

## Law-Free Zones

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Four years ago, when a number of us spoke at the first of these forums, we were aware that we were at a critical moment. For whatever it is worth, the participants in that first forum did not take the position that the United States should shrink from self-defense or from military action. We supported it. We also knew the government would seek changes in domestic surveillance laws, and we welcomed what we hoped would be an intelligent discussion of the issues.

Four years ago, while most of us thought existing legal frameworks, developed over centuries by the civilized world and shaped by exposure to violence and terrorism, had a lot to offer, we also recognized that the existing rules might need revision. We believed, however, that these changes should and would occur the way legal changes typically occur: for domestic law, through Congress; and for international law, via consultation with our allies, in regional forums, or at the United Nations.

Four years later, we know this has not been the case. Instead, the Administration took and continues to take the position that the threat of Islamic terrorism presents the United States with an entirely new phenomenon. This view argues that modern international terrorism is more than crime, so that existing criminal laws are essentially irrelevant to bringing it under control. At the same time, although we refer to this as a war on terror, we take the position that, as a legal matter, this also really is not war. In particular, the limitations on treatment of combatants, honed through generations of effort, have been determined to be inapplicable. The administration has declared that it is not bound by either the Geneva Conventions or conventions against torture. This position has been taken without specific authorization by Congress and against the advice of the State Department and the career military.

While there is something to be said for the proposition that our current situation presents us with a new challenge, there is almost nothing to be said in support of the conclusion that the administration drew from this insight – that the restraints imposed by criminal procedure, international humanitarian law, and international human rights law were inapplicable. The administration believes that it has no *legal* obligations that attend to its treatment of detainees and that those detainees have no *legal* rights. Our current position that we can ignore existing legal rules whenever we wish has resulted

in the creation of what I will refer to as law-free zones. I would like to discuss two of the means used by the administration to attempt to implement this strategy.

### **I. JURISDICTIONAL LAW-FREE ZONES**

One of the principal means by which the government has attempted to create law-free areas is by jurisdictional fiat: that is, by moving people away from courts and law so as to be able to avoid review to test whether the government's beliefs about their lack of rights were correct. There are at least three ways the government sought to avoid having to account for the individuals placed in their custody.

Most notably, the government opened, several years ago, the now-infamous detention facility at Guantanamo Bay, Cuba. The facility was chosen, at least in part, in the hope that it would put the individuals held there outside the reach of United States law, or indeed, of any law.<sup>1</sup> Although the United States exercised complete control over the base, and although it obviously would not allow the individuals incarcerated therein to appeal to Cuban law, the government asserted that the individuals could also not file a petition for habeas corpus in any United States court. Indeed, in argument before the Ninth Circuit, the Administration asserted that United States courts would not have jurisdiction to hear the claim of the individuals even if they were being summarily executed or tortured.<sup>2</sup>

Our government told us, by the way, that the detainees in Guantanamo were the "worst of the worst." That is almost certainly untrue. In fact, most of them have been released. Many of them, having subsequently been repatriated to Western countries, are now free, as no one was ever able to demonstrate how they were connected to terrorist activities. Many still there will almost certainly be released as well.

For the real "worst of the worst," or at least those the government believes to be the worst, there have been fates worse than Guantanamo. One means has been to transfer detainees to countries in the Middle East known to practice torture routinely. United States suspects have been sent to countries such as Syria, Uzbekistan and Pakistan.<sup>3</sup> In one case, a Syrian-born Canadian doctor, in transit through John F. Kennedy Airport, was secretly taken by the United States, flown to Jordan, and turned over to Syria, despite his pleas that he would be tortured if he were returned. He was returned, he was tortured, and, now that he is back in Canada, our government is refusing to cooperate in a Canadian inquiry about what happened to him.<sup>4</sup>

Perhaps the most serious defiance of civilized norms has been our use of disappearances. In our war in Iraq, the practice of holding what were called "ghost detainees"—prisoners whose identities were not disclosed to the Red Cross or their families—was widely utilized and, at least in one case, specifically approved by Defense Secretary Rumsfeld.<sup>5</sup> In Congressional testimony, an Army General told the

