

OXFORD

AMERICA'S WAR ON TERROR

*The State of the 9/11 Exception
from Bush to Obama*

JASON RALPH

AMERICA'S WAR ON TERROR

This page intentionally left blank

America's War on Terror

*The State of the 9/11 Exception from
Bush to Obama*

JASON RALPH

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries

© Jason Ralph 2013

The moral rights of the author have been asserted

First Edition published in 2013

Impression: 1

All rights reserved. No part of this publication may be reproduced, stored in
a retrieval system, or transmitted, in any form or by any means, without the
prior permission in writing of Oxford University Press, or as expressly permitted
by law, by licence or under terms agreed with the appropriate reprographics
rights organization. Enquiries concerning reproduction outside the scope of the
above should be sent to the Rights Department, Oxford University Press, at the
address above

You must not circulate this work in any other form
and you must impose this same condition on any acquirer

British Library Cataloguing in Publication Data
Data available

ISBN 978-0-19-965235-8

Printed by the MPG Printgroup, UK

Preface and Acknowledgments

This project started following publication of my previous book *Defending the Society of States: Why the United States Opposes the International Criminal Court and its Vision of World Society* (Oxford: Oxford University Press, 2007). I had begun to consider the Bush administration's war on terror as part of that book but the ideas for a new project only began to crystallize in the academic year 2007–2008. Thanks to a research sabbatical from my institution, the School of Politics and International Studies, University of Leeds, I was able to accept a Visiting Researcher invitation from the University of Queensland. I would like to thank the School of Political Science and International Studies at UQ, in particular Alex Bellamy, Richard Devetak, Tim Dunne, Marianne Hanson, Seb Kaempf and Richard Shapcott, for helping get this project off the ground and for being so friendly. It is there that I wrote two of the articles that introduced the arguments this book elaborates on. I would like to thank Cambridge University Press, Taylor and Francis and Sage for permission to draw on the arguments contained in the following: Jason Ralph, 'The Laws of War and the State of the American Exception', *Review of International Studies*, Vol 35, No 3, (2009) 631–49; Jason Ralph, 'Which Cosmopolitanism? Whose Empire? Or Why the Schmittian Charge of "Liberal Imperialism" is Only Half Right', *Global Society*, Vol 23, No 3 (2009) 207–24; and Jason Ralph, 'Carl Schmitt's Theory of the Partisan and Contemporary US Practice', *Millennium: Journal of International Studies*, Vol 39 No 2 (2010) 1–20.

The book is also the product of the research grant (grant number RES-000-22–3252) awarded by the Economic and Social Research Council. This allowed me to pursue this research agenda and I would like to acknowledge their support. I wish also to thank Sally Howarth and Helen Wells for their support in the grant writing process. The grant gave me time to develop my ideas into a book length project. I wish to thank Dominica Švarc who was employed for a short while as a research assistant. Dominica's background in law helped consolidate the interdisciplinary nature of the project and her thoroughness in collecting empirical data meant I was never short of material to analyse (in fact the opposite was the case). She also helped set up the project blog. The grant also enabled travel to Washington DC where I was able to attend the American Society for International Law annual conference and discuss the issues with many individuals involved in the day-to-day discourse that helps to define US policy. In particular, I would like to thank Geneve Mantri, Sarah Mendelson, Jumana Musa, Laura Olson, Andrea Prasow, Charles Stimson, Benjamin Wittes and others for making time to talk to me.

During the period of the grant I also made presentations of many working papers. I would particularly like to thank the convenors of these panels, as well as the ISA and BISA annual conferences. Having organized a conference during this period and having served on the BISA Board of Trustees I know how much work goes into planning these events. Works like this are in many respects products of a research environment and that does not exist without the work of many dedicated individuals. The same thanks should also go to my colleagues and students at the University of Leeds. They consistently provide a friendly and constructive atmosphere in which to work. In April 2011, I was awarded a British Academy Mid-Career Fellowship (grant number MC110531). The purpose of the fellowship is to examine what American exceptionalism means for British foreign policy, in particular the foreign policies of the centre-left. I have, however, been able to use this time to put the finishing touches to this book.

I would also like to thank the anonymous reviewers of the work I published during this period. I would especially like to thank the reviewers of this book, including Kevin Jon Heller. Kevin's detailed reading of the manuscript gives me confidence that the book speaks sensibly across the disciplinary divide between International Law and International Relations. I would also like to thank Alan Craig, Jack Holland, Jean-François Drolet and Ruth Blakeley for their reading of individual chapters. The argument and interpretation of the facts are of course my own. Dominic Byatt and his colleagues at Oxford University Press have again been excellent to work with.

Finally, I would like to thank my wife Katy. She gave birth to our children during this period. That, as every new parent knows, changes everything. Except, somehow, I was able to continue what I had set out to do when I started this project in 2007. That is only because she is amazing. And I am eternally grateful.

JR October 2012

Contents

1. Introduction	1
2. The Use of Force after 9/11	22
3. Prosecuting Terrorist Suspects after 9/11	55
4. Detaining Terrorist Suspects after 9/11	84
5. Interrogating Terrorist Suspects after 9/11	114
6. Conclusion	136
<i>Bibliography</i>	147
<i>Index</i>	175

This page intentionally left blank

Introduction

Following 9/11 the Bush administration argued that certain international norms did not apply to US conduct because the US faced a situation of exceptional insecurity. Its argument was underpinned first and foremost by the claim that the United States was in a state of armed conflict or 'at war' with 'a new kind of enemy'. This is important because the norms applicable to state conduct differ when a situation is understood as an 'armed conflict' or 'war'. In war, for instance, it is generally accepted that the state can kill an enemy combatant regardless of whether he is about to commit an atrocity. In peace, liberal human rights regimes expect that the state will try to arrest the terrorist before it is left with no choice but to target him with lethal force. In war, the state can prosecute an enemy combatant for certain offences in a military commission. In peace, the violent actor can expect to be tried in a civilian court. In war, the state can detain an enemy combatant without charge for the duration of the conflict. In peace, the liberal state is expected to release the detainee within a certain period or charge him with a criminal offence. Of course there is nothing strange about the United States being at war, but the Bush administration's decision to wage war against a non-state transnational network was unusual in several ways.

Firstly, previous US administrations had tended to see the al Qaeda threat through a peacetime law enforcement lens rather than an armed conflict. The Clinton administration did use military force in response to al Qaeda attacks, but these actions were generally seen as part of a policy that would 'counter' terrorism rather than wage 'war' on it.¹ Thus, when al Qaeda attacked the World Trade Center in 1993 the perpetrators were not labelled enemy combatants. They were instead treated as common criminals and prosecuted in a US federal court.² This approach to treating the terrorist violence of non-state

¹ President Clinton, 'Remarks in Martha's Vineyard, Massachusetts, on Military Action Against Terrorist Sites in Afghanistan and Sudan', 20 August 1998 at <<http://www.presidency.ucsb.edu/ws/?pid=54798&st=&st1=>>.

² Harold Hongju Koh, 'The Case against Military Commissions', *American Journal of International Law* 96 (2002) 337.

actors as a law enforcement issue tends to be consistent with the Westphalian international order that saw war as an interstate institution. This in part is because the state's monopolization of legitimate violence had been, as Hedley Bull noted, a significant means by which the anarchical society of states created international order.³ Of course, the law of non-international armed conflict recognized non-state actors as parties to war but there was a commonly held view that non-international armed conflicts were territorially based and not transnational or global. Geoffrey Corn, for instance, notes that 'during the five-plus decades between 1949 and 2001, the term "non-international" evolved to become synonymous with internal'.⁴

The war on terror was also unusual in a comparative sense. Few of America's close allies saw the fight against non-state terrorism in terms of war.⁵ The United Kingdom, for instance, had consistently denied that it was at war with the Irish Republican Army, despite the insistence of detainees that they were prisoners of war.⁶ The UK continued in this vein when, following the 7 July 2005 al Qaeda attacks, the Director of Public Prosecutions insisted that 'London is not a battlefield'.⁷ Leaders from across the community of liberal democracies have recognized that wars in territorially bracketed areas, primarily Afghanistan, are necessary to defeat al Qaeda; but rarely do their governments advocate treating all terrorist

³ Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, 2nd edn (Basingstoke: Palgrave Macmillan, 1995) 178. See also Charles A Jones, 'War in the Twenty-First Century: An Institution in Crisis', in Richard Little and John Williams (eds), *The Anarchical Society in a Globalized World* (Basingstoke: Palgrave Macmillan, 2006); Carl Schmitt, trans A C Goodson, *The Theory of the Partisan: A Commentary/Remark on the Concept of the Political* (Berlin: Duncker and Humboldt, 1963).

⁴ Geoffrey S Corn, 'What Law Applies to the War on Terror?', in Michael W Lewis et al (eds), *The War on Terror and the Laws of War: A Military Perspective* (Oxford: Oxford University Press, 2009) 8.

⁵ Israel's Ariel Sharon did echo Bush's statements, declaring war on terrorists on 4 December 2001, after a weekend of violence that saw twenty-six Israelis killed and 230 injured. See 'Full text of Sharon's address', BBC News, 4 December 2001 at <http://news.bbc.co.uk/1/hi/world/monitoring/media_reports/1690673.stm>. Sharon was careful not to declare war on the Palestinian Authority as this might imply some recognition of sovereign statehood. I am grateful to Alan Craig for this point. For elaboration see his 'The Struggle for Legitimacy. A Study of Military Lawyers in Israel', PhD thesis, University of Leeds, 2011. In 2006, the Supreme Court found that Israel was engaged in a 'continuous state of armed conflict' with various 'terrorist organizations' due to the 'unceasing, continuous and murderous barrage of attacks' and the armed response to these. *Public Committee Against Torture in Israel v. Israel* HCJ 769/02, para16, 14 December 2006.

⁶ 'The Government have considered it desirable in this connection to place formally on record by means of an interpretative declaration their understanding of the meaning of the term "armed conflict", which implies a high level of intensity of military operations, and their understanding of the requirements to be fulfilled by any national liberation movement which sought to invoke the protocol. Neither in Northern Ireland nor in any other part of the United Kingdom is there a situation which meets the criteria laid down for the application of either protocol.' Mr [Evan] Luard, *Hansard*, HC Deb, 14 December 1977, vol 941 cc 236-8W. Available at <http://hansard.millbanksystems.com/written_answers/1977/dec/14/war-laws-geneva-conventions>.

⁷ Clare Dyer, 'There is no war on terror', *The Guardian*, 24 January 2007.

suspects as enemy combatants.⁸ By contrast, US leaders have advocated waging a war against a transnational and globalized terrorist movement. Following 9/11, al Qaeda suspects were to be treated as enemy combatants in their own right, regardless of their location relative to a conventional battlefield and regardless of their affiliation to a particular state. For instance, the alleged 9/11 co-conspirator, Khalid Sheikh Mohammed, was detained in Pakistan and transferred to Guantánamo Bay. His enemy combatant status was based not on his participation in hostilities in Afghanistan but on the information on his computer relating to 9/11 and other hijacking plots.⁹

As well as being unusual, the US response to 9/11 was understood as being exceptional to the extent it was seen as ‘exempting’ itself from the normative regimes of the existing liberal order—institutions it had done so much to create.¹⁰ Insofar as the US response to 9/11 is concerned, this kind of exceptionalism manifested itself not just in its interpretation of the law of armed conflict; it also found expression in the US approach to international humanitarian law.¹¹ The Bush administration argued, for instance, that the Geneva Conventions did not apply to its war against al Qaeda because it was ‘a new kind of war’.¹² It argued, for instance, that

[c]ommon article 2, which triggers the Geneva Convention provisions regulating detention conditions and procedures for trial of [prisoner of war] POWs, is limited only to declared war or armed conflict ‘between two or more of the High Contracting Parties’. Al Qaeda is not a High Contracting Party. As a result the U.S. military’s treatment of Al Qaeda members is not governed by the bulk of the Geneva Conventions, specifically those provisions concerning POWs.¹³

⁸ In the UK, for instance, the four men that terrorized London on 21 July 2005 with their attempt to repeat the 7 July atrocity were found guilty of conspiracy to murder by a civilian jury in a civilian court. In addition, the three men accused of being involved in the 7 July plot were also tried in a Crown court. This time the jury was dismissed having failed to reach a verdict. The trio were later acquitted in April 2009 following a retrial: BBC, ‘Trio cleared over 7/7 attacks’, 28 April 2009 at <<http://news.bbc.co.uk/1/hi/uk/7507842.stm>>.

⁹ Department of Defense, Office of the Administrative Review of the Detention of Enemy Combatants, Summary of Evidence for Combatant Status Review Tribunal—Muhammad, Khalid Shayk, 8 February 2007 at <<http://www.defense.gov/news/ISN10024.pdf>>.

¹⁰ On exemptionalism as a form of exceptionalism see Michael Ignatieff, ‘Introduction: American Exceptionalism and Human Rights’ and Harold Hongju Koh, ‘America’s Jekyll-and-Hyde Exceptionalism’, in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton: Princeton University Press, 2005) 1–26 and 111–43.

¹¹ Ignatieff, ‘Introduction’, n 10 above, 4–5; Koh, ‘America’s Jekyll-and-Hyde Exceptionalism’, n 10 above, 124–42.

¹² The President first used this phrase in a telephone conversation with New York Mayor Rudolph Giuliani and Governor George Pataki on 13 September 2001 the transcript of which was made publicly available. Quoted by Benjamin Wittes, *Law and the Long War: The Future of Justice in the Age of Terror* (New York: Penguin Press, 2008) 45–6. See also Donald H Rumsfeld, ‘A New Kind of War’, *New York Times*, 27 September 2001.

¹³ Memo 4, ‘Application of Treaties and Laws to al Qaeda and Taliban Detainees. Memorandum (Draft) for William J Haynes II, General Counsel, Department of Defense, from John Yoo,

For the Bush administration then, al Qaeda operatives were not civilians guilty of committing or plotting normal crimes. They were recognized as heavily *politicized* actors and therefore worthy of the title ‘enemy’. They had, moreover, demonstrated the *capability* to deliver state-like levels of violence and therefore were worthy of ‘combatant’ status.¹⁴ Al Qaeda was not, however, and this is the significance of the above quote, an entity that had a sovereign or political *authority* to wage war. Thus, al Qaeda detainees were neither POWs nor civilians; they were ‘unlawful enemy combatants’. They could be targeted even if they were not directly involved in combat or about to commit a terrorist act. They could be prosecuted in a military commission or detained for the duration of the conflict, but the Geneva Convention’s ‘strict limitations’ on interrogation techniques did not apply.¹⁵ There were then two underlying aspects to the US response to the situation of exceptional insecurity post-9/11: the first was the insistence that the US was at ‘war’ with a transnational non-state network; the second was that certain aspects of the laws of war did not apply to this ‘new war’. The purpose of this book is to examine whether this approach to the al Qaeda threat has outlasted the moment of profound insecurity that gave rise to it. More than a decade on from those attacks, and following a change of administration, what influence do these arguments have on American policy?

