2005

Guantanamo, Rasul, and the Twilight of Law

Mark A. Drumbl
Washington and Lee University School of Law, drumblm@wlu.edu

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*Mark A. Drumbl**

TABLE OF CONTENTS

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* Associate Professor of Law and Ethan Allen Faculty Fellow, School of Law, Washington & Lee University; B.A., 1989, M.A., 1992, McGill University; J.D., 1994, University of Toronto; LL.M., 1998, J.S.D., 2002, Columbia University. Professor Drumbl has served as defense counsel in the Rwanda genocide trials, taught exiled Afghan lawyers, and participated as an amicus in litigation regarding the Combatant States Review Tribunals. His teaching and research areas include international human rights law, international criminal process, and global environmental governance. Professor Drumbl's work has been widely published in national and international books and journals, and he was recently selected as co-winner of the Association of American Law Schools' 2005 National Scholarly Papers Competition for a newly published article. *See* Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539 (2005). This Article is a modified version of the public address delivered by Professor Drumbl at Drake University Law School's 2005 Constitutional Law Symposium.

I. INTRODUCTION

In *Rasul v. Bush*,[1] the Supreme Court held that federal district courts have jurisdiction to consider challenges under the federal habeas corpus statute to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated in the United States military base at Guantánamo Bay, Cuba.[2] At the time of this writing, roughly 550 foreign nationals remain detained at Guantánamo.[3] These individuals essentially have been held for over three years without having faced formal or public legal process. Some observers opine that the detentions, as well as the interrogation methods deployed against the detainees, run afoul of international humanitarian law and international human rights law;[4] there are allegations of torture and abuse.[5] That said, "recent media reports indicate that the [Department of Defense] intends to release or transfer

1. Rasul v. Bush, 124 S. Ct. 2686 (2004). This litigation involved two separate cases that were previously consolidated (*Al Odah v. United States*, involving twelve Kuwaiti nationals, and *Rasul v. Bush*, involving two British and two Australian nationals). *Id.* n.1. The two British nationals were released from U.S. custody prior to the Court's issuing its opinion. David L. Sloss, Case Comment, Rasul v. Bush, 98 AM. J. INT'L. L. 788, 788 n.6 (2004).

2. *See* Rasul v. Bush, 124 S. Ct. at 2698 (discussing 28 U.S.C. § 2241 (2000)).

3. Khalid v. Bush, 355 F. Supp. 2d 311, 315 (D.D.C. 2005).

4. *E.g.*, Diane Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT'L L. 263, 319-45 (2004); Mark A. Drumbl, *Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C. L. REV. 1, 9-10 (2002); *see also* Dave Moniz, *U.S. Missed Chances to Stop Prison Abuses*, USA TODAY, May 18, 2004, at 4A (reporting that in May 2004, "eight high-ranking military lawyers voiced concerns to Pentagon officials and the New York State Bar Association that new interrogation policies developed after the Sept[ember] 11 attacks could lead to prisoner abuses" and that these policies "might 'reverse 50 years of a proud tradition of compliance with the Geneva Conventions'") (quoting Scott Horton, former head of the New York Bar's committee on international law).

5. Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantánamo*, N.Y. TIMES, Nov. 30, 2004, at A1 (reporting that the International Committee of the Red Cross has charged that the United States military has "used psychological and sometimes physical coercion 'tantamount to torture' on prisoners at Guantánamo"); Neil A. Lewis, *Fresh Details Emerge on Harsh Methods at Guantanamo*, N.Y. TIMES, Jan. 1, 2005, at A11 ("[I]nmates [have been] shackled for hours and left to soil themselves while exposed to blaring music or the insistent meowing of a cat food commercial. In addition, some may have been forcibly given enemas as punishment.").

hundreds in the near future."[6] It is unclear where these supposedly dangerous fighters shall be released or to whom they shall be transferred, thereby creating the very real possibility that they may continue to face indefinite detention and inhumane treatment at the hands of their new captors.

The *Rasul* decision provides precious little in the way of specific guidance. In fact, much of the scope, nature, content, and governing law of those challenges for which *Rasul* found jurisdiction are currently being defined in a second round of litigation working its way through the federal courts. *Rasul* was issued the same day as *Hamdi v. Rumsfeld*,[7] a case involving the rights of United States citizens detained as enemy combatants in United States territory. In *Hamdi*, the Supreme Court upheld the detention as enemy combatants of persons part of or supporting forces hostile to the United States or coalition partners in Afghanistan who engaged in an armed conflict against the United States, but then ruled that the Constitution demands that a United States citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.[8] These two cases have been both criticized and lauded for fettering executive discretion in a time of war.[9]

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6. Khalid v. Bush, 355 F. Supp. 2d at 315-16.

7. Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) (plurality opinion).

8. *Id.* at 2643, 2648-50. The *Hamdi* case, however, "leaves open at least as many questions as it answers." Jenny S. Martinez, Case Note, Hamdi v. Rumsfeld, 98 AM. J. INT'L L. 782, 785 (2004) (noting among these unanswered questions the following: the definition of enemy combatant; "how long the government can hold a detainee" prior to a hearing or access to counsel; what that hearing should look like; and other uncertainties arising from the decision's "ambiguous mingling of domestic and international law"). In the lead-up to *Hamdi*, the White House had claimed that it had the unilateral ability to declare a United States citizen an enemy combatant and then deny that individual access to any form of legal process to contest the indefinite detention that might result. *See* Anthony Lewis, Editorial, *A President Beyond the Law*, N.Y. TIMES, May 7, 2004, at A31 (noting the Bush Administration's classification of prisoners held in Guantánamo as "unlawful combatants," and thus outside the protections guaranteed by the Geneva Conventions).

9. *See, e.g.*, Thomas M. Franck, Editorial Comment, *Criminals, Combatants, or What? An Examination of the Role of Law in Responding to the Threat of Terror*, 98 AM. J. INT'L L. 686, 687-88 (2004) (praising the Court's decisions in Guantánamo cases as subjecting the president "to checks and balances vested by the Constitution in the Congress and the courts"); Stephen J. Schulhofer, *Checks and Balances in Wartime: American, British and Israeli Experiences*, 102 MICH. L. REV. 1906, 1910-12 (2004) (discussing the government's criticisms of efforts to hinder the discretion of executive branch officials).

This Article explores what has happened since the *Rasul* decision. It analyzes the operation of Combatant Status Review Tribunals (CSRTs) to determine the status of detainees as lawful soldiers or unlawful enemy combatants.[10] Furthermore, this Article discusses challenges to the use of military commissions to prosecute and punish those detainees charged with war crimes. Certainly, these two issues are connected insofar as the challenges to the military commissions involve underlying claims as to the unlawfulness of CSRTs. What is more, the United States very recently has begun a new set of proceedings at Guantánamo called Administrative Review Boards.[11] The goal of these proceedings is to ascertain whether a detainee remains a threat and, if not, whether release is in order.[12] This is a different determination than that made by CSRT proceedings, and in fact operates after a CSRT determination has been made. Administrative Review Board proceedings are not slated to be completed before the end of 2005.[13] That said, the use of Administrative Review Boards raises concerns very similar to CSRTs and, to this end, certainly connects to broader concerns regarding the role of law in the struggle against terrorism. Guantánamo is a stark metaphor of the perceptions among certain influential actors of the crimped role law should play in the war on terror[14] and, in turn, requires inquiry into whether there really is a trade-off between rule of law and national security or, rather, whether the two can be synergistic.

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10. *See* Memorandum from Paul Wolfowitz, Deputy Secretary of Defense, to the Secretary of the Navy, Order Establishing Combatant Status Review Tribunals (July 7, 2004), *available at* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf (establishing and describing the CSRTs to be used to determine the status of those held at Guantánamo).

