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Empire's Law: Foreign Relations by Presidential Fiat

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This essay considers the question of whether September 11 had an impact on the relationship of law and politics. It begins with the question of methodology. While recognition of historical continuities is important, my essay primarily focuses, instead, on new developments in the particular relationship of law and politics. The essay contends, first, that an analysis of the law post–September 11 can illuminate the politics involved and, moreover, that such an analysis suggests that we are indeed in a constructed transformative moment—that analysis of the legal responses to 9/11 reveals the concerted attempt to shift the site of political sovereignty at present and, in particular, to the U.S. executive.

The Problem of Method

Consider to begin with the methodological question regarding the extent to which September 11 is a transformative moment in the relationship of law and politics.[1] What this essay explores here is the relationship between the legal responses of the Bush administration and the events themselves in order to better understand how the sense of the transformative significance of these political events is constructed by the law.

The prevailing approach to the relationship of law and politics tends to miss the particular significance of the role of law because, in regard to the current administration, there is a tendency to adopt a highly "realist" approach to law and politics, one that is almost nihilistic as to the expectations of the law.[2] The realists tend to conflate the question of the rule of law with the political. In the realist approach, the legal response to September 11 is largely a product of the politics of September 11, which in

turn is thought to relate to the prevailing power balance of the various relevant political actors, such as the administration, the Congress, and the people, as well as the international community.

While it explains a lot, a problem with the realist approach is that it does not provide an adequate account for the role of law. An alternative approach to understanding September 11 emerges in the vivid debate between the realists and the idealists. From the idealist perspective on the post–September 11 political situation, there are a number of principles of law and normative values that should have been adhered to during this period, in particular relating to civil liberties and to the tradeoffs posed between the interests of the state and the rights of individuals and groups.[3] The antinomy posed here relates to varying conceptions of the relation of law and politics: idealists tend to consider law to be largely independent of political factors, while realist (and critical) legal theorizing tends to emphasize law's close relationship to politics.

This essay attempts to navigate the shoals of Scylla and Charybdis, to negotiate the constraints of the realist and idealist approaches, and to discuss the relationship of law and politics during this period via an alternative interpretive approach, which I contend offers a better account of what happened. One might characterize this interpretation as reflecting a pragmatic approach to the relationship of law and politics. That approach is aimed at trying to clarify to what extent we are in a transformative moment and precisely how one might understand the constructive impact of the Bush administration's responses.

The historical perspective that Marilyn Young adopts in her essay in this volume helpfully illuminates for us the continuities in the administration's approach. Young contends that the current responses in the war against terrorism involve a geopolitical balance of power historically reminiscent of the high Cold War period, namely, the period immediately following the Second World War, when the United States clearly emerged as the world's sole global power for a time. Young then goes on to suggest a way in which the current behavior of the United States is continuous with its historical political role and to point to other ways in which current U.S. unilateralism appears to go even farther than that of the high Cold War period. Beyond the Cold War analogy in Young's essay lies another analogy to a broader war model. One question this raises is whether the right analogy here is to the Cold War, to a hotter war, or to something other than war.

In my own view, understanding the current administration's actions may necessitate thinking in terms of other paradigms. The argument here is that we should turn away from the exceptional character of a war and

turn instead to the juridical-political regime associated with absolute sovereignty and security, tentatively termed here "empire's law."[4]

Narrating September 11: Transitional Narratives of War and Justice

Shortly after September 11, a debate began about the political and social construction of the events being played out in the media and in the Bush administration. The first narrative after the events begins with the story of the World Trade Center towers' collapse, and thousands killed, as a deplorable tragedy. This tragic narrative lasts a very short time, for such a narrative elicits no necessary response, but fatalism. This is un-American; there has to be something to do. Almost immediately thereafter, the tragic narrative gives way to a "justice" narrative. When the World Trade towers' collapse is characterized as an "attack,"[5] it reframes the administration's response. In "Operation Infinite Justice," the administration begins to characterize the events as a failure of criminal law; and the call is issued to bring Osama bin Laden to "justice." Almost from the start, the term "Operation Infinite Justice" was criticized for its absolutist, jihad-sounding language, yet it was perhaps an honest reflection of the administration's position and policy direction. To respond to extremist fundamentalism, there must be universals. And there would later be a similar rhetoric of morality aligned with the administration's political response.

Thereafter, there commenced an evident debate within the administration regarding what the proper response to the September 11 events should be. While there was an appeal to launching the "war against terrorism," there was also language alluding to alternative, competing juridical-political models. The reference to "campaigns" suggests that what is at stake is not a conventional war but, rather, an ongoing police operation: "Operation Infinite Justice."