AMERICAN EXCEPTIONALISM IN THEORY

The idea that a sovereign power may act to secure the common good in moments of emergency and not seek particular permissions is found in liberal

Deputy Assistant Attorney General, and Robert J Delahunty, Special Counsel, 9 January 2002’, in Karen J Greenberg and Joshua L Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (Cambridge: Cambridge University Press, 2005) 48. This opinion was written, as the reference suggests, as a draft memo to the Department of Defense. The same argument appeared in the actual memo which is now published as Memo 6, ‘Memorandum for Alberto R Gonzales, Counsel to the President, and William J Haynes II, General Counsel of the Department of Defense, 22 January 2002, from Jay S Bybee, Assistant Attorney General, 22 January 2002’, in Greenberg and Dratel (eds), *The Torture Papers*, 81–117. It then informed the President’s decision not to apply the Geneva Conventions: see Memo 11, ‘Humane Treatment of al Qaeda and Taliban Detainees, from President George Bush to the Vice-President et al’, 7 February 2002, in Greenberg and Dratel (eds), *The Torture Papers*, 134–5.

¹⁴ See John Yoo, *War By Other Means: An Insider’s Account of the War on Terror* (New York: Atlantic Monthly Press, 2006) 4. See also Deputy Secretary of Defense Paul Wolfowitz’s, Interview with *Vanity Fair*, 9 May 2003: ‘I know my thinking at that point was that the old approach to terrorism was not acceptable any longer. The old approach being you treat it as a law enforcement problem rather than a national security problem.’

¹⁵ Memo 7, ‘Memorandum for the President, Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban, from Alberto R Gonzales, 25 January 2002’, in Greenberg and Dratel (eds), *The Torture Papers*, n 13 above, 119.

theory, in particular John Locke's idea of 'prerogative power'.¹⁶ The moment of extreme emergency in this sense is 'a state of exception'. The sovereign acting in this moment by no means abandons the law. In fact the exception derives its authority from an understanding that 'it is directed at re-establishing or defending the existing order'.¹⁷ It is assumed that the laws deemed inapplicable at the moment of emergency will be restored once the crisis passes. In this respect, the exception is different from anarchy and chaos. For Carl Schmitt, however, the exception exposes the superficiality of the norm. Law cannot ever truly rule because it is always contingent on the political. The ever present possibility that 'friends' will act in expedient ways toward their 'enemies' means human relations are in a permanent state of exception.¹⁸ As Tracy Strong put it, life for the Schmittian conservative 'can never be reduced or adequately understood by a set of rules, no matter how complex . . . in the end, rule is of men and not of law—or rather that the rule of men must always existentially underlie the rule of law'.¹⁹

For Schmittian international relations theory, the permanence of the exception manifests itself through what it calls 'global linear thinking'.²⁰ Where politics and war were bracketed (i.e. restrained) inside a particular community, a state of exception or anarchy existed outside. These lines were first drawn by Papal authorities in the age of discovery and they persisted with the emergence of European society of states. Beyond Europe

the 'New World' began. At any rate European law, i.e. 'European public law', ended here. Consequently, so too did the bracketing of war achieved by the traditional European international law, meaning that here the struggle for land-appropriation knew no bounds. Beyond the line was an 'overseas' zone in which, for want of any legal limits to war, only the law of the stronger applied. . . . This freedom meant that the line set aside an area where force could be used freely and ruthlessly.²¹

Europe, in other words, had restrained violence by accepting an ethic of coexistence that emerged between states as *justus hosti*. This meant gradually

¹⁶ Iain Hampsher-Monk, *A History of Modern Political Thought: Major Political Thinkers from Hobbes to Marx* (Oxford: Blackwell Publishing, 1992) 107.

¹⁷ Oren Gross, 'The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the "Norm-Exception" Dichotomy', *Cardozo Law Review* 21 (1999–2000) 1825. Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press, 2006).

¹⁸ Carl Schmitt (translation, introduction, and notes by George Schwab), *The Concept of the Political* (Chicago: University of Chicago Press, 1996).

¹⁹ Tracy Strong, 'The Sovereign and the Exception: Carl Schmitt, Politics, Theology and Leadership', foreword to Schmitt, *Political Theology* (Chicago: University of Chicago Press, 2005) xxii.

²⁰ Carl Schmitt (translated and annotated by G L Ulmen) *The Nomos of the Earth in International Law of the Jus Publicum Europaeum* (New York: Telos Press Publishing, 2003).

²¹ Carl Schmitt, *The Nomos of the Earth*, n 20 above, 94–5.

abandoning the idea that objective standards were available to resolve *justa causa* disputes among sovereigns. Wars were still fought between ‘enemies’ but they were limited, unlike the wars fought against non-state ‘foes’, which took place beyond the line demarcating *jus publicum Europaeum*.²² The ethic of coexistence inside Europe was replaced by ‘the standard of civilization’ that imitated the normative hierarchies of the pre-modern period. Wars on the frontier in this sense took on the unlimited character of the holy wars of a pre-Westphalian period. In these frontier wars *justa causa* was the only normative test and a willingness to observe the restraints associated with European warfare was a matter of political rather than moral or legal calculation. The exception in Schmittian thinking was therefore spatial as well as situational. War beyond the line, in other words, existed in a permanent state of exception.²³

An implication of this is that one might expect the ethic of coexistence and the bracketed character of war and politics to follow the globalization of the society of states. Yet for Schmitt and his contemporary followers this did not happen because American *liberal internationalism* inevitably redrew the lines that characterized global politics in terms of friends and enemies. Illiberal enemies became foes and were excluded from the normative regimes that otherwise restrained warfare. As a consequence, liberal wars for Schmitt could take on the unrestrained character of the holy wars of pre-Westphalian Europe and the colonial wars of the frontier. Illiberal combatants were unjust regardless of how they conducted themselves on the battlefield. Liberal combatants thus had to fight for unconditional surrender and criminalize their opponent’s war aims.²⁴ So, as George Schwab put it, in presuming to fight for a just cause, ‘the US may thus cease to regard its opponents as “enemies” and treat them as “foes”’.²⁵

Despite the criticism of Schmitt’s international history, contemporary theorists have used the *Nomos of the Earth*, which they regard as ‘a missing classic

²² On the distinction between enemy and foe ‘which can best be understood by ascertaining whether certain accepted rules governing warfare are followed by combatants’, see G Schwab, ‘Enemy or Foe: A Conflict of Modern Politics’, *Telos* 72 (1987) 195; also G L Ulmen, ‘Return of the Foe’, *Telos* 72 (1987) 187–93.

²³ Schmitt, *The Nomos of the Earth*, n 20 above, 126–7. On the brutality of colonial warfare in North America and its connection to Europe’s holy wars, see John Grenier, *The First Way of War: American War Making on the Frontier, 1607–1814* (Cambridge: Cambridge University Press, 2004). On the different treatment of non-state enemies in frontier warfare, see Peter Maguire, *Law and War: An American Story*, (New York: Columbia University Press, 2001) 32–4. Maguire notes how ‘the Sioux were not charged with violations of the customary laws of war because the US government did not consider them lawful combatants. To grant them the status of legitimate belligerents would have been to recognize their sovereignty and their inherent right to wage war.’

²⁴ Schmitt, *The Nomos of the Earth*, n 20 above. For further discussion, see Jason Ralph, ‘The Laws of War and the State of the American Exception’, *Review of International Studies* 35 (2009) 631–49.

²⁵ Schwab, ‘Enemy or Foe’, n 22 above, 201.

in IR [International Relations], to interpret the war on terror and to explain post-9/11 policy.²⁶ Thus, Louiza Odysseos argues that ‘the War on Terror . . . is the quintessential liberal cosmopolitan war’. While the US purports to represent and act on universal values that erase normative lines between insider and outsider, the liberal discourse of human rights, freedom and democracy promotion inevitably securitizes the criminal so that it is treated as an enemy, and then draws lines between enemies and foes, excluding the latter from regimes that apply to the former. So,

those who use the discourse of ‘humanity’ politically designate themselves as arbiters of ‘humanity’, drawing a line between who is human and who is inhuman, who is good and who is evil, who is ‘freedom-loving’ and who is ‘freedom-hating’, to borrow from the vocabulary of US foreign policy since the terrorist attacks of 11 September 2001.²⁷

From this perspective, the US response to 9/11 is not unusual because liberal wars are always ‘exceptional’. Thus, Odysseos writes that the war on terror

is an exceedingly exemplary manifestation of the paradox of liberal modernity and war: of the occurrence of ever more violent types of war within the very attempt to fight wars which would end ‘war’ as such. Moreover, it is an example of how the cosmopolitan order’s emphasis on the erasure of geopolitical lines through universal humanity fails not only to end war, but even to bracket and limit it, causing not its humanisation but its intensification and dehumanisation.²⁸

The claim therefore is that the Bush administration’s argument that international humanitarian law did not apply to the new kind of war against al Qaeda stems, at least from the Schmittian perspective, from the logic of liberal internationalism. This suggests that the state of the post-9/11 exception has less to do with the intensity of the al Qaeda threat and more to do with the nature of American liberal internationalism. This book contests this claim

²⁶ Louiza Odysseos and Fabio Petito, ‘Introduction: The International Political Thought of Carl Schmitt’, in Louiza Odysseos and Fabio Petito (eds), *The International Political Thought of Carl Schmitt. Terror, Liberal War and the Crisis of Global Order* (London and New York: Routledge, 2007) 2. For others who saw the relevance of Schmitt, see William E Scheuerman, ‘Carl Schmitt and the Road to Abu Ghraib’, *Constellations* 13 (2006) 109–23; and Sanford Levinson, ‘Constitutional Norms in a State of Permanent Emergency’, *Georgia Law Review* 40 (2006) 706; and ‘Preserving Constitutional Norms in Times of Permanent Emergencies’, *Constellations* 13 (2006) 59. For the criticism of Schmitt’s history, see Martti Koskeniemi, ‘International Law as Political Theology. How to Read *Nomos der Erde*’, *Constellations* 11 (2004) 492–511; William Scheuerman, ‘International Law as Historical Myth’, *Constellations* 11 (2004) 537–50; Jason Ralph, ‘The Laws of War and the State of the American Exception’, *Review of International Studies* 35 (2009) 631–49.

²⁷ Louiza Odysseos, ‘Crossing the Line? Carl Schmitt on the “spaceless universalism” of cosmopolitanism and the War on Terror’ in Louiza Odysseos and Fabio Petito (eds), *The International Political Thought of Carl Schmitt. Terror, Liberal War and the Crisis of Global Order* (London and New York: Routledge, 2007) 126.

²⁸ Odysseos, ‘Crossing the Line?’, n 27 above, 137.

theoretically and empirically. The remainder of this section addresses the theoretical concerns and opens up the possibility of an alternative liberal approach to the terrorist threat, while the final sections of this chapter summarize the empirical evidence used to marshal the central argument, which is that liberal ideas were in fact a source of opposition to the war on terror and in certain respects acted as a political counterweight to the Bush administration's policy.

The Schmittian claim that the war on terror and the post-9/11 exception is embedded in the logic of liberal internationalism rests on a particular reading of liberalism and its influence on US foreign policy. It describes what is better identified as a neoconservative or 'hard' Wilsonian approach to foreign policy.²⁹ This simultaneously embraces and rejects liberal ideas. On the one hand, neoconservatism embraces liberal democratic peace theory and is committed to what Benjamin Miller called an 'offensive liberal' strategy of regime change and democracy promotion.³⁰ On the other, the neoconservative commitment to democracy promotion is a reaction against liberalism. It stems from a reading of Kant or the republicanism of the founding fathers (see below). It stems instead from a fear that without a national purpose to bind its citizens, American society will descend into nihilistic chaos and will be unable to secure itself in an international system that is always characterized by power competition.³¹ 'Democracy promotion' is a cause that provides that sense of purpose because it informs a 'heroic' conception of national identity. What William Kristol and Robert Kagan called a true 'conservatism of the heart' should 'emphasize both personal and national responsibility, relish the

²⁹ See Ralph, 'The Laws of War', n 26 above, 643–8. For the use of the term 'hard Wilsonianism' see Max Boot, 'Neocons', *Foreign Policy*, 140 (2004) 20–8. Others have distinguished similar differences within Wilsonian liberal internationalism. Yuen Foong Khong, for instance, prefers 'muscular Wilsonianism': Yuen Foong Khong, 'Neoconservatism and the Domestic Sources of American Foreign Policy', in Steve Smith, Amelia Hadfield and Tim Dunne (eds), *Foreign Policy: Theories, Actors, Cases* (Oxford: Oxford University Press, 2007); Pierre Hassner, 'The United States: The Empire of Force or the Force of Empire?', *Chaillot Papers No 54* (Paris: Institute for Security Studies, 2002); and John Mearsheimer, 'Hans Morgenthau and the Iraq War: Realism versus Neoconservatism', 18 May 2005, at <http://www.opendemocracy.net/democracy-americanpower/morgenthau_2522.jsp>; Daniel H Deudney, 'One-legged Wilsonianism', in *Bounding Power: Republican Security Theory From the Polls to the Global Village* (Princeton and Oxford: Princeton University Press, 2007) 186.

³⁰ Benjamin Miller, 'Democracy Promotion: Offensive Liberalism versus the Rest (of IR Theory)', *Millennium Journal of International Studies* 38 (2010) 561–91. On the overlap between neoconservatism and what he calls a 'neoliberal' commitment to democracy promotion, see Tony Smith, *A Pact with the Devil: Washington's Bid for World Supremacy and the Betrayal of the American Promise* (New York and London: Routledge, 2007). In a similar vein, see Inderjeet Parmar, 'Foreign Policy Fusion: Liberal Interventionists, Conservative Nationalists and Neoconservatives—the New Alliance Dominating the US Foreign Policy Establishment', *International Politics* 46 (2009) 177–209.

³¹ For a view that neoconservatism is a form of neoclassical realism that appeals to liberal values only to mobilize state power, see Jonathan D Caverley, 'Power and Democratic Weakness: Neoconservatism and Neoclassical Realism', *Millennium Journal of International Studies* 38 (2010) 593–614.

opportunity for national engagement, embrace the possibility of national greatness, and restore a sense of the heroic'.³² This in turn works to rescue American citizens from what is seen as the corrosive influence of liberal individualism.

The idea that national 'myths' of this kind can inspire a corrupted citizenry is often traced to the philosophy of Leo Strauss.³³ It is found more recently in Kristol and Kagan's call for a 'Neo-Reaganite' foreign policy. For them, an ideological foreign policy backed by massive increases in defence spending (i.e. material superiority) creates 'an elevated patriotism' and serves the task of 'preparing and inspiring the nation to embrace the role of global leadership'. The 'remoralization of America at home', they write, 'requires the remoralization of American foreign policy'.³⁴ To mobilize this kind of patriotism, Kristol and Kagan attack the exemplarism of the republican tradition. The possibility that history is moving in a democratic direction and that all the United States has to do is provide a good example for others to follow is dismissed as naive and irresponsible. Because 'America has the capacity to contain or destroy many of the world's monsters, most of which can be found without much searching . . . the responsibility for the peace and security of the international order rests so heavily on America's shoulders'. It is 'in practice a policy of cowardice and dishonor' to do otherwise.³⁵ It is, moreover, symptomatic of the wider crisis of liberal modernity. This is found for instance in the work of

³² William Kristol and Robert Kagan, 'Towards a Neo-Reaganite Foreign Policy', *Foreign Affairs* 75 (1996), 32. 'A true "conservatism of the heart" ought to emphasize both personal and national responsibility, relish the opportunity for national engagement, embrace the possibility of national greatness, and restore a sense of the heroic'.