11. The Administrative Review Boards consist of three military officers. Neil A. Lewis, *Guantánamo Detainees Make Their Case*, N.Y. TIMES, Mar. 24, 2005, at A21. They conduct hearings at which the defendant detainees, who are not entitled to lawyers, can dispute accusations that allege they were members of either al Qaeda or the Taliban. Most of the evidence is classified and unknown to the detainee. *Id.* In order to be released, the detainees "must persuade the board that no matter their history, they are not a threat to the United States or its allies." *Id.* As with CSRTs (in fact, in conjunction therewith), the United States argues that the Administrative Review Boards satisfy the *Rasul* obligations.

12. *Id.*

13. For this reason, this Article will not discuss Administrative Review Board proceedings in detail.

14. Richard J. Goldstone, *International Human Rights and Criminal Justice in the First Decade of the 21st Century*, 11 HUM. RTS. BRIEF 3, 4-5 (2004).

II. DEVELOPMENTS SINCE *RASUL*

A. *Combatant Status Review Tribunals*

The mandate of CSRTs is to review the available factual record for each Guantánamo detainee in order to determine whether that detainee qualifies as an enemy combatant.[15] Reviews of 558 detainees were conducted: of these, thirty-three "detainees were deemed to have been improperly labeled enemy combatants," and five of these thirty-three have been released.[16] The apparent purpose of CSRTs is to implement the *Rasul* obligation of offering some sort of hearing to each detainee.[17] A number of detainees deemed by a CSRT to be enemy combatants have since challenged the lawfulness of their ongoing detention in federal court under the habeas statute.[18] This litigation has led to splintered results.

On January 31, 2005, in *In re Guantanamo Detainee Cases*,[19] Judge Joyce Hens Green of the United States District Court for the District of Columbia rejected the government's motion to dismiss the habeas petitions initiated by Guantánamo detainees in the federal courts.[20] (All habeas petitions had previously been transferred to the District Court in the District of Columbia.[21]) Judge Green ruled that Guantánamo detainees were entitled to have the federal courts examine the lawfulness of their ongoing detentions and also that CSRTs were unconstitutional because they denied the detainees' fundamental right to due process under the Fifth Amendment.[22] Judge Green interpreted *Rasul* in conjunction with other

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15. John Mintz, *Pentagon Sets Hearings for 595 Detainees*, WASH. POST, July 8, 2004, at A8.

16. Lewis, *supra* note 11.

17. *See* Neil A. Lewis, *Fate of Guantanamo Detainees Is Debated in Federal Court*, N.Y. TIMES, Dec. 2, 2004, at A36 (reporting that the government's principle argument in litigation challenging CSRTs was that "the military had satisfied the Supreme Court's ruling by holding hearings at the naval base in which each inmate was given a chance to argue he was not properly deemed an enemy combatant").

18. 28 U.S.C. § 2255 (2000).

19. *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005).

20. *Id.* at 445.

21. *See* Gherebi v. Bush, 374 F.3d 727, 739 (9th Cir. 2004) ("It appears to us that the proper venue for this proceeding is in the District of Columbia.") (citations omitted).

22. *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d at 481 (allowing Guantánamo detainees to employ the federal courts to examine the lawfulness of their detentions and declaring CSRTs unconstitutional); *see also* Neil A. Lewis, *Judge Extends Legal Rights for Guantánamo Detainees*, N.Y. TIMES, Feb. 1, 2005, at A12

precedent to require the recognition that the detainees at Guantánamo possess enforceable constitutional rights.[23] She turned to the standard set forth by the plurality opinion in *Hamdi* (although *Hamdi* applied only to United States citizen enemy combatants) and concluded that CSRTs fell short of this standard, which required that the detainee "'receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker.'"[24] Viewed through the *Hamdi* lens, CSRTs were found to fail constitutional due process requirements owing, inter alia, to: (1) the inability of detainees to see the material evidence that served as the basis for the affirmation of their enemy combatant status and (2) to have lawyers (although Judge Green noted that the detainees have access to a military officer who serves as a "Personal Representative").[25] Judge Green also expressed concern over the definition of "enemy combatant" found in CSRTs, which was broader than that in *Hamdi*, which she found to be vague.[26]

Moreover, in taking note of allegations of torture at Guantánamo, Judge Green concluded that due process prohibits the government's use of statements involuntarily obtained through torture.[27] She held "that the CSRTs did not sufficiently consider whether the evidence upon which the tribunal relied in making its 'enemy combatant' determinations was coerced from the detainees."[28] Along with criticizing the way CSRTs handled accusations of torture, she found fault with the fact that CSRTs would not exclude such evidence.[29]

(discussing the decision by Judge Green and the tension that resulted between the ruling in *In re Guantanamo Detainee Cases* and United States District Court Judge Richard J. Leon's ruling in another Guantánamo detainee case, *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005)).

23. *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d at 454, 464.

24. *Id.* at 467 (quoting Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2647 (2004) (plurality opinion)).

25. *Id.* at 450, 468, 472.

26. *Id.* at 468, 474-78. The order creating CSRTs was the first formal document to officially define "enemy combatant," and did so as follows:

> [T]he term "enemy combatant" shall mean any individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

Id. at 450 (quoting Memorandum from Paul Wolfowitz, *supra* note 10, at 1).

27. *Id.* at 473.

28. *Id.*

29. *Id.* at 472-74. The government maintained that the proceeds of torture,

In addition to the constitutional claims, Judge Green held that certain detainees, namely those held because they were Taliban fighters or individuals associated with both the Taliban and al Qaeda, stated valid claims under the Third Geneva Convention.[30] She found that CSRTs determined the status of such individuals (as prisoners of war (POWs) or as unlawful combatants) in a manner that did not conform to the requirements set out by the Third Geneva Convention.[31] Judge Green held that the Geneva Conventions do not apply to al Qaeda since it is "not a 'High Contracting Party' to the Conventions, and thus individuals detained on the ground that they are members of that terrorist organization are not entitled to the protections of the treaties."[32] Moreover, I would add that it seems the definition of enemy combatant specified in the Order creating CSRTs, which treats Taliban fighters similarly to al Qaeda fighters, presumptively falls short of the Third Geneva Convention requirements. Judge Green concluded that the Geneva Conventions were self-executing since they

> were written to protect individuals, because the Executive Branch of [the United States had] implemented [them] for fifty years without questioning the absence of implementing legislation, because Congress clearly understood that the Conventions did not require implementing legislation except in a few specific areas, and because nothing in the Third Geneva Convention itself manifests the contracting parties' intention that it not become effective as domestic law without the enactment of implementing legislation . . . .[33]

Judge Green's decision conflicts with *Khalid v. Bush*,[34] an earlier decision from the same District Court, in which Judge Richard J. Leon ruled that the Guantánamo detainees could not be granted writs of habeas corpus to have their detentions examined in federal court.[35] Judge Leon concluded that nonresident aliens captured and detained outside the

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namely evidence obtained pursuant to torturing a detainee, is properly admissible before a review panel in determining the status of the detainee. *See* Michael J. Sniffen, *Evidence Gained by Torture Can Be Used By Military*, CINCINNATI POST, Dec. 3, 2004, at 4A.

30. *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d at 445, 480.

31. *Id.* at 478-80.

32. *Id.* at 479.

33. *Id.* (quoting Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 165 (D.D.C. 2004)).

