

9/11 AND AFTER: LEGAL ISSUES, LESSONS, AND IRREGULAR CONFLICT

By Nicholas Rostow and Harvey Rishikof

What I fear is not the enemy's strategy, but our own mistakes.

—Pericles¹

*Great cases, like hard cases, make bad law. For great cases are called great not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment.*²

—Northern Securities Co. v. United States, 1904

Rather than examining all legal issues and controversies since 2001 that have generated lessons,³ this chapter focuses on three in particular. The first part of the chapter focuses on the use of force because it helped frame the period that began on September 11, 2001. The next part concerns detention policies because they have been a locus of controversy almost from the moment of the first arrest or capture. Some commentators now contend that the subsequent wish to avoid controversy associated with detention appears to have led the United States more often than not to kill rather than capture. The second part then examines interrogation policy and techniques before moving on to the third part, which considers the legal impact of unmanned aerial vehicles as an example of the effect of advanced technology on law. The use of these vehicles has touched a nerve because of the novelty of the

platform. The chapter concludes by summarizing the lessons identified and makes recommendations for future handling of legal issues.

The Relevancy of Law and Lessons to Be Learned

Law permeates American strategy and tactics by defining the permissible space in which the United States may act and prescribing how it should act. The law, therefore, was relevant to the decision to engage in a “war” against terror after September 11, 2001, and to all operations, including detention, flowing from that decision.

The fact that law is important to Americans dates to the earliest English settlements in the 17th century. Nearly two centuries later, in 1803, the Supreme Court reminded its audience in *Marbury v. Madison* that “The government of the United States has been emphatically termed a government of laws, and not of men.”⁴ In implementation of this idea, the Constitution and laws apportion authority within the government to make decisions for the United States. They also define—sometimes broadly, sometimes in infinite detail—the boundaries limiting the reach of such decisions, identify permissible instrumentalities available to decisionmakers, and clarify ways to use such instruments. In addition, as part of “the supreme Law of the Land,”⁵ treaty obligations—some of which like the 1949 Geneva Conventions and the United Nations (UN) Charter have been incorporated into U.S. law by statute⁶—recognize that the United States is part of a larger community.⁷ We recall these essential features of U.S. Government and society because they imbue American strategy and tactics. Senior political and military leaders are part of this system of values and need to bear this fact in mind. The law grants substantive authority to act. It creates process, which is essential to decisionmaking, good or bad. It embodies and proclaims the values of a society—that is, “the pattern of behavior deemed right.”⁸

Looking back over the past decade and a half and taking full advantage of hindsight, we can begin to see what the U.S. Government did well, could have done better, and should not have done at all. A starting point is the fact that the 9/11 attacks seemed to come out of nowhere, leaving government officials scrambling to prevent what they were certain would be additional attacks and simultaneously trying to discover what had hit their country. Adding to the pressure-cooker atmosphere, the anthrax attacks of September

17–18, October 2, and October 9, 2001, and the crash of American Airlines Flight 587 in Queens, New York, on November 12, 2001 (which turned out to be a nonterrorist event), followed 9/11 in short order. In addition, daily reports of numerous potential attacks against the United States at home and abroad came to certain White House and other officials. The reports reflected real-time information originating inside and outside the Nation. They included little or no analysis in part because it was not clear that such analysis would have predicted the September 11 attacks, and nobody wanted again to take the risk of relying on such analysis. It was a time of extraordinary anxiety, and the heightened focus on preventing future attacks, which has lessened over time, still remains.⁹ Although the Federal Bureau of Investigation (FBI) closed its inquiry into the anthrax attacks in 2010,¹⁰ some commentators dispute the 2006 conclusion that one man, who committed suicide, was responsible for the anthrax crimes.¹¹

To say that after 9/11 government officials went to bed every night terrified of a repetition of an attack when they awoke is a cliché. It also is an understatement. This observation is not to excuse but to help explain. After all, government officials during the Cold War probably feared they would wake up to nuclear war.¹² That said, we appreciate that an atmosphere of fear and the reality of the increased stress it brings are obstacles to sound government decisionmaking. Government officials report that the mood was to take any steps deemed necessary to prevent additional attacks. Process and law appeared in the circumstances almost as if they were expensive luxuries.¹³

Every aspect of the U.S. response to the 9/11 attacks raised significant legal issues. First, it was necessary to secure American public officials and government buildings, clearly an executive branch responsibility under the Constitution. Second, the government employed all available resources to hunt for the perpetrators of the attacks. In the first days after September 11, this effort took a variety of forms, including what appeared to be indiscriminate arrest and detention of suspects, which raised issues of probable cause.¹⁴

Third, once the government pinpointed the source of the attacks, an international use of force became a likely option. Legal issues permeate all uses of military force. Domestic and international authorities and rules, including the international law governing the use of force (*jus ad bellum*) and the laws of war (also known as Law of Armed Conflict or international humanitarian

law) (*jus in bello*) govern. They frame the context in which policy, political, and moral responsibilities are discharged in connection with an international use of force.¹⁵

Fourth, intelligence collection and analysis, at home and abroad, was and is essential in responding to terrorist attacks. How intelligence is collected and against whom or what involves legal issues of the first importance. Since 2001, we have seen that how those legal issues are addressed affects the government's credibility, the ability to prosecute, and relations with most important allies and friends. When an administration ignores or misinterprets the law, it causes costly and unwanted distraction with long-lived effects. Leaks of real secrets—how the U.S. Government conducts intelligence collection and operations—have further undermined the legitimate effort to shore up security against future terrorist attacks. As intelligence operations against terrorists foreseeably may involve detention and interrogation, intelligence planning needs to include detention and interrogation protocols just as military planning should.

Fifth, the last 14 years have been rife with detention issues. How should one characterize as a legal matter those who are detained? How were they arrested or captured? How long are they to be detained in a conflict with no foreseeable termination? What are appropriate means for holding terror suspects pending prosecution or interrogation for intelligence purposes? What if the urgent need for intelligence causes the adoption of interrogation methods that make prosecution impossible or even violate domestic and international law? The question of what to do with suspected perpetrators when captured in the course of military or foreign intelligence operations should be examined early in the operational planning process. After capture is not the optimal moment to analyze policy options.

The U.S. Government disposes of an array of instruments with which to combat terrorists. Not all are, or need to be, military or intelligence-related. The Federal, state, and local response to terrorist attacks such as those carried out in Oklahoma City in 1995 involved a variety of intelligence responses in order, among other things, to determine whether the attack was international or domestic, part of a program of attack or an isolated incident, and the action of a large or small band. In the Oklahoma City bombing, law enforcement methods brought the perpetrators to justice in the U.S. criminal law system,

which concluded with incarceration and execution. Had the perpetrators been operating from a foreign country with the assistance of that country or from a part of a country outside governmental control, it might have been necessary for the U.S. Government to consider a military response.

The Use of Force

Uses of military force involve domestic and international law. The Constitution is the principal source of authority for the President and Congress to determine to use force internationally. As a matter of law, the United States is committed by domestic and international law to respect the international regime for the lawful use of armed force.

Afghanistan and Al Qaeda

U.S. domestic law governs how the United States takes decisions with respect to the international use of force. Under the Constitution, executive power is vested in the President, who also is commander in chief of the Armed Forces.¹⁶ Since the days of George Washington, scholars and practitioners, including judges, have acknowledged that the President has the authority and responsibility under Article II of the Constitution to direct the Armed Forces to defend the country.¹⁷ The President may or may not seek congressional support depending on the politics and situation of the moment.¹⁸ Attempts to legislate an outcome of this political process in advance, as with the 1973 War Powers Resolution, have failed.¹⁹ Politicians have not allowed the nominal law to constrain their constitutional, political options for addressing a crisis. The fate of President Barack Obama's proposed resolution authorizing the use of force against the Islamic State of Iraq and the Levant (ISIL) illuminates this point about the Constitution in action:²⁰ it appears that the proposal is not moving forward in Congress and that both the President and Congress agree that the President has sufficient existing authority, including the 2001 Authorization for Use of Military Force, to direct military operations against ISIL and other groups in the Middle East that the President determines threaten the United States.²¹

The domestic authority to use force against the government of Afghanistan, al Qaeda, and others involved in some way with the 9/11 attacks came both from the President's constitutional responsibilities under Article II and

from a congressional resolution authorizing the use of the “Armed Forces against those responsible for the recent attacks against the United States and its citizens.”²² The United States treated the events as armed attacks, giving rise to the right to use force in self-defense against the perpetrators and the government of the territory from which they came—Afghanistan.²³

Having determined that al Qaeda, with the assistance or acquiescence of Afghanistan, conducted the attacks, the President, independently of Congress, could direct the Armed Forces into action against the known and suspected perpetrators as a reasonable action given the absence of alternatives designed to prevent a repetition and to bring the situation creating the right of self-defense to an end.²⁴ The attacks so shocked the government and the country that it was clear that Congress would stand with the President and would want to be seen as doing so. The 2001 Authorization for Use of Military Force constituted both a statement of solidarity and authorization. As Justice Robert H. Jackson wrote in his concurring opinion in the Steel Seizure Case of 1952, the President operates at the zenith of his powers when explicitly supported by Congress.²⁵ *Explicit* does not mean by appropriations but by joint resolution.²⁶ The 2001 authorization put President George W. Bush in the strongest possible legal (and political) position to confront the attackers.

The resolution authorized the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” By its terms, this resolution fulfilled the requirements of the 1973 War Powers Resolution.²⁷ Not only did the 2001 authorization cement the domestic authorization for U.S. military operations in Afghanistan in 2001, it also was broad enough to allow military operations against those who carried out or supported the September 11 attacks, including “nations, organizations, or persons he determines . . . aided the terrorist attacks” *in order to prevent a repetition*.²⁸ Both the Bush and Obama administrations have argued that this resolution authorizes military operations, even more than 14 years after September 11, against entities the President concludes may have had a role in the 2001 attacks and to prevent a repetition of them. The resolution’s language, they argued, also encompassed capture and inter-

rogation, which are foreseeable consequences of a use of force. The breadth of the resolution's language was consistent with past open-ended congressional resolutions authorizing the use of force.

The day after the attacks, the UN Security Council adopted a resolution affirming the inherent right of self-defense at the same time it unequivocally condemned the terrorism of the day.²⁹ In response to the attacks, for the first time in its history, the North Atlantic Treaty Organization (NATO) invoked Article 5 to render assistance to one of its members suffering armed attack.³⁰

Iraq

In October 2002, Congress adopted a joint resolution authorizing the use of force against Iraq.³¹ Its preamble harked back to Iraq's invasion of Kuwait in 1990. The 2002 resolution also made the following points in arguing the legal case for the use of force: Iraq had not complied with UN Security Council resolutions and continued to support terrorist organizations and attack U.S. and other air forces implementing the resolutions; Iraq, having used weapons of mass destruction before³² and having harbored and supported terrorists, constituted a threat to the national security of the United States; Iraq had tried to kill former President George H.W. Bush; and prior resolutions expressed the sense of Congress supporting U.S. military enforcement of UN Security Council resolutions adopted after the 1991 Gulf War.

The 2002 resolution authorized the President "to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to (1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq."³³ The resolution, like the 2001 Authorization for Use of Military Force, specifically fulfilled War Powers Resolution requirements.³⁴ This resolution, therefore, provided congressional approval of the 2003 campaign against Iraq and satisfied all domestic law requirements for those military operations. Whether the President had authority to act without such congressional authorization remains a hypothetical question and need not concern us.

President Bush apparently thought the military buildup that turned out to be preparation for the 2003 invasion would strengthen the hand of diplomats.³⁵ In 1991, the UN Security Council adopted Resolution 687 that set

forth the conditions Iraq had to meet in order to bring an end to the council's authorization to use force to enforce the resolutions responding to Iraq's invasion and purported annexation of Kuwait. The wording of the congressional resolution aligned with this approach.³⁶

Ultimately, the issue for the administration in 2003 was whether to invade Iraq despite substantial international criticism and whether to take the criticism and advice seriously. The United States proceeded to act—after all, it alone had suffered attack on September 11—against Iraq because the President and Congress saw the world through the prism of the attacks. Every risk was magnified. The two political branches of the U.S. Government seemed unwilling to seriously consider the advice of longstanding allies with different perspectives on Iraq and the risks and consequences of an invasion.

International Law Governing the Use of Force in Afghanistan and Iraq

Regarding the U.S. use of force in Afghanistan, the authorities are clear or as reasonably clear as they ever are. Iraq was different. While the President's domestic authority to order the invasion of Iraq in 2003 was clear and uncontroversial as a result of the congressional resolution of 2002, the international legal authority was the subject of controversy, not least because of the advocacy of "preemptive" self-defense in the 2002 National Security Strategy.³⁷

As an independent state in the international system, the United States enjoys all the legal rights other states do. The UN Charter sets forth fundamental norms for international relations, binding on all states. They are part of U.S. statutory law.³⁸ The UN Charter provides that states may use force *only* in exercise of "the inherent right of individual or collective self-defence if an armed attack occurs" or pursuant to UN Security Council authorization.³⁹ The use of the word *inherent* means that the Charter brought forward to the UN era the customary law requirement that any use of force in self-defense fulfill the principles of necessity and proportionality. Once a decision is made to use force, military operations must conform to the laws of war.