What then took center stage was a growing debate over which model—war or justice—was most apropos for explaining September 11 and its aftermath. In this regard, there were various camps, with the defense establishment supporting the military model, while the legal establishment, some members of Congress, and civil libertarians, in particular, were insisting that the events of September 11 posed a problem of justice and that its perpetrators ought to be treated like those implicated in the 1993 attempts on the World Trade Center, namely, along the lines of ordinary federal judicial processes.[6] No coherent explanation was offered for why the events of 2002 should not be handled like those in 1993.

While there has been discussion of diverse war-versus-justice re-

sponses to September 11, at the start these responses were not always so easily distinguishable in the realm of international affairs, as there has historically been a close nexus in the discourses of war and justice. Indeed, historically, there has been an established role for international criminal trials in the justification of war, meant to rationalize and support the aims of military intervention in the name of humanity.[7]

Yet it hardly mattered which side of the debate one followed: whether it was the war model that would treat the Taliban regime and its allies as the enemy, guided by the relevant law of war, or the justice model that would treat members of Al Qaeda and those who harbored them as criminals subject to domestic law. The more profound problem here was that the administration saw no reason to commit to either of these conditions, seeking to follow neither the law of war, including the agreements binding on the United States in periods of conflict,[8] nor, ordinarily, applicable domestic criminal or constitutional law.[9] Instead, it seemed to be deliberately seeking out gray areas of nonlaw, or "no-law."

The position that emerged is that the military appeared not to be accountable to the ordinary domestic legal regime, but neither was it subject to a general application of an international humanitarian regime. Whereas in ordinary times the military would have been fully subject to a juridical regime, what became apparent was the attempt to use September 11 as an occasion for an extended "emergency" and a state of exception regarding the law. More and more, the administration called for law that was "exceptional." The claim was that because the United States was in an exceptional position, whatever related law was exceptional, and determining instances of departure, or exception, from law would be fully up to the administration.[10]

To what extent is this administration's position new, and to what extent is it related to September 11? Just how much continuity is there in the administration's approach? Even before September 11, there had already been a substantial collapse of the law of war and the law of peace and a move toward significant overlap of these in the discourse of human rights and other foreign affairs. The political conditions of the heightened political transitions at the close of the twentieth century, along with spiraling political fragmentation, have led to failed or weak states, steady-state small wars, and the apparent toleration of ongoing conflict. I have characterized this as the "normalization" of transitional political conditions, which are associated with the apparent entrenchment of an ongoing law of conflicts. A central concern of the international rule of law at present has become how to manage ongoing situations of conflict in global politics.[11]

sovereign. Instead, today "security sovereignty" is shared, and it depends on bodies of principles that are widely applicable and enforceable, rendering the U.S. position favoring "nonlaw," or law of the exception, as out of step with the emerging consensus. This is elaborated below.

The Law of the Exception

Consider some illustrations of the use of law in the sovereign security state model. Relatedly, consider the relationship of the expansion of the security state to the growth in the executive, and the resulting risks, of an imperial presidency. I shall discuss three issues: first, the expansion of executive discretion that is characteristic of the police power and, in particular, the executive discretion in the administration's "military order" authorizing detentions in the war against terrorism; next, the proposed military tribunals and how and to what extent these illustrate the "police power" model; and, last, the U.S. position in the international community and, in particular, regarding the new International Criminal Court, the institution established to prosecute the most heinous offenses under international humanitarian law. The creation of the ICC has coincided with the post–September 11 responses and, therefore, offers a further illustration of the sovereign security state model.

Framing the lawless emergency: the November 13th order. Here, I address the "military" order authorizing the detention, treatment, and trial of certain noncitizens in the war against terrorism. Two months after September 11, on November 13, 2001, the Bush administration tried to impose regulations concerning the security situation at the time, and its characterization of the events reflects the invocation of the security state model.[20] It eventually became clear that the administration was not exactly looking for a legal analogy; just the reverse—it appeared to be looking for a way out of any applicable law. What became evident during this period, through the order's definition of the applicable administrative regime, was the creation of a state of exception: leading the order's findings are that the post–September 11 situation is a "national emergency." Moreover, the November 13 order asserts that it is "not practicable to apply in the proposed military commissions under order" "the principles of law and the rules of evidence generally recognized in the trials of criminal cases in the U.S. District Courts."[21] Indeed, this frames the state of exception regarding the applicable law. Present political realities are characterized as posing an "extraordinary emergency," and the re-

lated exceptions are justified by "an urgent and compelling government interest."[22] "Compelling" interests are those of a constitutional order.