³³ On the Straussian idea of the 'myth', see Shadia B Drury, *Leo Strauss and the American Right* (London: Macmillan Press, 1999) 11–19. For a sympathetic view, which stresses 'a sort of political responsibility' for protecting the city 'from the dissolving and irresponsible action of philosophy, which questions and challenges received opinion', see Catherine Zuckert and Michael Zuckert, *The Truth about Leo Strauss* (Chicago: University of Chicago Press, 2006) 132. For Strauss's influence on neoconservatives like Irving Kristol and the need for foreign policy to provide nationally inspiring myths, see Michael C Williams, 'What is the National Interest? The Neoconservative Challenge in IR Theory', *European Journal of International Relations* 11 (2005) 307–37; and 'Morgenthau Now: Neoconservatism, National Greatness and Realism', in Michael Williams (ed), *Realism Reconsidered. The Legacy of Hans Morgenthau in International Relations* (Oxford: Oxford University Press, 2007) 216–40. The Straussian influence is just one part of the neoconservative movement. As Tony Smith notes, 'it is quite possible to subscribe to these concepts without ever having been exposed to Strauss': *A Pact with the Devil*, n 30 above, 29; see also Williams, 'What is the National Interest?', 309. For useful histories, see John Ehrman, *The Rise of Neoconservatism: Intellectuals and Foreign Affairs, 1945–1994* (New Haven, CT: Yale University Press, 1995); and Stefan Halper and Jonathan Clarke, *America Alone: The Neo-Conservatives and the Global Order* (Cambridge: Cambridge University Press, 2004).

³⁴ Kristol and Kagan, 'Towards a Neo-Reaganite Foreign Policy', n 32 above, 31. As Michael Williams puts it: 'Attitudes toward the national interest are as much a concern of domestic political virtue as a dimension of foreign policy. Indeed the two are seen as inseparable.' Williams, 'What is the National Interest?', n 33 above, 321.

³⁵ Kristol and Kagan, 'Towards a Neo-Reaganite Foreign Policy' n 32 above, 31.

Francis Fukuyama who warned that the liberal triumph in the Cold War could create what Nietzsche called ‘men without chests’. What gave life meaning was not simply the acknowledgement and respect of individual rights. Recognition involved the satisfaction of *thymos*, which is

the side of man that deliberately seeks out struggle and sacrifice, that tries to prove that the self is something better and higher than a fearful, needy, instinctual, physically determined animal. Not all men feel this pull, but for those who do, *thymos* cannot be satisfied by the knowledge that they are merely equal in worth to all other human beings.³⁶

Only by seeing relations with the non-liberal world through the ‘friend-enemy’ lens could post-Cold War liberals escape the moral torpor of modern life.³⁷

Neoconservatism thus embraces the democracy promotion side of the liberal internationalist agenda, but it also adopts a Schmittian-type critique of liberal internationalism. This insists, first and foremost, that sovereignty lies with the state and that the idea of a global international society is superficial because it lacks the ‘concrete’ bonds to inspire action in defence of liberal values.³⁸ It is not only superficial, it is also dangerous. This is because it plays directly into the hands of enemies; enemies who happen to understand politics

³⁶ Francis Fukuyama, *The End of History and the Last Man* (New York: Maxwell Macmillan, 1992) 304.

³⁷ As David Luban notes, Straussian shared the Schmittian view that it would not be desirable ‘to expunge deadly friend-enemy dyads from the world’ even if it were possible. ‘It would shrink the meaningfulness of human life to mere entertainment; life would at most be interesting, but never meaningful.’ David Luban, ‘Carl Schmitt and the Critique of Lawfare’, Georgetown Public Law and Legal Theory Research paper no 11-33, 28 March 2011 at <<http://ssrn.com/abstract=1797904>, 11>. To make this connection, Luban cites Strauss’s notes on Schmitt’s thesis in the 2007 expanded edition of *The Concept of the Political* (Chicago: University of Chicago Press, 2007). The differences are important to note, however. While Straussians shared Schmitt’s criticism of liberalism for its apparent dismissal of politics they did not celebrate the autonomy of politics. As Shadia Drury put it, Straussian politics had to be ‘wedded to the most serious questions about right and wrong, good and evil, truth and falsehood’ if it was ‘to rescue humanity from the triviality of liberalism’. Without this, ‘politics cannot succeed in accomplishing its task of uniting people and making them willing to lay down their lives for the collective’. By linking faith and politics, Drury concludes, ‘Strauss makes the latter more dangerous and more bloody’, which is exactly Schmitt’s criticism of liberal internationalism. Drury, *Leo Strauss*, n 33 above, 92–3. Likewise, Alan Wolfe reminds us that when Strauss noted ‘that “natural right must be mutable in order to be able to cope with the inventiveness of evil”’, he left considerable room for those inventive in finding ways to justify the suspension of agreed-upon constitutional procedures to combat evil’. Neoconservatives, he concludes, ‘should not be included in the Schmitt camp, but a propensity toward Schmittism can nonetheless be found among them’. Alan Wolfe, *The Future of Liberalism* (New York: Vintage Books, 2010) 139. On the moralization of Schmitt’s concept of the political, and the manner in which neoconservatism ultimately ends up ‘collapsing this fundamental political distinction into a universal ethics that purports to establish the moral authority of US sovereignty over the procedural universalisms of international law and institutions’, see Jean-François Drolet, *American Neoconservatism: The Politics and Culture of a Reactionary Idealism* (London: Hurst, 2011) 182–5.

³⁸ For the neoconservative critique of global liberal governance, see Jean-François Drolet, *American Neoconservatism*, n 37 above, 161–87.

in the Schmittian sense and are therefore able to exploit liberal naivete by turning international law and organization against the US and the liberal state. This critique of international law predated the response to 9/11 and it is captured by the phrase ‘lawfare’, which is used to signify ‘the use of law as a weapon of war against a military adversary’.³⁹ Although it is a modern term, it is deeply embedded in the Schmittian concept of politics and the irreducibility of the friend-enemy distinction. Indeed, it finds articulation in *The Concept of the Political* when Schmitt noted how, by seeking to disarm the state in the face of its enemies, liberalism ‘joins their side and aids them’.⁴⁰

In theory then, neoconservatism does articulate a liberal internationalist agenda in a way that resonates with the Schmittian interpretation of America’s war on terror. As noted, the Bush administration argued that certain legal regimes did not apply as it sought to defend and promote democracy. The point here, however, is that the liberal internationalist tradition in US foreign policy can be read very differently and in ways that clash with the Schmittian account of American exceptionalism. An alternative reading can be found in ways that link back to republican roots of Wilsonian liberal internationalism and the Kantian idea that human rights are universally and equally applicable and that their application cannot be subject to the exclusionary hierarchies of linear thinking. The United States itself is, of course, deeply embedded in this republican tradition. Indeed, Jonathan Hafetz captures this when he writes that the founding fathers insisted that the proposed Bill of Rights “‘expressly declare the great rights of mankind”, thus implicitly rejecting the “us” versus “them” dichotomy’ that Schmittians read in to liberal internationalism. The US Constitution was grown from the ‘seeds of a global constitution’.⁴¹

This republican inspired liberal internationalism is more reflective of the original version of American exceptionalism. This is described by Stanley Hoffman.

³⁹ Luban, ‘Carl Schmitt and the Critique of Lawfare’, n 37 above; also David Luban, ‘Lawfare and Legal Ethics in Guantánamo’, *Stanford Law Review* 60 (2008) 2020. For critics who see international humanitarian law as a ‘gentlemanly handicap’ conceded by the powerful to even up the fight, and a ‘foolhardy and irresponsible’ reward for terrorism, see J Rabkin, ‘The Politics of the Geneva Conventions: Disturbing Background to the ICC debate’, *Virginia Journal of International Law* 44 (2003) 169–205; and Lee Casey and David Rivkin, ‘Rethinking the Geneva Conventions’, in Karen J Greenberg (ed), *The Torture Debate in America* (Cambridge: Cambridge University Press, 2006) 204. This view was also expressed before 9/11: see, for example, Douglas Feith, ‘Law in the Service of Terror—The Strange Case of the Additional Protocol’, *National Interest* 1 (1985) 36–47. For attacks in this vein on the ICRC, see David B Rivkin Jr and Lee A Casey, ‘Rule of law: friend or foe?’, *Wall Street Journal*, 11 April 2005; and David B Rivkin Jr et al, ‘Not Your Father’s Red Cross’, *National Review Online*, 20 December 2004 at <<http://www.nationalreview.com/articles/213182/not-your-fathers-red-cross/david-b-rivkin-jr>>. See generally, David Forsythe, *The Politics of Prisoner Abuse: The United States and Enemy Prisoners after 9/11* (Cambridge: Cambridge University Press, 2011) 164–7.

⁴⁰ Schmitt, *Concept of the Political*, n 18 above, 51.

⁴¹ Jonathan Hafetz, *Habeas Corpus after 9/11: Confronting America’s New Global Detention System* (New York: New York University Press, 2011).

The main component of its exceptionalism has been, for more than a century after its independence, its geographically privileged position: far away from Europe and Asia to be able to be safe and uninvolved, yet capable of expanding into contiguous territories easily and without much of a contest. A second component was its institutions: it grew into being the greatest representative democracy, with greater participation of the public and of the legislative branch in foreign affairs than occurred anywhere else. Finally, American principles turned geography and institutions into guidelines for behaviour: a distaste for the rule of force that characterized European diplomacy and colonialism, the repudiation of aristocracy and its wiles, enshrined in a sacred text, the Constitution, which served and still serves as the glue that amalgamates all the ingredients of the melting pot.⁴²

So long as the US was isolated from the political machinations of Europe, in other words, it could live up to its republican principles as well as meet its responsibility under the global constitution by acting as an example of good governance.⁴³ But as Daniel Deudney and others have noted, the end of isolationism did not lead to the abandonment of republican theory. Nor did it necessarily mean American liberalism took on the harder edge that Schmittians describe. Building on the logic of America's founding 'as articulated in *The Federalist*, the republican security agenda of liberal internationalism seeks to populate the international system with republics and to abridge international anarchy in order to avoid the transformation of the American limited government constitutional order into a hierarchical state'.⁴⁴ This, Deudney further explains, is the essential meaning of President Wilson's call 'to make the world safe for democracy'. It was not a call to arms in order to defeat illiberal enemies. That would simply exacerbate the security dilemma and the tendency toward dictatorship. Rather it was a call to transform international relations through international organization and collective security. This was truly Kantian in the sense that democracy promotion and international law that restrained state power could not be ranked in order of presentation.⁴⁵ The republican liberal internationalist is committed to both equally. It was also quintessentially American. As Deudney put it, this 'core part of Wilsonian Liberal internationalism is Madisonianism in the context of global interdependence'.⁴⁶

⁴² Stanley Hoffman, 'American Exceptionalism: The New Version', in Ignatieff (ed), *American Exceptionalism* n 10 above, 225.

⁴³ On early republicanism, John Quincy Adams's 'exemplarism', his insistence that the US 'goes not in search of monsters to destroy' and the links to Wilsonian liberal internationalism, see W Tucker, 'The Triumph of Wilsonianism?' *World Policy Journal* 10 (1993) 83–99; and Deudney, *Bounding Power*, n 29 above.

⁴⁴ Deudney, *Bounding Power*, n 29 above, 186.

⁴⁵ Beate Jahn, 'Kant, Mill and Illiberal Legacies in International Affairs', *International Organization* 59 (2005) 193.

⁴⁶ Deudney, *Bounding Power*, n 29 above, 186.

From this emerged the United Nations Charter, as well as the bodies of international human rights and humanitarian law of the post-1945 era. International order would be based on the sovereign equality of state members and action taken on behalf of the common good was only legitimate if it came after a process of international public deliberation structured by the procedural norms articulated in the Charter. There was no sense in which the United States or liberal states more generally were custodians of the common good with a licence to act outside the confines of the Charter.⁴⁷ Humanitarian and human rights norms were also equally and universally applied. As Jack Donnelly notes, the idea that international human rights regimes were ‘a new standard of civilization’ is applicable only when applied to a particular reading of liberal internationalism.⁴⁸ The liberal commitment to human rights did not necessarily give way to the ‘two patterns of order’ that characterized the age of empire or to the linear thinking that Schmitt identified.⁴⁹ The ‘smug self-satisfaction’ of liberal imperialists was, he argued, rejected by the founders of the post-1945 liberal order. The ‘idea that some peoples have developed further than others, and thus should enjoy more rights and a greater say in politics’ was replaced by a more progressive and inclusionary approach.⁵⁰

What made this easier for realists to accept was the fact that the UN-based international order had national security exceptions built into it. The UN Charter for instance recognized the states’ inherent right to self-defence, which enabled them to use force outside the procedural norms of the Security Council. States could also derogate from certain aspects of the international human rights regime in moments of exceptional insecurity. Where this was denied, as in the Convention against Torture, it was reflective of the Kantian assumption that these ‘infernal arts’ were ‘vile in themselves’ and should be rejected on deontological grounds.⁵¹ As Thomas Mertens notes, however, it

⁴⁷ On the ‘equalitarian’ nature of the international order based on the UN Charter and the challenge posed by particular readings of liberal internationalism, see Christian Reus-Smit, ‘Liberal hierarchy and the licence to use force’, *Review of International Studies* 31 special issue (2005) 71–92.

⁴⁸ Jack Donnelly, ‘Human Rights: A New Standard of Civilization?’ *International Affairs* 74 (1998) 1–24.

⁴⁹ Edward Keen, *Beyond the Anarchical Society: Grotesque, Colonialism and Order in World Politics* (Cambridge: Cambridge University Press, 2002) 97–119.

⁵⁰ Donnelly, ‘Human Rights’, n 48 above, 14; see also Beate Jahn who distinguishes the liberal imperialist tradition, which assumed that ‘liberal ideals can be realized through the illiberal means of unequal rights’ from the republican tradition of Kant. Jahn, ‘Kant, Mill, and Illiberal Legacies’, n 45 above, 198.