A rule of reason operates with respect to the law governing the decision to use force and conduct military operations. With respect to the principle of necessity, force may be used in self-defense "if an armed attack occurs" when, taking into account the totality of the circumstances, it is unreasonable to sup-

pose a nonforcible response will achieve the lawful goal of self-defense—the end to the situation giving rise to the right to use of force defensively. What is proportional force also must conform to a rule of reason: that minimum *degree* of force reasonably calculated to achieve the lawful *goal* of force. As an operational matter, the tactical use of force should distinguish between combatant and noncombatant targets. Civilians may not be targeted.⁴⁰

Under the laws of war, prisoners must be treated with humanity, no matter whether they lawfully enjoy combatant status or not.⁴¹ Lawful combatants, for example, are entitled to treatment as prisoners of war (POWs). Unlawful combatants and others must be treated humanely but may be subject to prosecution for doing what would be lawful under the laws of war if done by lawful combatants—for example, killing. They do not enjoy “combatant immunity.”⁴²

As we have seen, the United States, with the implicit endorsement of the UN Security Council and the explicit concurrence of its NATO Allies, treated 9/11 as armed attacks to which it could respond with proportional uses of force. This judgment should have provided the basis for categorization and treatment of detainees from the outset, just as it did with respect to who or what could be the target of military operations. Together with the congressional resolution authorizing the use of force against the perpetrators, these actions signaled international agreement with the U.S. President’s decision to give Afghanistan an ultimatum to deliver Osama bin Laden and other al Qaeda leaders to the United States for trial or “share in their fate.”⁴³

International legal authorities for the U.S.-led invasion of Iraq in 2003 were more open to debate than U.S. domestic law authorities. Unlike in 1990–1991, the UN Security Council did not provide explicit authorization to use force against Iraq in 2001–2003. The Security Council resolution on Iraq prior to the invasion in March 2003, Resolution 1441 (2002), adopted on November 8, 2002,⁴⁴ found Iraq to be in “material breach” of its obligations under prior binding UN Security Council resolutions. Resolution 1441 was the ninth such Security Council finding since 1991.

Whether it could or should be read as an authorization is a matter on which experts have disagreed.⁴⁵ “Material breach,” according to the Vienna Convention on the Law of Treaties, which the United States always has regarded as an accurate statement of the customary international law of treaties and thus binding on the United States, vitiates the multilateral agreement and,

if all the parties agree, entitles one party to treat it as suspended or terminated.⁴⁶ Resolution 1441 provided that unanimous agreement. On the other hand, some have argued that the Security Council should have made that judgment, not individual states acting on the basis of the view that the 1991 authorization has continued in force because the Security Council had never rescinded it.⁴⁷

A principal U.S. legal theory made much of this UN Security Council finding of material breach. In 1990, the Council had authorized the use of force against Iraq to uphold and implement its resolutions responding to Iraq's August 1, 1990, invasion of Kuwait.⁴⁸ After the 1991 Gulf War, Resolution 687 set conditions that Iraq had to meet for the authorization to use force no longer to be in effect.⁴⁹ Those conditions not having been met, the United States and the United Kingdom (and the Legal Counsel to the United Nations in the 1990s) understood the 1990 authorization to remain in effect in 2002.

Detention

U.S. detention policy and practice after the attacks of September 11, 2001, have involved two unrelated but important elements. The first concerns domestic detention. The second involved detention of those captured in or near theaters of military operations against al Qaeda and its supporters and those suspected of terrorist connections or activities and residing or transiting foreign countries. Though the two kinds of detention raise different legal issues, U.S. conduct in each of these areas suggests several lessons to be learned.

Domestic Detention

In the immediate aftermath of the September 11 attacks, the United States relied on broad interpretations of statutes in order to detain aliens and U.S. citizens. These statutes were written in a different era and context. As then-Assistant Attorney General Michael Chertoff stated in 2001:

In past terrorist investigations, you usually had a defined event and you're investigating it after the fact. That's not what we had here. . . . From the start, there was every reason to believe that there is more to come. . . . So we thought that we were getting information to prevent more attacks, which was even more important than trying any case that came out of the attacks.⁵⁰

He also noted, “We’re clearly not standing on ceremony, and if there is a basis to hold them we’re going to hold them.”⁵¹ Attorney General John Ashcroft was more explicit still: “We have waged a deliberate campaign of arrest and detention to remove suspected terrorists who violate the law from our streets.”⁵² One assumes that he meant that persons who were suspected of terrorism were arrested for nonterrorism offenses, not on the basis of suspicion only.

Under the Immigration and Nationality Act of 1952, as amended, aliens found either inadmissible or removable for terrorist activity are subject to mandatory detention until deportation.⁵³ According to a 2002 FBI affidavit concerning the investigation into 9/11:

*the FBI identified individuals whose activities warranted further inquiry. When such individuals were identified as aliens who were believed to have violated their immigration status, the FBI notified the Immigration and Naturalization Service (INS). The INS detained such aliens under the authority of the Immigration and Nationality Act. At this point, the FBI must consider the possibility that these aliens are somehow linked to, or may possess knowledge useful to the investigation of, the terrorist attacks on the World Trade Center and the Pentagon.*⁵⁴

Fourteen years after September 11, the logic of the affidavit—the assumption that aliens who had violated their immigration status were or might be connected to terrorist threats—is clear. In 2001, everyone wanted to know what the FBI knew. Few questions were asked about the Bureau’s factual basis for arrests or how it obtained information. That is a lesson in itself. Government reticence about answering legitimate questions, just like government intimidation of people to make them afraid to ask questions, puts the people’s freedom and real security at risk.⁵⁵

The government also invoked the Material Witness Statute as authority to detain.⁵⁶ In relevant part, the statute provides:

If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by sub-

*poena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title. . . . Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken.*⁵⁷

In 2011, the Supreme Court held that motive is irrelevant in determining whether a particular use of the statute was constitutional.⁵⁸

The use of the Immigration and Nationality Act and Material Witness Statute after 9/11 resulted in more than 1,000 arrests, ending in prosecutions chiefly for document or immigration fraud. Some 400 persons were charged; 39 were convicted of terrorism-related offenses.⁵⁹ While the constitutional norm for arrest is “probable cause” leading to a judicial warrant, there are exceptions where “reasonable suspicion” exists.⁶⁰ The Supreme Court has alluded to the possibility of a broader exception when terrorism is suspected.⁶¹ Attorney General Ashcroft defended the policy and practice by quoting Attorney General Robert F. Kennedy’s willingness to arrest organized crime figures for “spitting on the sidewalk if it would help in the battle against organized crime.”⁶²

In September 2001, the U.S. Government believed that if it did not act quickly, another attack would follow. On the other hand, terrorist attacks or other such shocks require professionalism and vigilance from everyone to minimize unintended consequences, including and perhaps especially with respect to the rule of law. The imperative of such vigilance in the context and wake of chaos is another important lesson to be learned.

Detention as a Result of Armed Conflict

Detention is a foreseeable feature of military operations and counterterrorism operations generally. It requires answers to three questions, preferably before the operations take place: What are the circumstances of the detention, and, if they involve an armed conflict, what kind of armed conflict is involved? What are the rights and protections of the detainees? What is the appropriate governmental department that should be responsible for the detention process?

In all cases, the state is responsible. It has to decide how to discharge that responsibility. The Third Geneva Convention Relative to Prisoners of War sets forth requirements that the responsible body must follow.⁶³ In military opera-

tions, armed forces take and hold prisoners until the state decides otherwise. The armed forces are not the only governmental body that may do so; the state may designate other organizations as responsible or create an organization for the purpose of exercising responsibility with respect to detainees.

The following sections provide possible answers to these questions within the framework of what is commonly referred to as the “war on terror” and define the detention options available to the United States under the laws of war following the September 11 attacks. Those options include detaining the alleged attackers and their co-conspirators as prisoners of war as a matter of U.S. policy; detaining the alleged terrorist actors as unlawful combatants engaged in combat or combat-related activities, therefore subject to prosecution; and detaining civilians to remove them from the battlefield for their own protection. Regardless, treatment of detainees in the first two cases would be governed by Common Article 3 of the four 1949 Geneva Conventions, which means, at a minimum, humane treatment.⁶⁴ Prosecution, whether in military or civilian courts, would depend on admissible evidence.

The United States is a party to the most important treaties governing the conduct of military operations, including the four Geneva Conventions of 1949, which are at the core of the laws of war. Article VI, Clause 2, of the Constitution makes treaties part of “the supreme law of the land.”⁶⁵ This clause requires the United States to follow a treaty even if its language indicates that it is not self-executing, meaning that it cannot be enforced in U.S. courts without implementing legislation.⁶⁶ Parts of the Geneva Conventions have been adopted as U.S. statutes in the Uniform Code of Military Justice.⁶⁷

The 1949 Geneva Conventions are second only to the UN Charter in terms of numbers of states-parties. Authoritative decisionmakers therefore regard elements of the conventions as having become part of customary international law, binding on all states and participants in the international system whether they have become parties to the conventions.⁶⁸ In 1977, an international conference concluded two Protocols Additional to the 1949 Geneva Conventions, Protocol I dealing with international armed conflict and Protocol II dealing with noninternational armed conflict. The United States is not a party to protocols I and II but regards elements as accurately codifying customary international law. The protocols as a whole do not represent customary international law.⁶⁹

One must evaluate the detentions during the Afghan and Iraq conflicts through the lens of the laws of war. For much of the period 2001 to 2005, the administration went to great lengths to avoid doing so.⁷⁰ It further appears that experts in the laws of war and the law governing interrogation were excluded from the decisionmaking process.⁷¹ This result-oriented process led to erroneous decisions that have damaged the reputation of the United States and compromised the international and multilateral effort to combat terrorism.

International Armed Conflict. The Geneva Conventions and Additional Protocols of 1977 envision two types of armed conflict: an international armed conflict and a noninternational armed conflict. An international armed conflict involves at least two states in armed conflict with each other.⁷² Additional Protocol I will apply to the extent a state party to the conflict has ratified it or regards specific provisions to be accurate restatements of customary international law. The United States has not ratified Additional Protocol I in part because it confuses the distinction between military and civilian targets and humane treatment of prisoners. The protocol would extend lawful combatant status, as a matter of law, to those whom the United States and others regard as terrorists or other unlawful combatants not entitled to POW status upon capture. A “farmer by day, fighter by night”⁷³ does not constitute a lawful combatant in the American view; rather, such a person is an unlawful combatant directly participating in hostilities.⁷⁴

The Third Geneva Convention sets forth in detail criteria for lawful combatant status. They include the following:

Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

- (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.*
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:*

- (a) that of being commanded by a person responsible for his subordinates;*
- (b) that of having a fixed distinctive sign recognizable at a distance;*
- (c) that of carrying arms openly;*
- (d) that of conducting their operations in accordance with the laws and customs of war.⁷⁵*

If one is captured when fighting but does not meet these and similar criteria set forth in Article 4 of the Third Geneva Convention, one is not a lawful combatant and thus subject to prosecution for murder and/or accessory to murder. Although such a person does not enjoy POW status, as a matter of law, he must be treated humanely. A prisoner of war or someone held pursuant to Common Article 3 is entitled to not only humane but also respectful treatment.⁷⁶ Detention of a POW lasts “until the cessation of active hostilities,”⁷⁷ but POWs undergoing judicial punishment may be repatriated before the end of the sentence.⁷⁸

If one is not a lawful combatant, one is a mere fighter or “unprivileged belligerent” or unlawful combatant, not entitled to POW status upon capture. A member of the armed forces in conflict with an unlawful combatant may target the unlawful combatant in battlefield or other circumstances permitting the use of lethal force. In addition, on capture, an unlawful combatant is subject to prosecution for engaging in criminal acts that would be lawful for a lawful combatant to undertake (for example, killing). Lawful combatant status alone gives an individual the right to engage in hostilities without committing murder or being an accessory to murder.⁷⁹ The violent acts of an unlawful combatant usually constitute criminal acts.⁸⁰

The legal options considered above do not exhaust detention options or issues. In Iraq, for example, the United States found itself detaining Iraqis and others and having to categorize them by group affiliation and determine which law(s) to apply. Providing adequate facilities for the number of persons detained, maintaining security inside the facility as well as security from external attack, and conducting status review consume resources and carry high strategic risk. If detention operations appear to be a failure and conducted contrary to law and morality, as was the case at Abu Ghraib in 2003–2004, public support for the military campaign as a whole may erode and do so quickly. As

a matter of policy, the United States could treat all detainees captured in connection with the wars in Afghanistan and Iraq and global counterterrorism operations as POWs.⁸¹ The detaining state could determine whether a conflict is international or noninternational, what mix of international and domestic law to apply, and whether treatment is humane under the Geneva Conventions.⁸² In addition, it might decide to use tribunals to try alleged violators of the laws of war.

Guantanamo Bay. One of the most important lessons to identify and learn concerns the use of Guantanamo Bay Naval Base as a detention facility for persons captured in the war on terror. The decision to hold detainees there seems to have been made to minimize the U.S. constitutional rights of detainees and to maximize the government's freedom with respect to the treatment and interrogation of such detainees. Despite the voluminous memoir literature covering the period, we know little about how the decision was made and why.⁸³ Douglas Feith's memoir mentions the reason for establishing a facility at Guantanamo Bay was to avoid detainee petitions for writs of habeas corpus. The goal was to extract intelligence about future terrorist operations from those held there without benefit of legal counsel or other due process. This plan failed because it was predicated on a legal belief based in immigration law that a facility not on U.S.-owned territory was outside the Constitution,⁸⁴ which the Supreme Court held to be incorrect.⁸⁵ According to Feith and Donald Rumsfeld, Rumsfeld predicted that detention would become a serious political and legal issue and for that reason did not want the Department of Defense to be responsible.⁸⁶

The use of Guantanamo Bay as a prison for detainees has been severely criticized since 2001.⁸⁷ It was not necessary to house detainees there. One could just as easily have held them in theater or given responsibility for detention to our Afghan or Iraqi allies.⁸⁸ Alternatively, one could have put detainees in a facility in the territorial United States, as was the practice with respect to POWs during World War II. The latter option would have had foreseeable consequences. The government could have prepared for issues in advance and, therefore, reduced their impact on policy and politics.