Senate Armed Services Committee that the number of secret prisoners was in the dozens, up to as many as 100.<sup>6</sup>

Even longer term disappearances are apparently still going on as a part of CIA operations in the global war on terror. The real “worst of the worst,” such as Khalid Sheik Mohammed, are being held at secret locations, with no access to the Red Cross, no notification of families, no oversight with respect to their treatment, and, indeed, no confirmation that they are actually being held. The Red Cross has repeatedly but unsuccessfully sought information on a number of these individuals.<sup>7</sup> According to a New York Times report, President Bush informed the CIA that he did not want to know where these individuals were being held.<sup>8</sup> The United States has refused to make available to a German court an alleged leader of Al-Qaeda, resulting in the failure of the German Government to convict the only individuals charged so far for complicity in the September 11 massacre. The United States has also refused, for the worst of the worst, to allow officials of the Indonesian government to question the suspects. Indonesia was eventually allowed to give the United States questions to ask the individuals.<sup>9</sup> There are accounts that the individuals held in custody under these conditions have been tortured, although it is impossible to know anything about how they are being treated, good or bad.

Disappearances are a violation of international law. They are a practice that was perfected by the most repressive Latin American regimes during the second half of the twentieth century. It was their way to terrorize opposition as well as avoid any accountability for torture and murder that might be committed by those engaged in the disappearances. It is unfortunate that, four years after September 11, we continue to be a major human rights violator, but our practice here has not been fully repudiated or, outside of Iraq, even investigated.

## II. SUBSTANTIVE NO-LAW ZONES

In addition to the jurisdictional no-law zones, the administration has argued that, substantively, the individuals taken into United States custody are entitled to no legal protection. The administration, over opposition of the State Department, our career military, not to mention the rest of the democratic world, has taken the position that terrorist suspects are not subject to the protections provided by the common articles of the Geneva Conventions that relate to the treatment of prisoners of war, nor are they subject to the protections for civilians that are a part of the Geneva Conventions. In addition, the Administration believes that it is not bound, outside of the United States, by the restraints that exist against cruel and inhumane treatment that are a part of the Convention Against Torture, a treaty which we have signed.<sup>10</sup> The Administration’s position, still, is that suspects should not be entitled to the protections of criminal procedure or of legal conventions relating to treatment of individuals

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captured in wartime. Thus, while asserting that it no longer engages in “torture,” the Administration continues to assert the position that it may engage in humiliation, sensory deprivation, exposure to heat and cold, and other means prohibited to the rest of the world in its struggle against terrorist suspects. The Administration’s view that our soldiers should have these rights is so adamant that President Bush has threatened to veto Iraq appropriations for the next year if they contain a rider proposed by Senators McCain and Graham that would prohibit the United States from engaging in cruel and inhumane treatment of detainees.<sup>11</sup>

The devastating effects of this policy are apparent to any American who wishes to learn of them. Over and over again, our soldiers who engaged in interrogation have been encouraged to behave in a brutal fashion. The similarity of some of the accounts, their repeated nature, and the fact that they have occurred in each and every theatre of the war on terror belies the government’s claims that these brutal actions are attributable to a few “bad apples.” The most recent example, revealed in a recent report by Human Rights Watch, described torture of prisoners taking place, on almost a daily basis between September 2003 and April 2004, by members of the 82<sup>nd</sup> Airborne Division in Iraq.<sup>12</sup> The officer who revealed the abuse described a futile seventeen-month effort on his part to “determine what specific standards governed the treatment of detainees.” He concluded that his inability to learn what now constitutes legal interrogation practice contributed to abuses including “death threats, beatings, broken bones, murder, exposure to elements, extreme forced physical exertion, hostage-taking, stripping, sleep deprivation and degrading treatment.”<sup>13</sup>

