A PRESUMPTION OF GUILT: THE UNLAWFUL ENEMY COMBATANT AND THE U.S. WAR ON TERROR

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I. INTRODUCTION

Since the advent of the so-called "Global War on Terror," the United States of America has responded to the crimes carried out on American soil that day by using or threatening to use military force against Afghanistan, Iraq, Iran, North Korea, Syria, and Pakistan. The resulting projection of American military power resulted in the overthrow of two governments – the Taliban regime in Afghanistan, the fate of which remains uncertain, and Saddam Hussein's regime in Iraq – and "war talk" ebbs and flows with respect to the other countries on the U.S. government's "most wanted" list. As I have written elsewhere, the Bush administration employed a legal framework to conduct these military operations that was highly dubious – and hypocritical – arguing, on the one hand, that the United States was on a war footing with terrorists but that, on the other hand, because terrorists are so-called "unlawful enemy combatants," they were not entitled to the protections of the laws of war as regards their detention and treatment.[1] The creation of this euphemistic and novel term – the "unlawful enemy combatant" – has bewitched the media and even distinguished justices of the United States Supreme Court. It has been employed to suggest that the prisoners captured in this "war" are not entitled to "normal" legal protections, but should instead be subjected to a *régime d'exception* – an extraordinary regime—created de novo by the Executive branch (until it was blessed by Congress in the Military

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I would like to thank both Denver College of Law & The Nanda Center for International Law for this invitation, and express my gratitude to Ved and Kathryn Nanda and their wonderful students for their gracious hospitality. This is a very special opportunity for me, as my work in this area began at a conference held here in 2002, at a time during which it was very difficult to criticize Bush administration policy. I, and others like me, are deeply indebted to Ved Nanda, who provided a safe space in which to speak truth to power at a time when not many law schools or universities were willing to do so. I am honored to return here today, in the final days of the Bush presidency, to reflect upon what the past seven years have wrought, and consider the way forward.

1. Leila Nadya Sadat, *Terrorism and the Rule of Law*, 3 WASH. U. GLOBAL STUD. L. REV. 135, 140 n.16 (2004).

Commissions Act of 2006)[2] – in which any protections afforded the suspects become simply a matter of grace.

One cannot find the term "unlawful enemy combatant" in the Geneva Conventions or other treatises on the law of war. The administration traces its use to the case of *Ex parte Quirin*, a World War II opinion addressing the question whether Nazi "spies and saboteurs," who had entered the United States during the war, could be tried before a U.S. military commission.[3] Like many other Bush administration "legal opinions," the use of *Quirin* as the legal foundation not only for the invention of this new legal category, but to justify indefinite detention, coercive interrogation and other mistreatment, is deeply problematic. What the Court held in *Quirin* was that because the defendants (mostly German saboteurs) had entered the United States to engage in acts of spying and sabotage, they were not only liable to be captured and detained (like all POWs), but could, in addition, be tried before a military commission for acts violating the laws of war.[4] The *Quirin* opinion makes reference to "acts which render their belligerency unlawful," and from this language, which meant nothing more than that enemy prisoners who are accused of violating the laws of war may be tried as such, the Executive Branch developed a doctrine of "unlawful enemy combatant (UEC)," as subsequently defined in the Military Commissions Act of 2006.[5] Yet the United States Supreme Court, while admitting the uncertain contours and origin of the term, accepted the President's invocation of it in the *Hamdi* case. Indeed, the Court held only that Hamdi, a "citizen-detainee" seeking to challenge his classification as an enemy combatant could receive notice of the basis for his classification, and an opportunity to rebut the Government's factual assertions.[6] Only Scalia and Stevens squarely addressed the question of Hamdi's status, finding that "absent suspension [of the writ of habeas corpus] the Executive's assertion of military exigency has not been thought sufficient to permit detention without charge."[7] The same is true of the Supreme Court's opinion in *Boumediene*, which although striking down the suspension of habeas corpus in the Military Commission's Act of 2006, did not question the legitimacy of the classification scheme in the first place.[8] Indeed, like the plurality's view in *Hamdi*, Justice Kennedy's opinion only permits the detainee to have a meaningful right to *rebut the Pentagon's evidence*.[9]

2. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28, and 42 U.S.C.) [hereinafter Military Commissions Act of 2006].

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

4. *Id.* at 36-37, 47-48.

5. Military Commissions Act of 2006, *supra* note 2, §948a.

6. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004).

7. *Id.* at 554. (Scalia, J., dissenting). Scalia and Stevens appear to have been correct: like John Walter Lindh, the so called "American Taliban," Hamdi should have been tried for a crime or released. Indeed, after the Supreme Court's decision, he was exiled to Saudi Arabia and denaturalized. No charges were ever filed.

8. *Boumediene v. Bush*, 128 S.Ct. 2229, 2234-35 (2008).

9. *Id.* at 2238-39.