As the Supreme Court decided in 2004,⁸⁹ detainees do have the right to petition for a writ of habeas corpus. That decision has imposed resource costs on the United States, but they apparently have not been high. Few detainees have obtained their freedom using this avenue, although detainees have been

released pursuant to diplomatic agreement with other countries.⁹⁰ The use of ordinary district courts to try terrorist cases has proved feasible and successful, but moving the detainees to the districts for trial has proved politically impossible.⁹¹

The military commissions thus far have proved cumbersome and subject to innumerable legal objections and practical difficulties. The United States brought the first detainee to Guantanamo Bay in January 2002 and the last in March 2008. The United States has held approximately 780 detainees there since 2002. As of April 2015, 122 remained. Fifty-six are approved for release. Military commissions have convicted eight (six by plea agreement). An additional 29 are designated for trial, and 34 are being held indefinitely. The annual cost of the facility per detainee is approximately \$3 million.⁹²

Procedural and due process issues have hindered the prosecution at Guantanamo. In 2012, the District of Columbia Circuit Court reversed the conviction of Salim Hamdan on the grounds that the crime of material support did not exist as a war crime under international law at the time of the conduct.⁹³ Such issues were not anticipated but should have been because the commissions had to be created from scratch, including creating workable and fair rules of procedure.⁹⁴ In response to critics, Congress in 2009 amended the original 2006 Military Commissions Act. Critics continue to argue that the government should try detainees in ordinary Federal courts and that the failure to do so is a sign that the cases are not strong. Defenders of commissions point to security threats, the risk of disclosing classified information, and the fairness of the amended procedures since 2009. Still an open legal question is the “extent to which constitutional guarantees apply to aliens detained at Guantanamo.”⁹⁵ Pursuant to the Supreme Court holding in *Hamdan v. Rumsfeld*,⁹⁶ Common Article 3 of the Geneva Conventions applies. Thus, detainees are entitled to a hearing and trial before a duly constituted court vested with procedural and judicial guarantees. Comparison between the procedural safeguards of the two courts yields few material differences. Differences that exist include such subjects as search and seizure, a difference that reflects the character of armed conflict. In the end, the Supreme Court will determine whether, as a matter of U.S. law, military commissions provide adequate due process. If the court holds that they do, such a result still may not have an impact on international opinion, which seems to have calcified in opposition.⁹⁷

For all the failings and headaches associated with the detentions, there have been practical benefits to the detention experience. The United States has learned how to build and maintain a first-class detention facility, suited to a detention population unique to the American prison system. While the detention facilities at Guantanamo Bay do not run on ordinary corrections principles, this fact does not seem to put them at a higher risk of prison upheaval than other prisons. Visiting congressional delegations, the media, and the International Committee of the Red Cross provide continual observation of the treatment of detainees. Over time, the United States has learned how to operate such a facility and obtain information from detainees about plans for prison disruption. Detainees no longer have information relevant to current terrorist operations.

Detention at Guantanamo has raised the question of duration. A “war against terror” could last an extremely long time. Under the Third Geneva Convention, prisoners of war may be held until “the cessation of active hostilities.”⁹⁸ Does the detaining power alone have the right to decide when release will not result in a return to a battlefield? This question has yet to be answered, even as the United States attempts to close the Guantanamo facility by sending detainees elsewhere, knowing that some released detainees have resumed fighting the United States and its partners.⁹⁹

One of the most controversial U.S. practices at the facility is the implementation of a “no-suicide” policy. To prevent suicide, facility personnel must conduct 24-hour surveillance of the detainees and force-feed them when they go on hunger strikes.¹⁰⁰ In addition, as a Federal district judge noted on November 7, 2014, common sense and decency have not always prevailed in the treatment of detainees, even those in a physically debilitated condition as a result of hunger striking.¹⁰¹ Critics of the facility and practices there have threatened to complain to doctors’ licensing boards alleging violations of professional ethics. As a result, doctors have had to preserve anonymity.¹⁰²

The Guantanamo Bay detention facilities remain unique among both U.S. prisons and detention facilities for those captured in the course of hostilities. They are expensive, due to the fact that over 2,000 personnel are caring for fewer than 125 detainees.¹⁰³ The facility now raises the question: what is the U.S. standard for defining the meaning of “treated humanely” in Common Article 3 of the four Geneva Conventions of 1949? Is it the treatment those detainees receive today in Guantanamo?¹⁰⁴

Noninternational Armed Conflict. A noninternational armed conflict is what the language suggests: confined within the borders of a country. The categorization depends on geography because the laws of war have not applied in civil wars historically unless one side decides to abide by them, as in the case of the American Civil War.¹⁰⁵ Captives in civil wars in the past tended to receive harsh treatment. Common Article 3, affording all persons captured in a noninternational armed conflict humane treatment, did not formally become the standard until 1949. Even under the 1949 Geneva Conventions, the detaining authority determines whether treatment is humane, although it may be subjected to criticism if its treatment is not obviously humane. The United States has been criticized more for housing detainees in Guantanamo Bay than because of routine treatment methods. In 2002, the Bush administration announced that it would treat detained Taliban and al Qaeda fighters in a manner “consistent with the Geneva Conventions.”¹⁰⁶ According to Douglas Feith, this position reflected his views and those of the Chairman of the Joint Chiefs of Staff, General Richard B. Myers, not the Department of Justice, General Counsel of the Department of Defense, Counsel to the President, or Counsel to the Vice President.¹⁰⁷ The latter were reluctant to adopt a position that might confer legitimacy on al Qaeda and Taliban activities and constrain the range of interrogation options available.¹⁰⁸ The position Feith and Myers successfully opposed may have reflected a misunderstanding of the requirements of the Geneva Conventions with respect to interrogation. In 2001–2002, the administration’s process for preparing a position on law of war issues circumscribed discussion, excluding those lawyers—the Judge Advocates General in particular—who are most expert in the area. In this regard, an analogy might be a discussion of anti-trust law without the benefit of anti-trust lawyers. Feith, who had studied the Geneva Conventions and the 1977 protocols in the 1980s, was sufficiently expert to carry the day. Feith argued that the Geneva Conventions specified how to treat those who were captured and whether they were entitled to POW treatment. In any case, all were entitled to humane treatment.¹⁰⁹

In 2006, well after the initial reaction to the 9/11 attacks and the overthrow of the Taliban and Saddam Hussein, the Supreme Court clarified the U.S. position with respect to the legal character of the conflict with al Qaeda and the treatment of its members or affiliates. The Supreme Court held that, as a matter of U.S. law, the United States is engaged in a global, noninternational

conflict with al Qaeda.¹¹⁰ As such, detainees are not entitled to POW status as a matter of law but must be humanely treated consistent with Common Article 3 of the 1949 Geneva Conventions. Of course, the fact that the United States may deny alleged al Qaeda conspirators POW status operates as a floor rather than a ceiling on its legally permissible treatment options. For policy reasons rather than legal obligation, the United States could have chosen to afford al Qaeda detainees POW status and the accompanying protections under international and domestic constitutional law. In addition, the United States could arrest and prosecute detainees under domestic criminal law. Assembling a prosecutable case is sometimes difficult if interrogators and jailers have mistreated the defendant. Evidence of criminality may be hard to find by examining terrain and plumbing the memories of troops. Nonetheless, Federal court trials of terrorists have succeeded.¹¹¹ The court thus vindicated Myers and Feith. A lesson to draw from this episode is that the government avoided error because of the coincidence of Feith's expertise. A more inclusive legal process would have made luck unnecessary.

Interrogation: Hard Cases Make Bad Law

After September 11, the U.S. Government's most important goal was to prevent a repetition of the attacks. Therefore, as soon as arrests or captures were made, the government sought information from detainees regarding future plans. Leaders of the plot to commit the attacks of 9/11 and other al Qaeda members were most likely to possess this information; hence, the label "high-value detainees" applied.¹¹² The detention of such persons and the pressing need for information seemed to justify "enhanced interrogation techniques."¹¹³ The President himself chose the methods from a list.¹¹⁴ His conclusion, based on advice, was that waterboarding would be an acceptable exception to all the norms and laws regarding interrogation. In prior conflicts dating even to the Spanish-American War, the United States deemed such practices torture.¹¹⁵ These actions were to be carefully monitored and "were only applied to a handful of the worst terrorists on the planet, including people who planned the 9/11 terrorist attacks and who, among other things, were responsible for journalist Daniel Pearl's death."¹¹⁶ To date, only Central Intelligence Agency (CIA) interrogators have waterboarded detainees.¹¹⁷ The Agency instituted health protocols to ensure that no permanent harm was done.¹¹⁸

The CIA and executive branch proclaimed the value of these interrogations after the interrogation of Khalid Sheikh Mohammed—an alleged mastermind of the 9/11 attacks. The Bush administration announced that high-value detainees could provide information that would save thousands of innocent lives and “more than twenty plots [that] had been put in motion by al-Qa’ida against U.S. infrastructure targets” had been uncovered through these interrogations.¹¹⁹ CIA Director George Tenet pointed to the capture and interrogation of Khalid Sheikh Mohammed as one of the greatest CIA successes and wrote that “none of these successes would have happened if we had to treat KSM [Khalid Sheikh Mohammed] like a white-collar criminal—read him his Miranda rights and get him a lawyer who surely would have insisted that his client simply shut up.”¹²⁰ Other administration officials followed the same general line of explanation without disclosing the details of what the interrogation disclosed.¹²¹

The interrogation program provoked outrage.¹²² Defenders point to extreme circumstances as justification—for example, the placement of a nuclear weapon in a city.¹²³ Defenders of “enhanced interrogation techniques” (later deemed to be torture by President Obama¹²⁴) need to make the case that alternatives would not have worked. Professional interrogators assert that all one needs is time to obtain reliable information from most prisoners.¹²⁵ The Bush administration believed that time was what it lacked. According to Tenet, the CIA obtained Justice Department approval for the interrogation techniques it used and briefed the chairs and ranking Members of the congressional intelligence committees.¹²⁶

In 2014, the then-Democratic majority of the Senate Select Committee on Intelligence issued a report on the interrogations and CIA conduct. The report disputed the Agency claim that only three detainees were subject to waterboarding.¹²⁷ The report also disputed that interrogation techniques had proved an effective means of acquiring intelligence or gaining the cooperation of detainees. In response to this conclusion of the committee majority, CIA Director John Brennan stated, “the cause and effect relationship between the use of EITs [enhanced interrogation techniques] and useful information subsequently provided by the detainee is, in my view, unknowable.”¹²⁸ The committee majority report also accused the CIA of systematic misrepresentations about the program. Brennan denied this allegation.¹²⁹

Prohibition on Torture

Domestic and international law have relevancy to interrogation of those seized in connection with international military and other operations. With regard to those detained as a result of counterterrorism operations, including military operations, since September 11 discussion has focused on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and implementing legislation in the United States.

The United Nations Convention against Torture defines *torture* as:

*any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.*¹³⁰

The United States ratified the convention with a Senate-approved understanding that torture meant an act “specifically intended to inflict severe physical or mental suffering” resulting from the intentional infliction or threat of infliction, or infliction or threat of infliction on a third person, of severe physical or mental pain or suffering.¹³¹ The Federal Torture Act implementing this convention was adopted in 1994 and incorporated the understanding as statutory language.¹³² The Torture Statute imposed criminal penalties on actions against “one who specifically intends to inflict severe physical pain or mental pain or suffering.”¹³³ Since 1992, the United States also has been a party to the International Covenant on Civil and Political Rights, which prohibits “torture or . . . cruel, inhuman or degrading treatment or punishment.”¹³⁴ The question became: What is torture?

The Memoranda on Torture

For a number of years prior to the September 11 attacks, the CIA had sought legal opinions as protection when undertaking missions that likely would be particularly dangerous or politically controversial, or both. The claim of acting in accordance with legal advice is a defense in the event of criminal investigations of CIA activities.¹³⁵ The Justice Department Office of Legal Counsel is the executive branch authority on the meaning of U.S. law. Executive departments and agencies therefore seek its legal opinion. In summer of 2002 and again in May 2005, the CIA requested an Office of Legal Counsel opinion to safeguard against potential criminal and civil penalties against individuals involved in interrogating high-value detainees. The Office of Legal Counsel provided the requested opinions in several controversial legal memoranda.¹³⁶

These memoranda reviewed U.S. anti-torture statutes and proposed interrogation techniques. First, they concluded that the Fifth and Eighth Amendments of the Constitution do not extend to alien combatants when held outside the United States.¹³⁷ Second, they asserted that certain Federal criminal statutes do not apply to properly authorized interrogations of enemy combatants.¹³⁸ Third, the memoranda interpreted 18 U.S.C. § 2340—the statute making it a criminal offense for any person outside the United States to commit or attempt to commit torture—not to apply to interrogations conducted within the United States or permanent military bases such as Guantanamo Bay.¹³⁹ Furthermore, the memoranda interpreted § 2340 to define torture narrowly, requiring intentional acts resulting in “death, organ failure, or serious impairment of bodily functions.”¹⁴⁰ Fourth, al Qaeda and associated forces “are not entitled to the protections that the Third Geneva Convention provides to prisoners of war.”¹⁴¹ By redefining the legal standard for torture to equate with acts resulting in death or organ failure and ignoring the validity of the Geneva Conventions, the memoranda seemingly put aside existing law on torture. After arguing against what appeared to be settled law, the memoranda did not include an assessment of likely public, including international, reactions.