34. Khalid v. Bush, 355 F. Supp. 2d 311 (D.D.C. 2005).

35. *Id.* at 314.

borders of the United States did not have constitutional rights[36] and that the President had broad "war power[s]" to "capture and detain our enemies,"[37] and that the executive branch and legislature ought to be given deference in terms of the judiciary's assessment of claims brought by nonresident aliens during wartime.[38] Judge Leon also noted, in stark contrast to Judge Green, "that the CSRTs provide each petitioner with much of the same process afforded by Article 5 of the Geneva Conventions" and did not view this process as falling short of the *Hamdi* requirement.[39] Essentially, Judge Leon's comments on this point were dicta insofar as he had earlier found that the claimants were not entitled to any constitutional rights.[40] He did not assess any claims under the Geneva Conventions.

The contrasting—and seemingly conflicting—approaches of *In re Guantanamo Detainee Cases* and *Khalid* suggest that the District of Columbia Circuit Court of Appeals will be called upon to reconcile these differences and perhaps ultimately—and once again—the Supreme Court.[41] This reconciliation will involve ascertaining what substantive law applies in evaluating the status of the detainees, in particular whether the United States Constitution and/or the Geneva Conventions are the appropriate substantive law. In this regard, the line of cases involving CSRTs merges with litigation involving the prosecution of a select number of foreign national detainees at Guantánamo by military commissions,[42] to which this Article now turns, in which one District Court judge has held that the Third Geneva Convention is the applicable substantive law.[43]

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36. *Id.* at 320-23.

37. *Id.* at 319.

38. *Id.* at 329-30.

39. *Id.* at 323 n.16.

40. *Id.* at 321.

41. The need for some reconciliation may be made more urgent by public reports that, in one case, a CSRT ignored exculpatory information that "dominate[d]" the file of an individual it had determined to be an unlawful enemy combatant. Carol D. Leonnig, *Panel Ignored Evidence on Detainee*, WASH. POST, Mar. 27, 2005, at A1.

42. *See generally* Scott Higham, *Bin Laden Aide Is Charged at First Tribunal*, WASH. POST, Aug. 25, 2004, at A1 (chronicling the initial phase of the trial of Salim Ahmed Hamdan, an accused al Qaeda collaborator, before a military tribunal in Guantánamo, the first such use of a military tribunal since World War II).

43. *See* Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 160-65 (D.D.C. 2004). For another argument that the Geneva Conventions in fact provide the appropriate legal rules, see Sloss, *supra* note 1, at 793-98.

B. *Military Commissions*

On November 13, 2001, President George W. Bush signed an order creating military commissions to try non-U.S. citizens accused of terrorism and war crimes related charges.[44] A detainee becomes subject to the jurisdiction of a military commission upon a determination to that effect by the President.[45] Rules regarding the operation of the commissions were issued in March 2002.[46] Commissions are staffed by military officers.[47] The Rules provide limited appeal rights within the military system (although some civilian lawyers are involved as judges),[48] but there is no appeal to an independent court (Article III or otherwise) and the President has final review of guilty verdicts.[49] The Rules provide that a sentence shall be imposed "that is appropriate to the offense."[50] Pretrial proceedings have begun against certain detainees but remain mired in controversy and fraught by numerous challenges.[51] No actual trial has been concluded.

In *Hamdan v. Rumsfeld*,[52] a case that worked its way to the federal courts on the basis of a habeas petition, United States District Judge James Robertson of the United States District Court for the District of Columbia ruled that a detainee could be charged with war crimes only through the court-martial procedure contemplated by the Uniform Code of Military Justice unless that detainee had properly been determined to be an enemy combatant.[53] The government has appealed this decision, for which oral argument was held in early April 2005 before the Court of Appeals of the District of Columbia.[54] Hamdan, a Yemeni citizen seized in Afghanistan,

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44. *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

45. *Id.* at 57,834, § 2(a).

46. *See* DEP'T OF DEFENSE, MILITARY COMMISSION ORDER NO. 1 (Mar. 21, 2002), *available at* http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf.

47. *Id.* at 3, § 4(A)(3).

48. *Id.* at 13-14, § 6(H)(4)-(6).

49. *Id.* at 14, § 6(H)(6).

50. *Id.* at 13, § 6(G).

51. *See* Neil A. Lewis, *Guantánamo Tribunal Process in Turmoil*, N.Y. TIMES, Sept. 26, 2004, at N29 (noting challenges such as panel members possibly having personal conflicts, which would make them unsuitable to serve on the panel).

52. Hamdan v. Rumsfeld, 344 F. Supp. 2d 152 (D.D.C. 2004), *cert. denied*, 125 S. Ct. 972 (2005).

53. *Id.* at 173.

54. The opinion has not yet issued. *See* Hamdan v. Rumsfeld, No. 04-5393 (D.C. Cir. filed Mar. 2, 2005) (rescheduling oral argument).

served as a driver for Osama bin Laden.[55] Since he had not been properly determined to be an enemy combatant, it became improper to prosecute him through the military commissions, and the proceedings that had been initiated against him were halted.[56]

Like Judge Green in *In re Guantanamo Detainee Cases*, Judge Robertson held that the Geneva Conventions were applicable and self-executing.[57] Under the Third Geneva Convention, a detainee is presumed to be a POW unless a contrary determination is made by a "competent tribunal" as per Article 5 of the Convention.[58] POWs (as well as individuals whose POW status is in doubt) charged with war crimes are entitled under Article 102 of the Convention to the same process that the soldiers of the detaining power are ordinarily entitled to,[59] which in this case is the process of the Uniform Code of Military Justice.[60] Judge Robertson held that the major shortfall between the military commissions and courts-martial lay in the commissions' denying combatants a fair opportunity to respond to charges because of the classified nature of some of the evidence, the withholding of that evidence from combatants, and the exclusion of the combatants from commission sessions.[61]

Hamdan demonstrates the importance of the initial determination of unlawful enemy combatancy. Judge Robertson found that the CSRT in Hamdan's case did not determine the relevant question, namely whether Hamdan was a POW under the Geneva Convention.[62] He approached the question somewhat differently than Judge Green, but echoed the conclusion: CSRTs were inadequate.[63]

As a result of *Hamdan*, the military commission process, initially designed to accelerate the prosecution of terrorism and war crimes, has

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55. Higham, *supra* note 42.

56. Hamdan v. Rumsfeld, 344 F. Supp. 2d at 173.

57. *Id.* at 165.

58. Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, Art. 5, 6 U.S.T. 3316, 3322, 3324; 75 U.N.T.S. 135, 140, 142.

59. *Id.* art. 103, 6 U.S.T. at 3394, 75 U.N.T.S. at 212.

60. United States soldiers convicted of abusing Iraqi prisoners at Abu Ghraib were subject to this process.

61. Hamdan v. Rumsfeld, 344 F. Supp. 2d at 167-68. Another difference between the commissions and the courts-martial, namely the existence of rights of appeal that could extend to the independent federal judiciary in the case of the latter but only to the President in the case of the former, was not of much concern to Judge Robertson. *Id.* at 167.

62. *Id.* at 162.

63. *Id.*

stalled. *Hamdan* does not mandate that detentions of unlawful enemy combatants at Guantánamo Bay are unlawful per se,[64] but rather that there is a need for a competent tribunal to oust the presumption of POW status in individual cases and, unless and until such a determination is made, certain aspects of the military commission process are unlawful under the governing law, namely the Geneva Conventions, since they deviate from the procedure of the Uniform Code of Military Justice.[65] In a case where a competent tribunal properly determined, under the language of the Geneva Convention, that an individual detainee was in fact not a POW, then *Hamdan* suggests it could be permissible for that individual to face war crimes charges in the manner contemplated by the military commissions.[66] Similarly, Judge Green held that the concern lay with how individual eligibility for protected status had been determined, not with the question whether members of al Qaeda were collectively entitled to POW status (for her, al Qaeda fighters are not entitled to that status, whereas Taliban soldiers would be).[67]

In sum, it appears that the United States government's circumvention of the plain reading of the Geneva Conventions, undertaken to promote expediency and security over legalism, may have resulted in neither

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64. *See id.* at 173 (concluding that "unless and until a competent tribunal determines that Hamdan is not entitled to POW status, he may be tried for the offenses with which he is charged only by court-martial under the Uniform Code of Military Justice; . . . that, unless and until the Military Commission's rule permitting Hamdan's exclusion from commission sessions and the withholding of evidence from him is amended so that it is consistent with and not contrary to [the Uniform Code of Military Justice], Hamdan's trial before the Military Commission would be unlawful; and . . . that Hamdan must be released from the pre-Commission detention wing . . . and returned to the general population of detainees, unless some other reason other than the pending charges against him requires different treatment").