This dehumanization of a whole category of human beings – the "suspected terrorist" or "unlawful enemy combatant" — has had pernicious effects upon the American legal system and severely harmed America's international standing. These doctrines and the propaganda supporting them have led to the systematic use of torture and cruel, inhuman and degrading treatment used on prisoners detained in the legal limbo known as Guantanamo Bay, Kandahar prison in Afghanistan, and Abu Ghraib prison in Iraq, as well as the rendition of terror suspects to third countries and to "black sites" scattered around the world for detention, interrogation, mistreatment, and sometimes death.[10] Although most (but not all) of the individuals subjected to this regime have been foreigners, the impact of this Executive Activism has been on the American legal regime and the American psyche, for it has been U.S. investigators, U.S. courts, and U.S. lawyers, that carried out the government's plan. To this extent, all Americans are responsible for and affected by these policies, which have been carried out in our names, even if those targeted are, for the most part, aliens. Indeed, the *Los Angeles Times* recently reported that the officers in charge of the detention of Jose Padilla and Yasser Hamdi, both U.S. citizens detained as "unlawful enemy combatants," in military jails inside the United States, became increasingly uncomfortable and even alarmed that they were being directed to handle their prisoners under "Guantanamo Rules" – depriving them of all natural light for months, repeatedly interrogating them, denying them access to attorneys and mail from home, allowing them no contact with anyone other than guards, and depriving them, for years, even of minor distractions such as a soccer ball or a dictionary.[11]

This is a serious problem, both quantitatively and qualitatively, because the notion of creating a legal classification whereby all rights granted by law – domestic and international – become simply a matter of executive grace violates not only separation of powers principles but several other foundational principles of the American legal system, including equality before the law and the right to be presumed innocent before being subjected to criminal proceedings (whether civil or military). Indeed, these policies have turned U.S. legal principles upside down, resulting in a presumption of guilt applicable to anyone accused of acts of terrorism by the government – that the terror suspect, or "UEC" must rebut in order to defeat his or her imprisonment – under circumstances that hardly result in the kind of equality of treatment required by international law and U. S. Constitutional principles.

I will briefly survey the application of international human rights law, international humanitarian law, and the U.S. enemy combatant cases litigated thus

10. *See, e.g.*, Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition under International Law*, 37 CASE W. RES. J. INT'L L. 309 (2006); Leila Nadya Sadat, *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200 (2007) [hereinafter Sadat, *Extraordinary Rendition*]; Leila Nadya Sadat, *Shattering the Nuremberg Consensus: U.S. Rendition Policy and International Criminal Law*, 3 YALE J. INT'L AFF. 65 (2008) (no access to the YJIA, but should be on file with the author).

11. Pamela Hess, *Officer Wrote of harsh treatment of U.S. detainee*, L.A. TIMES, Oct. 8, 2008, at A9.

far, before venturing some thoughts on the continuing dangers of these policies, and what might be done to reverse them. I conclude on a cautionary note. Although the new administration may wish to break with the Bush legacy, it may be difficult to do so. "Guantanamo rules" penetrated quickly and deeply into the American legal system, and many of the individuals who wrote them continue to exercise influence and to assert their applicability, extension or incorporation into new legal doctrines and institutions, such as the establishment of so called "national security courts." This essay concludes with seven recommendations to President Obama to strengthen America's human rights infrastructure, and help prevent future human rights violations by the United States of America.

II. HISTORY AND ORIGIN OF THE PRESUMPTION OF INNOCENCE

A. International Human Rights Law

The presumption of innocence is found in all modern day human rights instruments. The presumption has a long pedigree, and is codified in the famous French *Declarations des droits de l'homme et du citoyen*[12] and enshrined in many, if not most, of the world's constitutions in some form or another, or is incorporated by judicial interpretation, as is the case in the United States.[13]

It was included in article 11(1) of the Universal Declaration of Human Rights, and subsequently codified in article 14 of the International Covenant on Civil and Political Rights, which provides that "[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."[14] A government could argue that the kind of preventive (indefinite) detention provided for in Guantanamo Bay is not covered by this prohibition because the individuals held there have never actually been accused of a crime; instead, they have been incarcerated as "unlawful enemy combatants" who will, for the most part, never face charges brought before a court of law or a military commission. Yet, earlier drafts of the Universal Declaration referred not to persons charged with crimes but to "any person" or "everyone," and the view of Eleanor Roosevelt and René Cassin, two principal drafters of the UDHR, was that the guarantee should benefit "everyone," regardless of whether they were involved in criminal proceedings or not.[15] Accordingly, the presumption is particularly important for those charged in criminal proceedings, but still applicable to those who are not. Moreover, article 9 of the Covenant also prohibits arbitrary detention and provides that "no one" shall be subjected to arbitrary arrest or detention, or deprived of liberty except on "grounds and in accordance with [legal

12. *See* Déclaration des Droits de L'homme et du Citoyen de 1789, art. IX, *available at* http://www.assemblee-nationale.fr/histoire/dudh/1789.asp.

13. *See, e.g.*, *Ross v. Moffitt*, 417 U.S. 600, 610 (1974) ("The purpose of the trial stage from the State's point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt.").

14. International Covenant on Civil & Political Rights, art. 14(2), 999 U.N.T.S. 171 (1966) [hereinafter ICCPR]; *See also*, Universal Declaration of Human Rights, G.A. Res. 217A, art. 11(1), U.N. GAOR, 3d Sess., 1st plen. mtg. U.N. Doc A/810 (Dec. 12, 1948).

15. STEFAN TRECHSEL, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS 155 (Oxford Univ. Press 2005).

procedures]."[16] The classification of an individual by the Executive Branch as an "unlawful enemy combatant" subject to indefinite detention violates this provision, as well.

The United States could have derogated from articles 9 and 14 of the Covenant, for the Covenant specifically permits derogation from certain of its provisions "in times of public emergency which threatens the life of the nation," subject to certain requirements: the measures taken must be "strictly required by the exigencies of the situation," "consistent with international law," and non-discriminatory, that is, taken "solely on the grounds of race, colour, sex, language, religion or social origin."[17] Other countries have filed formal derogations when confronted with acts of terrorism, including the United Kingdom.[18] The United States has not. Moreover, international human rights tribunals, including the European Court of Human Rights and the Inter-American Court of Human Rights have condemned indefinite detention without charges even in terrorism cases, holding in one case that even a fourteen day period without judicial intervention is "exceptionally long."[19] Finally, while a formal derogation permits some innovation in criminal proceedings there can be no derogation from the ban on torture or cruel, inhuman and degrading treatment found in article 7 of the Covenant.[20] Guantanamo-style interrogations run afoul of this provision, as well.