⁵¹ Immanuel Kant (translated with introduction and notes by M Campbell Smith) *Perpetual Peace: A Philosophical Essay* (London: George Allen and Unwin, 1915) 115. For a contemporary argument that liberal democracies are required to reject the idea of a scale that allows a cost-benefit analysis of torture, see Steven Lukes, ‘Liberal Democratic Torture’, *British Journal of Political Science* 36 (2006) 1–16.

also reflected the kind of consequentialist reasoning that spoke to a realist assessment of the national interest. Such acts should be prohibited from this perspective because they ‘would make mutual confidence in the subsequent peace impossible’.⁵² This is unthinkable from the Schmittian perspective, which sees the friend-enemy distinction as irreducible. But for Kantian liberals who insist that peace is possible and desirable, politics and war must be limited by universally and equally applicable norms. As Mertens put it, systems of torture from the Kantian perspective are ‘notoriously incompetent’ because statements made under these systems are ‘highly unreliable’. More than that, acts can be carried over from times of war into times of peace, making peace harder and corrupting the society that uses them.⁵³

It is not necessarily the case therefore, at least in theory, that American liberal internationalism should imitate the exclusionary hierarchies of previous empires in the way the Schmittian reading suggests it does. There are, to use the title of Thomas Walker’s article, ‘Two Faces of Liberalism’.⁵⁴ The purpose of this book is not to pass normative judgement on the legality or legitimacy of these competing arguments. The purpose instead is to highlight the essentially contested nature of the US response to 9/11 by describing the debate inside and outside the US government, as well as to take stock of the political significance of those arguments that underpinned the Bush administration’s initial response. There was no doubting that the US faced a situation of exceptional insecurity, but what that meant in terms of US national security policy was a matter of debate. As noted, the Bush administration insisted the 9/11 attacks were acts of war that gave rise to a situation of armed conflict. It further argued that the war on terror was a new kind of war where certain norms did not apply. As this book demonstrates, liberals contested every aspect of that policy programme, including the foundational claim that the US was at war with al Qaeda. This belies the Schmittian-inspired claim that the war on terror was a quintessential liberal cosmopolitan war and it indicates, in theory at least, that an alternative approach to post-9/11 security is imminent in American liberalism. That does not necessarily mean such an alternative has significance in practice, however. It is to that question that the following section turns. It summarizes the book’s main claims and is structured so as to introduce each chapter in turn.

⁵² Kant, *Perpetual Peace*, n 51 above, 114. Thomas Mertens, ‘Kant’s Cosmopolitan Values and Supreme Emergencies’, *Journal of Social Philosophy* 38 (2007) 225.

⁵³ Mertens, ‘Kant’s Cosmopolitan Values’, n 52 above, 234.

⁵⁴ Thomas C. Walker, ‘Two Faces of Liberalism: Kant, Paine, and the Question of Intervention’, *International Studies Quarterly* 52 (2008) 449–68.

AMERICAN EXCEPTIONALISM IN PRACTICE

The argument that there were liberal alternatives to the Bush administration's response to 9/11, which characterized al Qaeda first as an enemy, then as a foe, necessitates a broader view of politics. The liberal alternative to the war on terror was inclusionary to the extent it included terrorist suspects in the international legal regimes without characterizing them as friends. All sides of the debate understood the threat posed by al Qaeda. The question was whether the threat was exceptional in a way that necessitated a shift from a law enforcement approach that characterized al Qaeda as 'criminals' to a war-based approach where they were characterized as 'enemies'; and then from a conventional war-based approach that characterized them as 'enemies' to a new or unconventional war-based approach where they were, in Schmittian terms, 'foes'.

Chapter 2 starts by outlining the liberal opposition to the framing of the 9/11 attacks as giving rise to an armed conflict with al Qaeda as the enemy. At issue was the question of whether al Qaeda could be party to an armed conflict and if so what kind. Its status as a non-state actor ruled out the possibility that it could be party to an international armed conflict and commentators like Mary Ellen O'Connell argued that outside 'the real wars of Afghanistan and Iraq, al Qaeda's action and our [the US] responses have been too sporadic and low-intensity to qualify as armed conflict'.⁵⁵ For the Bush administration, however, the determination of whether war existed was 'a question for the political branches' and both Congress through the Authorization to Use Military Force (AUMF) of 14 September 2001, and the President in his Military Order of 13 November 2001, determined that the al Qaeda attacks had ushered in a state of armed conflict.⁵⁶

⁵⁵ Mary Ellen O'Connell, 'When is a War not a War? The Myth of the Global War on Terror', *ILSA Journal of International and Comparative Law* 12 (2005–6) 538 and 534; see also 'The Legal Case against the Global War on Terror', *Case Western Reserve Journal of International Law* 36 (2004) 349–57, and 'The Choice of Law against Terrorism', *Journal of National Security Law and Policy* 4 (2010) 343–68; Marco Sassòli, 'Use and Abuse of the Laws of War in the "War on Terrorism"', *Law and Inequality: A Journal of Theory and Practice* 22 (2005) 198–202; Leila Sadat, 'Terrorism and the Rule of Law', *Washington University Global Studies Law Review* 1 (2004), 140; Allen S Weiner, 'Hamdan, Terror, War', *Lewis and Clarke Law Review* 11 (2007) 1003–9.

⁵⁶ Memorandum from Deputy Assistant Attorney General, Patrick F Philbin to White House Counsel to the President, Legality of the Use of Military Commissions to Try Terrorists, 6 November 2001 at <http://dspace.wrlc.org/doc/bitstream/2041/70944/00117_011106display.pdf>; S J Res 23 Joint Resolution to authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States, 14 September 2001 at <<http://www.law.cornell.edu/background/warpower/sj23.pdf>>; President George W Bush, 'Military Order—Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terror', 13 November 2001 at <<http://www.law.cornell.edu/background/warpower/fr1665.pdf>>.

Having introduced the debate, Chapter 2 demonstrates the continuity between the Bush and Obama administrations. To be certain, there have been important differences. The human and material costs of the armed conflicts in Afghanistan and Iraq prompted a reassessment of what was necessary to secure the United States against future terrorist attacks. As a member of the Illinois Senate Barack Obama had opposed the Bush administration's war against Iraq and spoke out against it in October 2002. He consistently drew the distinction between the conflict in Afghanistan, which he came to portray as a war of necessity, and the conflict in Iraq, which he portrayed as a 'rash war' driven by the 'ideological agendas' of neoconservatives in the Bush administration.⁵⁷ He took this approach into office, withdrawing the US commitment to Iraq, while escalating it in Afghanistan, albeit within the context of a timetable for withdrawal. The National Security Strategy of 2010 suggested a more cautious approach to the democracy promotion agenda, one that was more consistent with the republican liberal approach described above and one that was conscious of the burdens of leadership. This in turn translated into a new approach toward international institutions. It is argued in Chapter 2 that this informed the Obama administration's response to the Arab Spring.

The continuity between the Bush and Obama administrations exists however to the extent that the US continued to insist over a decade after 9/11 that it was in a state of armed conflict with al Qaeda. This argument, moreover, is not limited to what it described as the 'hot' battlefields of Afghanistan. As Obama's chief counter-terrorism adviser John Brennan put it shortly after the tenth anniversary of the 9/11 attacks,

The United States does not view our authority to use military force against al-Qa'ida as being restricted solely to 'hot' battlefields like Afghanistan. Because we are engaged in an armed conflict with al-Qa'ida, the United States takes the legal position that—in accordance with international law—we have the authority to take action against al-Qa'ida and its associated forces without doing a separate self-defense analysis each time.⁵⁸

Furthermore, the Obama administration argued along similar lines to the Bush administration in respect to using force in self-defence. As Chapter 2 notes, the Bush administration argued in 2002 that international society had to 'adapt the concept of imminent threat to the capabilities and objectives of today's adversaries'.⁵⁹ Some saw this as reflecting the exclusionary and

⁵⁷ 'Wars of Reason, Wars of Principle' speech to an anti-war rally in Chicago, 26 October 2002 at <http://www.tnj.com/archives/2004/september2004/final_word.php>.

⁵⁸ John O. Brennan, Remarks of Assistant John Brennan to the President for Homeland Security and Counterterrorism, Harvard Law School, 16 September 2011 at <<http://www.lawfareblog.com/2011/09/john-brennans-remarks-at-hls-brookings-conference/>>.

⁵⁹ White House, The National Security Strategy of the United States of America, September 2002, 15, at <<http://www.state.gov/documents/organisation/63562.pdf>>. For support of this position, see Abraham D Sofaer, 'On the Necessity of Pre-emption', *European Journal of International Law* 14 (2003) 209–26.

hierarchical approach of the liberal state along the lines that mirror the Schmittian critique. Anthony Anghie, for instance, saw the Bush doctrine of pre-emption as a ‘Victorian moment’ that limited the right to use force in a certain way to the US and its friends; and indeed the idea of adapting that right was rejected by liberals committed to an international society centred on the UN Charter.⁶⁰ Yet there have been echoes of the Bush administration’s position in the US approach to the use of force under Obama. John Brennan for instance followed up his statement about the notionally global character of the battlefield with the following argument:

We are finding increasing recognition in the international community that a more flexible understanding of ‘imminence’ may be appropriate when dealing with terrorist groups, in part because threats posed by non-state actors do not present themselves in the ways that evidenced imminence in more traditional conflicts. . . . Over time, an increasing number of our international counterterrorism partners have begun to recognize that the traditional conception of what constitutes an ‘imminent’ attack should be broadened in light of the modern-day capabilities, techniques, and technological innovations of terrorist organizations.⁶¹

Chapter 3 develops the theme that the war on terror was characterized by the kind of exclusionary hierarchies that Schmittian theory sees as intrinsic to liberalism. This is seen in the way that certain (although not all) terrorist suspects were excluded from the regimes that guaranteed the rights of the accused in federal courts and prosecuted in military commissions. As is explained, this can be understood as an extension of the Bush administration’s strategy of preventive self-defence. The concern was that terrorists could exploit civilian trials to advance their political agenda and that the risk of acquittal, and thereby the risk that the accused might return to the battlefield, was too high. As President Bush put it in his military order of 13 November 2001:

Given the danger to the safety of the United States and the nature of international terrorism . . . I find . . . that it is not practicable to apply in military commissions under this order the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district court.⁶²

The military commission system was characterized by another exclusionary hierarchy. Terrorist suspects were not only excluded from the criminal justice

⁶⁰ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004) 291–309; United Nations High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, 2004 at <<http://www.un.org/secureworld>>.

⁶¹ Brennan, Harvard Law School, 16 September 2011. See also Eric Holder (Remarks of the Attorney General, Northwestern University School of Law, 5 March 2012 at <<http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>>) in which he argued that the President was not required ‘to delay action until some theoretical end-stage of planning—when the precise time, place, and manner of an attack become clear. Such a requirement would create an unacceptably high risk that our efforts would fail, and that Americans would be killed.’

⁶² Bush, ‘Military Order’, n 56 above.

system because they were deemed to be enemy combatants, as enemy combatants they were excluded from the laws of war because they were deemed to fall outside the scope of the Geneva Conventions. This meant they could not claim the privileges, including immunity from prosecution, enemy combatants as prisoners of war could claim in conventional warfare. Of course, enemy combatants in conventional warfare were not immune from being prosecuted for war crimes, which included for instance targeting civilians. But the Bush administration's military commission system made it a war crime for enemy combatants to target US soldiers. This crime was initially called 'murder by an unprivileged belligerent' and was changed by subsequent Military Commission Acts to 'murder in violation of the laws of war'. It is argued here that this turns on its head the principle of 'battlefield equality', which for Michael Walzer characterized the modern war convention.⁶³ It instead is a post-modern reflection of a pre-modern warfare when combatants who fought were '*for that reason alone*, deemed criminals—even if they refrained from atrocities such as plunder, rape, and massacre'.⁶⁴ Alternatively, as Chapter 3 argues, it can be viewed in terms of the globalization of the hierarchical relationship between combatants in non-international armed conflict or civil war.

These kinds of exclusionary hierarchies might be taken as further evidence of the Schmittian critique. Yet Chapter 3 also notes how the military commission system was strongly contested by liberals and realists, including those that occupied significant positions in the national security community. The arguments the Bush administration made for not applying the Geneva Conventions, for instance, were opposed by liberals who insisted that even if al Qaeda and the Taliban were not covered by the Third Geneva Convention relating to enemy combatants as prisoners of war, they should be included in the humanitarian regime that was articulated by the Fourth Geneva Convention that related to civilians in war. This argument was voiced within the State Department, which added that as a political matter the US had little to gain by not applying the Geneva Conventions in this way. Chapter 3 also notes how the use of military commissions was subject to judicial review and how the application of the crime 'murder by an unprivileged belligerent' was contested within the military commission system itself. With the election of President Obama there was hope among liberals that military justice for acts of terrorism would be ended and this hope was extended when he suspended their use in his first month in office.

⁶³ Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 2006) 137.

⁶⁴ Robert D Sloane, 'The Cost of Conflation: Preserving the Dualism of *Jus ad Bellum* and *Jus in Bello* in the Contemporary Law of War', *Yale Journal of International Law* 34 (2009) 58. Emphasis added.

The conclusion to this chapter, however, very much follows that of the previous. Following a review of those detainees still at Guantánamo, for instance, the new administration announced military commission trials would be restarted and the President defended himself against the charge that this was a reversal. He had, he noted in the important National Security Archives speech, supported the use of a reformed system of military commissions and his administration would make those reforms in the Military Commission Act of 2009.⁶⁵ As Chapter 3 notes, that Act continued to hold open the possibility that al Qaeda, as enemy combatants, could be prosecuted for ‘murder in violation of the laws of war’ and indeed the government continued to charge terrorists, like Abdal-Rahim Hussein Muhammed Abdul-Nashiri, with this crime. It is also significant that where the Obama administration did seek to reverse its predecessor’s approach, political pressure prevented it from doing so. This was the case with the proposal that Khaled Sheikh Mohammed should be tried for his alleged involvement in the 9/11 attacks in a New York federal court, which provoked intense political opposition in Congress, and significantly New York itself. Given the Obama administration’s focus on other issues, primarily health care reform, it was not willing to spend the political capital necessary to see this instance of change through to completion. As Chapter 3 notes, Mohammed was returned to the military commission system. It is also important to note, however, that the administration did not always give in to political pressure to treat terrorist suspects as enemy combatants. The individuals involved in the December 2009 attack on the Northwest Airline flying to Detroit and the May 2010 Times Square incident were treated as criminal suspects rather than enemy combatants.

Chapter 4 develops this theme by examining detention issues across the Bush and Obama administrations. It starts by reiterating a central argument of the Bush administration, which was that the 9/11 attacks had ushered in a state of exceptional insecurity and that the US was at war against al Qaeda. This is significant in this instance because it used that argument to defend its practice of preventive detention. In its response to the Inter-American Commission on Human Rights, for instance, it argued that international human rights law did not apply either to the conduct of hostilities or the capture and detention of enemy combatants. These were governed by the law of armed conflict, which authorized the US to detain enemy combatants for the duration of the conflict. As enemy combatants rather than criminal suspects, the detainees at Guantánamo were excluded from regimes that a republican liberal approach would have insisted were equally and universally applicable.

⁶⁵ Barack Obama, Remarks at the National Archives, 21 May 2009 at <http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09>.

Again this might prove the relevance of the Schmittian critique. Despite its commitment to a cosmopolitan order and the erasure of lines of exclusion, in other words, American liberalism inevitably engages in what Schmitt called linear thinking and this is revealed particularly in moments of exceptional insecurity. Yet the evidence presented in this chapter demonstrates the significance of the republican pushback against the Bush administration's argument. This manifested itself in the legal challenges to the Bush administration's policy and the eventual extension of the right to *habeas corpus* under the US constitution. When President Obama promised to close the Guantánamo detention facilities within a year of taking office it seemed that the pushback had overhauled Bush's policy programme. Again, however, having reviewed the cases of those being held at Guantánamo, the new administration considered it necessary to hold some detainees in what it called 'prolonged detention'. These were, as the President put it in his National Security Archives speech, 'people who were, in effect, at war with the United States' and 'like other prisoners of war—must be prevented from attacking us again'.⁶⁶ Invoking the war paradigm in this way illustrated what Klaidman characterizes as the 'hybrid' character of the 'Obama doctrine' on counter-terrorism and asymmetric war. 'Sometimes a military model made sense. Other times a law-enforcement model was the way to go.'⁶⁷ Although this again represents continuity with the Bush administration, this chapter notes how having invoked the laws of war to detain terrorist suspects as enemy combatants the implications of that were strongly debated within the Obama administration. This debate echoes some of the analysis contained in Chapter 2, where the scope of 'the battlefield' and how the US identified 'the enemy' was contested.