65. *See id.* at 162 (holding that Hamdan is entitled to full protection of the Third Geneva Convention unless an Article 5 "competent tribunal" determines that he is not a prisoner of war under Article 4 of the Convention).

66. *See id.* (holding Hamdan "may not be tried for the war crimes he is charged with except by a court-martial duly convened under the Uniform Code of Military Justice," and not a military commission).

67. *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 479 (D.D.C. 2005). Judge Green also stated:

> It may well turn out that after the detainee is given a fair opportunity to challenge his detention in a *habeas* proceeding, the legality of his detention as an "enemy combatant" will be upheld and he will continue to be held at Guantanamo Bay until the end of the war on terrorism or until the government determines he no longer poses a threat to U.S. security.

Id. at 477.

expediency, security, nor respect for law. Although there has been some discussion of bringing the military commissions more in line with the court-martial process, this discussion has encountered considerable opposition within the administration.[68] What is more, in oral argument before the Court of Appeals for the District of Columbia, the Department of Justice's position was that "courts should give the President broad latitude to wage war against terrorism," and that this war should be waged "without intervention from U.S. courts."[69] The peculiar paradox of the government's position emerges from comments made in the wake of the *Hamdan* decision. For example, a Justice Department spokesperson was quoted as critiquing *Hamdan* for its conferral of protected status under the Geneva Conventions on terrorists.[70] This critique, however, fails to recognize the irony that it was a conscious decision by the Bush Administration to invoke the war paradigm against terrorism instead of, for example, the criminal law paradigm or a countermeasures paradigm. In consciously doing so, the administration ran the risk of absurdly glorifying terrorism as armed conflict and terrorists as "warriors," and ineluctably leading to the assumption by the detaining power of at least some obligations under the law of war. Furthermore, it was the decision by the government to summarily deny Geneva process to all detainees that led the courts to enter the fray. More broadly, this gives rise to a deeply inconsistent position which "invokes the law of war as a source of legal authority for the government to maintain custody over the Guantánamo detainees, while simultaneously denying that the detainees have any legal rights under the Geneva Conventions."[71] David L. Sloss rightly determines this position to be "untenable."[72] Even less tenable is that, notwithstanding the directives in *Rasul* and *Hamdi*, reports emerged in January 2005 of the administration's plan to indefinitely imprison hundreds of suspected terrorists in United States custody "whom [officials] do not want to set free or turn over to courts in the United States or other countries,"[73] including those unlikely to ever go through a military tribunal for lack of evidence.

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68. Carol D. Leonnig, *Justice Dept. Defends Value of Military Trials*, WASH. POST, Apr. 8, 2005, at A3; Tim Golden, *U.S. Is Examining Plan to Bolster Detainee Rights*, N.Y. TIMES, Mar. 27, 2005, at A1.

69. Leonnig, *supra* note 68.

70. Neil A. Lewis, *U.S. Judge Halts War-Crime Trial at Guantánamo*, N.Y. TIMES, Nov. 9, 2004, at A1.

71. Sloss, *supra* note 1, at 797-98 (footnote omitted).

72. *Id.* at 798.

73. Dana Priest, *Long-Term Plan Sought for Terror Suspects*, WASH. POST, Jan. 2, 2005, at A1.

III. THE TWILIGHT OF LAW

The administration's ongoing approach to Guantánamo, CSRTs, the Administrative Review Boards, and the military commissions—and grudging responses to judicial intervention related thereto—is wholly consistent with broader policy initiatives that disaggregate domestic and international law from the conduct of the war on terror. When taken together, these initiatives reflect an understanding of law as meddlesome and irritating, sometimes cloying and annoying, and to be applied selectively.[74] From this perspective, too much law—namely, too deep an entanglement in the web of legalism and legalese—is dangerous insofar as it threatens United States national security interests by bogging down the rapidity and effectiveness of counterterrorist initiatives. I posit that this understanding has gained ascendancy within the executive branch, yet not among uniformed lawyers. This ascendancy has prompted a rather sudden twilight of law, with only the occasional intervention by the judiciary stalling a sunset. These developments operate not only in the United States but also, to varying degrees, within a number of other influential governments, including those of the United Kingdom and Russian Federation.[75]

With regard to American policy, additional examples of these broader initiatives include the use of renditions and ghost detainees, attempts to shield the executive branch from accountability, and legal advisers' memoranda narrowly—and in some cases bizarrely—interpreting the language of the Geneva Conventions and Convention Against Torture. I explore each of these examples in turn, and the emerging skepticism

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74. *See* Tim Golden, *After Terror, A Secret Rewriting of Military Law*, N.Y. TIMES, Oct. 24, 2004, at A1 (noting the Bush Administration's aggressive approach to terrorism law, which "saw no reason [why] they could not adapt rules" used in past American wars, and instead apply "prevailing standards of military justice"); *see also* Neil A. Lewis & Eric Schmitt, *Lawyers Decided Bans on Torture Didn't Bind Bush*, N.Y. TIMES, June 8, 2004, at A1 (concluding that "after the Sept[ember] 11 terrorist attacks the administration's lawyers were set to work to find legal arguments to avoid restrictions imposed by international and American law").

75. Like their United States counterparts, courts in the United Kingdom have become sites for dissensus and contestation. *See, e.g.*, G. v. Sec'y of State for the Home Dep't, [2004] 1 W.L.R. 1349 (C.A.) (permitting release on bail of a suspected international terrorist in light of a finding that his mental illness was created by his extended indefinite detention); Lizette Alvarez, *British Court Says Detentions Violate Rights*, N.Y. TIMES, Dec. 17, 2004, at A1 (reporting that the House of Lords has ruled that Section 23 of the 2001 United Kingdom Anti-Terrorism, Crime and Security Act, which permitted the detention of foreign terror suspects indefinitely without charge or trial, is incompatible with the European Convention on Human Rights).

among the nation's civilian (but not uniformed) leadership towards the law generally and international humanitarian and human rights law specifically.

A. *Use of Renditions and Ghost Detainees*

"One approach used by the CIA has been to transfer captives it picks up abroad to third countries willing to hold them indefinitely and without public proceedings. The transfers, called 'renditions,' depend on arrangements between the United States and other countries, such as Egypt, Jordan and Afghanistan," with dubious human rights records.[76] The rendition process effectively precludes those individuals picked up from going to court or remaining free. Because of the secret nature of renditions, the receiving governments do not have to provide public justifications, as is required in generally accepted extradition practice. Moreover, although the Iraq conflict is a traditional state-to-state conflict to which the Geneva Conventions unequivocally apply, there has been a concerted effort by the United States to carve out exceptions to the Conventions in terms of their relevance to this theater of operations. For example, a relatively recent Bush Administration legal opinion concluded that some non-Iraqi prisoners captured by American forces in Iraq are not entitled to the protections of the Geneva Conventions and can be moved outside Iraq for interrogation purposes.[77] There is also evidence of a practice of hiding unregistered detainees ("ghost detainees") in Iraq[78] "out of frustration with the excessive legalism . . . [this practice] operate[d] outside of legal limits."[79]

B. *Shielding the Executive Branch from Judicial Review and Accountability*

Recently confirmed Attorney General Alberto Gonzales previously advised the White House that one of the reasons to declare that Taliban and al Qaeda detainees were not covered by the Geneva Conventions was that this "substantially reduces" the threat of criminal prosecution for

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76. Priest, *supra* note 73.