Reactions to the Memoranda

Strong criticism greeted the June 2004 public release of the Office of Legal Counsel memoranda on torture.¹⁴² Top administration officials immediately

began to distance themselves from it. Congress and the administration acted to strengthen the existing prohibitions on torture by U.S. officials. The memoranda were withdrawn, reaffirmed in 2005, and withdrawn again. Nonetheless, in 2005, the Attorney General reaffirmed the lawfulness of the use of harsh interrogation techniques. Ultimately, the Supreme Court reached conclusions contradicting those in the memoranda. The memoranda nevertheless have continued to be part of the debate about the legality of torture.¹⁴³

Congress. During his nomination hearing for U.S. Attorney General, Michael Mukasey commented on the memoranda, stating that “worse than a sin, it was a mistake.”¹⁴⁴ Subsequent administration actions reflect such an opinion of the memoranda. Much of the current legal framework for interrogating terrorist detainees was established as a reaction to the memoranda. In 2005, Congress passed the Detainee Treatment Act, commonly referred to as the McCain Amendment,¹⁴⁵ which sought to enforce U.S. international obligations by explicitly prohibiting all executive departments and agencies from subjecting detainees under U.S. Government control to “cruel, inhuman, or degrading” treatment, consistent with international law.¹⁴⁶ Additionally, the law limited interrogation techniques only to those listed in the U.S. Army Field Manual.¹⁴⁷ At the same time, Senator John McCain (R-AZ) publicly announced that the bill did not rule out harsh treatment in case of an emergency such as imminent attack or even when faced with a hostage rescue scenario.¹⁴⁸

Hamdan. In June 2006, the Supreme Court held that the United States is obligated to adhere to the prohibition on torture in Common Article 3 of the 1949 Geneva Conventions.¹⁴⁹ In *Hamdan v. Rumsfeld*,¹⁵⁰ the Supreme Court held that Article 3 applied to the conflict with al Qaeda and prohibited subjecting detainees to violence, outrages upon personal dignity, torture, and cruel or degrading punishment. Thus, *Hamdan* gave notice that the Office of Legal Counsel’s memoranda were incorrect.

A year later, President Bush issued Executive Order 13340, reinforcing existing legal prohibitions on torture.¹⁵¹ However, another controversial Office of Legal Counsel opinion overshadowed this order. The opinion concluded that six “enhanced interrogation techniques,” when used with specified conditions and safeguards, could be employed by the CIA against high-value detainees belonging to al Qaeda without violating either the McCain Amendment or Article 3 of the Geneva Convention.¹⁵²

The Obama Administration. On January 22, 2009, on his second full day in office, President Obama issued his own executive order concerning detainee interrogation, rescinding Bush's order and closing many avenues for interrogation left open by the Bush administration. The order banned enhanced interrogation and instructed all U.S. agencies that the only authorized interrogation techniques were those listed in the Army Field Manual. Much like the Bush administration's executive orders and memoranda on torture, President Obama's stance also has met with criticism and provoked debate. Some argue that his position on interrogation has gone too far, overly constraining American efforts to obtain valuable information from terrorist suspects. Such criticisms focus in particular on the President's rejection of enhanced interrogation techniques. The arguments claim that since all interrogation methods used now must conform to the standards of the Army Field Manual, America's enemies can prepare themselves to resist these methods, thereby rendering interrogations less effective sources of valuable intelligence. Furthermore, many argue that, in the case of an emergency when time is of the essence, it may be necessary to use harsh interrogation techniques to obtain necessary intelligence.¹⁵³

Lessons from Interrogation Policy

The magnitude of the September 11 attacks was unprecedented, as were the shock and fear it generated. In this time of emergency, when suspects refused to talk, it was to some extent inevitable that the Bush administration would use extreme measures to obtain any information that could protect American lives, including extrajudicial means such as enhanced interrogation techniques and torture. That such interrogation techniques will be used regardless of the law (or their historical record of effectiveness) does not render them legal. The U.S. interrogation policy brings us back to an important lesson from the first decades of the 21st century: the need for a disciplined and inclusive interagency process as a check on action that in retrospect seems impulsive rather than carefully considered.¹⁵⁴

First, some commentators believe it should be permissible to engage in torture/enhanced interrogation techniques. Advocates of this position argue that such techniques should be used only if circumstances require them and if rigorous procedures, including congressional oversight, exist. In such a case,

the government would be arguing that it was permitted by a legal doctrine of necessity. Such procedural steps are necessary so as to publicly emphasize compliance with domestic and international law. The U.S. Government should seek to establish domestic rather than international procedures and processes to follow before engaging in enhanced interrogations.¹⁵⁵ This process should include review by independent legal specialists, particularly given the complex questions of international humanitarian law that interrogation inevitably raises. Transparency also must be provided such that the other branches of government are capable of providing meaningful oversight of the interrogations.

Second, some argue that if the President is going to act extrajudicially, a limited duration must be established under which the employment of extraordinary measures such as enhanced interrogation may reasonably be used.¹⁵⁶ The President cannot have an unlimited timeframe during which he legally may act out of necessity as commander in chief; the ticking bomb actually must tick. When the emergency passes and no threat to U.S. citizens seems imminent, military and civilian personnel must be prohibited from engaging in harsh techniques.

Third, military and nonmilitary personnel must be trained to conduct interrogations in a manner that is consistent with domestic and international law.¹⁵⁷ They must be aware of the potential consequences of interrogation. Such training is especially important given that U.S. law provides legal protections against criminal and civil actions only when U.S. agents “did not know that the [interrogation] practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful.”¹⁵⁸ A good faith reliance on advice of counsel is an important factor in considering the reasonableness of such actions¹⁵⁹ but is not a substitute for adequate training.

Fourth, the executive branch itself needs greater internal oversight so that it is aware of the actions taken by the military or the Intelligence Community. It took the senior levels of the Bush administration nearly 4 months to learn of the “shocking and clearly illegal” events in the military detention facility at Abu Ghraib.

Influencing the debate are the following questions and how they are answered: Do the interrogation techniques—torture—work? Such techniques have been used since time immemorial, which suggests the perpetrators believe some useful information always will be obtained. Are such techniques

of interrogation politically defensible in a democracy, particularly the United States? The Golden Rule is the norm but is not followed by many enemies of the United States. Should the United States, as a matter of policy, follow that rule whether enemies do so? Finally, what role should morality play? Is torture consistent with what Americans think they are or what they think their government should do?

The exchanges among the majority and minority of the Senate Select Committee on Intelligence and the CIA have neither answered all the questions nor put to rest the controversy about the use of enhanced interrogation techniques and the effectiveness of such techniques. We conclude that the United States should respect the normative regime against torture set forth in the convention and implementing statute, and that if a President deems it necessary to authorize conduct that varies from that normative regime, he or she should be prepared to defend the action by making a necessity defense. If the President is not prepared to take that step, that fact would suggest that deviating from the norm is not necessary or otherwise justified.¹⁶⁰

High-Tech Sniping: The Targeted Killing Controversy

In the wake of the 9/11 attacks, first the Bush administration and then the Obama administration have insisted, without much controversy or opposition, that the United States is engaged in an armed conflict with al Qaeda, its associates, and any state that supported it. This characterization of the conflict does not mean law enforcement methods would never be used, especially as the perpetrators had engaged in prosecutable crimes. Rather, it acknowledges the need for a spectrum of methods to defend the country and prevent a repetition of the attacks. As a result, from the outset, the conflict engaged the President's constitutional authorities and responsibilities as commander in chief and the use of U.S. armed force against al Qaeda. Determining lawful targets for the armed forces takes place in this context.¹⁶¹

The 2001 Authorization for Use of Military Force explicitly gives the President power to target individuals determined to bear responsibility for the attacks. The laws of war permit the targeted killing of lawful targets (indeed, the laws of war prefer targeted killings because they demonstrably respect or attempt to respect distinctions between combatants and noncombatants and military and civilian targets), and the history of warfare is in large part the his-

tory of soldiers trying to kill identifiable soldiers on the opposing side. At the same time, applying the standard involves more than just applying a yardstick. For example, a difficult issue of appraisal involves determination of who or what might be considered to be directly participating in hostilities.¹⁶²

The 9/11 attacks highlighted the danger posed by terrorist safe havens in remote parts of the world. Unmanned aerial vehicles (UAVs), because of their technological qualities, have come to be a weapon of choice in targeting commanders and leaders of al Qaeda and other terrorist groups at war with the United States. They can loiter over a target for long periods, permitting the acquisition of precise targeting data. They fire precision weapons, thus permitting substantial limitation of collateral damage. They do not put friendly pilots or soldiers at risk because they are unmanned. They can attack persons hiding in areas difficult to reach by soldiers. For these reasons, President Bush, and, more frequently, President Obama have used UAVs in fighting terrorists. Then-CIA Director Leon Panetta called armed UAVs “the only game in town in terms of confronting or trying to disrupt the Al Qaeda leadership.”¹⁶³

Despite the advantages provided by UAVs and their demonstrated effectiveness, their use has engendered much debate.¹⁶⁴ So long as the targeted killing is carried out consistently with the legal principles from the laws of war set forth in this chapter, we see no more difficulty with the practice than with the sort of sniping that killed Admiral Nelson at the Battle of Trafalgar.

The Lawful Target

The 2001 Authorization for Use of Military Force gave the President appropriate guidance as well as discretion. Its grant of authority “to use all necessary and appropriate force”¹⁶⁵ limited the President’s authority to use the military instrument to those situations where police action, by the United States or the state in which the terrorist is found, is impossible. It was neither necessary nor appropriate to use the Armed Forces to track down and arrest Timothy McVeigh for the 1995 Oklahoma City bombing. Attacks by UAVs in London or Paris or Moscow would be inappropriate as well as unnecessary. A use of force against Osama bin Laden was “necessary and appropriate” given the lawfulness of the target under the laws of war and the circumstances of his location, including the lack of cooperation by the host government or inability of

the host government to discharge its international legal responsibilities with respect to the use of force from its territory.

Military operations conducted by the United States must conform to U.S. legal obligations. The Uniform Code of Military Justice incorporates that law in so far as it is set forth in treaties to which the United States is a party, such as the four 1949 Geneva Conventions, or in customary international law.¹⁶⁶ U.S. military operations are conducted with the benefit of legal advice offered by Judge Advocates General assigned to commands in the field, the headquarters of combatant commanders, and Washington, DC.

The principal sources of law in this area are the 1949 Geneva Conventions and those sections of Additional Protocol I of 1977 that the United States regards as an accurate codification of customary international law. At the core of this body of law are the principles of necessity, proportionality, distinction, and humanity.

Necessity. The military necessity requirement “arises predominantly from customary international law.”¹⁶⁷ Military objectives are defined in Article 52 of Additional Protocol I as “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”¹⁶⁸ This principle recognizes the legitimate interest in ending hostilities through victory.¹⁶⁹ At the same time, since the first effort to codify a nation’s view of the laws of war during the American Civil War, states have recognized that “[m]ilitary necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering.”¹⁷⁰

Proportionality. The principle of proportionality “requires that damage to civilian objects . . . not be excessive in relation to the concrete and direct military advantage anticipated.”¹⁷¹ Thus, belligerents are required to weigh the military objective potentially achieved against the loss of civilian life and damage to civilian property. When determining whether a belligerent met this standard, one employs a “reasonable commander” standard—that is, “one must look at the situation as the commander saw it in light of all known circumstances.”¹⁷²

Distinction. The principle of distinction is central to the modern laws of war. It obligates military commanders to distinguish between military and civilian objectives.¹⁷³ This principle requires combatants to discriminate be-

tween military and civilian targets, direct their attacks at other combatants and military targets, and protect civilians and civilian property to the extent reasonable.¹⁷⁴ Attacks that are not directed at military objects or that employ a method or means of combat that cannot be directed—so-called indiscriminate attacks—are forbidden.¹⁷⁵ Belligerents must be distinguishable from civilians and “refrain from placing military personnel or materiel in or near civilian objects or locations.”¹⁷⁶

While Protocol I directs belligerents to meet a “feasibility” standard in regard to operations—for example, “those who plan or decide upon an attack” must do “everything feasible” to ensure they are not attacking civilians, civilian objects, or items or individuals who enjoy special protection; to “take all feasible precautions” when choosing weapons and tactics to minimize incidental injury and collateral damage; and to select that military objective from among those yielding a “similar military advantage” that “may be expected to cause the least danger to civilian lives and to civilian objects”¹⁷⁷—the United States certainly does not recognize this requirement as part of customary international law however much it tries to adhere to it in operations and uses a quantum of force that seems reasonable under the circumstances.¹⁷⁸

Humanity. The principle of humanity or avoidance of “unnecessary suffering” limits the ability of combatants to adopt certain “means of injuring the enemy.”¹⁷⁹ Consistent with the principle of necessity, inflicting “suffering, injury, or destruction not actually necessary for the accomplishment of legitimate military purposes” is prohibited.¹⁸⁰ The humanity principle is comprised of three parts: it prohibits use of “arms that are per se calculated to cause unnecessary suffering”; it prohibits use of “otherwise lawful arms in a manner that causes unnecessary suffering”; and those prohibitions apply only when the unlawful effect is specifically intended.¹⁸¹

The State Department Legal Advisor, Harold Koh, explained the Obama administration’s position with respect to adherence to these principles in military operations in 2010. He stated that the United States applied “law of war principles,” including:

First, the principle of distinction, which requires that attacks be limited to military objectives and that civilians or civilian objects shall not be the subject of the attack; and

*Second, the principle of proportionality, which prohibits attacks that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the concrete and direct military advantage anticipated.*¹⁸²

If a target is lawful under the laws of war, a state may use weapons, including weapons delivered by UAVs against such targets. In this context, targeted killing is no more than high-tech sniping. As a matter of international law, when Afghanistan was unwilling or unable to take action against the perpetrators of the 9/11 attacks and similarly unwilling or unable to prevent future attacks, the United States not only had a right to use force in self-defense against those perpetrators, but also in fact had no choice if it were to defend itself against further attacks.

Critics have attacked the targeted killing program on the basis of its compliance with the law of war principles of distinction, proportionality, and necessity. Yet UAVs are currently among the most precise weapons to hit remote targets. Despite the sophistication of their technology, unmanned platforms do not and cannot replace people in the evaluation process by which a lawful target is identified, potential for civilian casualties is weighed, and after-action results are considered. Unmanned platforms nonetheless make distinguishing between military and nonmilitary targets and keeping collateral damage to a minimum easier than historically has been possible. UAVs offer other specific advantages that would seemingly make them preferable. They allow operators to make target-engaging decisions absent fear of death or the “fog of war.” They also allow for process in a way that other weapons systems do not. For example, because a pilot is not in danger, the command center has additional time to debate a strike and weigh the prudence of striking a particular target.