Finally, it is worth noting that, while acts of terrorism may violate the international human rights of victims, the individuals suspected of committing those acts are not, by virtue of their classification as "terrorists" by the executive branch or media, stripped of their fundamental human rights. Indeed, the European Court of Human Rights and the Inter-American Court of Human Rights have unequivocally stated that alleged terrorists – even undisputed terrorists – remain protected by human rights law.[21]

What, then, of the application of international human rights law or the constitution during war; is it correct, as Cicero wrote, that *inter arma enim silent leges* – that the laws fall mute in times of war? Or that they, to paraphrase former Chief Justice William Rehnquist, "speak with a somewhat different voice?"[22] While the United States has argued otherwise, courts, as well as treaty monitoring bodies such as the Torture Committee and the Human Rights Committee, have

16. ICCPR, *supra* note 14, art. 9(1).

17. ICCPR, *supra* note 14, art. 4(1).

18. *See* DAVID ANDERSON & JEMIMA STRATFORD, JUSTICE, RESPONSE TO THE JOINT COMMITTEE ON HUMAN RIGHTS INQUIRY INTO UK DEROGATIONS FROM CONVENTION ON RIGHTS 3 (2002), http://www.justice.org.uk/images/pdfs/derogations.pdf.

19. Aksoy v. Turkey, 1996-VI Eur. Ct. H.R. 2260, at para. 78.

20. *See* ICCPR, *supra* note 14, art. 4(2).

21. *See, e.g.*, Brogan v. United Kingdom, 11 Eur. Ct. H.R. 117 (ser. A), ¶ 62 (1988) (finding that the UK had violated Article 5(1) protections of the European Convention on Human Rights after detaining alleged terrorist suspects for several days.); *see also* Durand & Ugarte Case, 2001 Inter-Am. Ct. H.R. (ser. C) No. 68, at 118 (Aug. 16, 2000) (finding that the military forces in Peru used excessive forces disproportional to the perceived threat to confront alleged terrorists).

22. WILLIAM REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 225 (Vintage Books 1998).

found that human rights law continues to apply in armed conflict, subject to specialized rules that may be carved out by international humanitarian law,[23] a body of law to which I now turn.

B. International Humanitarian Law

What is an individual's status under international humanitarian law when captured during an armed conflict? Under the laws of war, once the United States determined to invade Afghanistan and Iraq, the applicable law was primarily set out in the four Geneva Conventions of 1949, which have, since World War II, been the gold standard regarding the capture, detention, treatment, and trial of prisoners of war and civilian internees.[24] Indeed, the four Geneva Conventions enjoy unparalleled support among States, having been ratified by virtually every country in the world, including the United States, Afghanistan, and Iraq,[25]and are, without a doubt, part of the customary laws of war.[26] Geneva law, as it has come to be called, requires that prisoners be treated humanely, forbids secret detention sites, and appoints the International Committee of the Red Cross as the international monitor for Geneva compliance.[27] The United States was a principal mover and negotiator of the four Geneva Conventions in 1949, and not only became a party to them, but their custodian too, with the original signed copies residing in a vault at the U.S. Department of State.[28]

Early in the GWOT, however, over the objections of U.S. Secretary of State, Colin Powell,[29] and the State Department's Legal Advisor, William H. Taft, IV,[30]

23. For judicial decisions s*ee, e.g.,* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8), at para. 25; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9), at para. 106; Coard et al. v. United States, Case 10.951, Inter-Am. C.H.R., Report No. 109/99, OEA/ser.L/V/II.106, doc. 6 rev. ¶ 39 (1999); *accord* Sadat, *supra* note 1, at 140-142.

24. *See generally* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]. Nonetheless, even if not classified as POWs, those captured would fall within the provisions of Geneva IV, on civilians. *See generally* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]; *see also* COMMENTARY ON GENEVA CONVENTIONS OF 12 AUGUST 1949: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 271 (Oscar Uhler & Henri Coursier eds., 1958) [hereinafter ICRC COMMENTARY].

25. ICRC, International Humanitarian Law, Treaties & Documents by Date, http://www.icrc.org/ihl.nsf/INTRO?OpenView (scroll down and follow « State parties » hyperlink for all Geneva Conventions).

26. *See, e.g.*, The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶ 35, *delivered to the Security Council*, U.N. Doc. S/25704 (May 3, 1993). This report was unanimously adopted by the Security Council. S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

27. Protocol I elaborates upon the Geneva Conventions, and although it has not been ratified by the U.S., many of its provisions, particularly those regarding the humane treatment of prisoners are considered part of customary international law. *See, e.g.,* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 75, June 8, 1977, 1125 U.N.T.S. 3.