Chapter 5 describes the debate surrounding the interrogation of terrorist suspects after 9/11. Echoing its position on the detention question, the Office of Legal Counsel for the Bush administration argued that the US was not bound by certain international human rights standards, including those contained within the Convention against Torture, because they applied only to territory under its jurisdiction. This form of linear thinking was ultimately rejected when Congress passed the Detainee Treatment Act in response to the Abu Ghraib scandal. It effectively erased the geographical lines that had been drawn to determine the applicability of human rights standards, noting that there was no geographical limitation on the applicability of the prohibition against cruel, inhuman or degrading treatment or punishment. The chapter also describes the debate surrounding the possibility that enhanced interrogation techniques (EITs) could be used

⁶⁶ Barack Obama, Remarks at the National Archives, n 65 above.

⁶⁷ Daniel Klaidman, *Kill or Capture: The War on Terror and the Soul of the Obama Presidency* (Boston, New York: Houghton Mifflin Harcourt, 2012) 259.

in self-defence to prevent future terrorist attacks. The Bush administration argued that the use of such methods provided information that helped to stop terrorist attacks, but this was strongly contested. Ultimately, President Obama rejected the use of EITs on liberal and realist grounds. For him, the use of EITs was neither necessary nor effective. In fact they were, from his perspective, counter-productive to the extent they acted as 'a recruitment tool' for America's enemies. By describing former Vice-President Dick Cheney's response to this argument the chapter illustrates how such questions cannot be understood simply in terms of liberal versus realist perspectives. As in the debate on the applicability of the Geneva Conventions (see Chapter 3), realists who prioritize national security are themselves divided by competing conceptions of the enemy and the threat it poses.

The final chapter brings together the main points of the book to illustrate how the theoretical division within American liberal internationalism manifested itself in the debate surrounding national security policy after 9/11. Its main focus is on the extent to which the Obama administration in particular has altered that policy. With the election of a candidate who had been critical of the Bush administration's national security policy there was an expectation in some quarters that the war on terror would end. That has not been the case. The US under the Obama administration continued to argue that it is at war with al Qaeda and its affiliates. To be certain, there was intense debate within the Obama administration about the scope of the battlefield and the definition of the enemy; and in this respect there has been change within a broader continuity. That change was not as much as liberals expected and certainly not as much as they had hoped for. The fact that the Guantánamo Bay detention facility remained open long after the President promised to close it is indicative of that. The point made in the concluding chapter is that this continuity is in part a matter of choice and it is in part a matter of domestic politics.

The Use of Force after 9/11

At the centre of the post-9/11 policy was the claim that al Qaeda's attacks gave rise to a state of armed conflict between the United States and a transnational terrorist network. In addition, the Bush administration claimed that because of the unprecedented nature of the threat, the norms governing the right to use force in self-defence had to be updated. The US would not wait for a threat to materialize before acting. It would act to 'confront the worst threats before they emerge'.¹ The purpose of this chapter is threefold. Firstly it describes the post-9/11 policy programme in this area, including the use of force against Afghanistan and Iraq, and the 'targeted killing' of al Qaeda operatives as enemy combatants. The second purpose of this chapter is to locate these arguments in a broader policy debate and thereby demonstrate that this policy programme was not inherent to American liberal internationalism. In fact, the chapter argues that the framing of the 9/11 attacks as acts in an ongoing armed conflict, and al Qaeda as enemy combatants, was a conservative move that did resonate with a Schmittian view of politics but that an alternative liberal position existed. This maintained that terrorists were criminals rather than enemies or foes and that the norms associated with peacetime law enforcement operations could still be applied despite the situation of insecurity that prevailed after 9/11. Such an argument did not deny that a state of armed conflict and the laws of war applied in Afghanistan and Iraq, but from this alternative perspective these wars were territorially bracketed and not part of a global war on terror. Likewise, an alternative liberal position existed on the Bush administration's interpretation of the right to use force in self-defence, arguing that its doctrine of pre-emption was likely to destabilize international society by creating a new hierarchy that privileged the US and, in certain expressions, liberal states more generally. The fact that the Bush administration did work with the United Nations to address the issue of Iraqi weapons

¹ President George Bush, Remarks by the President at the 2002 Graduation of the United States Military Academy, West Point, New York, 1 June 2002 in *Selected Speeches of President George W Bush 2001–2008*, 125–38 at <http://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected_Speeches_George_W_Bush.pdf>.

of mass destruction (WMD) is evidence that a republican form of liberalism was not without influence. Ultimately, however, US policy was underpinned by realist assessments of the US national interest after 9/11 and a neoconservative, or offensive liberal, approach that saw the US as both the vanguard of liberal democratic revolution and the ultimate custodian of the international common good.

The third purpose of this chapter is to assess the significance of these arguments on the Obama administration. It is argued that the human and material costs of the American commitment to Iraq were so exacting that it changed the realist assessment of a policy of regime change/democracy promotion and its value to the national interest. Under Obama, the US recommitted itself to decision making through the institutions of international society in part because it wanted to repair relations with otherwise alienated allies and restore a sense of international legitimacy to US practice. It also realized that multilateralism was a way of sharing the international burdens of great power responsibility. It is no surprise that the Obama administration, like all its predecessors, reserved the right to use force unilaterally in self-defence. It is evident, however, that in many respects the Obama administration continued to ground the practice of targeting al Qaeda in the law of armed conflict and broad conceptions of the inherent right to self-defence. This marks the first of several continuities between the two administrations.

THE 'WAR' ON TERROR

As an intuitive response to the scale of the devastation, and as a rhetorical indicator of the intensity of the government's impending response, President Bush's representation of 9/11 as an act of 'war' seemed incontrovertible. It was not long after 9/11, however, that it became clear that the President, supported by Congress, considered the US to be at war with al Qaeda (and not simply the state of Afghanistan) in a legal sense. Although the 'war on terror' sounded as if it had been cast from the same mould as the 'war on poverty' or the 'war on drugs', it did in fact have more in common with military actions that were understood to be real rather than metaphorical wars. On 18 September 2001, for instance, Congress passed Public Law 107-40,² which became known as the Authorization to Use Military Force (AUMF). It allowed 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,

² Public Law 107-40, S J RES 23.

in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.³

The significance of this law cannot be overstated. As we shall see in this and subsequent chapters, it underpinned US policy during the Bush *and* Obama administrations. They consistently referred back to the AUMF when seeking to explain the legal foundation of targeted killings (see below) and prolonged detention (see Chapter 4). To be certain, the Obama administration argued that the AUMF was the *only* source of the President's war powers relative to al Qaeda.⁴ This was different to the previous administration, which argued that the President's authority to wage war was found in the Commander-in-Chief clause of Article 2 of the US Constitution. He did not from this perspective require congressional authorization.⁵ This dispute is not the focus of this chapter suffice to say that the republican who emphasizes the checks and balances of the domestic constitution is more likely to support the idea that US war powers are also bound by international law.⁶

Congressional support for the 2001 AUMF was almost unanimous.⁷ Despite that, alternative interpretations of 9/11 were available. In contrast to the Bush administration, some portrayed the terrorist attacks as crimes rather than acts of war, and al Qaeda was nothing more than a criminal enterprise. Its status as an 'enemy' was metaphorical not literal. As shocking as the events of that day were, the scale of the violence did not change these facts. Anne-Marie Slaughter, for instance, argued that al Qaeda's actions could easily have been defined as hijackings and murder, which obviously fell within the criminal

³ S J Res 23 Joint Resolution to authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States, 14 September 2001 at <<http://www.law.cornell.edu/background/warpower/sj23.pdf>>.

⁴ Harold Hongju Koh, Legal Adviser, US Department of State, 'The Obama Administration and International Law', Annual Meeting of the American Society of International Law, 25 March 2010 at <<http://www.state.gov/s/l/releases/remarks/139119.htm>>.

⁵ Memo 1 from Deputy Assistant Attorney General John Yoo to Deputy Counsel to the President Timothy Flanigan, 'The President's Constitutional Authority to Conduct Military Operations against Terrorists and Nations Supporting Them', 25 September 2001, in Karen J Greenberg and Joshua L Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (Cambridge: Cambridge University Press, 2005) 3–24.

⁶ Of course, it does not necessarily follow. The conservative that believes the rule of law 'stops at the water's edge' may still insist that the President be bound by the checks and balances in the US constitution. Ironically, liberals *and* conservatives have attacked Obama's use of force in Libya because he claimed UN Security Council Resolution 1973 provided the legal mandate and did not seek congressional authorization. See Bruce Ackerman and Oona Hathaway, 'Obama's illegal war', *Foreign Policy*, 1 June 2011 at <http://www.foreignpolicy.com/articles/2011/06/01/obamas_illegal_war>; and Charles Krauthammer, 'Obama and Libya: The professor's war', *Washington Post*, 25 May 2010 at <http://www.washingtonpost.com/opinions/obama-and-libya-the-professors-war/2011/03/24/ABPjvmRB_story.html>.

⁷ Californian Congresswoman Barbara Lee was the only person to vote against the Resolution on the grounds that it granted the President a 'blank check'. Barbara Lee, 'Why I opposed the resolution to authorize force', *San Francisco Chronicle*, 23 September 2001.

jurisdiction of US federal courts.⁸ Criminal proceedings would have been assisted by the many extradition treaties and international conventions institutionalizing international co-operation in these areas. A whole raft of these conventions were negotiated in the 1970s with the aim of facilitating state co-operation on the prevention of aircraft hijacking, hostage taking and terrorist bombings. While these did not provide a generic definition of ‘terrorism’ they did identify *acts* of terrorism that could be punished regardless of the political cause they purported to serve.⁹ Furthermore, if prosecutors sought recognition of the scale of the attack they could easily have defined 9/11 as a crime against humanity and they could have referred the case to an international criminal court.¹⁰ Of course, those arguing this position were not denying that the 9/11 attacks were acts of terrorism. Al Qaeda obviously used terrifying violence for ideological and political purposes. The liberal concern was that the ‘focus on, and overuse of the terrorist terminology [would] obscure the extent to which resort to terrorist tactics is already regulated’ by domestic and international law.¹¹ The failure to reach a legal consensus on what exactly constituted terrorism was no argument for framing the attacks as exceptional. While a generic definition of terrorism in a global convention would help, it was clear that the absence of such a convention did not create ‘a legal void’.¹²

The decision to wage ‘war’ against al Qaeda was also contested with reference to the law of armed conflict. For some, al Qaeda’s status as a non-state actor

⁸ Anne-Marie Slaughter, ‘A defining moment in the parsing of war’, *Washington Post*, 16 September 2001, B04; see also Alain Pellet, “No, This is not War!” The Attack on the World Trade Center: Legal Responses’, *European Journal of International Law Discussion Forum*, 3 October 2001 at <http://www.ejil.org/forum_WTC/ny-pellet.html>; Michael Howard, ‘What’s in a Name? How to Fight Terrorism’, *Foreign Affairs* 81 (2002) 8–13; Mark Drumbl, ‘Victimhood in our Neighborhood: Terrorist Crime, Taliban Guilt and the Asymmetries of the International Legal Order’, *North Carolina Law Review* 8 (2002) 1–113; Mary Ellen O’Connell, ‘To Kill or Capture Suspects in the Global War on Terror’, *Case Western Reserve Journal of International Law* 35 (2003) 326–7; Antonio Cassese, ‘Terrorism is also Disrupting Some Crucial Legal Categories of International Law’, *European Journal of International Law* 12 (2001) 993–1001; Georges Abi-Saab, ‘The Proper Role of International Law in Combating Terrorism’, *Chinese Journal of International Law* 1 (2002) 307–8; Frédéric Mégret, ‘War? Legal Semantics and the Move to Violence’, *European Journal of International Law* 13 (2002) 361–99; R J Sievert, ‘War on Terrorism or Global Law Enforcement Operation’, *Notre Dame Law Review* 78 (2002) 307–53.

⁹ Helen Duffy, *The ‘War on Terror’ and the Framework of International Law* (Cambridge: Cambridge University Press, 2005) 23–5.

¹⁰ See Pellet ‘No, This is not War!’, n 8 above. It was not possible to send the 9/11 conspirators to the International Criminal Court because the acts occurred before July 2002 and therefore fell outside the temporal jurisdiction of the Court. However, liberals on both sides of the Atlantic argued that the UN Security Council should set up an ad hoc tribunal as it did for the former Yugoslavia and other instances where crimes against humanity had occurred. See Geoffrey Robertson, ‘Lynch mob justice or a proper trial’, *The Guardian*, 5 October 2001; Roy S Lee, ‘An Assessment of the ICC Statute’, *Fordham International Law Journal* 25 (2002) 756–7; Leila Sadat, ‘Terrorism and the Rule of Law’, *Washington University Global Studies Law Review* 1 (2004) 135–54.

¹¹ Duffy, *The ‘War on Terror’*, n 9 above, 44.

¹² *Ibid.*

ruled out the possibility that 9/11 was part of an *international* armed conflict.¹³ Its non-state status would not, however, necessarily rule out the possibility that its attacks were part of a *non-international* armed conflict (NIAC). There were, however, international norms that guided the application of this law. These were set out by the International Criminal Tribunal for the former Yugoslavia in the *Tadic* case. For a situation to be classed as a NIAC the non-state actor had to be organized as an armed group and the hostilities had to be of a certain level of intensity.¹⁴ It is these criteria that enabled a court to distinguish armed conflict from 'banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law'.¹⁵ On this basis, Mary Ellen O'Connell argued that outside 'the real wars of Afghanistan and Iraq, al Qaeda's action and our [the US] responses have been too sporadic and low-intensity to qualify as armed conflict'. The President's 'war on terror', she concluded, did 'not meet the legal definition of war'.¹⁶

For its part, the Bush administration argued that al Qaeda was organized as an armed group and that its violent acts met the armed conflict threshold. Deputy Assistant Attorney General John Yoo, for instance, asked why the status of al Qaeda as a non-state actor should make any difference to whether the US was at war. For Yoo and others, al Qaeda was different to normal criminal enterprises like the mafia because it was intensely political, and the fact that it had 'killed more people than the Japanese at Pearl Harbor' meant it

¹³ Geoffrey S Corn, 'What Law Applies to the War on Terror?', in Michael W Lewis et al (eds), *The War on Terror and the Laws of War: A Military Perspective* (Oxford: Oxford University Press, 2009) 10; Marco Sassòli, 'The Status of Persons Held in Guantánamo under International Humanitarian Law', *Journal of International Criminal Justice* 2 (2004) 99; George H Aldrich, 'The Taliban, Al Qaeda, and the Determination of Illegal Combatants', *American Journal of International Law* 96 (2002) 893.

¹⁴ *Prosecutor v. Dusko Tadic. Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* 2 October 1995 at <<http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>>. For discussion, see Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge: Cambridge University Press, 2010) 117–58.