Achieving effective distinction between military and civilian targets is a goal of contemporary laws of war. That UAVs provide an advantage to the side possessing them seems undeniable. But inequality in means of warfare is not disqualifying or illegal. Military commanders hope that the battle is unfair to their advantage. Regardless of whether jihadists are considered lawful combatants or unlawful noncombatant fighters, terrorists who actively take part in hostilities against the United States by plotting attacks are targetable.¹⁸³

Further addressing these principles, the White House's May 23, 2013, fact sheet, "U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities," states that compliance with these four principles is integral to the overall standard that the United States uses in deciding whether to undertake a targeting operation against a particular terrorist target. That sheet asserts specifically:

[L]ethal force will be used outside areas of active hostilities only when the following preconditions are met: First, there must be a legal basis for using lethal force. . . . Second, the United States will use lethal force only against a target that poses a continuing, imminent threat to U.S. persons. . . . Third, the following criteria must be met before lethal action may be taken:

- 1. Near certainty that the terrorist target is present;*
- 2. Near certainty that non-combatants will not be injured or killed;*
- 3. An assessment that capture is not feasible at the time of the operation;*
- 4. An assessment that the relevant governmental authorities in the country where action is contemplated cannot or will not effectively address the threat to U.S. persons;*
- 5. An assessment that no other reasonable alternatives exist to effectively address the threat to U.S. persons.*

*Finally, whenever the United States uses force in foreign territories, international legal principles, including respect for sovereignty and the law of armed conflict, impose important constraints on the ability of the United States to act unilaterally—and on the way in which the United States can use force.*¹⁸⁴

As currently conducted, unmanned attacks fall into two procedural categories. The Obama administration has tried to apply lessons it took from the Bush administration experience. It has been transparent, or at least reasonably transparent, with respect to determining who is targeted. After the targeted killing of American Anwar al-Awlaki in 2011, the administration released legal

memoranda and a fact sheet providing parameters of its targeted killing procedure. Paired with subsequent news reports, a rough sketch has emerged of an intensive interagency process in which names are nominated and then debated. Lawyers are present to help decide whether to engage the targets.

Al-Awlaki's U.S. citizenship caused debate over whether targeted killing was subject to constitutional due process protections. Some¹⁸⁵ argue that individual targets require "notice" before they are attacked.¹⁸⁶ Others, like Samuel Adelsberg,¹⁸⁷ argue a neutral decisionmaker and additional inter-branch deliberation are required. Still others insist judicial review of targeting decisions is required. A last group, to which the authors of this chapter belong, do not consider such killings to involve judicial process at all. Being lawful targets as a matter of the laws of war, combatants can be killed in military operations.

A leaked Department of Justice white paper argues that a lethal operation against a U.S. citizen who is a senior operational leader of al Qaeda or an associated force, in a foreign country, outside the area of active hostilities, does not violate due process.¹⁸⁸ Use of force in such circumstances is justified as an act of national self-defense.¹⁸⁹ Additionally, an al Qaeda leader is a member of the cohort against whom Congress has authorized the use of necessary and appropriate force.¹⁹⁰ The fact that such a person also might be a U.S. citizen does not alter this conclusion.¹⁹¹

This analysis is consistent with Supreme Court cases holding that the military constitutionally may use force against a U.S. person who is part of enemy forces.¹⁹² Applying the Supreme Court's balancing approach in *Mathews v. Eldridge*, the white paper concluded that lethal operations are permissible (that is, the government's interest would outweigh the private interest of the targeted citizen at issue), at least where an informed, high-level official of the U.S. Government has determined that the targeted individual poses an imminent threat of violent attack against the United States; where a capture operation would be infeasible (and where those conducting the operation continue to monitor whether capture becomes feasible); and where such an operation would be conducted consistent with applicable law of war principles. Similar determinations were expressed by Eric Holder¹⁹³ and President Obama.¹⁹⁴ In 2010, Harold Koh noted that "a state that is engaged in an armed conflict or in legitimate self-defense is not required to provide targets with legal process before the state may use lethal force."¹⁹⁵

Conclusions

It is impossible now to say when the era that began on September 11, 2001, will end. Involved in continuous military and counterterrorism operations and subject to repeated terrorist attacks, the United States, its friends, and allies face a difficult future full of hard choices. How they should make those choices is set forth in their respective constitutions and the laws adopted pursuant to them. The body of relevant law includes international law. Our conclusions embody lessons identified and to be learned from the first 14 years of the period, which perhaps should be considered now as a condition of international life rather than a long war.

First, of course, the United States and others should prepare themselves for attack.¹⁹⁶ Such preparation means practice, as if one were doing fire drills at school, and development of plans for certain foreseeable situations involving substantial numbers of casualties or shocking events, such as the January 2015 murder of the *Charlie Hebdo* staff in Paris, that do not involve large numbers of people but strike at the heart of free expression.

Second, a regular and vigorous interagency decisionmaking process is essential. When an event occurs, whether terrorist, military, or natural, the pressure for speed will be enormous. That pressure squeezes out thinking and common sense. The latter are essential to successful response.

Third, legal planning must be included as part of operational planning. Thus, lawyers should be regarded as essential participants in the planning process, preparing their clients for legal issues along the way and advising them on how to address the issues as they come up. Such subjects as targeting, arrest, and detention inevitably will be part of any military and counterterrorist operations.

It is to be hoped that, as Philip Bobbitt has stated, “We have entered a period in which strategy and law are coming together.”¹⁹⁷ In any event, it is desirable that we do so because the law expresses what society deems permissible strategy and tactics. The fusion of law and policy is at the core of political legitimacy and of the chief lessons we identify as important to learn in contemplation of future conflict.

Lessons to be learned by the United States from the response to the 9/11 attacks are easier to identify than to learn and implement; the lessons cross disciplines. They are not exclusively legal or military or tactical or strategic.

But because the law involves a process of authoritative decision, it is inextricable from what often is considered an exclusively “policy” process.

Embrace a Disciplined, Inclusive, Interagency Decisionmaking Process

Such process contributes to good government in ordinary times.¹⁹⁸ In a crisis, when one may be tempted to treat them as time-consuming luxuries, it is even more important. First impressions of reality usually are incomplete or wrong.¹⁹⁹ Particularly when, as in the case of the September 11 attacks, there is fear that they constitute the first of a series of surprise attacks, the impulse inevitably will be to seek shortcuts and demand instant results. A disciplined and inclusive interagency decisionmaking process should fit the circumstances and not be sidelined. The process should not seek consensus for its own sake, nor should it cut out those whose views are in a minority. It should ensure that issues presented to the President for decision reflect serious options, different points of view, and appropriate analysis, including the foreseeable consequences, costs, and benefits. And the options should be presented in a timely fashion. Numerous examples exist where such an approach was lacking in the period 2001–2014.²⁰⁰ The dearth of process in the early days of the Bush administration was striking in the area of legal advice to the President. Counterterrorism, moreover, is a concept and subject that attracts exploitation and expansion to achieve unrelated objectives because of the difficulty in government of resisting any idea labeled “counterterrorism.” A vigorous interagency process can keep unrelated subjects off the agenda and focus the issues to be addressed and choices to be made.

Embrace the Constitution and Fundamental International Norms

The Constitution has served the American people well for 228 years. For over a century, the United States has made support for the international rule of law a fundamental part of its foreign policy and a definition of its national interests. In the immediate aftermath of the 9/11 attacks and the commencement of military operations in Afghanistan in October 2001, the administration tried to work around the Constitution in the way it held and treated detainees. It arrested large numbers of people using statutory authorities never contemplated to be relevant to counterterrorism operations. Probably driven by fear of addition-

al attacks and a belief that detainees had information about such attacks that had to be extracted at all costs, the administration refused humane treatment for all detainees despite the requirement of the 1949 Geneva Conventions.²⁰¹

Administrations invariably find themselves enmeshed in unnecessary controversy when they do not adhere to the Constitution and respect legal standards. Decisions should not be made to avoid what, in the circumstances, may appear to be constitutional inconveniences such as due process.²⁰² One hears in defense of the conduct in the immediate aftermath of the September 11 attacks that the country was not attacked again, even though some things were done that courts subsequently held to be unlawful or an abridgement of constitutional due process. When government officials seek to evade the Constitution or fundamental international norms such as those governing the use of force or the treatment of prisoners, the result, more often than not, is poor decisionmaking and worse results. Another consequence is distortion of the public debate. In such circumstances, the focus tends to be on legal requirements and procedures, not the substance of the policy.²⁰³

Prepare and Plan for Detention Operations and Foreseeable Legal Issues in Advance

This third lesson has a number of parts. It concerns the need to include detention planning during the development of a military campaign plan²⁰⁴ and to assign the best people to detention operations. As the Abu Ghraib abuses showed, failed detention policies can have strategic consequences.²⁰⁵ In the course of developing a plan for the detention, interrogation, and treatment of detainees, the United States also must sort out, to the extent it can in advance, the complex legal environment it almost certainly will confront during military operations abroad. What kind of conflict is involved as a matter of law? How should one categorize the enemy for purposes of the Geneva Conventions and other relevant and applicable bodies of law? In the event of occupation of even a part of a country, one foreseeably may become involved in detention operations not related to the battlefield. Afghanistan involved issues of Afghan, U.S., and International Security Assistance Force jurisdiction and applicable international law. Iraq brought home the complexity of meeting the requirements of the Third (prisoners of war) and Fourth (civilians) Geneva Conventions in an environment of ongoing violence, political upheaval, and

difficult logistics. The fact that the United States and its military partners are party to different treaties containing rules for armed conflict, including detention and treatment of detainees, alone creates significant operational issues. It is essential that, to the extent foreseeable and possible, commanders and their operations not be trapped in likely legal thickets. Legal planning, therefore, should be an integral part of military planning.

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Notes

¹ Thucydides, *The Peloponnesian War*, trans. Rex Warner (Baltimore: Penguin Books, 1972), 122.

² *Northern Securities Co. v. United States*, 193 U.S. 197, 401 (1904) (Holmes, J., dissenting).

³ See, for example, Benjamin Wittes, *Law and the Long War: The Future of Justice in an Age of Terror* (New York: Penguin, 2008).

⁴ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

⁵ U.S. Const. art. VI.

⁶ The War Crimes Act of 1986 in part codified Common Article III of the Geneva Conventions. 18 U.S.C.A. § 2441. The United Nations Participation Act of 1945 (UNPA) authorizes U.S. participation in the United Nations, including to fulfill UN Charter obligations specifically under Art. 41. 22 U.S.C.A. § 287.

⁷ Some important attributes—sovereignty, for example—of every country, including the United States, result from the workings of the international system and international law. See Morton A. Kaplan and Nicholas deBelleville Katzenbach, *The Political Foundations of International Law* (New York: Wiley, 1961).

⁸ Eugene V. Rostow, *The Ideal in Law* (Chicago: University of Chicago Press, 1978), 1. Also, “Roman jurists thought law could not be defined at all—that it pervaded society

too deeply, and in so many ways, that the idea of law could never be captured in a single perspective.” Ibid.

⁹ Conversation with C. Dean McGrath, Jr., Deputy Chief of Staff, Office of the Vice President, 2001–2005.

¹⁰ Department of Justice, *Amerithrax Investigative Summary: Released Pursuant to the Freedom of Information Act* (Washington, DC: Department of Justice, 2010), available at <www.justice.gov/archive/amerithrax/docs/amx-investigative-summary.pdf>.

¹¹ Jeanne Guillemin, *American Anthrax: Fear, Crime, and the Investigation of the Nation's Deadliest Bioterror Attack* (New York: Times Books, 2011), 245–249.

¹² On his last day in office, Secretary of State Dean Rusk remarked to his colleague Eugene Rostow, the Under Secretary of State for Political Affairs, that there had been no nuclear wars on his watch, thus revealing the importance of that concern during his 8 years in office.

¹³ See, generally, Gabriella Blum and Philip B. Heymann, *Laws, Outlaws, and Terrorists: Lessons from the War on Terrorism* (Cambridge: MIT Press, 2010).

¹⁴ See the Constitution Project, *Report on Post-9/11 Detentions* (Washington, DC: Liberty and Security Initiative of the Constitution Project, June 2, 2004), available at <http://constitutionproject.org/pdf/report_on_post_9_11_detentions2.pdf>.

¹⁵ See, for example, Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 2nd ed. (Cambridge: Cambridge University Press, 2010). “Laws of war” or “law of armed conflict” are more precise terms than “international humanitarian law” and therefore preferred.

¹⁶ U.S. Const. art. II, §§ 1–2.

¹⁷ See, for example, Harold Hongju Koh, *The National Security Constitution: Sharing Power after the Iran-Contra Affair* (New Haven: Yale University Press, 1990); Eugene V. Rostow, *President, Prime Minister, or Constitutional Monarch?* McNair Paper No. 3 (Washington, DC: NDU Press, 1989); Henry Bartholomew Cox, *War, Foreign Affairs, and Constitutional Power, 1829–1901* (Cambridge: Ballinger, 1984); Abraham D. Sofaer, *War, Foreign Affairs, and Constitutional Power: The Origins* (Cambridge: Ballinger, 1976); Louis Henkin, *Foreign Affairs and the Constitution* (Mineola, NY: Foundation Press, 1972); Edward S. Corwin, *The President: Office and Powers, 1787–1957* (New York: New York University Press, 1957); Robert F. Turner, “The Constitutional Framework for the Division of National Security Powers among Congress, the President, and the Courts,” in *National Security Law*, ed. John Norton Moore and Robert F. Turner (Durham, NC: Carolina Academic Press, 2005), 779–841.