28. JANE MAYER, THE DARK SIDE 9 (2008).

29. *See* Memorandum from Colin Powell, Sec'y of State, U.S. Dep't of State to Alberto R. Gonzales, Counsel to the President, Draft Decision Memorandum for the President on the Applicability

lawyers in the U.S. Department of Justice argued that the United States should abandon the provisions of the Geneva Conventions in favor of a *de novo* legal regime that they believed would be superior for the capture, detention, treatment, and trial of enemy prisoners, whether captured in the United States or abroad. In the words of then Counsel to the President, Alberto Gonzales, the "new paradigm" of "the war against terrorism render[ed] obsolete Geneva's strict limitations on questioning of enemy prisoners and render[ed] quaint some of its provisions . . . ."[31]

President Bush ultimately accepted the Department of Justice's arguments, and declined to apply Geneva law to either al Qaeda or Taliban detainees in U.S. custody.[32] A diplomatic and legal furor ensued, and the extremely negative international reaction generated by the creation and operation of the U.S. prison at Guantanamo Bay, as well as other U.S. detention centers, is summarized by the words of Amnesty International, which, in its 2005 annual report, suggested that the U.S. detention center at Guantanamo Bay had become the "gulag of our times."[33]

Nearly two years after the September 11th attacks and the Afghan invasion, Iraq was invaded by the United States and a "coalition of the willing,"[34] one justification for which was the continuation of the GWOT.[35] Although the United

of the Geneva Convention to the Conflict in Afghanistan (Jan. 26, 2002), *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB, at 122-23 (Karen J. Greenberg & Johsua L. Dratel eds., 2005) [hereinafter TORTURE PAPERS].

30. Memorandum from William H. Taft, IV, Legal Advisor, U.S. Dep't of State to Alberto R. Gonzales, Counsel to the President, Comments on Your Paper on the Geneva Convention (Feb. 2, 2002), *reprinted in* TORTURE PAPERS, *supra* note 29, at 129; *see also* Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT'L L. 811, 825-26 (2005).

31. Memorandum from Alberto R. Gonzales, Counsel to the President to George W. Bush, President, Decision Re: Application of the Geneva Convention on Prisoners of War to the Conflict with Al-Qaeda and the Taliban (Jan. 25, 2002), *reprinted in* THE TORTURE PAPERS, *supra* note 29, at 119 [hereinafter Gonzales, Geneva Memo].

32. Memorandum from George W. Bush, President to Richard B. Cheney, Vice President et al., Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), *reprinted in* THE TORTURE PAPERS, *supra* note 29, at 134. The memo is elliptical in its reasoning, concluding that al Qaeda members do not receive the protection of the Geneva Conventions because "al Qaeda is not a High Contracting Party to Geneva." *Id.* As regards the Taliban, although the memo concludes that Geneva applies to the conflict with the Taliban, the President nonetheless determined that "the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva." *Id.* at 135.

33. Irene Khan, *Foreword* to AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL REPORT 2005: THE STATE OF THE WORLD'S HUMAN RIGHTS (2005), *available at* http://www.amnesty.org/en/library/asset/POL10/001/2005/en/6287f77f-d53a-11dd-8a23-d58a49c0d652/pol100012005en.html.

34. *See* Steve Schifferes, *U.S. Names "Coalition of the Willing,"* BBC NEWS, Mar. 18, 2003, *available at* http://news.bbc.co.uk/2/hi/americas/2862343.stm.

35. The Bush administration repeatedly conflated al Qaeda and Iraq as enemies in the War on Terror, leading more than seventy percent of all Americans to believe that Saddam Hussein was responsible in some way for the September 11th attacks. *See, e.g.*, *Bush Administration on Iraq 9/11 Link*, BBC NEWS, Sept. 18, 2003, *available at* http://news.bbc.co.uk/2/hi/americas/3119676.stm.

States determined that Geneva law applied to the conflict in Iraq,[36] the decision not to apply Geneva law to the detainees captured in the Afghan conflict clearly spilled over to the Iraq theatre, where, once again, credible allegations of prisoner mistreatment and violations of international law were made against the United States.[37] The most visible evidence of this abuse was shocking photos emanating from the U.S. detention facility at Abu Ghraib. Indeed, the prisoner abuse problem was much more serious, both quantitatively and qualitatively, as regards detainees in Iraq, than the problems at Guantanamo Bay. In all U.S. detention facilities, however, there has been egregious mistreatment of detainees, violations that have contravened the minimum guarantees of common article 3, as well as many specific provisos of the Geneva Conventions and the Uniform Code of Military Justice.[38] The United States has argued that it may deprive detainees of all protections due to their UEC status; the International Committee of the Red Cross has protested to the contrary. It is the view of the ICRC (correct, in my estimation) that either the Third Geneva Convention applies if they are POWs; or the Fourth applies if they are not.[39] Law, like nature, abhors a vacuum, and during armed conflict, captives are presumptively entitled to POW status - unless an article five Tribunal determines otherwise.[40]

III. THE U.S. ENEMY COMBATANT CASES

A. Individuals Tried in U.S. Courts

Turning now to the treatment of detainees in U.S. courts or within U.S. jurisdiction, the picture is more confused. Three detainees have been tried in U.S. federal courts on criminal charges stemming from their connections to the September 11th attacks, Al Qaeda, or the Taliban: John Walker Lindh, the so-called "American Taliban;"[41] José Padilla, the alleged "dirty bomber;"[42] and Zacharias Moussaoui, the "so-called" twentieth hijacker.[43] Two of those tried – Lindh and Padilla – were U.S. citizens, and although Lindh was picked up in Afghanistan following the U.S. invasion of that country on October 7th, Padilla was arrested in O'Hare airport returning from four years of living abroad. While these individuals were nominally entitled to a presumption of innocence, certain irregularities regarding their trials, particularly in terms of the evidence introduced against them and credible allegations of coercive interrogation and cruel treatment (in the cases of Lindh and Padilla), suggest that the administration's reversal of the presumption

36. *See, e.g.*, Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT'L L. 461, 476-77 (2002).