¹⁵ *Tadic Trial Chamber Judgment* para 562, cited in Cullen, *The Concept of Non-International Armed Conflict*, n 14 above, 122. Sassòli helpfully summarizes: 'Criteria permitting . . . qualification [as non-international armed conflict] are the intensity, number of active participants, number of victims, duration and protracted character of the violence, organization and discipline of the parties, capability to respect IHL, collective, open and coordinated character of hostilities, direct involvement of governmental armed forces (versus law enforcement agencies) and *de facto* authority by the non-state actor over potential victims'. Sassòli, 'The Status of Persons', n 13 above, 99–100.

¹⁶ Mary Ellen O'Connell, 'When is a War not a War? The Myth of the Global War on Terror', *ILSA Journal of International and Comparative Law* 12 (2005–6) 538 and 534; see also 'The Legal Case against the Global War on Terror', *Case Western Reserve Journal of International Law* 36 (2004) 349–57, and 'The Choice of Law against Terrorism', *Journal of National Security Law and Policy* 4 (2010) 343–68; Marco Sassòli, 'Use and Abuse of the Laws of War in the "War on Terrorism"', *Law and Inequality: A Journal of Theory and Practice* 22 (2005) 198–202; Sadat, 'Terrorism and the Rule of Law', n 10 above, 140; Allen S Weiner, 'Hamdan, Terror, War', *Lewis and Clarke Law Review* 11 (2007) 1003–9.

was reasonable to define 9/11 as part of an armed conflict. It also meant the US was within its international rights to respond with military force.¹⁷ This was the line taken by Deputy Assistant Attorney General Philbin in a 6 November 2001 memo to the White House Counsel. A state of armed conflict existed in part because the death toll of 9/11 ‘surpasses that at Pearl Harbor, and rivals the toll at the battle of Antietam in 1862, one of the bloodiest engagements in the Civil War’.¹⁸ Likewise, General Counsel at the Department of Defense, William Haynes, was under ‘no doubts that the attacks of 11 September 2001 constituted acts of war’ and that al Qaeda should be treated as an enemy rather than a criminal organization.¹⁹ These arguments enabled the President to decide that a state of armed conflict existed. His Military Order of 13 November 2001 was based on the finding that:

International terrorists, including members of al Qaeda, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States *on a scale that has created a state of armed conflict that requires the use of United States Armed Forces.*²⁰

It is tempting to conclude from this that what separates the liberal from the conservative is their interpretation of the facts and whether they meet legal thresholds for armed conflict. The conservative has greater propensity to see the terrorist act as violence that constitutes armed conflict. There is some truth to that. The neoconservative faith in American power can encourage an interpretation of situations that enables the President to use that power. To leave it there, however, misses another important point. Conservatives and liberals not only tend to interpret legal thresholds and the facts differently, they disagree fundamentally as to *who decides* whether a state of armed conflict exists. Liberals like O’Connell put much store by the opinion of jurists. But for conservatives this misunderstands where sovereignty lies. The authority to decide when violent acts reach the threshold of armed conflict rests with American politicians. Indeed, Deputy Assistant Attorney General Patrick Philbin stated this explicitly in his November 2001 advice to the White

¹⁷ John Yoo, *War by Other Means: An Insider’s Account of the War on Terror* (New York: Atlantic Monthly Press, 2006) 4; William H Taft IV, ‘War not Crime’, in Karen J Greenberg (ed), *The Torture Debate in America* (Cambridge: Cambridge University Press, 2006) 223–8.

¹⁸ Memorandum from Deputy Assistant Attorney General Patrick F Philbin to White House Counsel to the President, *Legality of the Use of Military Commissions to Try Terrorists*, 6 November 2001 at <http://dSPACE.wrllc.org/doc/bitstream/2041/70944/00117_011106display.pdf>.

¹⁹ William J Haynes II, General Counsel of the Department of Defense to Members of the ASIL-CFR Roundtable, 12 December 2002 at <http://www.cfr.org/publication/5312/enemy_combatants.html>.

²⁰ President George W Bush, ‘Military Order—Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terror’, 13 November 2001, emphasis added, at <<http://www.law.cornell.edu/background/warpower/fr1665.pdf>>.

House. '[D]etermining whether war exists', he stated, 'is a question for the political branches'.²¹

On 7 October 2001, the US launched Operation Enduring Freedom. The military action was 'designed to disrupt the use of Afghanistan as a terrorist base of operations, and to attack the military capability of the Taliban regime'.²² The Taliban was held responsible because it had refused to 'close terrorist training camps; hand over leaders of the al Qaeda network; and return all foreign nationals, including American citizens, unjustly detained'.²³ Again, some contested the administration's interpretation of the facts. Helen Duffy, for instance, claimed that it was at least 'open to question whether the Taliban regime had the power and authority in respect of al Qaeda to satisfy the degree of control required for acts of private entities to be legally attributed to it. . . . No evidence of the regime's "control" over al Qaeda, nor clarity as to the other allegations against the regime (and the legal consequences thereof), was therefore advanced'.²⁴ Yet from the Bush administration's perspective there was no doubt. Regimes like the Taliban that supported al Qaeda had to be overthrown and brought to justice. Indeed, the President made clear in his statement to the American people that the battle went beyond Afghanistan. 'Every nation has a choice to make' he said. 'In this conflict, there is no neutral ground. If any government sponsors the outlaws and killers of innocents, they have become outlaws and murderers themselves'.²⁵

This is significant for the main argument of the book because if it was the case that the US unduly conflated the Taliban and al Qaeda, then the Schmittian critique that the war on terror is an imperialist campaign against non-liberal ideologies begins to look more convincing. This is especially so when the war against terror is cast in terms that implicate illiberal regimes regardless of their specific support to al Qaeda and 9/11.²⁶ This is somewhat of a moot

²¹ Memorandum from Deputy Assistant Attorney General 6 November 2001, n 9 above.

²² The White House Office of the Press Secretary Statement by the President, 7 October 2001 at <<http://www.globalsecurity.org/military/library/news/2001/10/mil-011007-usia01.htm>>. On Taliban responsibility, see UK Government, 'Responsibility for the Terrorist Atrocities in the US, 11 September 2001', 4 October 2001 at <<http://www.fas.org/irp/news/2001/11/ukreport.html>>. See also John Bellinger, 'Legal Issues in the War on Terrorism', *International Humanitarian Law Project Lecture Series*, London School of Economics, 31 October 2006 at <http://www2.lse.ac.uk/PublicEvents/pdf/20061031_JohnBellinger.pdf>.

²³ Statement by the President, 7 October 2001, n 22 above.

²⁴ Duffy, *The 'War on Terror'*, n 9 above, 189.

²⁵ Statement by the President, 7 October 2001, n 22 above.

²⁶ See for instance Daniel Pipes, 'Who is the Enemy?' *Commentary*, January 2002 at <<http://www.danielpipes.org/103/who-is-the-enemy>>; Norman Podhoretz, *World War IV: The Long Struggle against Islamofascism* (New York: Doubleday, 2007); Lawrence F Kaplan and William Kristol, *The War over Iraq: Saddam's Tyranny and America's Mission* (San Francisco: Encounter Books, 2003) 101. See also Tony Blair's view that the conflict in Afghanistan was part of 'a war

point regarding Afghanistan because it was in fact widely accepted that the US could target the Taliban given its links to al Qaeda. It is, as we shall see, more significant in the case of US action against Iraq where the claim of a link between that state and al Qaeda was less convincing. In fact, Daalder and Lindsey argue that the Bush administration's commitment to defeating the Taliban was based, at least initially, on the link it had to al Qaeda and not an ideological commitment to liberal democracy promotion. 'Part of the reason for the administration's failure to plan for postwar Afghanistan', they argue, 'was its ideological distaste for nation-building, a reflection of the fact that the president and most of his advisers were assertive nationalists, not democratic imperialists'.²⁷ Indeed, a realist tolerance of those elements of the Taliban that could be separated from al Qaeda gradually exercised greater influence on US policy with the realization that democratizing Afghanistan by defeating the Taliban was probably beyond the international coalition's means. Indeed, President Obama stated in December 2009 that the US would 'support efforts by the Afghan government to open the door to those Taliban who abandon violence and respect the human rights of their fellow citizens'.²⁸

THE DOCTRINE OF PRE-EMPTIVE SELF-DEFENCE

The right to use force in self-defence is contained in Article 51 of the UN Charter, which states '[n]othing 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 . . .' The term 'armed attack' has been interpreted as an attack by states. Indeed, the US Senate specified in 1949 that 'the words armed attack clearly do not mean irresponsible groups or

unlike any other . . . not a battle for territory, not a battle between states [but] a battle for and about the ideas and values that would shape the twenty-first century', in Tony Blair, *A Journey* (London: Hutchinson, 2010).

²⁷ Ivo H Daalder and James M Lindsay, *America Unbound: The Bush Revolution in Foreign Policy* (Washington DC: Brookings, 2003) 112.

²⁸ President Barack Obama, Remarks in Address to the Nation on the Way Forward in Afghanistan and Pakistan, West Point Military Academy, West Point, New York, 1 December 2009. For neoconservative opposition that recalls the failure of the Clinton administration to restrain the Taliban through engagement, see Michael Rubin, 'Taking Tea with the Taliban', *Commentarymagazing.com*, February 2010. Other neoconservatives attack the idea of talks with the Taliban and Obama's 'cultural relativism' as 'absurd': see Joshua Muravchik, 'The Abandonment of Democracy', *Commentarymagazing.com*, July/August 2009. Nevertheless, the prospects of talks with the Taliban increased when bin Laden was killed in May 2011: see Daniel Dombey, 'White House looks to talks with Taliban', *Financial Times*, 5 May 2011 at <<http://www.ft.com/cms/s/0/e7d2341a-773e-11e0-aed6-00144feabdc0.html>>.

individuals, but rather an attack by one state upon another'.²⁹ For this reason there was some debate over the extent to which the US response to 9/11 was authorized under the Charter. An argument whereby the violence of a non-state actor like al Qaeda could be interpreted as an 'armed attack' and so trigger the right to use military force in self-defence is contained in the International Court of Justice (ICJ) ruling in the *Nicaragua* case. This found broad agreement that 'the nature of the acts which can be treated as constituting armed attacks' covers both action by regular military armed forces and 'the sending on behalf of a state of armed bands, groups'.³⁰ By this standard there would have been no doubt that 9/11 triggered the US right to use force in self-defence if al Qaeda terrorists had been sent to the United States by another state (i.e. Afghanistan). Merely supporting al Qaeda by providing it a haven, however, would not by this standard trigger that right.

As noted above, the Bush administration argued that al Qaeda was inseparable from the Taliban and for this reason Operation Enduring Freedom was a lawful act in an ongoing armed conflict. The US also argued, however, that al Qaeda's actions triggered its right to use force in self-defence outside a situation of armed conflict. This was not because Afghanistan had necessarily 'sent' al Qaeda to attack the US. Rather, it was because the Taliban regime had failed to stop al Qaeda launching those attacks from Afghan territory and was either unwilling or unable to do so in the future.³¹ The US was, in this respect, claiming that the authority to use force in self-defence was broader than the norm that was articulated in *Nicaragua*. For some it was too broad; and by not saying so the UN Security Council failed in its duty to preserve international peace and security.³² But for others the US argument was not only prudent, it was in fact lawful because *Nicaragua* did not represent 'the customary

²⁹ Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge: Cambridge University Press, 2010) Kindle edition, 369.

³⁰ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)* International Court of Justice, 26 November 1984 at <<http://www.icj-cij.org/doctoc/p1=3&p2=3&code=nus&case=70&k=66>>. Nicaragua had been sending arms to El Salvador in an attempt to overthrow its regime. The US argued this constituted an armed attack, which justified the mining of Nicaraguan waters in an act of collective self-defence. The ICJ rejected the US arguments, stating that the sending of armed groups into the territory of another state would constitute an armed attack but not the supply of arms. Nicaraguan action did not therefore constitute an armed attack and did not justify the use of military force by the US against Nicaragua. Ruys, *'Armed Attack'*, n 29 above, 406–8.

³¹ Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc S/2001/946 7 October 2001.

³² Eric Myjer and Nigel White, 'The Twin Towers Attack: An Unlimited Right to Self-Defence?' *Journal of Conflict and Security Law* 7 (2002) 1–17. While some supported the US right to use force against al Qaeda they did not regard as permissible any attack on the Taliban simply because it was unable to control al Qaeda and control its activities: see, for example, Jordan Paust, 'Use of Armed Force against Terrorists in Afghanistan, Iraq and Beyond', *Cornell International Law Journal* 34 (2002) 539.

and accepted practices of states in the context of transnational terrorism'.³³ Indeed, Tom Ruys notes how the Bush administration's position, which was sometimes referred to as the 'Shultz doctrine' after President Reagan's Secretary of State, had in fact informed President Clinton's 1998 decision to use force against Sudan and Afghanistan in response to al Qaeda attacks on US embassies.³⁴

The international reaction to this question was telling. In Ruys's view it constituted 'an important step in the transition from the classical view that terrorist attacks must be dealt with through law-enforcement mechanisms to the acceptance that the recourse to military force may exceptionally be warranted to deal with transnational terrorism'.³⁵ By calling 9/11 an 'armed attack', and by supporting Operation Enduring Freedom, the North Atlantic Treaty Organization (NATO), the Organization of American States (OAS), the UN Security Council and others seemingly helped to shift the meaning of the self-defence norm away from the narrow interpretation that existed in the *Nicaragua* decision.³⁶ The concern for others was that international society was sliding to a position 'where force is permitted in so many instances that the regulation of it no longer makes any sense'.³⁷

The *ratione personae* requirement (from *whom* must an attack emanate before self-defence can be triggered) was not the only contentious issue. In June 2002, in a speech at West Point military academy, the President argued that the new national security situation required new thinking about defence. The containment and deterrence strategies of previous years were no longer possible:

³³ Greg Travalio and John Altenberg, 'Terrorism, State Responsibility and Military Force', *Chicago Journal of International Law* 4 (2003) 97–119. Others argued that the standards articulated in *Nicaragua* were 'obscure' and needed to develop to adapt to the new terrorism. See Sean D Murphy, 'Terrorism and the Concept of "Armed Attack" in Article 51 of the UN Charter', *Harvard International Law Review* 43 (2002) 41–51.

³⁴ Ruys, 'Armed Attack', n 29 above, Kindle edition, 427.

³⁵ Ruys, 'Armed Attack', n 29 above, Kindle edition, 427.

³⁶ See, for instance, Derek Jinks, 'State Responsibility for the Acts of Private Armed Groups', *Chicago Journal of International Law* 4 (2003) 83–95, who argues ratification of the US claims broadened the law of state responsibility to include the lower threshold of 'harbouring' rather than 'controlling' terrorists. See also Duffy, *The 'War on Terror'*, n 9 above, 161, who noted 'a shift away from the necessity of a state responsibility nexus'; and Michael Byers, 'Terrorism, the Use of Force and International Law after September 11', *International Relations* 16 (2002) 155–70, who implies the US was pursuing a legal strategy to purposefully shift law away from the restriction contained in *Nicaragua*. Ruys suggests caution in concluding the US response to 9/11 indicated a shift in this aspect of the law. Ruys, 'Armed Attack', n 29 above, Kindle edition, 441. The ICJ's opinion on the legal consequences of the wall in occupied Palestinian territory has, he argues, reassessed the more traditional view that the violence of non-state actors only constitutes an armed attack for the purpose of invoking a state's inherent right to self-defence if they are in some way supported by another state. See Noam Lubell, *Extraterritorial Use of Force against Non-State Actors* (Oxford: Oxford University Press, 2010) 31; Ruys, 'Armed Attack', n 29 above, Kindle edition, 472–8.