77. Douglas Jehl, *U.S. Action Bars Rights of Some Captured in Iraq*, N.Y. TIMES, Oct. 26, 2004, at A1. For David Luban, this is "a likely grave breach of the Geneva Conventions." David J. Luban, *Liberalism and the Unpleasant Question of Torture*, 91 VA. L. REV. (forthcoming Oct. 2005) (manuscript at 60, on file with the author).

78. *See* Josh White, *Army Documents Shed Light on CIA 'Ghosting'*, WASH. POST, Mar. 24, 2005, at A15 (detailing the process whereby detainees are kept without documentation of their detention).

79. Luban, *supra* note 77, at 63-64.

United States officials for war crimes (defined to include any grave breach of the Geneva Conventions) under domestic United States law.[80] Secretary of State Colin Powell had sternly disagreed with this recommendation, igniting a serious internal debate.[81] The President responded by stating that Taliban detainees were entitled to the coverage of the Geneva Conventions, whereas al Qaeda fighters were not; however, he then denied actual prisoner-of-war status to all detainees.[82] He also asserted that, in those instances where it was applicable, the Geneva Conventions would only be followed to the extent appropriate and consistent with military necessity.[83] These assertions set the rules of the game such that personnel may well have felt encouraged (or at least entitled) to use interrogation methods that were more coercive in nature than those habitually permitted. In a different vein, American officials have stated that the administration "has decided to take the unusual step of bestowing on its own troops and personnel immunity from prosecution by Iraqi courts for killing Iraqis or destroying local property after the occupation ends and political power is transferred to an interim Iraqi government."[84]

C. *Bold Reinterpretations of the Geneva Conventions and Convention Against Torture*

The administration has categorized terrorist attacks as armed attacks instead of criminal attacks,[85] but has then cast important aspects of

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80. Memorandum from Alberto Gonzales, Attorney General of the United States, to President George W. Bush, Application of the Geneva Conventions to the Conflict With Al Qaeda and the Taliban 2 (Jan. 25, 2002), *available at* http://news.lp.findlaw.com/hdocs/docs/ torture/gnzls12502mem2gwb.html; John Barry et al., *The Roots of Torture*, NEWSWEEK (May 24, 2004), *at* http://msnbc.msn.com/id/4989481/site/newsweek; *see also* Michael Isikoff, *Memos Reveal War Crimes Warnings*, NEWSWEEK (May 17, 2004), *at* http://msnbc.msn.com/id/4999734/site/newsweek (reporting that "internal memos show that administration lawyers were privately concerned that they could be tried for war crimes themselves based on actions the administration [was] taking").

81. Memorandum from Colin L. Powell, Secretary of State, to Counsel to President George W. Bush, Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan (Jan. 26, 2002) (on file with the author), *available at* http://www.ia-forum.org/files/XGCZLN.pdf.

82. Paul Koring, *No PoWs Being Held in Cuba, Bush Says*, GLOBE & MAIL (Toronto), Feb. 8, 2002, at A12; Katherine Seelye, *In Shift, Bush Says Geneva Rules Fit Taliban Captives*, N.Y. TIMES, Feb. 8, 2002, at A1.

83. Koring, *supra* note 82; Seelye, *supra* note 82.

84. Robin Wright, *U.S. Immunity in Iraq Will Go Beyond June 30*, WASH. POST, June 24, 2004, at A1.

85. *See, e.g.*, Lewis, *supra* note 70 (quoting a Department of Justice

international humanitarian law—which customarily governs the conduct of belligerents in armed conflict—as "quaint" and "obsolete."[86] Skepticism about the role of law also animated the now disavowed August 1, 2002 torture memorandum, as well as its ancestors and progeny.[87] There is cause to believe that this documented legal advice, along with other deliberate decisions made at senior levels to circumscribe the role of law, affected the degree of respect for law present in the Abu Ghraib prison[88] and, therefore, may well have contoured the sadistic environment and abusive conduct

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spokesman as stating that the *Hamdan* decision "put terrorism on the same legal footing as legitimate methods of waging war").

86. Pete Yost, *Did White House Lawyer Set Legal Basis for Abuse?*, COM. APPEAL (Memphis), May 17, 2004, at A7 (reporting correspondence from White House Counsel Alberto Gonzales to President Bush in which Mr. Gonzales stated that the "'new paradigm'" occasioned by the fight against terrorism "'renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some if its provisions'") (quoting Memorandum from Alberto Gonzales, *supra* note 80, at 2).

87. *See* WORKING GROUP REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY, AND OPERATIONAL CONSIDERATIONS 21 (Mar. 6, 2003) (concluding that "18 U.S.C. § 2340A (prohibition against torture) must be construed as inapplicable to interrogations undertake pursuant to [the President's] Commander-in-Chief authority"), *available at* http://online.wsj.com/public/resources/documents/military_0604.pdf (classified draft made publicly available by *The Wall Street Journal*). The Working Group Report drew heavily from—and at times reproduced—an August 1, 2002, memorandum that argued that the President's wartime powers superceded antitorture laws and treaties. Dana Priest et al., *Justice Department Memo Says Torture 'May Be Justified'*, WASH. POST, June 13, 2004, at A3 (referring to a memorandum signed by former Assistant Attorney General Jay Bybee, subsequently appointed as a judge on the United States Court of Appeals for the Ninth Circuit). This memorandum, in turn, derives from earlier documentation. *See, e.g.*, Memorandum from John Yoo, Deputy Assistant Attorney General, and Robert J. Delahenty, Special Counsel for Department of Justice, to William J. Haynes, II, General Counsel, United States Department of Defense, Application of Treaties and Laws to Al Qaeda and Taliban Detainees (Jan. 9, 2002), *available at* http://www.msnbc.msn.com/id/5025040/site/newsweek (titling itself the "Application of Treaties and Laws to Al Qaeda and Taliban Detainees"). The August 1, 2002 memorandum generated harsh criticism insofar as it appeared to justify the use of torture (stopping just short of death) in the war on terror and to immunize personnel committing torture from legal process.

88. Scott Higham & Joe Stephens, *New Details of Prison Abuse Emerge*, WASH. POST, May 21, 2004, at A1 (reporting investigations of allegations at Abu Ghraib of savage beatings, prisoners being forced to retrieve food from toilets, sexual molestation, force-feeding pork and liquor to Muslim prisoners, forcing prisoners to bark like dogs, riding prisoners like animals, forced masturbation, rape, and sodomy). For a chronology of the allegations at Abu Ghraib, see Avril O'Reilly-Healy, Abu Ghraib: The Case for Command Responsibility 4-5, 13-26 (Dec. 2004) (unpublished manuscript, on file with the author).

there.[89] Both independent and Army inquiries into the prison abuses suggest that senior officials, while not personally culpable, are to be faulted for failing to exercise proper oversight.[90] "A confidential report to Army generals in Iraq in December 2003" warned of ongoing detainee abuse in and beyond Abu Ghraib, which suggests that senior officials were aware of the problems early on.[91]

Moreover, there is evidence of the pervasive and long-term nature of abuses by United States forces throughout Iraq, Afghanistan, and Guantánamo,[92] further suggesting that the "few bad apples" theory[93] might

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89. *See* Isikoff, *supra* note 80 ("Administration critics have charged that key legal decisions made in the months after September 11, 2001, including the White House's February 2002 declaration not to grant any Al Qaeda and Taliban fighters prisoner of war status under the Geneva Convention, laid the groundwork for the interrogation abuses that have recently been revealed in the Abu Ghraib prison in Iraq.").