The political conditions being considered are exceptional and are defined in terms of security. This language already constitutes a move away from law, for the rationale of security is being used to justify the suspension of law, that is, law's operation in a state of exception. The definition in "security" terms is a regime definition of conditions that relate to the police role. The next point goes to the problem of defining just who is subject to the order. What is remarkable in light of the above statement of the "emergency" is the absence of a definition of the relevant subject of the order, whether of the substantive offenses or of the status of the individual subjects. According to the order, a person can be tried for violations of the "laws of war and other applicable laws"[23] with respect to "acts of international terrorism."[24] Yet the November 13 order lacks a definition of terrorism. Because of that, in addition to various definitions, including membership in Al Qaeda, the individuals subject to the military order and eligible for detention include "non-U.S. citizens," with respect to whom the presidency "determine[s] from time to time"[25] that, if they do not fit one of the other definitions, "it is in the interest of the U.S. that such individual[s] be subject to this order."[26] What this essentially means is that the definition of individuals subject to the detention order will be left entirely to the president.

The problem with the lack of definition in the November 13 order is that it shows the extent to which, despite the use of the term "military order" and the reference to "military commissions," this promulgation is hardly an exercise necessarily within the law of war. It is not clear whether mere membership in Al Qaeda, harboring terrorists, and other offenses left undefined in the order violate the law of war, which is, after all, the necessary predicate for the jurisdiction of the military commission, under both the common law and Article 21 of the Uniform Code of Military Justice.[27] Not all acts of international terrorism are necessarily violations of the law of war. Therefore, for the order to be applicable to the intended categories of acts and persons, added specific authority from Congress would be necessary. What is plain about the administration's November 13 order is the extent to which it is an illustration of apparently unbridled executive discretion.

Another problem of expanded executive prerogatives that threatens the separation of powers is the order's attempt to extend the jurisdiction of the proposed military commissions to acts not associated with September 11. This uncouples the authority of the proposed military commis-

sions from Congress's September 18 joint resolution, which sanctioned force against those who planned, authorized, committed, or aided the terrorist attacks on September 11.[28] There is a remarkable gap between the predicate bases of the Bush order and the definition of the substantive offenses in the authority granted by the congressional resolution. For the congressional authority granted was rather limited, and it was defined in terms of September 11. Congress's resolution was most certainly not a declaration of war, whereas the administration's order is far more ambiguous—and a somewhat tautological statement of executive fiat. The November 13 order, which proposes military commissions to address offenses unrelated to the September 11 attacks, particularly against persons in the United States, in the absence of further congressional action, raises serious questions of both constitutional and statutory authority. What is patently clear is that the order constitutes an act of pure executive discretion.

Many months after September 11, this state of affairs has continued. Indeed, to this day, the administration has failed to publicly identify the suspects in its sweep.[29] Moreover, because of the secrecy and nontransparency of these detentions, even if there were definitions of the subjects or offenses in the order, it would be nearly impossible to verify the definition by the application of the order. Such secret detentions are the hallmark of the police state.[30]

There are other aspects of the military order, particularly in reference to the military tribunals, that raise serious problems of abuse of executive discretion. Even though the terms of the Bush order could apply to prisoners of war, it is not limited to them because it also includes "unlawful combatants" and others.[31] At least two categories of persons are protected under the law of war: "prisoners of war" and "unlawful combatants." However, the November 13 order also potentially applies to other categories of persons. Moreover, there is no attempt to reconcile the order with international law. That the order gives the president exclusive authority to make the determination of whether a person fits the categories of the order renders the order standardless and sweeping, a perfect illustration of pure executive discretion. It is remarkable to have a standardless order of this kind, without an independent appeal. This is in clear conflict with prevailing international law. Article 106 of the Third Geneva Convention requires a right of appeal for prisoners of war and provides that prisoners of war should be treated in the same manner as "the members of the armed forces of the detaining power."[32] The extraordinary unilateral nature of the president's decision pursuant to the order, together

with the absence of standards, conflicts with the Third Geneva Convention, which specifically provides for a hearing by a competent tribunal to determine whether a person might fall into the category of either "unlawful combatant" or "prisoner of war." Indeed, in the absence of such hearings, persons in custody are supposed to be given the benefit of the presumption that they are prisoners of war.[33]

Moreover, under domestic law, the military order denies the basic remedy of habeas corpus provided by the U.S. Constitution. Denial of this supreme constitutional right, which is guaranteed except in the extraordinary emergency of "cases of rebellion or invasion,"[34] raises serious constitutional questions because the existence of such limiting political conditions would ordinarily be determined by Congress.[35] Indeed, the choice of Guantánamo Bay itself points to a deliberate selection of a site intended to be outside the parameters of the Constitution.[36]

Subsequent rules promulgated by the administration for guiding the proposed military tribunals may mitigate some of the problems with the original order.[37] Under the March 21, 2002, rules, a military tribunal's decisions will be reviewed by a three-member panel; however, without an independent appeals process,[38] many of the original concerns remain. Once again, what is underscored in the post–September 11 expanded prosecutorial powers is the nearly unfettered executive discretion over who will be prosecuted and under what rules, as well as what standards will guide the review of convictions and sentences.