37. *See Iraq: U.S. Prisoner Abuse Sparks Concerns Over War Crimes*, HUMAN RIGHTS WATCH, April 29, 2004, http://www.hrw.org/en/news/2004/04/29/iraq-us-prisoner-abuse-sparks-concerns-over-war-crimes.

38. *See id*; *see also 3 Soldiers Charged In Deaths of Iraq Detainees*, CBS NEWS, June 19, 2006, http://cbs3.com/national/3rd.Brigade.Combat.2.269173.html; TORTURE PAPERS, *supra* note 29, at 1140-41.

39. *See* GC III *supra* note 24; GC IV, *supra* note 24.

40. GC III, *supra* note 24, art. 5.

41. *U.S. v. Lindh*, 227 F.Supp.2d 565, 565 (E.D. Va. 2002).

42. *Rumsfeld v. Padilla*, 542 U.S. 426, 426 (2004).

43. *U.S. v. Moussaoui*, 483 F.3d 220, 220 (4th Cir. 2007).

of innocence for all captives in the "war on terror," spilled over into the federal courts, potentially distorting the outcomes of trials held under "normal rules."

Padilla's case is particularly disturbing, because his arrest was based upon testimony from two individuals – Abu Zubaydah and Binyam Mohammed – whom, as it transpires, had provided unreliable information under torture.[44] After Padilla's arrest, he was classified as an "enemy combatant" by an order of June 9, 2002 signed by President Bush, and accused of plotting to set off a dirty bomb, an accusation that appears to have been erroneous, or at least unprovable.[45] He was transferred to military custody and litigation ensued – leaving him there for 1307 days until,[46] just as it appeared that the Supreme Court might review his case and decide against the President's authority to indefinitely detain a U.S. citizen, he was finally indicted and transferred to the US District Court for the Southern District of Florida for trial. The trial did not involve any of the earlier allegations against Padilla – only that he had attended an al Qaeda training camp.[47] The trial judge refused to find that Padilla's long military confinement – in which he was allegedly held in isolation in a 7 by 9 foot cell, deprived of sleep, hooded and forced to assume stress positions for long periods – did not render him unfit for trial nor deprive him of a speedy trial. [48] Padilla was convicted and sentenced on January 22, 2008 to 17 years and 4 months and is now in a supermax prison facility here in Florence, Colorado.[49] His mother is appealing the verdict.[50]

B. Held in indefinite detention without trial or subject to military commissions?

Unlike Padilla, most Guantanamo detainees have not received a trial in federal court. With respect to Guantanamo Bay, of the 775 originally brought there, approximately 270 detainees remain, 200 of whom could be repatriated if a country could be found to receive them.[51] Fewer than a dozen have been charged

44. Andrew Patel, *Padilla v. Bush*, *in* THE ENEMY COMBATANT PAPERS 663, 663 (Karen J. Greenberg & Joshua L. Dratel eds., 2008).

45. *See* David Hancock, *Judge: Charge Or Release Padilla*, CBS NEWS, Feb. 28, 2005, http://www.cbsnews.com/stories/2005/02/28/terror/main677099.shtml; *see also* Marisol Bello, *'Enemy combatant' Padilla gets 17 years for conspiracy*, USA TODAY, Jan. 1, 2008, http://www.usatoday.com/news/nation/2008-01-22-padilla-sentencing_N.htm; *Enemy Combatant*, CBS NEWS, http://www.cbsnews.com/elements/2006/04/04/in_depth_us/timeline1469944_0_main.shtml (last visited April 16, 2009).

46. Stephen Vladek, *The Anticlimactic Trial of Jose Padilla*, JURIST, May 15, 2007, *available at* http://jurist.law.pitt.edu/forumy/2007/05/anticlimactic-trial-of-jose-padilla.php.

47. *United States v. Padilla*, No. 04-60001-CR-Cooke, 2006 WL 3678567 (S.D. Fla. Nov. 17, 2006); *see also* Charles S. Doskow, *Jose Padilla and Due Process of Law*, 19 ST. THOMAS L. REV. 199, 221-22 (2006).

48. *Padilla*, *supra* note 47; *see also* Peter Whoriskey, *Judge Refuses to Dismiss Padilla's Charges*, THE WASHINGTON POST, Mar. 24, 2007, at A9.

49. Hari M. Osofsky, *The Geography of Justice Wormholes: Dilemmas From Property and Criminal*, 53 VILL. L. REV. 117, 136 (2008).

50. *Padilla given long jail sentence*, BBC News, Jan. 23, 2008, *available at* http://news.bbc.co.uk/2/hi/americas/7203276.stm.

51. Melissa A. Jamison, *The Sins of the Father: Punishing Children in the War on Terror*, 29 U. LA. VERNE L. REV. 88, 98-99 (2008); see also Michael Isikoff, *No Country for 270 Men*, NEWSWEEK, Jun. 23, 2008, *available at* http://www.newsweek.com/id/141513

before a military commission leaving indefinite detention without charges to be their fate.[52]

The first detainee to be tried before a military commission at Guantanamo Bay was Salim Ahmed Hamdan.[53] Hamdan was captured in November 2001 by the Northern Alliance, then turned over to U.S. military forces and sent to Guantanamo in June 2002.[54] After years of litigation, he was the first individual to be tried since the U.S. started transporting detainees to Guantanamo Bay in 2002. His trial before a military commission came as a surprise, and in spite of a perception of unfairness, resulted in at least a partial victory for the accused. He was acquitted of the conspiracy charges and sentenced only to 5-1/2 years, with credit for time served.[55] He was scheduled to be released on December 31, 2008, but the government recently announced its intention to return him to his home in Yemen.[56]