¹⁸ Robert F. Turner, “The Authority of Congress and the President to Use the Armed Forces,” in *National Security Law*, 843–884; *Marbury*, 137; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 578 (1952); Robert F. Turner, “Truman, Korea, and the Constitution: Debunking the ‘Imperial President’ Myth,” *Harvard Journal of Law and Public Policy* 19, no. 2 (Winter 1996), 533; Louis Fisher, “The Korean War: On What Legal Basis Did Truman Act?” *American Journal of International Law* 89, no. 1 (1995), 21.

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¹⁹ Turner, “The Constitutional Framework;” Turner, “The Authority of Congress.”

²⁰ Letter from the President to Congress, February 11, 2015, enclosing a draft joint resolution authorizing for 3 years the use of force, not including “enduring offensive ground combat operations.”

²¹ Stephen W. Preston, “The Legal Framework for the United States’ Use of Military Force Since 9/11,” remarks at the annual meeting of the American Society of International Law, April 10, 2015, available at <www.defense.gov/Speeches/Speech.aspx?SpeechID=1931>.

²² S.J. Res. 23, September 18, 2001. Pub.L. 107-40, 115 Stat. 224 (2001) (hereafter Authorization for Use of Military Force Against Terrorists or, AUMF).

²³ Letter from John D. Negroponte, U.S. Permanent Representative to the United Nations, to the President, UN Security Council, October 7, 2001, available at <http://avalon.law.yale.edu/sept11/un_006.asp>. Letter fulfilled obligation under Article 51 of the UN Charter to report defensive uses of force to the Security Council.

²⁴ James E. Baker, *In the Common Defense: National Security Law for Perilous Times* (Cambridge: Cambridge University Press, 2007).

²⁵ *Youngstown Sheet & Tube Co.*, 635–636 (1952) (Jackson, J., concurring). See also Baker, 40–44.

²⁶ War Powers Resolution, 50 U.S.C. § 1547 (a) (1) (1973).

²⁷ AUMF § 2 (b) (1). On the constitutionality of at least parts of the War Powers Resolution, see *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

²⁸ Emphasis added.

²⁹ UN Doc. S/RES/1368 (September 12, 2001). The International Court of Justice (ICJ) Advisory Opinion on the Israeli wall or security fence took a different view and denied that the attacks that caused Israel to build the wall gave rise to an international law right of self-defense. See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9), available at <www.icj-cij.org/docket/files/131/1671.pdf>. On the limited import of an ICJ Advisory Opinion, see Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 237, para. 17 (July 8), available at <www.icj-cij.org/docket/files/95/7495.pdf>.

³⁰ On September 12, 2001, the North Atlantic Treaty Organization (NATO) invoked Article 5 (April 4, 1949), available at <www.nato.int/cps/en/natolive/official_texts_17120.htm>. Article 5 provides:

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

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Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

³¹ H.J. Res. 114, Oct. 16, 2002. Pub. L. 107-243, 116 Stat. 1498 (2002) (hereafter Iraq AUMF).

³² Iraq repeatedly deployed chemical weapons during its 8-year war with Iran. The first documented case was the November 1980 chemical bombing of the city of Susangerd. By February 16, 1984, Iraq had used chemical weapons against Iran at least 49 times, killing at least 109 and injuring hundreds of others. In 1991, the Central Intelligence Agency (CIA) estimated that Iran had suffered thousands of deaths from Iraq's use of chemical weapons. On March 16, 1988, the Iraqi regime used chemical weapons against its own Kurdish population in the city of Halabja. The attack killed between 3,200 and 5,000 people and injured 7,000 to 10,000 more. Margret A. Sewell, "Freedom from Fear: Prosecuting the Iraqi Regime for the Use of Chemical Weapons," *St. Thomas Law Review* 16 (2004), 365–393.

³³ Iraq AUMF.

³⁴ *Ibid.*

(c) WAR POWERS RESOLUTION REQUIREMENTS—

(1) *SPECIFIC STATUTORY AUTHORIZATION—Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.*

(2) *APPLICABILITY OF OTHER REQUIREMENTS—Nothing in this joint resolution supersedes any requirement of the War Powers Resolution.*

³⁵ Stephen J. Hadley, interview by Joseph J. Collins and Nicholas Rostow, October 7, 2014.

³⁶ The authoritative U.S. view was set forth by State Department Legal Adviser William H. Taft IV and his colleague, Todd F. Buchwald, in "Preemption, Iraq, and International Law," *American Journal of International Law* 97, no. 3 (July 2003), 557–563. Articles by John Yoo, Richard N. Gardner, Richard A. Falk, Miriam Sapiro, Thomas M. Franck, Tom J. Farer, and Jane E. Stromseth appeared in the same issue of the journal, discussing the same subject from different points of view and therefore illuminating the scope of the dialogue about legality. The U.S. Naval War College *International Law Studies*, 80 (2006), edited by Richard B. Jacques, provides the same insights through articles by Ruth Wedgwood, Thomas M. Franck, Nicholas Rostow, Yoram Dinstein, Marco Sassoli, W. Hays Parks, Jeffrey K. Walker, Adam Roberts, Michael N. Schmitt, M.H. MacDougall, Wolff Heintschel von Heinegg, Hyun-soo Kim, D.L. Grimond and G.W. Riggs, Alan Baker, Jean-Philippe Lavoyer, John F. Murphy, Jan Hladik, David E. Graham, and Charles H.B. Garraway on issues in international law and military operations arising from the Iraq campaign and war on terror.

³⁷ *The National Security Strategy of the United States of America* (Washington, DC: The

White House, September 2002), 9, available at <www.state.gov/documents/organization/63562.pdf>. The use of the term *preemptive* was unfortunate and seemed to mark a break with the historical U.S. position that the international law of self-defense included a right of anticipatory self-defense, as had been established by Daniel Webster in 1841 and adhered to by every administration since then. The documents establishing this interpretation of international law are in the *Caroline* file, available at <http://avalon.law.yale.edu/19th_century/br-1842d.asp>. As Professor Yoram Dinstein, formerly twice the Stockton Professor of International Law at the Naval War College, frequently argues, if the 2002 National Security Strategy had used the word *interceptive*, it would have *preempted* problems. The National Security Strategy is a political, not a legal, document.

³⁸ UNPA.

³⁹ UN Charter Article 51, which reads:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary to maintain or restore international peace and security.

On the controversies over the meaning of “armed attack,” see Yoram Dinstein, *War, Aggression, and Self-Defence*, 5th ed. (Cambridge: Cambridge University Press, 2011), 196–277; Nicholas Rostow, “International Law and the Use of Force: A Plea for Realism,” *Yale Journal of International Law* 34, no. 2 (Summer 2009), 549.

⁴⁰ See Dinstein, *Conduct*, throughout; Myres S. McDougal and Florentino P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (New Haven: Yale University Press, 1961).

⁴¹ U.S. courts, administrations, and the Department of Defense use the term *unlawful combatant*. As a matter of law, there is no such person. One either is a combatant or a noncombatant. If one is a combatant, one may, as a matter of law, engage in activities that otherwise would constitute murder. If one is a noncombatant, one may not engage in such conduct without incurring risk of prosecution. *Fighter* would be a more neutral term than unlawful combatant and would make the distinction clear. The Obama administration uses the term *unprivileged belligerent*, which approximates the same idea. See *Ex Parte Quirin*, 317 U.S. 1 (1942); Dinstein, *Conduct*, 33. Rather than insist on usage that readers may find unfamiliar, we adopt the common parlance of *lawful* and *unlawful* combatants to distinguish between combatants, who enjoy the privilege of killing as a matter of international and domestic law, and noncombatants, who do not enjoy such privilege and are not entitled, as a matter of law, to prisoner of war status on capture.

⁴² The Third Geneva Convention in effect contains a roadmap for treating detainees.

⁴³ George W. Bush, “Address to a Joint Session of Congress and the American People,”

Washington, DC, September 20, 2001.

⁴⁴ UN doc. S/Res/1441 (2002), November 8, 2002.

⁴⁵ Jane Stromseth, "Law and Force After Iraq: A Transitional Moment," *American Journal of International Law* 97, no. 3 (July 2003), 628.

⁴⁶ Vienna Convention. The Constitution defines *treaty* more narrowly than international law. Therefore, the United States is not a party to the Convention. Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force January 27, 1980, available at <<http://www1.umn.edu/humanrts/instreet/viennaconvention.html>>; Robert Dalton, "Treaties and Other International Agreements," in *National Security Law*. With respect to material breach, Article 60 of the Vienna Convention provides that:

A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.
2. *A material breach of a multilateral treaty by one of the parties entitles:*

a. The other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either: i. In the relations between themselves and the defaulting State, or ii. As between all the parties; b. A party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State; c. Any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty. 3. *A material breach of a treaty, for the purposes of this article, consists in: a. A repudiation of the treaty not sanctioned by the present Convention; or b. The violation of a provision essential to the accomplishment of the object or purpose of the treaty.* 4. *The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.* 5. *Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.*

Thus, Iraq's action, in the U.S. and United Kingdom (UK) view, meant that the 1990 UN Security Council authorization to use force remained in force, allowing "Member States co-operating with the Government of Kuwait . . . to use all necessary means to uphold resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area." UN doc. S/Res. 678 (1990), November 29, 1990. On the UK view, see "The Written Answer of the Attorney General, Lord Goldsmith, to a Parliamentary Question on the legal basis for the use of force in Iraq," March 17, 2003, UK Foreign and Commonwealth Office.

⁴⁷ Thomas N. Franck, "What Happens Now? The United Nations after Iraq," *American Journal of International Law* 97, no. 3 (2003), 613; Patrick McLain, "Settling the Score with Saddam: Resolution 1441 and Parallel Justifications for the Use of Force Against Iraq," *Duke Journal of International Law* 13, no. 1 (2003), 233, 249. Paragraph 34 of UN Security

Council Resolution 687 (1991) (“Decides to remain seized of the matter and to take such further steps as may be required for implementation of the present resolution and to secure peace and security in the region”) meant the Security Council alone could decide when the authorization in Resolution 678 (1990) could be invoked; for a different interpretation of the Security Council Iraq resolutions, see Nicholas Rostow, “Determining the Lawfulness of the 2003 Campaign Against Iraq,” *Israel Yearbook on Human Rights* 34 (2004), 15–34; Sean D. Murphy, “Assessing the Legality of Invading Iraq,” *Georgetown Law Journal* 92, no. 4 (2004), 173–272; Jules Lobel and Michael Ratner, “Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-fires and the Iraqi Inspection Regime,” *American Journal of International Law* 93, no. 1 (1999), 124 (absence of, or ambiguity in connection with, question of Security Council authority).

⁴⁸ UN doc. S/Res. 678 (1990) (November 29, 1990); Taft and Buchwald, “Preemption.” See also Rostow, “International Law.”

⁴⁹ UN doc. S/Res. 687 (1991) (April 3, 1991).

⁵⁰ Quoted in Stephen Dycus et al., *National Security Law*, 5th ed. (New York: Wolters Kluwer, 2011), 733.

⁵¹ *Ibid.*, 734.

⁵² *Ibid.*

⁵³ 8 U.S.C. §§1182(a)(3)(B), 1227(a)(4)(B), as amended (2001).

⁵⁴ Affidavit of Michael E. Rolince, U.S. Department of Justice, Executive Office for Immigration Review, Immigration Court, quoted in Dycus et al., 739–740.

⁵⁵ On June 17, 2015, the Second Circuit Court of Appeals held that “The Constitution defines the limits of the Defendants’ [former prison wardens Dennis Hasty, Michael Zenk, and James Sherman, former Attorney General John Ashcroft, former Federal Bureau of Investigations Director Robert Mueller, and former Immigration and Naturalization Service Commissioner James W. Ziglar] authority; detaining individuals as if they were terrorists, in the most restrictive conditions of confinement available, simply because these individuals were, or appeared to be, Arab or Muslim, exceeds those limits. . . . Holding individuals in solitary confinement twenty-three hours a day with regular strip searches because their perceived faith or race placed them in group targeted for recruitment by al Qaeda violated the detainees’ constitutional rights.” See *Turkmen, et al. v. Hasty, et al.*, Nos. 13-981, 13-999, 13-1002, 13-1003, 13-1662 at *106-07 (2nd Cir. June 17, 2015), available at <www.ca2.uscourts.gov/decisions/isysquery/16c71149-0fdd-4844-b140-d197f4bd3118/9/doc/13-981_complete_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/16c71149-0fdd-4844-b140-d197f4bd3118/9/hilite/>.

⁵⁶ 18 U.S.C. §3144, as amended (1986).

⁵⁷ *Ibid.*

⁵⁸ *Ashcroft v. Al-Kidd*, 563 U.S. ___ (2011), 131 S. Ct. 2074 (2011) (“Efficient and even-handed application of the law demands that we look to whether the arrest is objectively

justified, rather than to the motive of the arresting officer.”), quoted in Dycus et al., 757.

⁵⁹ Dycus et al., 738.

⁶⁰ The police may arrest based on “articulable suspicion that the person has been, is, or is about to be engaged in criminal activity.” *United States v. Place*, 462 U.S. 696, 702 (1983). “[R]easonable suspicion of criminal activity,’ short of probable cause, only ‘warrants a temporary seizure for the purpose of questioning limited to the purpose of the stop.” *Florida v. Royer*, 460 U.S. 491, 498 (1983). Quoted in Dycus et al., 735. In 2006, Congress amended the Immigration and Nationality Act to permit arrest and detention of aliens on suspicion of illegal status.

⁶¹ *Zadvydas v. Davis*, 533 U.S. 678 (2001).

⁶² Quoted in Dycus et al., 738. British local authorities are said to use cameras installed as part of the effort to fight terrorism to enforce recycling laws.