The military tribunals. Next, I shall discuss aspects of the military tribunals that further illustrate the deployment of what I have characterized as the "law of exception." The November 13 order concerning the military tribunals proposed that suspected Al Qaeda members or supporters would be tried before them but also lumped together all sorts of disparate defendants and related laws. Again, what is suggested is that the United States is operating largely outside established legal regimes in the area of "exception." This is indeed a law of exception because the military tribunals follow neither U.S. law nor international law; nor are they commensurate with either the war model or the justice model. Instead, they are consistent with a security regime that functions at the limits of the law.

That the exceptional character of the military tribunals for terrorism suspects puts them in an "in between" or "no-law" legal zone can be seen in the mixed character of the offenses to be tried. "Terrorism" and "assisting terrorism" do not necessarily fall under the law of war. The hybridity

of the proposed military tribunals is similarly seen in the judging powers of both civilian and military judges; and it is also evident in the potential subjects, which include both alien civilians and prisoners of war.

The extraordinary power arrogated by the executive epitomizes the sovereign police state. The president asserts the power to punish any noncitizen who violates a broadly defined understanding of the laws of war, but it is nevertheless a power that is not consistent with the laws of war. What is remarkable is the extent to which the president is going it alone here. There has not been a classic declaration of war regarding the events of September 11; the limited authority that Congress gave to the president was to engage in the "necessary and appropriate" use of force. Therefore, the so-called military tribunals actually have very little connection to September 11, but rather appear to be an illustration of the exploitation of contemporary political conditions to expand executive power in a remarkable way. Where the standard is "necessary and appropriate," then the review standard in the relevant inquiry would go to whether the actions taken are disproportionate, that is, whether secret detentions, military tribunals, and the absence of appeals are disproportionate to the limited state of emergency associated with September 11. To what extent will there be any judicial constraints on or any meaningful judicial review of the current policies?

The other characteristic aspect of the security regime seen here is that the notion of the "terrorist" has no fixed meaning and is left always open to definition (and expansion) by the executive; moreover, it is increasingly defined in terms of the classic "friend/enemy" distinction of politics.[39] This is clearly evident in the November 13 order when it refers to "non-citizens," who, by definition, are not full members of the decision-making community and are being treated in ways that ought to imply close judicial scrutiny.

In the present security regime, law is all about what allows enforcement, what enables the police operation. There is little other independent meaning. While this use of police operations in the world did not begin with September 11 (for example, the "Gulf War" represents a historical precedent), we can nevertheless expect to see more of this in the campaign against terrorism.

The United States and the international community. So far, I have been discussing the administration's overt response to terrorism, a problem that transcends the conventional discrete lines of domestic and international politics and law. Indeed, it is definitional of terrorism, given its aims and objects, that it destabilizes established categories in the law

along those lines. Now, I turn to the realm that is explicitly international. The international context makes clear the administration's conception of sovereignty, particularly, its view of the U.S. position in the world.

As discussed above, in its response to September 11, the United States has largely sought to eschew the parameters of international law. Moreover, it has elided the other political constraints of allies, making it plain that it will pursue a unilateral action, whether with respect to detained terrorists, the attack on Afghanistan, or, more currently, in its plan to extend the war on terrorism to Iraq, despite the fact that other multilateral options would have been possible, as the terrorist attacks on the U.S. civilians clearly constituted a crime against humanity.[40] Nevertheless, this unilateral stance has become the norm.

The final illustration of "empire's law" discussed here is the U.S. position regarding a permanent International Criminal Court.[41] The debate over whether the United States would become a party to the ICC had long been under way during the post–September 11 responses, yet, prior to September 11, the final U.S. position had not been fully reached. Had history gone differently, one could speculate that the U.S. position on the ICC's fateful development might also have been different.