IV. ONE STEP FORWARD, TWO STEPS BACK

It is worrisome that matters may get worse before they get better. The "Unlawful Enemy Combatant," category remains legally intact[57] and hundreds, if not thousands, of detainees in and out of Guantanamo Bay have been subjected to it. Even where it is not formally employed, "Guantanamo rules" appear to apply, and the Bush administration has been persistent and unyielding in asserting its ability to continue to hold individuals indefinitely under the UEC label. Indeed, even following Hamdan's trial, President Bush continued to argue that he had the right to hold Hamdan indefinitely – past the time of his sentence.[58]

The rendition program continues and access to the courts for victims is blocked at every turn by the State secrets doctrine – even when it is clear that the U.S. government has been mistaken in identifying a particular individual as a suspected terrorist. This was the case with Maher Arar, a Canadian citizen who was picked up mistakenly at Kennedy airport and rendered by U.S. officials to Syria where he was tortured for 10 months until the Canadian government secured his release.[59] Cruel treatment has not been renounced, and earlier this fall the *New*

52. Baher Azmy, *Rasul v. Bush and the Intra-Territorial Constitution*, 62 N.Y.U ANN. SURV. AM. L. 369, 373-74 (2007).

53. Brian D. Fahy, *Given an Inch, the Detainee Effort to Take a Mile: The Detainee Legislation and the Dangers of the "Litigation Weapon in Unrestrained Enemy Hands,"* 36 PEPP. L. REV. 129, 166-67 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

54. *Id*.

55. Josh White & William Branigin, *Hamdan to be Sent to Yemen*, WASH. POST, Nov. 25, 2008 at A1.

56. *Id*.

57. This question is squarely presented by the *al-Marri* case, recently taken up by the Supreme Court, and scheduled to be argued next year. A*l-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (en banc), *vacated and remanded sub nom. Al-Marri v. Spagone*, No. 08-368, 2009 WL 564940 (U.S. Mar. 6, 2009).

58. Peter Finn, *Judge Rejects Government Call to Reconsider Hamdan Sentence*, WASH. POST, Oct. 31, 2008, at A10, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/10/30/AR2008103004661.html.

59. THE COMM. ON INT'L HUMAN RIGHTS OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. & CTR.

York Times published a story stating that the administration is no longer committed to closing the prison camp at Guantanamo Bay, although President Obama has recommitted to closing the prison.[60]

Additionally, the racism and anti-muslim/anti-arab sentiment that emerged following the 9/11 attacks continue to fuel and distort U.S. foreign and domestic policy – to scare the public and whip up sentiment for government policies that are indefensible as a matter of law. Moreover, it has led to a plunge in support for the United States and its policies worldwide. The U.S. has been brought to task before the Human Rights Committee, the Torture Committee, the European Parliament, and the InterAmerican Commission on Human Rights.[61] Racism and ethnic slurs surfaced in the Presidential campaign, where it was widely reported that robocalls alleging that Obama took his oath of office on a Koran, were apparently being heard all around the United States. These scare tactics are self defeating in terms of winning hearts and minds in the Muslim world and misshape U.S. foreign policy, causing U.S. policymakers to base decisions on prejudice rather than facts.[62]

Finally, there are now individuals arguing that the way to "fix" the public relations problem of Guantanamo Bay is to make it worse - by creating specialized national security courts and/or "amending" the Geneva Conventions.[63] As to the latter, the ICRC has steadfastly opposed amending the Conventions,[64] and of course, there are already two amendments, Protocols I and II, neither of which has been ratified by the United States.[65] If the United States is serious about working

FOR HUMAN RIGHTS AND GLOBAL JUSTICE, N.Y. UNIV. SCH. OF LAW, TORTURE BY PROXY: INTERNATIONAL AND DOMESTIC LAW APPLICABLE TO "EXTRAORDINARY RENDITIONS" 11-12, 18 (2004). *See also* Sadat, *Extraordinary Rendition, supra* note 10, at 1203 (describing Arar's detention in Syria under the United States' rendition program).

60. Steven Myers, *Bush Decides to Keep Guantánamo Open*, N.Y. TIMES, Oct. 21, 2008, at A16, ¶¶ 1, 5, *available at* http://www.nytimes.com/2008/10/21/washington/21gitmo.html.

61. *See e.g.*, Human Rights Watch, *U.N. Challenges U.S. Rights Record*, July 26, 2006, http://www.hrw.org/en/news/2006/07/26/un-challenges-us-rights-record; U.N. COMM. AGAINST TORTURE, *Consideration of Reports Submitted by State Parties Under Article 19 of the Convention*, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006) *available at* http://daccessdds.un.org/doc/UNDOC/GEN/G06/432/25/PDF/G0643225.pdf?OpenElement; European Parliament Resolution on Guantanamo, EUR. PARL. DOC. P6_TA(2006)0070 (2006), *available at* http://www.derechos.org/nizkor/excep/gtmoeng.html; David Swanson, Op-Ed., *Inter-American Commission on Human Rights Hears Complaints Against United States*, OpEdNews.com, http://www.opednews.com/articles/Inter-American-Commission-by-David-Swanson-090325-713.html (last visited April 17, 2009).

62. Leila Nadya Sadat, *Do All Arabs Really Look Alike? Prejudice and the U.S. "War" on Terror*, 50 WAYNE STATE L. REV. 69, 74 (2004).

63. *See, e.g.*, *Obama and Guantanamo*, Op-Ed., WALL ST. J., Jan. 22, 2009, at A16, *available at* http://online.wsj.com/article/SB123258578172604569.html.