90. Bradley Graham & Josh White, *Top Pentagon Leaders Faulted in Prison Abuse*, WASH. POST, Aug. 25, 2004, at A1 (discussing the Schlesinger Report, a report published by an independent panel describing conditions at Abu Ghraib); Thom Shanker & Kate Zernike, *Abuse Inquiry Faults Officers on Leadership*, N.Y. TIMES, Aug. 19, 2004, at A12 (discussing the Fay Report, a report authored by Major General George R. Fay detailing the conclusions of a "high level Army inquiry"); *see also* R. Jeffrey Smith, *Documents Helped Sow Abuse, Army Report Finds*, WASH. POST, Aug. 30, 2004, at A1 (discussing documents written by senior officials that Army officials now say helped sow the seeds of prison abuse in Iraq).

91. Josh White, *U.S. Generals in Iraq Were Told of Abuse Early, Inquiry Finds*, WASH. POST, Dec. 1, 2004, at A14.

92. *See* Lewis, *Fresh Details Emerge on Harsh Methods at Guantanamo*, *supra* note 5 (detailing treatment of Guantánamo prisoners condemned by the Red Cross); *see also* Dan Eggen & R. Jeffrey Smith, *FBI Agents Allege Abuse of Detainees at Guantanamo Bay*, WASH. POST, Dec. 21, 2004, at A1 (reporting the American Civil Liberty Union's allegations that "extremely aggressive interrogation techniques were more widespread at Guantanamo Bay than was acknowledged by military officials"); Carlotta Gall, *Rights Group Reports Deaths of Men Held by U.S. in Afghanistan*, N.Y. TIMES, Dec. 14, 2004, at A21 (reporting the Human Rights Watch's assertions that "the Defense Department [is] operating outside the law . . . and [is] failing to investigate abuses, including killings" involving men in custody of American forces in Afghanistan); Bob Herbert, Editorial, *Stories from the Inside*, N.Y. TIMES, Feb. 7, 2005, at A21 (describing "[t]he horror stories from the scandalous interrogation camp that the United States is operating at Guantánamo Bay, Cuba"); Thomas E. Ricks, *Detainee Abuse by Marines Is Detailed*, WASH. POST, Dec. 15, 2004, at A1 (reporting abuses of prisoners over the previous two years in a variety of units throughout Iraq as "distinct" from the abuses perpetrated by army reservists at Abu Ghraib); Eric Schmitt, *Navy Charges 3 Commandos with Beating of Prisoners*, N.Y. TIMES, Sept. 25, 2004, at A7 (reporting charges of assault with intent to cause death and serious bodily harm brought as a result of an Army investigation into the deaths of fifty-four detainees in Iraq and Afghanistan and an inquiry into activity of the Navy Seals and Navy Special

not be too factually accurate.[94] The "few bad apples" theory is the official story: namely, that a warped fringe group of individuals on the night-shift at Abu Ghraib, acting independently, inflicted the abuses. This theory has been accepted as a narrative for the military prosecutions in the Abu Ghraib cases, for which the defense that superiors in the chain of command established the conditions for violence has been rejected.[95] The evidence of longstanding and widespread abuses in a number of theaters of operation, however, suggests that this might plausibly be a situation where it was the barrel that made the apples bad or, as David Luban writes, that Abu Ghraib really is the "apple tree."[96] Furthermore, some personnel at Guantánamo expressed a belief that "they were relying on authority from senior officials in Washington to conduct aggressive interrogations."[97]

A new memorandum on December 30, 2004, replaced the August 1, 2002, torture memorandum.[98] This new memorandum flatly states that torture violates United States and international law, omits the contested conclusions that the President, as Commander-in-Chief, could supercede

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Operations Forces in Iraq).

93. T.R. Reid, *Graner Gets 10 Years for Abuse at Abu Ghraib*, WASH. POST, Jan. 16, 2005, at A1 (reporting that "President Bush has said that the prison abuse was strictly the fault of a handful of junior enlisted soldiers").

94. *See* Barton Gellman & R. Jeffrey Smith, *Report to Defense Alleged Abuse by Prison Interrogation Teams*, WASH. POST, Dec. 8, 2004, at A1 (describing the contents of documents outlining "the regular use of violence"); White, *supra* note 91 (citing a confidential report to Army generals indicating that detainee abuse was not restricted to Abu Ghraib, but instead occurred throughout Iraq).

95. Kate Zernike, *High-Ranking Officers May Face Prosecution in Iraqi Prisoner Abuse, Military Officials Say*, N.Y. TIMES, Jan. 17, 2005, at A8 (reporting that Specialist Charles A. Graner, Jr., who was convicted of abuse of prisoners and sentenced to ten years in prison, "could offer no witnesses or evidence to prove that higher-ups authorized" the abuse scandal). Graner's lawyer also argued that "[u]sing naked and hooded detainees to make a human pyramid was much like what cheerleaders 'all over America' do at football games . . . and putting naked prisoners on leashes was much like what parents in airports do with their toddlers." *See* Kate Zernike, *Central Figure in Iraq Abuse Goes on Trial*, N.Y. TIMES, Jan. 11, 2005, at A1. Not all of those soldiers accused of abuse at Abu Ghraib pleaded a superior orders defense. *Id.* (reporting that Private Ivan L. Frederick, who had accepted a plea bargain, testified that "commanders did not know about the kind of treatment shown in the photographs and would not have sanctioned it").

96. Luban, *supra* note 77, at 29.

97. Eggen & Smith, *supra* note 92.

98. Memorandum from Daniel Levin, Acting Assistant Attorney General, to James B. Comey, Deputy Attorney General, United States Department of Justice, Office of Legal Counsel, Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (Dec. 30, 2004), *available at* http://www.usdoj.gov/olc/dagmemo.pdf.

United States antitorture laws, and omits the contention that United States personnel could assert a number of defenses to torture.[99] It also omits the narrow definitions of torture—namely, that torture had to involve "severe" pain, or "pain equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death"—found in the earlier memorandum.[100] However, in his confirmation hearings for Attorney General, then White House Counsel Alberto Gonzales underscored that the Executive did not consider the CIA and other nonmilitary personnel fully bound by the same rules as military personnel in matters of interrogation.[101] That point is significant insofar as the CIA carries out the interrogation of a number of "high value" terror suspects.[102] Although the December 30, 2004, memorandum appears to apply equally to military, CIA, and nonmilitary personnel, the latter two "fall outside the bounds of [the] 2002 directive issued by President Bush that pledged the humane treatment of prisoners in American custody."[103] This leads one observer to opine that "the White House had carved an exemption for the C.I.A. in how it goes about interrogating terror suspects, allowing the agency to engage in conduct outside the United States that would be unconstitutionally abusive within its borders."[104] When coupled with the reality that abuse and torture continued at Abu Ghraib even after the scandal came to light in the spring of 2004,[105] it seems that this exemptionalism may corrode the decisiveness of the new memorandum's pronouncements regarding the "abhorrent" nature of torture.

If a permissive option emerges to let the CIA coordinate interrogation to avoid the sunshine that has haltingly been directed toward military interrogations, then this reflects a continued subverting and avoidance of law. It may also suggest that the "torture culture" that David Luban argues the Office of Legal Counsel—one of the most elite groups of lawyers in the federal government—self-consciously created may have

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99. *Id.* at 2.

100. *Id.* (quotation marks omitted).