Despite some impetus toward the creation of a permanent international criminal tribunal after Nuremberg, the geopolitical U.S.-Soviet balance delayed its development until half a century later. During the spring of 2002, more than sixty countries ratified the "Rome Treaty," enough to establish a permanent ICC. The jurisdiction of this court over the most heinous violations began during the summer of 2002.[42]

The United States has now officially "unsigned" the treaty and has indicated that it will resist the court's jurisdiction.[43] Moreover, the United States now appears to be on the road to full-fledged opposition to the ICC, as evidenced in its diplomacy with other countries as well as in the remarkable conditions of exception that the administration has demanded regarding its role in so-called peace operations around the world.[44]

Consider the U.S. position during the debate about the ICC and the extent to which it follows the structure of the sovereign police argument discussed above. In the ICC debate, the administration once again is operating at the limits of the law, as it follows neither the regime of ordinary peacetime law nor the regime of military justice.[45] Moreover, in the ICC debate, the military is invoked as the basis of the administration's opposition.[46] This is particularly problematic as the administration justifies its opposition in terms of security concerns, where it finds itself regularly juxtaposing military authority to that of the law.

This notion of a military authority above the law is characteristic of

non-rule-of-law states. However, the position defended by the United States, adopting that of the Department of Defense, is premised on a more complex, even paradoxical, police argument: namely, that the claim to exception from the law is grounded from within the law and its enforcement. According to this argument, as the sole military superpower and functioning as a worldwide cop, the United States has a greater potential exposure to the ICC's jurisdiction, and, the administration contends, there is a strong possibility of politicized prosecutions. Therefore, so the argument goes, the United States needs privileged protection from the ICC's jurisdiction.[47]

While at first the United States pushed for the strategy of "exception at will"—with the United States having the power to lobby referral of all cases by the UN Security Council and block any it opposed with a veto—it became clear that exclusive Security Council referral jurisdiction in the ICC would not be accepted. In the final treaty, the Security Council retains referral power, as well as the power to temporarily defer prosecutions that arrive in the court via alternative routes. For some time, the United States continued to try to find a legal formula for exemption, but, by the end of the Rome conference, it dropped even the pretense of a formula, peremptorily demanding, instead, a full and total exemption from the court's prosecutions. This stance rendered impossible further engagement by the United States in the ICC. The final decision to "unsign" the preceding administration's signature to the Rome Treaty, executed in the Clinton presidency's last days, was merely the formal extension of the Bush administration's stated position that it did not intend to cooperate with the court.[48]

In Europe, as well as in U.S. human rights circles, there has been a substantial outcry over the American position. The claim is that the Bush administration is being hypocritical because it insists that other countries adhere to international law while always seeking a full exemption for the United States. Much is made of the occasional U.S. support for international institutions, such as the ad hoc criminal tribunal presently trying former Yugoslav president Slobodan Milosevic[49] and adjudicating atrocities relating to the Rwandan genocide.[50] Of course, there are others who argue just the opposite, noting that the international institutions may be less politicized than any individual state's judiciary.[51]

Nevertheless, to some extent, the U.S. position regarding the Hague war crimes tribunal prosecuting Milosevic and the U.S. position on the ICC are not irreconcilable, but, rather, follow the present administration's logic. Since the United States conceives of itself as the world sovereign, one might argue that it would be contradictory for U.S. police operations

to be subject to the ICC. Indeed, the ICC stands for the possibility that any head of state anywhere in the world could potentially be subject to the court's jurisdiction and thus to a sovereign police action.[52] Therefore, to yield to the ICC's jurisdiction would, to some extent, contravene the U.S. sovereign police logic, that is, where the United States is deemed the preeminent enforcer yet somehow liable to being the object of a police action. Indeed, the point of the United States as the sovereign police power is now being made in the ad hoc international tribunal prosecution of Milosevic to justify the enforcement of humanitarian intervention by the NATO powers. So the very question posed by the new international juridical regime is whether there ought to be review of sovereign police power. To what extent might accommodating expanded juridical sovereignty be interpreted as a challenge to the exceptional status of the U.S. police power worldwide?

Conclusion

The very definition of sovereignty today means the power to define the limits of the law, that is, the power to suspend the validity of existing international and constitutional law. The United States claims with respect to the current international humanitarian law regime that, as the self-appointed world police, it must operate in a state of exception. Yet while this argument may have surface plausibility, it is clear that the United States is not an effective world sovereign, as it has no monopoly over legitimate violence, which is in any event defined more by numerous conventions enforced in a decentralized way—in and by the law, not in its lurch.

A similar logic is being deployed at the domestic level. As with terrorism, there is substantial fluidity in the ramifications of the domestic for foreign affairs and vice versa. Here, the contradictions are only more evident, clearly revealing a politicized executive, attempting to maneuver on the basis of terrorism, free of congressional oversight or constitutional checks. At the domestic level, one can see that the administration's rhetoric reflects a freewheeling, nontransparent executive. There is only a veneer of the sovereignty of law.[53] For the most part, to date, the administration's various operations have proceeded without congressional or judicial check, and the challenge to the rule of law is even greater in the domestic context.