64. *See, e.g.*, Jakob Kellenberger, *Statement by the President of the ICRC – 58th Session of the Commission on Human Rights*, 845 INT'L REV. OF THE RED CROSS 240 (2002) *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/59KC9Y.

65. INT'L COMM. OF THE RED CROSS, STATES PARTY TO THE GENEVA CONVENTIONS AND THEIR ADDITIONAL PROTOCOLS 7 (2003), *available at* http://www.aiipowmia.com/legis/protocoles.pdf. There is also a third protocol that is not of relevance to this essay. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem, Dec. 8, 2005, 45 I.L.M. 555.

with other countries on mutually agreeable rules regarding detainee treatment of terrorists captured in military operations, ratifying those protocols, before opening negotiations on a third, is probably required. Moreover, it is unclear what this new treaty would look like. No democracy will sign on to a treaty permitting cruel treatment or torture as lawful interrogation techniques, nor would it be conceivable that indefinite detention would be approved, which are the primary elements of the current legal regime that the Bush administration wanted to change.

Several legal scholars have suggested the establishment of national security courts that would be staffed by civilian judges, but have specialized rules for the trial of terror suspects.[66] The courts would be located on military bases,[67] and could presumably try detainees from Guantanamo Bay, if it was closed, or perhaps newly captured individuals. The very purpose of these courts would be to make the UEC category a permanent one, as the proposals would permit indefinite preventive detention, as well as trials in "special courts" where defendants would have been deprived of their right to remain silent. This would presumably mean that they were forced to speak through coercion or some other means.[68]

This idea is deeply problematic and probably unconstitutional. Indeed, it too is based upon a presumption of guilt and evinces a pernicious classification between ordinary citizen A and suspected terrorist B. Proponents of these courts admit that they would like them so they can cut "constitutional corners," by eliminating a defendant's right to remain silent, among other modifications – and presumably avoid the military justice system as well.[69] Yet the *Moussaoui*, *Padilla*, and *Lindh* trials demonstrated the clear ability of U.S. federal judges to try cases involving alleged terrorists.[70] The establishment of these new terror courts has been condemned by the Constitution Project – a blue ribbon commission that found that "establishing a new, unprecedented, and unnecessary system of tribunals risks undermining the constitutional protections enshrined in our criminal justice system, and would ultimately create far more problems than it could possibly solve."[71] As one federal judge has pointed out, the Classified Information Procedures Act provides a set of rules for criminal cases that protects classified information and still maintains "some degree of transparency."[72] Moreover, if the

66. *See, e.g.*, Amos N. Guiora, *Qurin to Hamdan: Creating a Hybrid Paradigm for the Detention of Terrorists*, 19 FLA. J. INT'L L. 511, 527 (2007); Jack L. Goldsmith & Neal Katyal, Op-Ed., *The Terrorists' Court*, N.Y. TIMES, July 11, 2007, at A19; Glenn Sulmasy, Op-Ed., *The National Security Court: A Natural Evolution*, JURIST: Legal News & Res., May 11, 2006, *available at* http://jurist.law.pitt.edu/forumy/2006/05/national-security-court-natural.php.

67. *See*, Sulmasy, *supra* note 66.

68. *See id.*; Editorial, *Workable Terrorism Trials: A Special Federal Court Could Balance Fundamental Rights and National Security Needs*, WASH. POST, July 27, 2008, at B6.

69. *See generally* Sulmasy, *supra* note 66; Kendall W. Harrison, *The Evolving Judicial Response to the War on Terrorism*, 75 WIS. LAW. 14, 15, 68 (Dec. 2002).

70. *See* John C. Coughenour, Op-Ed., *How to Try a Terrorist*, N.Y. TIMES, Nov, 1, 2007, at A27.

71. *A Critique of National Security Courts*, THE CONSTITUTION PROJECT, June 23, 2008, at 6, *available at* http://www.constitutionproject.org/pdf/Critique_of_the_National_Security_Courts.pdf.

72. Coughenour, *supra* note 70.

real issue is the use of evidence obtained through so called "enhanced interrogation techniques," it cannot be constitutionally admissible in any federal court.

V. CONCLUSION

America's legal system was sorely tested during the Bush years, and it is not yet clear whether it will ever fully recover. At the same time, many lawyers pushed back, particularly with regard to the more extreme departures from the law advocated by Bush administration officials often risking their careers in so doing. These included Navy General Counsel Alberto Mora and Navy Judge advocate general Michael Lohr,[73] Lieutenant Commander Charles Swift, and the military lawyers assigned to defend detainees at Guantanamo Bay, to name a few. Civilian lawyers like Michael Ratner, Joe Margulies, and Tom Wilner also played a key role in bringing the rule of law back into U.S. government policy, risking their reputations in doing so.[74] British lawyer Clive Stafford Smith filed lawsuits on behalf of Guantanamo detainees, and law professors wrote articles and amicus briefs attempting to influence government policy and the courts.[75]

Recently, U.S. courts have upheld the rule of law, particularly the United States Supreme Court, which has issued a quartet of decisions providing detainees with access to the courts and affirming their minimum rights under the laws of war.[76] At the same time, the Court did not address the fundamental problems with the UEC classification itself, and its decisions were relatively narrow. Nevertheless, the *Rasul* decision, holding that the detention facility at Guantanamo Bay was within U.S. jurisdiction, the *Hamdi* decision upholding the right of detainees to challenge the evidence against them, and the *Hamdan* decision finding that no matter what their status, the detainees were entitled to the protection of common article 3 of the Geneva Conventions (prohibiting cruel treatment) were courageous and important decisions not just for the U.S. legal system, but upholding the rule of law around the world. With the retirement of Justice O'Connor, and the passing of former Chief Justice William Rehnquist, however, the consensus on the Court is increasingly fragile, and the new President could have a tremendous influence on these cases through his appointments.