101. Eric Lichtblau, *Gonzales Says Humane-Policy Order Doesn't Bind C.I.A.*, N.Y. TIMES, Jan. 19, 2005, at A17.

102. *Id.*

103. *Id.*

104. *Id.*

105. Neil A. Lewis, *Iraqi Prisoner Abuse Reported After Abu Ghraib Disclosures*, N.Y. TIMES, Dec. 8, 2004, at A12 (stating that "[t]wo [United States] Defense Department intelligence officials reported observing brutal treatment of Iraqi insurgents" in June 2004, "several weeks after disclosures of abuses at Abu Ghraib," and that when two agency members "objected to the treatment, they were threatened and told to keep quiet by other military interrogators").

dissipated somewhat, but has been far from extinguished or marginalized.[106] After all, in December 2004, just a couple weeks before publication of the new memo, but considerably past the disavowal of the controversial August 2002 memo, a Justice Department lawyer informed a CSRT "that it would not be illegal to torture detainees to obtain statements about them."[107] Moreover, it is important to recall that all the memoranda regarding torture were vetted by lawyers throughout the administration and, more importantly, written in a seemingly competitive context in which sophisticated lawyers, who ought to be aware of their ethical responsibilities as legal advisors, fiercely sought to be the drafter of the memorandum most conducive to legalizing torture and harsh interrogation methods.[108]

D. *Skepticism of Law*

Let me underscore that the Bush Administration has made some use of the ordinary criminal law and process to host a number of terrorism related prosecutions—most prominently those of John Walker Lindh, Zacharias Moussaoui, the Virginia jihad network, and Ahmed Omar Abu Ali—in United States courts.[109] However, the role of rule of law and due process has been curtailed in these domestic prosecutions, often rather extensively. The rush to convict has unsurprisingly led to the subsequent

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106. *See* Luban, *supra* note 77, at 29-30, 32-33, 39-41 (describing the ideology of torture as exemplified by the Office of Legal Counsel's memos attempting to justify torture for interrogation purposes).

107. Carol D. Leonnig & Julie Tate, *Detainee Hearings Bring New Details and Disputes*, WASH. POST, Dec. 11, 2004, at A1; *see also* Sniffen, *supra* note 29 (reporting the government's acknowledgement that evidence gained by torture is used in hearings). For other examples of the ongoing embeddedness of the "torture culture," see Luban, *supra* note 77, at 50 (discussing "the necessity defense as a perfect embodiment of the liberal ideology of torture").

108. *See* Luban, *supra* note 77, at 62.

109. Two-hundred and eighty-four persons have been charged with "terrorism crimes" in United States courts. *See* Larry Thompson, Comments at Panel on Terrorism and Civil Liberties, Southeastern Association of American Law Schools Conference (Aug. 3, 2004) (notes on file with the author). The definition of "terrorism crime" is very broad. There have been 152 pleas, which have led to some convictions and some acquittals. *Id.* The Abu Ali case could raise the question whether evidence obtained from a defendant in Saudi Arabia, allegedly through torture administered by Saudi captors, is admissible in a United States court. *See* Jerry Markon & Steve Coll, *Prosecutors Say Va. Man Not Tortured*, WASH. POST, Feb. 24, 2005, at A4 (relating the potential use of evidence obtained from Abu Ali, "an American student charged in an al Qaeda plot to kill President Bush," by use of "physical and psychological pressure . . . short of severe or prolonged torture" used in a Saudi prison).

unraveling of some convictions.[110] Attempts by other nations, for example Germany, to prosecute terrorist defendants have also been undermined by due process concerns owing to the United States's refusal to permit those defendants to interview supposedly relevant witnesses from Guantánamo. The Department of Justice has vigorously asserted use of material witness warrants in terrorism investigations that far transcends the initially intended purpose of such warrants.[111] All in all, "[d]espite the 9/11 commission's remarkable exercise in public education, the government is still trying to make the war on terror ever more secret."[112]

In sum, in the wake of major decisions such as *Rasul* and *Hamdi*, and lower court decisions such as *Hamdan*, the approach of the United States government has not changed much. Every incursion made by the judiciary in the name of constitutional law or the law of war has met with resistance or has set in motion a further series of defensive maneuvers. In fact, within the executive branch there has been considerable consolidation regarding the limited role law should play in the war on terror, a continued suspicion of adversarial review, frustration with curial intervention, and fear of the judicialization in any form of the executive branch's role in the war.[113] In fact, the Department of Defense in its 2005 National Defense Strategy flatly states that "[o]ur strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international

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110. *See, e.g.*, Danny Hakim & Eric Lichtblau, *After Convictions, The Undoing of A U.S. Terror Prosecution*, N.Y. TIMES, Oct. 7, 2004, at A1 (reporting cases of four Middle Eastern immigrants, released after the Justice Department "took the extraordinary step of repudiating its own case and successfully mov[ed] to throw out the terrorism charges" after finding "fault with virtually every part of its prosecution").

111. Ricardo J. Bascuas, *The Unconstitutionality of "Hold Until Cleared": Reexamining Material Witness Detentions in the Wake of the September 11th Dragnet*, 58 VAND. L. REV. (forthcoming Oct. 2005) (manuscript at 8-18, on file with the author).

112. Michael Ignatieff, *Lesser Evils*, N.Y. TIMES MAG., May 2, 2004, at 50, *available at* http://www.ksg.harvard.edu/news/opeds/2004/ignatieff_less_evils_nytm_050204.htm (referring to the government's refusal to disclose the names of detainees and, under the Patriot Act, how many times it has used its expanded authority).

113. *See, e.g.*, JOINT CHIEFS OF STAFF, JOINT DOCTRINE FOR DETAINEE OPERATIONS I-11 (Mar. 23, 2005) (formalizing the category of enemy combatants and removing that category entirely from the purview of the Geneva Conventions), *available at* http://hrw.org/campaigns/torture/jointdoctrine/jointdoctrine040705.pdf. The Draft Joint Doctrine does not make the determination of enemy combatant status consistent with Article 5 of the Third Geneva Convention. Moreover, it also subjects the obligation to treat detainees humanely to the qualification of military necessity, this not being consonant with principles of international humanitarian law. *Id.*

fora, judicial processes, and terrorism."[114] This can be read to plainly place law and the implementation thereof by national and international legal institutions on a continuum with terrorism as a peril—quite an astonishing position—instead of viewing law as something that, if appropriately deployed, can itself imperil terrorism.

I argue that this defensive posture stems from a reasonably held, although ultimately parochial, belief that law—particularly international law—saps national security instead of supporting it. This posture, as articulated by Robert Kagan, concludes that the United States historically has treated international law with considerable reserve, so the current attitudes are nothing new, and that American power and legitimacy have little to do with fidelity to rule of law.[115] Although there may be some simple appeal to Kagan's two conclusions, I posit they are anchored on a false premise—that law in general, and international law in particular, hinders more than it helps—and, what is more, that they leave untapped American "soft power," which is more relevant to the multigenerational and multioperational war on terrorism than to war as we traditionally have understood it.

IV. THE FALSE DICHOTOMY BETWEEN RULE OF LAW AND NATIONAL SECURITY

Although non-state actor terrorism has been cast as something very new, we respond to it in a way that is very old: namely, war. What is more, apparent differences between the war on terror and war in its most classic sense (among nation-states, which in large part is the basis for the *jus ad bellum* and the *jus in bello*) have led the "U.S. government . . . [to] justify the wholesale suspension of the rule of law."[116] This is based on an assumption, to use Tom Franck's words, that there are "inconvenience costs of adhering to the rule of law."[117] From this assumption, a number of questions arise. First, what might these inconvenience costs actually be, and more interestingly, are there inconvenience costs in failing to adhere to rule of law? More generally, does an approach skeptical of law actually serve national security interests? I do not purport in this limited space to

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114. DEP'T OF DEFENSE, THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 5 (Mar. 2005), *available at* http://www.defenselink.mil/news/Mar 2005/d20050318nds2.pdf.