We need to better understand the contemporary expansion in the presidential police power in the name of emergency. These developments should be interpreted in the context of other broader political changes,

for the most part related to globalization politics that have threatened many of the established institutions and processes that have hitherto provided accountability and legitimacy. In thinking about political institutions in hard times, we should not allow the extension of what ought to be limited emergencies as a pretext for the permanent expansion of the security state. States of exception should be treated as such—at best, as provisional accommodations, subject to constitutional limitations. While the problem of terrorism may defy facile analogies, whether to war, to the police state, to ordinary times, it ought not become an occasion for lawlessness. Indeed, the last century saw a history of such abuses in the war against communism.

Analysis of the law after September 11 illuminates the U.S. attempt to construct a sovereign role in international affairs. Yet, in many ways, this construction is paradoxical, and even beside the point, for September 11 makes clear the obsolescence of the prevailing understanding of national security premised on territory and force. Rather than lying outside law, the emerging notion of security will depend on greater international cooperation within the law.

Notes

1. For a useful discussion of method, see Steven R. Ratner and Anne-Marie Slaughter, eds., "Symposium on Method in International Law," *American Journal of International Law* 93 (1999): 291.
2. On realism generally, see Stephen Krasner, "Abiding Sovereignty," *International Political Science Review* (forthcoming 2003); John Mearshimer, *The Tragedy of Great Power Politics* (New York: Norton, 2001). See also Ruth Wedgwood, "The Rules of War Can't Protect Al Qaeda," *New York Times,* December 31, 2001, sec. A, p. 17.
3. See Aryeh Neier, "The Military Tribunals on Trial," *New York Review of Books,* February 14, 2002, 11–15; Ronald Dworkin, "The Trouble with the Tribunals," *New York Review of Books,* April 25, 2002, 10–12; Lawrence H. Tribe, "Trial by Fury: Why Congress Must Curb Bush's Military Courts," *New Republic,* December 10, 2001, 18.
4. On "empire" in political theory, see Michael Hardt and Antonio Negri, *Empire* (Cambridge: Harvard University Press, 2001). See also Robert Cooper, "The Post-Modern State," in *Re-Ordering the World: The Long-Term Implications of 11 September,* ed. Mark Leonard (London: Foreign Policy Centre, 2002), 11–20, calling for a new imperialism of "cooperative empire." On American unilateralism, see Nicholas Lemann, "The Next World Order," *New Yorker,* April 1, 2002, 42–48.
5. See Elizabeth Becker, "A Nation Challenged; Renaming an Operation to Fit the Mood," *New York Times,* September 26, 2001, sec. B, p. 3; CNN, "Army Gets Orders: 'We're Ready to Go,'" September 20, 2001, http://fyi.cnn.com/2001/US/09/20/ret.deploy.
6. See Harold Koh, "We Have the Right Courts for bin Laden," *New York Times,* November 23, 2002, sec. A, p. 39; George Fletcher, "War and the Constitution," *American Pros-*

pect, January 14, 2002, 26; Bruce Ackerman, "On the Home Front, a Winnable War," *New York Times*, November 6, 2001, sec. A, p. 21.