³⁷ Myjer and White, 'The Twin Towers Attack', n 32 above, 17.

when unbalanced dictators with weapons of mass destruction can deliver those weapons on missiles or secretly provide them to terrorist allies.

We cannot defend America and our friends by hoping for the best. We cannot put our faith in the word of tyrants, who solemnly sign non-proliferation treaties, and then systemically break them. If we wait for threats to fully materialize, we will have waited too long. . . the war on terror will not be won on the defensive. We must take the battle to the enemy, disrupt his plans, and confront the worst threats *before they emerge*.³⁸

This was reinforced by the National Security Strategy of 2002. Like the West Point speech, the National Security Strategy focused on the challenge posed ‘at the crossroads of radicalism and technology’. This was a new challenge according to the White House because in the past WMD technology had been in the hands of ‘status quo, risk averse’ enemies. Deterrence was, in those circumstances, an effective strategy. But deterrence based only upon retaliation was considered pointless against ‘rogue states more willing to take risks’ and terrorists ‘whose so-called soldiers seek martyrdom in death and whose most potent protection is statelessness’. This ‘overlap between states that sponsor terror and that pursue WMD compels us to action’. The US ‘must be prepared to stop rogue states and their terrorist clients *before* they are able to threaten or use weapons of mass destruction’.

Although the text of Article 51 of the UN Charter sets out the right to use force in self-defence as a response to an armed attack, many argued that the right to anticipatory self-defence existed in customary international law. These ‘counter-restrictionists’ tended to limit such a right to situations where the threat to be stopped was ‘instant, overwhelming, leaving no choice of means and no moment of deliberation’.³⁹ These were the words used by US Secretary of State Daniel Webster in his criticism of British action against Canadian rebels in December 1837. This involved crossing the border into the United States, setting fire to the *Caroline*, an American ship used by the rebels, and forcing it over Niagara Falls. This event attained ‘a mythical authority’ in international law and was referred to by states to justify the right to use pre-emptive force in self-defence, but also to support the necessity and proportionality principles.⁴⁰ What concerned many was that the US post-9/11 was articulating a strategy based on *preventive* self-defence rather than *pre-emptive*; which had the potential to destabilize international relations as states could no

³⁸ Remarks by the President at the 2002 Graduation of the United States Military Academy, 1 June 2002, n 1 above.

³⁹ On the debate between restrictionist and counter-restrictionist interpretations of the Charter, see Ruys, ‘*Armed Attack*’, n 29 above, Kindle edition, 255–62.

⁴⁰ Christine Gray, *International Law and the Use of Force* (Oxford: Oxford University Press, 2000) 105.

longer expect the Charter to limit a state's recourse to force. The fear was, as Kirsten Schmalenbach put it, that states would 'find themselves in the role of Goethe's sorcerer's apprentice'. The threat posed by al Qaeda and rogue states would, in other words, lead to unintended consequences if the Bush doctrine was taken as 'a general authorization of the use of force.'⁴¹ But for the Bush administration the priority was countering what it saw as the more immediate threat and this demanded new thinking. 'For centuries', the National Security Strategy noted:

international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of pre-emption on the existence of imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack. We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons that can easily be concealed, delivered covertly, and used without warning.⁴²

Anthony Anghie's critique of this aspect of the Bush doctrine captures the manner in which it fits the exclusionary and hierarchical character that Schmittians associate with liberal internationalism. As Anghie noted, the National Security Strategy's interpretation of pre-emptive self-defence would, if it was universalized, lead to an enormous instability, given the various tensions that exist between states. Yet this of course was not the intention. The implication behind the Bush doctrine therefore was that the right to use force against threats before they emerged was to be exercised exclusively by the United States and its allies. '[E]ven though self defence is the most basic of sovereign rights', Anghie writes, '*pre-emptive* self defence is a right that the United States intends to be confined only to itself and its allies'. This is because no rational state would dare to openly and directly even attempt to attack it as the global superpower. As a result:

⁴¹ Kirsten Schmalenbach, 'The Right of Self-Defence and the War on Terrorism', *German Law Journal* 3 (2002) <<http://www.germanlawjournal.com/index.php?pageID=11&artID=189>>. See also Neta Crawford, 'The Slippery Slope to Preventive War', *Ethics and International Affairs* 17 (2003) 30–9; 'The Justice of Preemption and Preventive War Doctrines', in Mark Evans (ed), *Just War Theory: A Reappraisal* (Edinburgh University Press, 2005) 25–49; and 'The False Promise of Preventive War: The "New Security Consensus" and a More Insecure World', in Henry Shue and David Rodin (eds), *Preemption* (Oxford: Oxford University Press, 2007) 89–125; and the United Nations High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, 2004 at <<http://www.un.org/secureworld>>.

⁴² White House, The National Security Strategy of the United States of America, September 2002, 15, at <<http://www.state.gov/documents/organisation/63562.pdf>>. For support of this position, see Abraham D Sofaer, 'On the Necessity of Pre-emption', *European Journal of International Law* 14 (2003) 209–26.

the idea of sovereign equality that continues to compel the imagination of the international community may be preserved in a formal sense only, because the realities of international relations will ensure that powerful states—those that have the capacity to inflict massive destruction on any opponent, through the use of nuclear weapons if necessary—enjoy a special status even within an ostensibly egalitarian system. If, then, pre-emption does somehow become an accepted part of international law as a result of the Bush doctrine, then the international order will come to somewhat resemble the system that existed among European states in the late nineteenth century.⁴³

The right of pre-emptive self-defence was in this respect ‘a Vitorian moment’ to the extent it was applied unevenly across international society. It reflected a new hierarchy whereby the sovereign equality of states took second place to the security requirements of the US and its allies.⁴⁴ The question to ask at this stage is whether the Bush doctrine of pre-emption was part of a *liberal* hierarchy. The answer to this question is complicated by the manner in which the doctrine was linked to the neoconservative agenda of regime change and democracy promotion, which the President himself seemed to adopt when he spoke of an ‘axis of evil’, which of course included Iraq.⁴⁵

It is argued here that the doctrine of pre-emption, and indeed the invasion of Iraq (see below), emerged out of a realist focus on national security rather than a commitment to a liberal internationalist agenda of democracy promotion. It predated 9/11 but emerged out of a sense that the US was in some sense fortunate on 9/11. Had al Qaeda been in possession of chemical, biological or nuclear weapons, many more people would have died.⁴⁶ The possibility that WMD of this kind would get into the hands of terrorists, individuals that would not hesitate before using them in ‘a second wave’ of attacks, was clearly

⁴³ Anthony Anghie, ‘The War on Terror and Iraq in Historical Perspective’, *Osgoode Hall Law Journal* 43 (2005) 49–50 at <http://www.ohlj.ca/archive/articles/43_12_anghie.pdf>.

⁴⁴ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004) 291–309.

⁴⁵ President Bush, State of the Union Address to the 107th Congress, US Capitol, Washington DC, 29 January 2002 in *Selected Speeches*, n 38 above, 103–14.

⁴⁶ Daalder and Lindsay, *America Unbound*, n 27 above, 116–22. See also the President’s account of the impact of the anthrax attack and botulinum alert in October 2001. Bush acknowledges that the Department of Justice and FBI alleged that the source of the anthrax attack was Dr Bruce Ivins, a US army medical scientist who committed suicide in 2008. George Bush, *Decision Points* (New York: Random House, 2010) 152–9. Ron Suskind notes how this thinking dovetailed with Rumsfeld’s pre-9/11 document ‘National Security Policy Issues—Post Cold War Threats’, which identified a need to prevent rogue states challenging the US with WMD: *The One Percent Doctrine: Deep Inside America’s Pursuit of its Enemies since 9/11* (London: Simon & Schuster, 2006) 64. See also Alan M Dershowitz, *Preemption: A Knife That Cuts Both Ways* (New York and London: WW Norton, 2006) 205, who claims that, as Secretary of Defense in 1991, Cheney gave the Israeli general who organized the 1981 attack on the Iraqi nuclear facility at Osirak a satellite photo of the destroyed reactor with the following inscription ‘With thanks and appreciation for the outstanding job’. This was despite the fact that the Security Council had condemned the attack.

a concern in the immediate post-9/11 period. Ron Suskind, for instance, notes how intelligence on the activities of Ummah Tameer-e-Nau (which means 'Islamic revival') prompted Vice-President Cheney to reconsider when it was necessary to use force to protect national security. This group was made up of radicalized members of the Pakistani elite, including the nuclear scientist Bashir ud Din Mahmood, and it was reportedly trying to spread weapons technology throughout the Muslim world, including groups like the Taliban and al Qaeda. Although there was no specific intelligence on al Qaeda having a WMD capability, this intelligence did, according to Suskind, force the administration to consider how it would respond to 'a low-probability, high-impact event'. It is here that Cheney reportedly formulated the 'one per cent doctrine'. 'If there's a one per cent chance that Pakistani scientists are helping al Qaeda build or develop a nuclear weapon', he said, '*we have to treat it as a certainty in terms of our response. . . . It's not about our analysis, or finding a preponderance of evidence. . . . It's about our response.*' As Suskind notes, this formulation of the requirements for preventive action virtually removed all burden of proof from the state claiming the right to use force in self-defence. It was, he writes, 'a mandate of extraordinary breadth'.⁴⁷

The question of whether the doctrine of pre-emption is reflective of the exclusionary hierarchies that Schmittians consider to be inherent in liberal internationalism is further complicated by what might be called a neoliberal view that the US, rather than the UN Security Council, is the ultimate custodian of the international common good. This is evident, in this instance, in the argument presented by Lee Feinstein and Anne-Marie Slaughter. Like the Bush administration, they argued that 'the rules now governing the use of force, devised in 1945 and embedded in the UN Charter, are inadequate'. They also argued that the risk of a large-scale armed attack had increased, and therefore the bar to preventive military action should be lowered, if the state with WMD was 'run by rulers without internal checks on their power'.⁴⁸ This view added an ideological aspect to Anghie's description of the exclusionary nature of the doctrine of pre-emptive self-defence. Non-liberal states had no right to pursue a WMD capability. Liberal states, on the other hand, not only had a right and reason to keep hold of such weapons, they could claim to be acting in self-defence when they took preventive action against aspirant states, especially if they were illiberal states.

⁴⁷ Suskind, *The One Percent Doctrine*, n 46 above, 62. See also Dershowitz who writes that 'a small but significant risk of non-imminent nuclear attack may provide more justification for a preventive military action than would a large-scale risk of an imminent but small-scale attack with conventional weapons'. He suggests that preventive action could be justified on a five per cent likelihood of a nuclear attack, in *Preemption*, n 46 above, 225-6.

⁴⁸ Lee Feinstein and Anne-Marie Slaughter, 'A Duty to Prevent', *Foreign Affairs* 83 (2004) 137. See also Ruth Wedgwood, 'The Fall of Saddam Hussein: Security Council Mandates and Pre-emptive Self-Defense', *American Journal of International Law* 97 (2003) 582.

To be certain, liberals like Feinstein and Slaughter argued that the liberal state should seek UN Security Council authorization (or that of a regional organization) before using military force in this way. They depart from the republican model of liberal internationalism (see Chapter 1), however, when they consider what the liberal state should do when the UN Security Council fails to authorize preventive action. The US failure to convince the Security Council to authorize preventive action might be taken as an indication that the necessity criteria have not been met. For Feinstein and Slaughter, however, preventive action is still legitimate in these circumstances if the US had engaged in 'good faith' negotiations. The assumption here is that the Security Council is being unreasonable in denying that mandate and, as custodians of the common good, the US (or a nascent community of democracies) can act.⁴⁹ This marks a significant schism in liberal thinking, which is discussed in more detail below with reference to Iraq. The more general point is that, because the target of Feinstein and Slaughter's concern was *the non-liberal state* seeking WMD, it is again easy to see how liberalism can lead to the kind of normative hierarchies Schmittians point to. Anghie again articulates the way in which it fits into a discourse on the exclusionary and hierarchical approach of liberal internationalism, especially when he notes that liberal states continue to claim that *their* WMD are necessary for self-defence. In this context, Feinstein and Slaughter's analysis seems to suggest that the right to self-defence is 'exercisable only by western civilized states'.⁵⁰

THE BUSH DOCTRINE AND THE IRAQ WAR

If Feinstein and Slaughter identify the illiberal character of a WMD-aspirant state to be a reason for considering unilateral preventive action, it does not follow that they necessarily support regime change and democracy promotion by force. Indeed, they argued in their 2004 *Foreign Affairs* article that the state's right to use force in self-defence should be limited. Preventive military force could only be exerted 'on the smallest scale, for the shortest time, and at the lowest intensity necessary to achieve its objective'.⁵¹ For neoconservatives

⁴⁹ Feinstein and Slaughter, 'A Duty to Prevent', n 48 above, 149. On the possible legitimizing role of a 'community of democracies', see Wedgwood, 'The Fall of Saddam', n 48 above, 578, and Allen Buchanan and Robert O Keohane, 'The Preventive Use of Force: A Cosmopolitan Institutional Proposal', *Ethics and International Affairs* 18 (2004) 1–22. For a critique that is more in line with the republican roots of liberal internationalism, see Christian Reus-Smit, 'Liberal hierarchy and the license to use force', *Review of International Studies* 31 special issue (2005) 71–92.

⁵⁰ Anghie, *Imperialism*, n 44 above, 304. For a similar criticism, see Anthony Burke, 'Against the New Internationalism', *Ethics and International Affairs* 19 (2005) 73–9.

⁵¹ Feinstein and Slaughter, 'A Duty to Prevent', n 48 above, 149.

like Lawrence Kaplan and William Kristol, however, the doctrine of pre-emption was one part of a broader and more ambitious 'Bush doctrine'.⁵² Like Feinstein and Slaughter, they identified illiberal states that sought WMD as a particular cause for concern. Yet they saw no reason to consult with the Security Council before taking military action and every reason to overthrow the non-liberal regime that aspired to WMD. Such a strategy they argued advanced America's security interests and it was America's particular duty to promote the democratic cause. Kaplan and Kristol, for instance, argued that democracy was a universal aspiration, as evidenced by the collapse of Soviet totalitarianism, and democratic states rarely, if ever, waged war against one another. It was neither imperialistic nor utopian to promote democracy in one's foreign policy therefore. A 'straightforward argument' followed: the 'more democratic the world becomes, the more likely it is to be congenial to America'.⁵³ More specifically, they argued that Arab repression had 'fuelled Islamist terror movements and anti-Americanism'. Following September 11, therefore, the US should reconsider its tactical alliance with illiberal regimes in the Middle East. It should at the very least withdraw its support for these regimes in order to counter the radicalization of Arab populations and prevent anti-Americanism.