⁶³ Geneva Convention Relative to the Treatment of Prisoners of War, August 2, 1949, reprinted in Adam Roberts and Richard Guelff, eds., *Documents on the Laws of War*, 3rd ed. (Oxford: Oxford University Press, 2000), 244ff.

⁶⁴ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, Art. 3, reprinted in Roberts and Guelff, 198–199:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

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The Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

This Common Article appears in the three other 1949 Geneva Conventions dealing with Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Prisoners of War, and Civilians in Time of Armed Conflict. *Ibid.*, 223–224, 245, 302.

⁶⁵ U.S. Const. art. VI.

⁶⁶ *Medellin v. Texas*, 128 U.S. 1346 (2008).

⁶⁷ Article 134 of the Uniform Code of Military Justice, the “general article,” allows the military to import noncapital Federal criminal statutes and charge them in a military court-martial. 10 U.S.C. §934. Art. 134 (1956). Thus, Article 134 incorporates the War Crimes Act of 1996.

⁶⁸ See, for example, Roberts and Guelff, 196. See also Dinstein, *Conduct*, chapter one; W. Michael Reisman and Chris T. Antoniou, *The Laws of War* (New York: Vintage, 1994), xix–xxi; Theodor Meron, “The Geneva Conventions as Customary Law,” *American Journal of International Law* 81, no. 2 (April 1987), 348–370.

⁶⁹ On the U.S. position with respect to parts of Protocols I and II, see Michael J. Matheson, then Deputy Legal Adviser, U.S. Department of State, “The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions,” *American University Journal of International Law and Policy*, vol. 2 (1987), 415, 419. See also Kenneth Anderson, “Wall Street Journal Mistaken About the Obama Administration and Protocol I?” *The Volokh Conspiracy.com*, available at <<http://volokh.com/2011/03/08/wall-street-journal-mistaken-about-the-obama-administration-and-protocol-i/>> (comments by John Bellinger III, formerly Legal Adviser to the National Security Council, 2001–2005, and Legal Adviser to the Department of State, 2005–2009, on the Obama administration decision to be guided by Article 75 of Protocol I, pertaining to humane treatment of detainees, even though the United States is not a party to Protocol I, and Article 75 does not codify customary international law). See also Nicholas Rostow, “The World Health Organization, the International Court of Justice, and Nuclear Weapons,” *Yale Journal of International Law* 20, no. 1 (1995), 151, esp. 163–173, and citations therein.

⁷⁰ Adam R. Pearlman, “Meaningful Review and Process Due: How Guantanamo Detention is Changing the Battlefield,” *Harvard National Security Law Journal* 6, no. 1 (2015), 255; but see Donald Rumsfeld, *Known and Unknown: A Memoir* (New York: Sentinel, 2011), 563–569, for a different view of the decisionmaking process.

⁷¹ Jack Goldsmith, *The Terror Presidency: Law and Judgment inside the Bush Administration* (New York: Norton, 2007), 22.

⁷² Dinstein, *War*, 5–8.

⁷³ Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Study on Targeted Killings, Addendum, UN doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston). See also Nicholas Rostow, “The Laws of War and the Killing of Suspected Terrorists: False Starts, Rabbit Holes, and Dead Ends,” *Rutgers Law Review* 63, no. 4 (2011), 1215, 1225.

⁷⁴ Dinstein, *Conduct*, 146–155.

⁷⁵ 1949 Geneva Convention III Art. 4.

⁷⁶ 1949 Geneva Convention III specifies in detail how prisoners of war (POWs) are to be treated, cared for, and protected. Article 75 of Additional Protocol I of 1977 sets forth minimum “Fundamental guarantees” with respect to treatment. The Obama administration has decided to follow this Article out of a sense that it is right. John Bellinger, “Obama’s Announcements on International Law,” *Lawfareblog.com*, March 8, 2011, available at <www.lawfareblog.com/2011/03/obamas-announcements-on-international-law>. Common Article 3’s requirements are set forth in note 66.

⁷⁷ 1949 Geneva Convention III Art. 118.

⁷⁸ *Ibid.*, Art. 115.

⁷⁹ Jens David Ohlin, “When Does the Combatant’s Privilege Apply?” *OpinioJuris.org*, August 1, 2014, available at <<http://opiniojuris.org/2014/08/01/combatants-privilege-apply/>>. See also Dinstein, *Conduct*, 33–61.

⁸⁰ *Ibid.*

⁸¹ Defense Department usage is *enemy prisoners of war* because it uses POW to mean, among other things, a “privately owned weapon.”

⁸² In the U.S. case, the conditions of detainees in Guantanamo Bay are much improved compared to when the facility consisted of essentially a fenced-in tennis court.

⁸³ An exception is Douglas J. Feith, but he does not spend much time on the decision. See note 108 below. See also Pearlman, “Meaningful Review.”

⁸⁴ Douglas J. Feith, *War and Decision: Inside the Pentagon at the Dawn of the War on Terrorism* (New York: HarperCollins, 2008), 159.

⁸⁵ *Boumediene v. Bush*, 553 U.S. 723(2008).

⁸⁶ Feith, 160; Rumsfeld, 561–573.

⁸⁷ Louis Begley compared it to Devil’s Island, the notorious French prison in Guiana where Dreyfus was held. *Why the Dreyfus Affair Matters* (New Haven: Yale University Press, 2009), 31ff (“the United States’ own Devil’s Island in Guantanamo”).

⁸⁸ Rumsfeld, 561–573.

⁸⁹ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

⁹⁰ Seven Uighurs contested a Combat Status Review Tribunal determination that they were “enemy combatants.” The District of Columbia Circuit Court of Appeals held that there was insufficient evidence to hold them. The government therefore had to release

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them, transfer them, or conduct a new hearing. Four eventually went to Bermuda. *Huzaiifa Parhat v. Gates*, 532 F.3d 836 (D.C. Cir. 2008).

⁹¹ *National Defense Authorization Act for Fiscal Year 2013*, 10 U.S.C. § 801 note (2012); *National Defense Authorization Act for Fiscal Year 2014*, 10 U.S.C. § 801 note (2013).

⁹² There were 242 detainees in Guantanamo Bay at the beginning of the Obama Presidency. Department of Defense Office of Military Commissions, Human Rights Fact Sheet, March 2015, available at <www.mc.mil/home>.

⁹³ *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012).

⁹⁴ President Bush established the first post-September 11, 2001, military commissions and accompanying guidelines. Military Order, November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," *Federal Register* 66 (November 16, 2001), 57833, available at <<https://federalregister.gov/a/01-28904>>.

⁹⁵ Jennifer K. Elsea, *Comparison of Rights in Military Commission Trials and Trials in Federal Court* (Washington, DC: Congressional Research Service, March 21, 2014).

⁹⁶ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

⁹⁷ *Ibid.* A substantial number of lawyers and millions of dollars have been devoted to making the commission a legitimate forum for prosecution.

⁹⁸ Geneva Convention III, Art. 118; Roberts and Guelff, 289.

⁹⁹ Carol Rosenberg, "Why Obama Can't Close Guantanamo," *Foreign Affairs*, December 14, 2009, available at <www.foreignaffairs.com/articles/136781/carol-rosenberg/why-obama-cant-close-guantanamo>.

¹⁰⁰ Senator Diane Feinstein, among others, has criticized this practice. See Andy Worthington, "Sen. Dianne Feinstein Urges Pentagon to End 'Unnecessary' Force-Feeding at Guantánamo," *EurasiaReview.com*, April 14, 2015, available at <www.eurasiareview.com/14042015-sen-dianne-feinstein-urges-pentagon-to-end-unnecessary-force-feeding-at-guantanamo-oped>. It is not evident that facility personnel have an alternative if the detainees are not to be permitted to kill themselves.

¹⁰¹ *Dhiab v. Obama*, No. CV05-1457(GK), 2014 WL 5795483 (D.D.C. November 7, 2014).

¹⁰² In 2010, Nicholas Rostow was told this information officially during a trip to Guantanamo Bay as part of review, on behalf of the President and Secretary of Defense, of the treatment of detainees.

¹⁰³ James Risen and Matt Apuzzo, "C.I.A. on Path to Torture, Chose Haste over Analysis," *New York Times*, December 15, 2014, A1.

¹⁰⁴ International Committee of the Red Cross, "Treaties and State Parties to Such Treaties," available at <www.icrc.org/applic/ihl/ihl.nsf/INTRO/475?OpenDocument>. Article 75 of 1977 Protocol I Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, Art. 75, contains a lengthy elaboration on Common Art. 3 of the 1949 Geneva Conventions. Roberts and

Guelff, 463–466.

¹⁰⁵ Dycus et al., 235. See the Lieber Code, Instructions for the Government of Armies of the United States in the Field (1863), originally published as General Orders No. 100, War Department, Adjutant General's Office, on April 24, 1863, reprinted in Dietrich Schindler, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions, and Other Documents*, 4th rev. ed. (Leiden: Martinus Nijhoff Publishers, 2004).

¹⁰⁶ Statement of the White House Press Secretary, February 7, 2002.

¹⁰⁷ Feith, 161–165; Lisa L. Turner, “The Detainee Interrogation Debate and the Legal-Policy Process,” *Joint Force Quarterly* 54 (3rd Quarter 2009), 42–46.

¹⁰⁸ Feith, 162.

¹⁰⁹ *Ibid.*, 161–163.

¹¹⁰ *Hamdan v. Rumsfeld*, 548 U.S. 557, 630 (2006).

¹¹¹ For example, *United States v. Yunis*, 924 F.2d 1086, 1089 (D.C. Cir. 1991).

¹¹² See Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, to John Rizzo, Senior Deputy General Counsel, CIA 14 (May 10, 2005) available at <www.fas.org/irp/agency/doj/olc/techniques.pdf>.

¹¹³ John A. Rizzo, *Company Man: Thirty Years of Controversy and Crisis in the CIA* (New York: Scribner, 2014).

¹¹⁴ Hadley, interview.

¹¹⁵ Paul Kramer, “The Water Cure,” *The New Yorker*, February 24, 2008, available at <www.newyorker.com/magazine/2008/02/25/the-water-cure>.

¹¹⁶ This insurance against harming the victim of waterboarding raises the question: did the detainee know, and if so, did it affect the result of the interrogation? The silence on the results of the waterboarding, except in most general terms, is deafening. See George Tenet with Bill Harlow, *At the Center of the Storm* (New York: HarperCollins 2007), 242.

¹¹⁷ CIA interrogators presumably were acting under a covert action finding. In addition, they were acting pursuant to a legal opinion by the Office of Legal Counsel at the Justice Department.

¹¹⁸ U.S. Congress, Senate, Senate Select Intelligence Committee, Committee Study of the Central Intelligence Agency's Interrogation Program, 113th Cong., 2nd sess., 2014, available at <www.washingtonpost.com/wp-srv/special/national/cia-interrogation-report/document/>.

¹¹⁹ Tenet, 250.

¹²⁰ *Ibid.*, 255.

¹²¹ Richard Cheney, interview by Timothy Russert, *Meet the Press*, September 16, 2001, available at <www.whitehouse.gov/vicepresident/news-speeches/speeches/vp20010916>.

html>. Cheney stated, “we have to work through sort of the dark side.” Testimony of Cofer Black to Joint House and Senate Select Intelligence Committee, September 26, 2002, available at <www.fas.org/irp/congress/2002_hr/092602black.html>. Black stated, “All I want to say is that there was ‘before’ 9/11 and ‘after’ 9/11. After 9/11 the gloves come off.” Also see James P. Terry, *The War on Terror: The Legal Dimension* (Lanham, MD: Rowman and Littlefield, 2013), 73–77, who weighs the claims for the results of enhanced interrogation against results. Terry, who served as Legal Counsel to the Chairman of the Joint Chiefs of Staff under Colin Powell pointed out that some advocates of the treatment of Khalid Sheikh Mohammed believe that he provided valuable information that saved lives but undermine their case because the plots he claimed to have helped foil were disrupted before he was captured.

¹²² Stephen Grey, *Ghost Plane: The True Story of the CIA Torture Program* (New York: St. Martin’s Griffin, 2006), 242–243; Henry Shue, “Torture,” in *Torture: A Collection*, ed. Sanford Levinson, rev. ed. (Oxford: Oxford University Press, 2004), 55 (moral absolutism recognized by the European Court of Human Rights); Jeannine Bell, “‘Behind This Mortal Bone’: The (In)effectiveness of Torture,” *Indiana Law Journal* 83, no. 1 (2008), 339 (arguing torture is neither effective nor in a nation’s best interest); David Luban, “Liberalisms, Torture, and the Ticking Bomb,” *Virginia Law Review* 91, no. 6 (2005), 142 (stating ticking bomb scenarios are a device to rationalize and institutionalize torture); Jane Mayer, *The Dark Side* (New York: Doubleday 2008), 213.

¹²³ Fritz Allhof, “Torture Warrants, Self-Defense, and Necessity,” *Public Affairs Quarterly* 25, no. 3 (July 2011); Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven: Yale University Press, 2002); John T. Parry, “Torture Warrants and the Rule of Law,” *Albany Law Review* 71, no. 3 (2009), 885–906.

¹²⁴ Zeke Miller, “Obama: ‘We Tortured Some Folks,’” *Time*, August 1, 2014.

¹²⁵ Steven M. Klienman, “The Promise of Interrogation v. the Problem of Torture,” *Valparaiso University Law Review* 43, no. 4 (2009), 1577–1587.

¹²⁶ Tenet, 242.

¹²⁷ One member of the minority voted with the majority. Majority Report, 31 n. 145 reports that an overseas detention facility had equipment for conducting waterboarding. The committee found no evidence that someone had been waterboarded at the site, but committee suspicions were aroused by finding evidence of paraphernalia. The committee majority did not believe what CIA said on the subject. See note 121, at 6.