7. See Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 3d ed. (New York: Basic Books, 2000).
8. Namely, the Geneva Conventions that regulate the treatment of prisoners of war. See Geneva Convention (3) Relative to the Treatment of Prisoners of War, 75 U.N.T.S. [UN Treaty Series] 135, adopted August 12, 1949, entered into force October 21, 1950.
9. See Alberto R. Gonzalez, "Martial Justice, Full and Fair," *New York Times*, November 30, 2001, sec. A, p. 27.
10. See CNN, "Bush Advisers Debate Detainees' Status," January 26, 2002, http://www.cnn.com/2002/US/01/26/ret.powell.detainees/?related.
11. See Ruti Teitel, "Humanity's Law: Rule of Law for a Global Politics," *Cornell International Law Journal* 35, no. 2 (2002): 356–87.
12. See Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999); see also Michael Ross Fowler and Julie Marie Bunck, *Law, Power, and the Sovereign State: The Evolution and the Concept of Sovereignty* (University Park: Pennsylvania State University Press, 1995).
13. For discussion of the legitimacy of this intervention, see Louis Henkin, "Kosovo and the Law of 'Humanitarian Intervention,'" *American Journal of International Law* 93, no. 4 (October 1999): 824–27.
14. See Ruti Teitel, "Transitional Justice Genealogy," *Harvard Human Rights Journal* 16 (spring 2003): 69–94; Ruti Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000), epilogue.
15. See Thomas Donnelly, "The Past as Prologue: An Imperial Manual," *Foreign Affairs*, July/August 2002, 165–70; Lemann, "The Next World Order," 42; Thomas L. Friedman, "Foreign Affairs: Was Kosovo World War III?" *New York Times*, July 2, 1999, sec. A, p. 17.
16. On the philosophical implications of contemporary sovereignty, see Giorgio Agamben, *Means without End: Notes on Politics* (Minneapolis: University of Minnesota Press, 2000), 103–6.
17. Indeed, this approach appears to be a move away from the increasing shift to positive law from natural law, which seems to be a throwback in the history of international law and international relations. See Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th ed. (London: Routledge, 1997).
18. See statement of Richard Haass, State Department director of policy and planning, in Lemann, "The Next World Order," 44. Referring to the current policy of "limited sovereignty" as representing the emergence of a new principle, Haass says, "sovereignty entails obligations," principally "not to massacre your own people" and "not to support terrorism in any way." Failure to meet these obligations means the forfeiture of "the normal advantages of sovereignty, including the right to be left alone inside your own territory." Ibid., 45.
19. See Alessandra Stanley, "Conference Opens on Creating Court to Try War Crimes," *New York Times*, June 15, 1998, sec. A, p. 1; Roger Cohen, "The World: Europe's New Policeman," *New York Times*, October 18, 1998, Week in Review, 3.
20. See President, Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism," *Federal Register* 66, no. 222 (November 16, 2001): 57,833.
21. Ibid., sec. 1(f).

22. Ibid., sec. 1(g).
23. Ibid., sec. 1(e).
24. Ibid., sec. 2(a)(1)(ii).
25. Ibid., sec 2(a).
26. Ibid., sec. 2(a)(2).
27. Art. 21 of the Uniform Code of Military Justice, 10 U.S.C. 821 (2001).
28. See *Authorization for Use of Military Force,* Public Law 107-40, 107th Cong., 1st sess., September 18, 2001 (authorizing "necessary and appropriate" force against the terrorist network involved in the terrorist attacks of September 11).
29. *Center for National Security Studies v. U.S. Department of Justice,* Docket no. 01-2500 (GK), 215 F. Supp. 2d 94 (D.C. Cir. Aug. 2, 2002) (following litigation, a judge ordered the disclosure of the list of U.S.-based detainees), stay granted pending appeal in *Center for National Security Studies v. U.S. Department of Justice,* no. 01-2500 (GK), 215 F. Supp. 2d 58 (D.C. Cir. Aug. 15, 2002). Contrast *North Jersey Media Group, Inc. v. Ashcroft,* 308 F.3d 198 (3d Cir. 2002) (finding that the attorney general may conduct deportation hearings in secret when the individual involved might have connections to or knowledge of the 9/11 attacks) and *Detroit Free Press v. Ashcroft,* 303 F.3d 681 (6th Cir. 2002) (finding that there is a First Amendment right of access to deportation proceedings).
30. See Ruti Teitel, "Persecution and Inquisition," in *The Transition to Democracy in Latin America: The Role of the Judiciary,* ed. Irwin Stotsky (Boulder, Colo.: Westview Press, 1994): 141–153.
31. See Military Order of November 13, 2001, section 2(a)(1).
32. See Geneva Convention (3) Relative to the Treatment of Prisoners of War, art. 106, 75 U.N.T.S. [UN Treaty Series] 135, entered into force October 21, 1950 (requiring for every law "the right of appeal or petition from any sentence").
33. Geneva Convention (3) Relative to the Treatment of Prisoners of War. There are other rights that the relevant Geneva Convention article refers to that are not guaranteed, even in the subsequent draft regulation.
34. See U.S. Constitution, Art. I, sec. 9.
35. Indeed, there are precedents during the American Civil War. See *Ex Parte Milligan,* 71 U.S. 2 (1866).
36. Compare *United States v. Verdugo-Urguidez,* 494 U.S. 259 (1990), with *Reid v. Covert,* 354 U.S. 1 (1957) (regarding the extraterritorial reach of the U.S. Constitution).
37. See Department of Defense, Military Commission Order no. 1, March 21, 2002.
38. Ibid., sec. 6 (4).
39. See Carl Schmitt, *The Concept of the Political* (Chicago: University of Chicago Press, 1996).
40. See Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9, July 17, 1998, art. 7, reprinted in 37 I.L.M. [International Legal Materials] 999 (1998). See also Frederic L. Kirgis, "Terrorist Attacks on the World Trade Center and the Pentagon," *ASIL Insights,* September 2001, http://www.asil.org./insights/insigh77.htm.
41. See Rome Statute of the International Criminal Court, 37 I.L.M. 999 (1998); Undersecretary of State for Political Affairs Marc Grossman, Address at the Center for Strategic and International Studies, Washington, D.C., May 6, 2002 (United States will not join the International Criminal Court).
42. Neil A. Lewis, "U.S. Is Set to Renounce Its Role in Pact for World Tribunal," *New York Times,* May 5, 2002, sec. A, p. 18.
43. See U.S. Defense Secretary Donald Rumsfeld, Statement on the ICC Treaty, May 6, 2002,