In addition to treating detainees as if they had no rights, the government asserts the right to try the individuals for membership in Al-Qaeda, in military commissions set up by the government. I have no doubt that Al-Qaeda officials who planned or financed attacks against Americans are guilty of criminal offenses and should be tried under United States law or International Criminal Conventions on the subject. Nor should there be any impediment for war crimes trials against those who have committed atrocities against civilians. But neither of these courses has been chosen by the Administration. Instead, we are using what are essentially our own war crimes tribunals to try individuals for offenses not against American criminal law, but of the law of war. But there is at least a potential problem here, for it is not entirely clear that in modern understanding of the term war crime, mere membership in a banned organization or shooting at American troops ought to qualify. Moreover, if individuals are going to be tried for offenses in the law of war, for example, for failure to follow the Geneva Conventions, it would make sense that our government would be required to conduct its proceedings with some attention to the limitations on Government power that are also a part of the Geneva Convention.<sup>14</sup>

Our military commission system is a good example, in my mind, of our inability to learn from our allies, or even from ourselves. Many of our allies, such as

the United Kingdom, have had wrenching experiences and long experience in working through the question of how to try terrorist suspects. Closer to home, we have a military justice system that, while far from perfect, has long experience in balancing security and individual rights. Our military commission system is more restrictive of suspects' liberties than either of these examples, or of numerous other examples to be found in democratic systems threatened with terrorism. The Commission system posits trials on the President's say-so of individuals in a system with no right to confrontation, no right to be present, and no right to consult with counsel about at least some evidence. This is a system that the military lawyers assigned to represent the defense believe to be rigged and with all of that, it has been woefully inefficient.

Finally, there is the question of detention. The administration has taken the position that it may hold those it designates as enemy combatants as long as our current war continues. In other words, it takes the position that while members and supporters of terrorist groups don't have any of the rights of soldiers, they nevertheless can be held for the duration of our conflict with Al-Qaeda, or perhaps with terrorism itself, based merely upon the administration's untested assertion that these individuals are members of Al-Qaeda.<sup>15</sup>

Thus, in the four years after the September 11 attacks, our government has asserted that it may seize those it believes to be its enemies, take them anywhere, treat them pretty much as it wishes, try them, or hold them. Four years later, even though we know our government has made these assertions, and even though we know of the abuse that has resulted from these claims of impunity, we and our elected representatives have made little effort to try to control those who act in our name.

### III. CONCLUSION

Well, I suppose at this point, it is fair to ask, "So what? Who cares about these people? As long as this policy has kept us safe, hasn't it been worth it?" So let me explain what I believe to be some of the costs of United States policy.

First, it has prevented us from achieving justice. One of the outcomes of September 11 that I just would not have imagined is that, four years after the event, we would have not tried anyone for the planning or financing of the worst crime ever committed against Americans. I do not know whether our failure is because after four years we do not know who planned and financed the event; whether we do know but have never brought into custody those who have planned and financed the event; whether we have the individuals in custody but are unwilling to try them because we are afraid of the information that the trial would have to reveal; or whether we have the individuals in custody but cannot try them because the information was obtained through means, such as torture, which would prohibit its admission in court. Whatever the reason, I believe this is a real disservice to our country.



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Second, our insistence that we be able to act with impunity has complicated our efforts to mobilize international resources. It should be obvious to everyone by now that international terrorism is an international problem, that the United States is not the only place targeted, and that solutions to this problem must occur through international cooperation. We need a common set of norms with our allies on the issue of prisoner treatment and interrogation, so that individuals we capture who have offended the law of other countries can be convicted in those countries. We need to be able to assure countries who turn over prisoners to us that they will be humanely treated. We need to work, much more vigorously than we have, for international conventions to deal with terrorism.

Third, this has been a terrible disservice to our military. Career military personnel were aware that civilized restraints that coexist with warfare must be taught and reinforced. They warned that abandonment of the restraints embodied in charters such as the Geneva Conventions would prove dangerous. We have placed our soldiers in peril and, at least in some situations, encouraged them to behave like brutes.

Finally, we ought to at least understand how badly we have damaged our ability to promote democracy and the rule of law. Three of the four of us on this panel spent a good deal of time in the 1990's working in Eastern Europe, Africa, and Central and Eastern Asia on projects to promote the rule of law. Some of our colleagues at other institutions were critical advisors in the early 1990's to countries in Central and Eastern Europe when they were writing their national constitutions. Our country had some failures here, but there were also some amazing successes. Our policies over the last several years have inflicted real damage on our ability to be taken seriously when we attempt to encourage others to support democracy and human rights. If we really believe that exporting democracy will lead to a safer world, we had better be willing to observe the rule of law in our own actions.