115. Robert Kagan, *A Matter of Record: Security, Not Law, Established American Legitimacy*, FOREIGN AFF., Jan.-Feb. 2005, at 170, 170-72.

116. Franck, *supra* note 9, at 687.

117. *Id.*

answer these complex inquiries. Rather, I hope to set out some broad brushstrokes and to thereby modestly upend the currents of public discussion and stasis of political assumption.

There is cause to suspect that the containment of law in the conflict in Iraq, and in the war on terrorism generally, may have augmented the terrorist threat.[118] CIA Director Porter Goss and Vice-Admiral Lowell Jacoby (director of the Defense Intelligence Agency) told a Senate Committee in February 2005 that the United States "occupation [of Iraq] has become a potent recruiting tool for al Qaeda and other terrorist groups."[119] More specifically, it strikes me as appropriate to worry that abuses at Abu Ghraib have increased the risk that a greater number of previously unmotivated individuals now feel motivated to lead a life of terror. One Army report certainly thought these abuses were "feeding the Iraqi insurgency by 'making gratuitous enemies.'"[120] There is a link between violating people's rights and jeopardizing national security. On the other hand, there are situations where diligently respecting rights—in other words fighting with one hand tied behind the back, to borrow the oft-cited language of the Israeli Supreme Court, may in fact enhance a nation's ability to fight over time by diminishing the recruitment and zeal of the enemy.[121]

Intelligence experts substantiate the claim that national security and rule of law do not operate in opposition to each other. Some flatly state that abusing suspects may lead to their providing patently false information.[122] What is more, given that many suspects rounded up in antiterrorism programs expect to be tortured, due process may in fact make them more compliant.[123] There also is evidence that "a defendant's right to legal counsel was beneficial not only to suspects but also to law-

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118. *See, e.g.*, Douglas Jehl, *U.S. Panel Sees Iraq as Terror Training Area*, N.Y. TIMES, Jan. 14, 2005, at A14 (discussing forecast issued by the National Intelligence Council). One government forecast suggested that the war in Iraq generally "could provide an important training ground for terrorists" and concluded that the "key factors behind terrorism show no signs of abating over the next 15 years." *Id.*

119. Dana Priest & Josh White, *War Helps Recruit Terrorists, Hill Told*, WASH. POST, Feb. 17, 2005, at A1.

120. White, *supra* note 91.

121. *See* Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT'L & COMP. L. Q. 1, 15 (2004) (quoting the President of the Israeli Supreme Court as explaining that "[s]ometimes, a democracy must fight with one hand tied behind its back") (quotation marks and citation omitted).

122. Jane Mayer, *Outsourcing Torture*, THE NEW YORKER, Feb. 14 & 21, 2005, at 106.

123. *Id.* at 112.

enforcement officers. Defense lawyers frequently persuaded detainees to co[o]perate with prosecutors, in exchange for plea agreements." [124]

I certainly do not know what value the information obtained through torture actually has—probably very little, I would suspect, much as the interrogation experts posit. Yet, we seem to cling to the belief that there is something of merit—some chestnut, somewhere—that will emerge from the endless interrogations conducted in our name. I wonder whether this is partly a function of denial: namely, this is what we choose or want to believe, rather than honestly appreciating the dim prospect that torturing someone over the course of years would actually yield something of value. The marginal returns certainly strike me as diminishing quite abruptly. After all, what value really can be had from continuing to question the Guantánamo and Afghan detainees: incarcerated, isolated for three years already, has not any information they might ever have had become stale?

Putatively rendering an individual for interrogation or detaining someone for intelligence-gathering seems to bleach the more sinister reality of indefinite detention and infliction of violence (psychological and physical) for purposes that might actually be other than utilitarian information-gathering. One eminently understandable purpose might be incapacitation. But one would assume this would only make sense after a thorough process to assess the actual (or potential) dangerousness of the detainee in question. And once an individual is detained, what purpose does abuse, sexual assault, or torture further for the goal of incapacitation? So, perhaps we need to look elsewhere. Another purpose could be deterrence (say, by torturing someone and throwing away the key just because they may be a terrorist or because they may have been in the wrong place at the wrong time, this might dissuade others from participating in terrorism). Or retribution—perhaps this is the motivation? Until we can have a frank discussion of what really might be going on and realize the limits of the utilitarian quest for intelligence as a rationale to legitimize current practices, our public discourse will remain stunted.

Democracies need to be particularly vigilant here. For philosopher Michael Ignatieff, "liberal democratic regimes encourage a kind of moral narcissism, a blinding belief that because this kind of society authorizes such means, they must be acceptable."[125] Ignatieff goes on to note that, as a consequence of this moral narcissism, "democratic values . . . may actually blind democratic agents to the moral reality of their actions. The

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124. *Id.*

125. MICHAEL IGNATIEFF, THE LESSER EVIL 119 (2004).

nobility of ends is no guarantee against resort to evil means; indeed, the more noble they are, the more ruthlessness they can endorse."[126] The threat occasioned by our narcissism is precisely why the firm hand of law is so important, and should remain important, in the struggle against terrorism. After all, waging war against nihilistic actors who know no regard whatsoever for law can be especially conducive to the narcissism Ignatieff fears, particularly as these terrorists conduct themselves as barbarians, outlaws, and evildoers. That said, our responses to their threats and attacks could do more damage to our dignity than the threats and attacks themselves. This too forms part of the calculus of the apocalyptic mind of the terrorist agenda. We must resist that trap.

Human history gloomily teaches us that systemic human rights abuses can be perpetrated by anyone in the name of any a conflict.[127] Once governments begin slicing away rule of law by amending the rules on torture, they may hungrily continue to slice; ordinary individuals may internalize this hunger from above, and we all might end up—rather precipitously—in a disturbing place. It is hard to contain the suspension of law: there is something tempting about this truancy, or perhaps it is simply corrosive. For example, as discussed earlier, methods darkly used against unlawful enemy combatants—methods that themselves pose serious challenges to international human rights law—quickly became transplanted to Iraq, where they were used somewhat indiscriminately against prisoners of war, those innocents detained by mistake, those held for criminal activity, insurgents, and, undoubtedly, some terrorists.[128]

In sum, calls by certain policymakers that governments need to whittle down human rights in order to promote national security can be alarmist and shortsighted. I propose a different model that, instead of viewing the crimping of law as necessary to promote national security interests, posits a synergy between respect for law and protection of national security. We all have been impoverished to the extent that public discourse has been framed to squeeze out meaningful debate regarding alternate models.

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126. *Id.*

127. *Id.* at 115, 118.

128. Tim Golden & Don Van Natta Jr., *U.S. Said to Overstate Value of Guantánamo Detainees*, N.Y. TIMES, June 21, 2004, at A1 ("Defense Department officials have acknowledged that American jailers in Iraq, under pressure to produce better intelligence, adapted some new, more aggressive interrogation techniques that were approved by Secretary of State Donald H. Rumsfeld for use at Guantánamo.").

V. CONCLUSION

If we accept there to be a war on terror—as the United States Supreme Court did in *Hamdi*—we must recognize that this war should be waged in the name of law, not against law. Victory certainly is the objective, but how victory is achieved is also crucial. This is especially the case so that a war deemed to be just remains just, even a war against an enemy like the terrorist, for whom law knows no meaning and for whom the innocent are a coveted battlefield. Moreover, there may be utilitarian and strategic value to fighting the lawless from within the realm of the law, in addition, of course, to the normative and expressive value that law connotes for us. To this end, when courts intervene in the name of law, as they have in *Rasul*, *Hamdi*, *In re Guantanamo Detainee Cases*, and *Hamdan*, these interventions can readily be constructed as complements to national security, instead of naïve and pesky threats thereto.