national security wiretapping of Americans.[60] And while a current of legal thought

since the the passage of FISA's passage has asserted that the president has inherent power to conduct such surveillance—and that he can therefore override the law if need be—no administration since the passage of FISA had relied on that theory to circumvent its requirements. Most commentators, rather, believed that FISA both codified and limited the president's power and took seriously the notion that acting outside it was a crime.

This field, however, is the exception. In general, looking back on the law the day before the attacks, it is remarkable how many components of a muscular legal architecture for a war on terror had been preserved in American law or had already taken root in American behavior. Laid out like the pieces of a jigsaw puzzle dumped onto a table, they were there for an administration and a Congress that wanted to assemble a structure to govern a new orientation for American policy—a conflict that was neither pure war nor pure law enforcement. The great mistake of the Bush administration was that it never tried to enlist Congress's aid in putting the puzzle together but tried instead to go it alone and use and aggrandize each piece separately.