Here are seven suggestions for President Obama's new administration:

First, close the U.S. detention facility at Guantanamo Bay. The existence of this prison camp has become a lightening rod for criticism of the United States and a recruitment tool for international terrorists. It seems clear from what information is available, that many of the approximately 250 detainees have been cleared for release, but the administration has not been able to find a country willing to take

73. *See, e.g.*, MAYER, *supra* note 28, at 224-28.

74. *Id.*, at 205-07.

75. *See* Biography of Clive Stafford Smith, REPRIEVE UK, http://www.reprieve.org.uk/staff_clivestaffordsmith.htm; *see also* John Semmens, *Condemned Murderer Endorses Obama*, Jul. 27, 2008, http://www.freerepublic.com/focus/f-bloggers/2052111/posts.

76. *See Hamdi*, *supra* note 6; *Boumediene*, *supra* note 8; *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Rasul v. Bush*, 542 U.S. 446 (2004).

them.[77] This has been advocated by former Secretaries of State, military officers, human rights groups and legal and political experts. President Obama announced during the campaign that he plans to close Guantanamo and he should make it a top priority to keep this promise.

Second, ensure respect for the U.S. Constitution by using existing, ordinary courts – civilian and military – to try Guantanamo detainees who are accused of serious crimes. During his campaign, President Obama announced that he felt the existing legal system could handle the detainees yet to be tried. More recently, it was reported that he was considering the establishment of a "new legal system" to handle the most sensitive cases, which is presumably a reference to the national security courts discussed above. Yet a close look at the proposals suggests a disdain for time-tested rules of law eerily similar to the lawyering style that pervaded the administration during the past eight years. The federal courts – and regularly constituted military courts – are more than capable of trying individuals accused of terrorism and violations of the laws and customs of war, as they have done so before.

Third, the President should establish a Blue Ribbon Commission evaluating U.S. detention policies over the past seven years. The Commission needs to examine not only issues of accountability for violations of U.S. and international law, but should make an authoritative record and issue recommendations regarding victim reparations for those who were imprisoned by U.S. officials or under U.S. authority by mistake. The Commission could also make recommendations concerning items 4-7, below.

Fourth, the President should immediately issue an Executive Order mandating humane treatment for all detainees in U.S. custody. It needs to be made clear that there is no "CIA exception" to the Convention Against Torture, and that the United States takes seriously not only its role as a beacon of freedom, human rights and democracy, but its obligations under international law.

Fifth, the President should recommit the United States of America to the international and domestic rule of law; by supporting and ratifying, when possible, the many human rights and humanitarian law treaties that the United States has eschewed during the past decade. In particular, the United States should support the International Criminal Court, and ratify the Convention on the Rights of the Child, the Convention for the Elimination of Discrimination Against Women, the Landmines Ban, the new cluster bomb treaty and the new Convention on Forced Disappearances.

Sixth, the President should not issue pardons to individuals accused of war crimes, crimes against humanity or facilitating torture or cruel, degrading or inhumane treatment

Seventh, the President should seriously consider joining the Inter-American system by ratifying the American Convention on Human Rights. Additionally (or

77. Matt Apuzzo & Lara Lakes Jordan, *Obama team developing plan to close Guantanamo*, ST. LOUIS POST-DISPATCH, Nov. 11, 2008, at A5.

alternatively) the United States could also consider establishing its own human rights commission. It seems clear that the European Convention on Human Rights, for example, has had a moderating influence on European efforts to address international terrorism. For example, in *A. v. Secretary of State*, the U.K. House of Lords held in 2005 that Britain could not indefinitely detain aliens suspected of connections to terrorism.[78]

There is no doubt that governments have a duty to respond to national security threats, but they have equally important obligations to ensure the human rights of their citizens, and their prisoners. Fear causes governments to overreact; strong institutions help nations to respond in a more measured way. Most democracies are members of regional human rights regimes, and many have their own national human rights commissions. The United States could consider these examples as it looks for ways to strengthen its own human rights record and enhance its world leadership.

The new President should consider implementing these suggestions even though cynics could argue that the United States has "gotten away" with conducting the war on its own terms, without regard to, or respect for, the opinions of mankind and the legal and institutional framework of international law. In addition to the obvious point of enlightened self-interest—that the United States can only achieve its objectives if it acts with legitimacy and commands respect—there is the deeper moral question of deciding what we stand for. Do Americans still believe that all human beings are created equal and endowed with inalienable rights, beliefs that many generations of Americans have died fighting for, beliefs that have inspired respect and admiration for the United States the world over, and principles that President Obama invoked in his campaign?

The war that was launched from the nightmare of September 11 has produced the nightmare of Guantanamo, the horror of Abu Ghraib, the broken lives of the U.S. soldiers killed or wounded in Iraq and Afghanistan, the deaths of tens, maybe hundreds of thousands of Afghan and Iraqi civilians, and the shattered psyches of America's torture and rendition victims. The United States is better than this—surely it can temper its great power with moderation and reason, to paraphrase Justice Jackson's famous phrase uttered at Nuremberg so many years ago. On January 20, 2009, it is to be hoped that the 44th President of the United States of America will immediately begin to recommit the United States to respecting the human rights of its enemies as well as its friends.

78. *See* A. v. Sec'y of State for the Home Dep't, [2004] UKHL 56, [2005] 2 A.C. 68 (H.L.) (appeal taken from Eng.) (U.K.).