http://www.defenselink.mil/news/May2002/b05062002_bt233-02.html. See also Department of State, Under Secretary of State for Arms Control and International Security John R. Bolton, Letter to UN Secretary General Kofi Annan, indicating the United States's intention is not to become a party to the ICC treaty, May 6, 2002, USDOS Press Release, http://www.state.gov/r/pa/prs/ps/2002/9968.htm.

44. See Colum Lynch, "United States Seeks Court Immunity for East Timor Peacekeepers," *Washington Post,* May 16, 2002, sec. A, p. 22; Christopher Marquis, "United States Is Seeking Pledges to Shield Its Peacekeepers from Tribunal," *New York Times,* August 7, 2002, sec. A, p. 1.
45. See Somini Sengupta, "U.S. Fails in U.N. to Exempt Peacekeepers from New Court," *New York Times,* May 18, 2002, sec. A, p. 4; Serge Schmemann, "U.S. Peacekeepers Given Year's Immunity from New Court," *New York Times,* July 12, 2002, sec. A, p. 3. There was a recent resolution of the matter on a case-by-case basis with involvement of the Security Council, as contemplated under Article 16 of the ICC Treaty.
46. See the American Servicemembers' Protection Act, which is an attempt to challenge any future U.S. participation in the ICC. *The American Servicemembers' Protection Act of 2002,* U.S. Public Law 107–206, 107th Cong., 2nd sess., August 2, 2002.
47. See Rumsfeld, Statement on the ICC Treaty, May 6, 2002.
48. Such cooperation would have been required by the Rome Statute, art. 86. The Bush administration's decision to resort to "unsigning" appears to take seriously the possibility of legal obligations arising from its signature. See Vienna Convention, art. 18, which asks nations to refrain from taking steps to undermine treaties that they sign. For discussion of the contradiction in this interpretive approach, see Ruti Teitel, "Global Rule of Law: Universal and Particular" (paper presented at Central European University Conference, Universalism in Law: Human Rights and the Rule of Law, Budapest, June 14–16, 2002).
49. See Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Security Council Resolution 827, UN SCOR [Security Council Official Records], adopting UN Doc. S/25704 at 36, annex, and UN Doc. S/25704/Add.1 (1993), available at http://www1.umn.edu/humanrts/icty/statute.html; Statute of the International Criminal Tribunal for the Former Yugoslavia, Security Council Resolution 827, UN SCOR, 48th sess., 3,217th mtg., UN Doc. S/RES/827 (1993), as amended by Security Council Resolution 1166, UN SCOR, 3,878th mtg., annex, UN Doc. S/RES/1166 (1998), available at http://www1.umn.edu/humanrts/resolutions/SC98/1166SC98.html.
50. See Statute of the International Tribunal for Rwanda, Security Council Resolution 955, UN SCOR, 49th sess., 3,453rd mtg., UN Doc. S/RES/955 (1994), available at http://www1.umn.edu/humanrts/peace/docs/scres955.html.
51. See Henry Kissinger, "The Pitfalls of Universal Jurisdiction," *Foreign Affairs,* July/August 2001, 86.
52. This is not to say that such an indictment requires an international court. See *Regina v. Bow St. Metro.,* Stipendiary Magistrate, *Ex parte Pinochet Ugarte,* [2000] 1 A.C. [Advisory Circular] 61 (H.L. [House of Lords] 1998), reprinted in 37 I.L.M. 1302 (1998), vacated by *Regina v. Bow St. Metro.,* Stipendiary Magistrate, *Ex parte Pinochet Ugarte* (no. 2), [2000] 1 A.C. 119 (H.L. 1999), reprinted in 38 I.L.M. 430 (1999); *Regina v. Bow St. Metro.* Stipendiary Magistrate, *Ex parte Pinochet Ugarte* (no. 3), [2000] 1 A.C. 147 (1999).
53. See, e.g., American Servicemembers' Protection Act.