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## Notes

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1. See Memorandum from Patrick F. Philbin & John C. Yoo, Deputy Assistant Attorney General, U.S. Dept. of Justice, to William J. Haynes, II, General Counsel, U.S. Dept. of Defense (Dec. 28, 2001), available at [www.msnbc.msn.com/id/5022681/site/newsweek](http://www.msnbc.msn.com/id/5022681/site/newsweek) (last visited Oct. 26, 2005).
2. See *Gherebi v. Bush*, 352 F.3d 1278, 1299-1300 (9th Cir. 2003), vacated and remanded, 124 S.Ct. 2932 (2004). The government's position was ultimately rejected by the Supreme Court in *Rasul v. Bush*, 542 U.S. 466 (2004). The Court held that federal courts had jurisdiction to "determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing." *Rasul*, 542 U.S. at 563. The opinion did not reach the question of the rights, if any, of detainees, but merely decided that the federal habeas statute allowed the federal courts to hear their challenges.
3. Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, WASH. POST, Dec. 26, 2002, at A1.
4. HUMAN RIGHTS WATCH, THE UNITED STATES' "DISAPPEARED," 4 (2004), available at <http://www.hrw.org/backgrounder/usa/us1004/us1004.pdf>.
5. Eric Schmitt & Thom Shanker, *Rumsfeld Issued an Order to Hide Detainee in Iraq*, N.Y. TIMES, June 17, 2004, at A1; see Josh White, *Rumsfeld Authorized Secret Detention of Prisoner*, WASH. POST, June 18, 2004, at A22.
6. HUMAN RIGHTS WATCH, *supra* note 4, at 6.
7. *Id.* at 8-9.
8. James Risen et al., *Harsh CIA Methods Cited in Top Qaeda Interrogations*, N.Y. TIMES, May 13, 2004, at A1.
9. HUMAN RIGHTS WATCH, *supra* note 4, at 10.
10. See David J. Gottlieb, *How We Came To Torture*, 14 KAN J.L. & PUB. POL'Y 449, 453-55 (2005).
11. Executive Office of the President, Statement of Administration Policy 2-3 (July 21, 2005) available at <http://balkin.blogspot.com/SAP.S.1042.pdf> (last visited Oct. 26, 2005). The McCain-Graham amendment was passed in the Senate by a vote of 90-9. The bill is currently before a conference committee; the Administration still vehemently opposes the measure.
12. HUMAN RIGHTS WATCH, LEADERSHIP FAILURE—FIRSTHAND ACCOUNTS OF TORTURE OF IRAQI DETAINEES BY THE U.S. ARMY'S 82<sup>ND</sup> AIRBORNE DIVISION (2005), available at <http://hrw.org/reports/2005/us0905/us0905.pdf> (last visited Oct. 26, 2005).
13. Captain Ian Fishback, *A Matter of Honor*, WASH. POST, Sept. 28, 2005, at A21.
14. This issue was at the center of a recent case, *Hamdan v. Rumsfeld*, 415 F.3d 38 (D.C. Cir. 2005), petition for cert. filed, Aug. 8, 2005. The court in *Hamdan* approved some aspects of the Military Commission system, holding that Congress's authorization of the use of force after September 11<sup>th</sup> implicitly authorized the use of military commissions as well. The court also concluded that even if the commission proceedings would violate the Geneva Convention, that convention could not be relied upon by an individual litigant in a habeas corpus action.
15. In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Supreme Court disagreed in part with the government's position. It ruled that an individual held as an enemy combatant was entitled to a "meaningful opportunity" to contest the factual basis for the detention. At the same time, the Court approved the government's position that Congressional authorization for the use of force after September 11<sup>th</sup> permitted detention of Al-Qaeda members as enemy combatants. In *Padilla v. Hanft*, 423 F.3d 386 (4<sup>th</sup> Cir. 2005), a panel of the Fourth Circuit relied upon *Hamdi* in concluding that the potentially indefinite detention of Jose Padilla, the American citizen arrested at O'Hare airport in Chicago, as an enemy combatant was constitutionally permissible.