¹²⁸ CIA, “Remarks as Prepared for Delivery by CIA Director John O. Brennan in response to the Senate Select Committee on Intelligence Study on the Former Detention and Interrogation Program,” December 11, 2014, available at <www.cia.gov/news-information/speeches-testimony/2014-speeches-testimony/remarks-as-prepared-for-delivery-cia-director-john-o-brennan-response-to-ssci-study-on-the-former-detention-and-interrogation-program.html>.

¹²⁹ *Ibid.*

¹³⁰ United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ¶ 1, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984). The UN Convention against Torture requires all signatories to make torture a crime.

¹³¹ Dycus et al., 914.

¹³² 18 U.S.C. §§ 2340–2340A (2000).

¹³³ *Ibid.*

¹³⁴ International Covenant on Civil and Political Rights, Art. 7 (1966) (the United States became a party in 1992), 999 U.N.T.S. 171.

¹³⁵ Daniel L. Pines, “Are Even Torturers Immune from Suit? How Attorney General Opinions Shield Government Employees from Civil Litigation and Criminal Prosecution,” *Wake Forest Law Review* 43, no. 1 (2008), 93–160; A. John Radsan, “Sed Quis Custodiet Ipsos Custodes: The CIA’s Office of General Counsel?” *Journal of National Security Law & Policy* 2, no. 2 (2008), 201–252.

¹³⁶ Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, August 1, 2002, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Department of Justice (withdrawn December 30, 2004, by Acting Assistant Attorney General Daniel Levin); Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay Bybee, August 1, 2002 (withdrawn by Levin memorandum); Memorandum from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, to William J. Haynes II, General Counsel of the Department of Defense, “Military Interrogation of Alien Unlawful Combatants Held Outside the United States,” March 14, 2003, available at <www.aclu.org/files/pdfs/safefree/yoo_army_torture_memo.pdf>. This memo was produced by John Yoo and signed by Jay Bybee (withdrawn by Levin memorandum).

¹³⁷ Haynes memorandum, 6–10.

¹³⁸ *Ibid.*, 11–47.

¹³⁹ *Ibid.*, 1–2, 32–47.

¹⁴⁰ *Ibid.*, 39, 1, 36–47.

¹⁴¹ Executive Order 13440, “Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency,” July 20, 2007, available at <<http://fas.org/irp/offdocs/eo/eo-13440.htm>>.

¹⁴² Julie Angell, “Ethics, Torture, and Marginal Memoranda at the DOJ Office of Legal Counsel,” *Georgetown Journal of Legal Ethics* 18, no. 3 (2005), 557–568; George Harris, “The Rule of Law and the War on Terror: The Professional Responsibility of Executive Branch Lawyers in the Wake of 9/11,” *Journal of National Security Law & Policy* 1, no. 2 (2005), 409–452; Luban, 1425–1453; “The Bush Administration and the Torture Memo: What on Earth Were They Thinking?” *Economist*, June 17, 2004.

¹⁴³ Reaction to Yoo’s memorandum by fellow Republicans within the Office of Legal Counsel (OLC) is illuminating. Jack Goldsmith, who headed the OLC from 2003 to 2004, stated

that Yoo's memo was "riddled with error" and a "one-sided effort to eliminate any hurdles posed by the torture law." Daniel Levin, who headed the OLC after Goldsmith, described his initial reaction to Yoo's memo as "this is insane, who wrote this?" See David D. Cole, "The Sacrificial Yoo: Accounting for Torture in the OPR Report," *Journal of National Security Law & Policy* 4, no. 2 (2010), 455.

¹⁴⁴ "Nomination of Michael Mukasey to Be the Attorney General of the United States: Hearing of the Senate Committee on the Judiciary," Federal News Service, October 17, 2007.

¹⁴⁵ Department of Defense Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006 (P.L. 109-148); the National Defense Authorization Act for FY 2006 (P.L. 109-163).

¹⁴⁶ See generally 13 No. 2 Human Rights Brief 39-40 (2006).

¹⁴⁷ See P.L. 109-148, Title X, Sec. 1002 (2005); P.L. 109-163, Title XIV, Sec. 1402 (2006).

¹⁴⁸ S. Amend. 1556 to S. 1042, 109th Cong. (2005), reprinted in 151 Congressional Record S8889 (July 25, 2005).

¹⁴⁹ Geneva Convention Relative to the Treatment of Prisoners of War Art. 3, August 12, 1949, 6 U.S.T. 3116, 75 U.N.T.S. 135.

¹⁵⁰ 548 U.S. 557 (2006).

¹⁵¹ Executive Order 13340.

¹⁵² Department of Justice, Office of Legal Counsel, "Memorandum Regarding Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to Certain Techniques That May Be Used by the CIA in the Interrogation of High-level Al Qaeda Detainees," July 20, 2007.

¹⁵³ Luban, 1425 (ticking bomb scenarios rationalize and institutionalize torture); Kate Kovarovic, "Our 'Jack Bauer' Culture: Eliminating the Ticking Time Bomb Exception to Torture," *Florida Journal of International Law* 22, no. 2 (2010), 251.

¹⁵⁴ See Goldsmith, 166-168 (impact of fear).

¹⁵⁵ See Alan M. Dershowitz, "Is There a Torturous Road to Justice?" *Los Angeles Times*, November 8, 2001, B19 (judges should be allowed to issue "torture warrants," thus permitting the use of torture within our legal system rather than "outside of the law"); but see Oren Gross, "Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience," *University of Minnesota Law Review* 88, no. 4 (2004), 1481, 1487 ("preventive interrogational torture is far too complex to be addressed by definitional juggling").

¹⁵⁶ Philip B. Heymann and Juliette N. Kayyem, *Long-Term Legal Strategy Project for Preserving Security and Democratic Freedoms in the War on Terrorism* (Cambridge: MIT Press, 2004) (determining an emergency exception based upon President showing "an urgent and extraordinary need").

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¹⁵⁷ See Charles Krauthammer, “The Truth About Torture,” *Weekly Standard*, December 5, 2005, available at <www.weeklystandard.com/content/public/articles/000/000/006/400rh-qav.asp>.

¹⁵⁸ P.L. 109-148, Title X, Sec. 1004; P.L. 109-163, Title XIV, Sec 1404.

¹⁵⁹ *Ibid.*

¹⁶⁰ As long ago as *Marbury v. Madison*, the Supreme Court opined that not only was the government of the United States a government of laws, but that “It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right” 5 U.S. (1 Cranch) 137, 163. At the same time, the court observed, “by the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience” 5 U.S. at 165–166. In the context of a Presidential decision to torture a detainee, these statements beg the question: is such a decision a political act in which case the President is accountable politically, or is it a violation of a legal right not to be tortured, in which case the President would be accountable in a court? In our judgment, however one answers, the President is accountable for his or her acts. Under the Constitution, there exists no unaccountable power. See also Blum and Heymann, 130.

¹⁶¹ In law enforcement operations, the standards for the use of lethal force are entirely different. Blum and Heymann, esp. chapter 4.

¹⁶² Dinstein, *Conduct*, 146–152.

¹⁶³ Pam Benson, “U.S. Airstrikes Called ‘Very Effective,’” *CNN.com*, May 18, 2009, available at <www.cnn.com/2009/POLITICS/05/18/cia.pakistan.airstrikes>.

¹⁶⁴ Blum and Heymann, chapter 4.

¹⁶⁵ Joint Resolution, “Authorization for Use of Military Force,” September 18, 2001, Pub. L. 107-40 (S.J. Res. 23).

¹⁶⁶ See, for example, Field Manual 27-10, *The Law of Land Warfare* (Washington, DC: Headquarters Department of the Army, 1956); Army Regulation 190-8, “Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees,” October 1, 1997, § 1.1(b)(4) (stating that, should conflicts arise, the Geneva Conventions take precedence over the regulation).

¹⁶⁷ *Ibid.*

¹⁶⁸ Protocol I, Art. 48; Roberts and Guelff, 447.

¹⁶⁹ *Ibid.*

¹⁷⁰ U.S. War Department, General Orders No. 100, the Lieber Code of 1863, Art. 16 (1863). For example, the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land, Annex, Art. 23, prohibits treacherous killing or wounding or using weapons causing unnecessary suffering. Roberts and Guelff, 77. The 1907 Hague Conventions are part of customary international law. Dinstein, *Conduct*, 15.

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¹⁷¹ Protocol I, Art. 51 (5)(b); Roberts and Guelff, 449.

¹⁷² Jeff A. Bovarnick et al., *Law of War Deskbook* (Charlottesville, VA: International and Operational Law Department, U.S. Army Judge Advocate's Legal Center and School, 2011), 156.

¹⁷³ See generally Dinstein, *Conduct*, 8.

¹⁷⁴ Bovarnick, 154.

¹⁷⁵ Protocol I, art. 51(4); Roberts and Guelff, 448–449.

¹⁷⁶ Bovarnick, 155.

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*, 155–156.

¹⁷⁹ *Ibid.*, 157.

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² Harold Hongju Koh, address to the Annual Meeting of the American Society of International Law, March 25, 2010, available at <www.state.gov/s/l/releases/remarks/139119.htm>.

¹⁸³ *Ibid.*

¹⁸⁴ The White House, “Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities,” May 23, 2013, available at <www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism>.

¹⁸⁵ See Mike Dreyfuss, “My Fellow Americans, We are Going to Kill You: The Legality of Targeting and Killing U.S. Citizens Abroad,” *Vanderbilt Law Review* 65, no. 1 (2012), 249.

¹⁸⁶ Cf. *Hamdi v. Rumsfeld*, 542 U.S. 507, 597 (2004) (Thomas, J., dissenting).

¹⁸⁷ Samuel S. Adelsberg, “Bouncing the Executive’s Blank Check: Judicial Review and the Targeting of Citizens,” *Harvard Law & Policy Review* 6, no. 2 (2012), 437–459.

¹⁸⁸ Department of Justice, “Lawfulness of Lethal Operation Directed against a U.S. Citizen who is a Senior Operational Leader of Al-Qa’id or an Associated Force,” published by NBC News on February 4, 2013.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

¹⁹² *Ex parte Quirin*, 317 U.S. 1 (1942).

¹⁹³ Robert Chesney, “Text of the Attorney General’s National Security Speech,” March 5, 2012, *Lawfareblog.com*, available at <www.lawfareblog.com/2012/03/text-of-the-attorney-generals-national-security-speech/>.

¹⁹⁴ “Remarks by the President at the National Defense University,” Washington, DC, May 23, 2013, available at <www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

¹⁹⁵ Koh, address to the Annual Meeting of the American Society of International Law. In addition, *Al Aulahi v. Obama* (D.D.C. 2010) seems to indicate that judicial inquiry into such process is a nonjudiciable political question. In *Al Aulahi*, Judge Bates held that Anwar Al-Aulahi’s lawsuit seeking to enjoin the U.S. Government from targeting his son was nonjusticiable under the political question doctrine because “[j]udicial resolution of the ‘particular questions’ posed” would require [it] to decide complex issues such as “whether . . . Anwar Al-Aulahi’s alleged terrorist activity render[ed] him a concrete, specific, and imminent threat to life or physical safety” and “whether there are means short of lethal force that the United States could reasonably employ to address any threat that Anwar Al-Aulahi poses to U.S. national security interests.” These questions, Judge Bates stated, would require the court take into account military, strategic, and diplomatic considerations—for example, to “assess the merits of the President’s (alleged) decision to launch an attack on a foreign target”—that it was simply not competent to handle. Thus, the extent to which due process conflicts with U.S. Government’s targeted killing program may remain in the realm of academics but not courts. *Al-Aulahi v. Panetta*, No. 12-1192 (D.D.C. July 18, 2012).

¹⁹⁶ Blum and Heymann, 189–193.

¹⁹⁷ Philip Bobbitt, “Playing by the Rules,” *The Guardian*, November 15, 2003.

¹⁹⁸ Baker; Tower Commission, *Report of the President’s Special Review Board* (New York: Bantam Books, February 27, 1987), parts I and II.

¹⁹⁹ This insight goes as far back at least as Thucydides, *The Peloponnesian War*, bk. I, ch. I, 24.

²⁰⁰ For example, Hadley, interview.

²⁰¹ Each of the four Geneva Conventions of 1949 contains a common Article 3 requirement of humane treatment of persons detained who are not entitled to the protections afforded prisoners of war, that is, combatants as defined in the Third Geneva Convention. The conventions are reprinted in Roberts and Guelff. During the early part of 2002, there was significant debate as to whether to consider treating captured Taliban or al Qaeda personnel as prisoners of war under the Third Geneva Convention of 1949. The initial decision to declare all captured enemy soldiers to be “unlawful combatants”—not entitled as a matter of law to be treated as prisoners of war—appears to have been the result, at least in part, of a mistaken reading of the Geneva Conventions. A memorandum went to President Bush with a significant error. The memorandum stated that, under the Geneva Conventions, an interrogator could ask only a prisoner’s name, rank, and serial number, when in fact the convention provides that a prisoner of war is only required to provide that information. The interrogator may ask whatever question he or she wishes. The President naturally felt such constraints would have been untenable under the circumstances created by the September 11 attacks. But the Geneva Conventions would not have

imposed those constraints in the first place. Author conversation with William Lietzau, former Deputy Assistant Secretary of Defense for Rule of Law and Detainee Policy.

²⁰² Feith, 159, “And government lawyers argued that a facility on non-U.S.-owned territory would likely not be subject to habeas corpus petitions by detainees.”

²⁰³ For example, the American debate about the 2011 Libya campaign for the most part concerned the applicability of the War Powers Resolution, not the wisdom of the effort to oust Muammar Qadhafi.

²⁰⁴ Martin E. Dempsey, interview by Richard D. Hooker, Jr., and Joseph J. Collins, January 15, 2015.

²⁰⁵ When the Abu Ghraib story broke in the press, a 19-year-old Marine watching television reports stated, “Some assholes have just lost the war for us.” Thomas E. Ricks, *Fiasco: The American Military Adventure in Iraq* (New York: Penguin Press, 2006), 290.