Democracy promotion in the Middle East was therefore more than a mere afterthought to a realist counter-proliferation strategy involving regime change. It was, from the neoconservative perspective, key to victory in the war on terror. It is unlikely however that democracy promotion by itself could have been the driver for the invasion of Iraq. It needed to be linked to the material threat posed by WMD. Indeed, such an action would have been inconsistent with the Bush doctrine, which had two aspects to it: democracy promotion *and* pre-emption against a WMD capability. This was the reason the US policy of regime change focused on Iraq and not other illiberal regimes. Neoconservatives like Kaplan and Kristol did not shy away from criticizing non-liberal states like Iran, Egypt and Saudi Arabia because of their supposed role in the rise of Islamist terrorist groups. But none of these states, with the exception perhaps of Iran, was seeking WMD. The identity of these regimes may have been a problem for neoconservatives but it was not as pressing a problem as Iraq. The focus on WMD-aspirant states was therefore a question of priorities. It was also politically necessary. Democracy promotion by itself could not command support within the administration. As Deputy Secretary

⁵² Kaplan and Kristol see three pillars to the Bush doctrine, pre-emption, democracy promotion and American pre-eminence: *The war over Iraq*, n 26 above, 79–125.

⁵³ Kaplan and Kristol, *The war over Iraq*, n 26 above, 105. See Tony Smith, *A Pact with the Devil: Washington's Bid for World Supremacy and the Betrayal of the American Promise* (New York and London: Routledge, 2007) 83–122 for an argument that liberal democratic peace theorists were complicit in the policy of regime change.

of Defense Paul Wolfowitz put it, liberating the Iraqi people was ‘not a reason to put American kids’ lives at risk, certainly not on the scale we did it’.⁵⁴

To be sure, there was an argument within government that was based on a neoconservative commitment to transform the ideological character of the Middle East. Wolfowitz again articulated this. For him, Iraq *was* linked to 9/11 and Islamist terrorism. The 9/11 attackers were Saudis, but the reason they and others in that country had been radicalized was because US troops were stationed in the holy land. The US presence in the Gulf was, Wolfowitz argued, ‘a huge recruiting device for al Qaeda’. However, the only reason US troops were deployed there was because Iraq threatened Saudi Arabia. Removing the Iraqi threat to Saudi Arabia would ‘open the door to other positive things’, including the withdrawal of US troops, the deradicalization of Saudi nationals and possibly the democratization of that country.⁵⁵ Yet this too was apparently not enough to commit the US to regime change. ‘The truth is’, Wolfowitz concludes, ‘for reasons that have a lot to do with the U.S. government bureaucracy, we settled on the one issue that everyone could agree on which was weapons of mass destruction as the core reason.’⁵⁶

The focus on the material threat posed by an Iraqi WMD capability is therefore evidence that US policy was not determined by a liberal internationalist commitment to democracy promotion. As noted, the Bush administration was driven by a realist understanding of the terrorist/WMD threat, which insisted that because the stakes were so high after 9/11 a reassessment of the self-defence norm was necessary. Indeed, it reasserted this argument at the most intense periods of the Iraq crisis.⁵⁷ Yet this argument was opposed in significant places, not least by America’s closest ally, the United Kingdom, which was committed, at least initially, to a UN-centred liberal internationalist approach. It could not support a war of self-defence because the threat of an Iraqi armed attack was not, in its view, imminent.⁵⁸ The only means of

⁵⁴ Paul Wolfowitz, Interview with *Vanity Fair*, 9 May 2003 at <<http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2594>>.

⁵⁵ Wolfowitz, Interview with *Vanity Fair*, n 54 above.

⁵⁶ Wolfowitz, Interview with *Vanity Fair*, n 54 above. Support for the claim that this argument informed policy is found in the fact that shortly after the invasion US troops did leave Saudi Arabia. Oliver Burkeman, ‘America signals withdrawal of troops from Saudi Arabia’, *The Guardian*, 30 April 2003 at <<http://www.guardian.co.uk/world/2003/apr/30/usa.iraq>>.

⁵⁷ Memorandum from William H Taft IV, Legal Adviser to the State Department, to Members of the ASIL-CFR Roundtable, ‘The Legal Basis for Preemption’, 18 November 2002 at <<http://www.cfr.org/international-law/legal-basis-preemption/p5250>>. For a justification of the Iraq War on these grounds by a Bush insider, see John Yoo, ‘International Law and the War in Iraq’, *American Journal of International Law* 97 (2003) 563–76.

⁵⁸ When the UK Secretary of Defence Geoff Hoon publicly raised anticipatory self-defence as a possible reason for war against Iraq, the Attorney General sent him a ‘mildly rebuking’ letter making it clear that this was not an argument he, as the government’s chief lawyer, could defend: Letter from the Attorney General Peter Goldsmith to Rt Hon Geoff Hoon, Secretary of State for Defence, 28 March 2002 at <<http://www.iraquirquiry.org.uk/media/42845/goldsmith-hoon-letter.pdf>>; and

squaring force, especially for the purpose of regime change, with this approach was through UN Security Council authorization. To be certain, the UK was flexible on what a UN mandate would look like (see below), but in the summer of 2002 it did help to check US policy. It did this mainly by reinforcing the position of the US Secretary of State Colin Powell, which saw the UN route as a means of maximizing political support.⁵⁹ Evidence of the significance of this position came in September 2002 when President Bush indicated to the General Assembly that he would pursue additional resolutions.⁶⁰ From that point on the official reason for going to war was not regime change and democracy promotion, nor was it self-defence. It was Iraq's supposed breach of its obligation to disarm as specified by UN Security Council resolutions going back to the first Gulf War of 1991.

From this perspective, then, the invasion of Iraq was a collective security operation consistent with a universal international society centred on the UN. It would be wrong, however, to accept this view without qualification. At the centre of this debate is the interpretation of Security Council Resolution 1441, which was passed in November 2002. The coalition that eventually invaded Iraq argued that this resolution 'revived' the mandate that existed in Resolution 678 (1990), which was passed following Iraq's invasion of Kuwait. This authorized states to restore international peace and security to the region, and Resolution 687 (1991) and Resolution 1441 (2002) identified a continuing threat to the region posed by Iraq's WMD capability. The issue was no longer Kuwait, but the threat posed by Iraqi WMD could still give rise to a situation that mandated the use of force. Opponents of military action argued, however, that authority for war could not be located in a resolution passed twelve years earlier; and even if one could accept the 'revived authority' argument, there was a flaw in the US-UK interpretation of Resolution 1441. It called on the Security Council to *consider* the situation of Iraqi co-operation with UN weapons inspectors before military action could be taken. This indicated the need for a 'second resolution'. Indeed, the coalition seemingly acknowledged that when they tried in March 2003 to secure another resolution explicitly authorizing the use of force.⁶¹ To go to war having clearly failed to gain that resolution was an act that, in the words of the UN Secretary General, was 'not

Peter Goldsmith, Oral Evidence to the Iraq Inquiry, 27 January 2010, 17–18 at <<http://www.iraqinquiry.org.uk/transcripts/oralevidence-bydate/100127.aspx>>.

⁵⁹ Richard Haass, *War of Necessity, War of Choice: A Memoir of Two Iraq Wars* (New York: Simon & Schuster, 2009) 222–3; David Manning, Oral Evidence before the Iraq Inquiry, 30 November 2009 at <<http://www.iraqinquiry.org.uk/media/40459/20091130pm-final.pdf>>.

⁶⁰ George Bush, Address to the UN General Assembly, 12 September 2002 at <<http://www.guardian.co.uk/world/2002/sep/12/iraq.usa3>>.

⁶¹ See Jason Ralph, 'After Chilcot: Blair's "Doctrine of International Community" and the UK Decision to Invade Iraq', *British Journal of Politics and International Relations* 13 (2011) 304–25.

in conformity with the Security Council—with the UN Charter'.⁶² The coalition argued however that the word 'consider' in Resolution 1441 merely required the Security Council to meet and discuss the situation. It did not require another resolution. It was not ideal to go to war in these circumstances but the Security Council had, from the US and UK perspective, demonstrated an inability to enforce its own resolutions and in that moment of paralysis it was left to others to act as custodians of the common good.⁶³

The argument that the decision on when to use force in the name of international security could be taken by a single state, or coalition of states, rather than the UN Security Council was not conceived for the purpose of legitimizing the Iraq invasion. A similar argument had been made during the Kosovo crisis, for instance. Then NATO's action was considered legitimate, even in the absence of a resolution explicitly authorizing the use of force, given the exceptional humanitarian crisis.⁶⁴ Indeed, neoliberals recalled this argument at the moment the Security Council was debating the so-called 'second resolution' on Iraq. Anne-Marie Slaughter, for instance, argued that:

[b]y giving up on the Security Council, the Bush administration has started on a course that could be called 'illegal but legitimate,' . . . The relevant history here is from Kosovo. In 1999, the United States, expecting a Russian veto of military intervention to stop Serbian attacks on ethnic Albanians in Kosovo, sidestepped the United Nations completely and sought authorization for the use of force within NATO itself.⁶⁵

Indeed, evidence from the Iraq Inquiry in the UK demonstrates that the Kosovo experience reinforced the Blair government's view that it could support the invasion if the proposed second resolution was vetoed at the Security Council.⁶⁶ As Tony Blair put it at the time:

Supposing in circumstances where there was a clear breach of Resolution 1441 and everyone else wished to take action, one put down a veto. In those circumstances it would be unreasonable. Then it would be wrong because otherwise you couldn't uphold the UN. Because you'd have passed your resolution and then you'd have failed to act on it.⁶⁷

⁶² Kofi Annan, 'An Illegal War', *New York Review of Books*, 16 September 2004 at <<http://www.nybooks.com/articles/archives/2004/oct/21/an-illegal-war/>>.

⁶³ Wedgwood, 'The Fall of Saddam Hussein', n 48 above, 579; and Yoo, 'International Law and the War in Iraq', n 57 above, 567.

⁶⁴ The Independent International Commission on Kosovo, *The Kosovo Report*, 21 June 2006 at <http://sitemaker.umich.edu/drwcasebook/files/the_kosovo_report_and_update.pdf>.

⁶⁵ Anne-Marie Slaughter, 'Good reasons for going around the U.N.', *New York Times*, 18 March 2003 at <<http://www.nytimes.com/2003/03/18/opinion/good-reasons-for-going-around-the-un.html>>.

⁶⁶ Ralph, 'After Chilcot', n 61 above, 316–17.

⁶⁷ BBC Newsnight, transcript of Blair's Iraq interview, 6 February 2003. Available online at: <<http://news.bbc.co.uk/1/hi/programmes/newspnight/2732979.stm>>.

There are two conclusions to draw from this. Both advance the book's central argument. The first is that the coalition of those willing to invade Iraq did set the US and its allies up as the 'arbiters of humanity'.⁶⁸ To claim they had an international mandate when they had tried and failed to secure one suggests this much. This was not, as in the Kosovo case, a case of acting on the basis that a majority at the Security Council supported military action. The UK's Ambassador to the UN Sir Jeremy Greenstock told the Iraq Inquiry for instance that he 'never felt that we [the coalition of the willing] got close to having nine positive votes in the bag'. Likewise, UK Foreign Secretary Jack Straw stated that as 'a statement of absolute fact' the UK never had nine votes. On this basis, Greenstock concluded, the decision to go to war was from his perspective 'legal but of questionable legitimacy in that it didn't have the democratically observable backing of the majority of the member states'.⁶⁹ In this sense the neoliberal decision to support the invasion of Iraq was reflective of a worldview based on a US-centred hierarchy that excluded those who would otherwise have been included in an international society centred on UN collective security.

The additional point to make is that the US-led coalition that invaded Iraq was not representative of liberal internationalism. The invasion quite clearly divided liberals. Reflecting back on the diplomacy of the period, for instance, Anne-Marie Slaughter argues that the US and UK effectively misinterpreted the 'duty to prevent' because in fact the UN Security Council, including the French, which had threatened to veto the resolution, had reached a reasonable (and correct) conclusion that Iraq did not have WMD. She used this experience as a means of restating the importance of international deliberation to the liberal internationalist approach. 'Woodrow Wilson believed in what he called "common counsel"', she argued.

[T]he idea was that people can come together and deliberate collectively, and they will produce a better outcome. It wasn't about including everybody just for the sake of inclusion; it was a genuine belief that you would get better outcomes. . . . If you apply that principle internationally, it argues that we should work through international institutions, not just because that's the law or because we think other countries will like us more if we do, although the legitimacy part is important, but because we will actually get better outcomes. We would have gotten a better outcome in Iraq if we had really listened to other countries in the United Nations. There were many countries, many of them our allies, telling us that there were not weapons of mass destruction, or at least that we should look much harder before we decided that there were. In fact, if you go back and look at

⁶⁸ Louiza Odysseos, 'Crossing the Line? Carl Schmitt on the "Spaceless Universalism" of Cosmopolitanism and the War on Terror', in Louiza Odysseos and Fabio Petito (eds), *The International Political Thought of Carl Schmitt: Terror, Liberal War and the Crisis of Global Order* (London and New York: Routledge, 2007) 126.

⁶⁹ Cited in Ralph, 'After Chilcot', n 61 above, 318–19.

the debates, it is striking just how accurate many of the opponents from other countries were.⁷⁰

A Wilsonian approach to international dialogue, in other words, would have caused the US-led coalition to change track. This of course was said with the benefit of hindsight. There were however those who opposed the war at the time, not least Barack Obama. In a speech on October 2002 the future President made it clear that he was not opposed to the use of force in all circumstances but that he opposed what he called a ‘dumb’ and ‘rash’ war. It was a:

war based not on reason but on passion, not on principle but on politics. Now let me be clear—I suffer no illusions about Saddam Hussein. He is a brutal man. A ruthless man. A man who butchers his own people to secure his own power. He has repeatedly defied UN resolutions, thwarted UN inspection teams, developed chemical and biological weapons, and coveted nuclear capacity. He’s a bad guy. The world, and the Iraqi people, would be better off without him. But I also know that Saddam poses no imminent and direct threat to the United States or to his neighbours, that the Iraqi economy is in shambles, that the Iraqi military is a fraction of its former strength, and that in concert with the international community he can be contained until, in the way of all petty dictators, he falls away into the dustbin of history. I know that even a successful war against Iraq will require a U.S. occupation of undetermined length, at undetermined cost, with undetermined consequences. I know that an invasion of Iraq without a clear rationale and without strong international support will only fan the flames of the Middle East, and encourage the worst, rather than best, impulses of the Arab world, and strengthen the recruitment arm of al-Qaida. I am not opposed to all wars. I’m opposed to dumb wars.⁷¹

It was this stance, in the context of the human and material costs of the Iraq conflict, that helped get Obama elected in November 2008. It is to the changes he made to US national security policy after that that we now turn.

OBAMA’S NATIONAL SECURITY STRATEGY

Like its predecessor, the Obama administration identified the nexus of violent extremism and WMD as the most significant security challenge facing the

⁷⁰ See Anne-Marie Slaughter, ‘The Crisis of American Foreign Policy: Wilsonianism in the Twenty-First Century’, Carnegie Council, 21 January 2009 at <<http://www.cceia.org/resources/transcripts/0108.html>>.

⁷¹ Barack Obama, ‘Wars of reason, Wars of principle’ speech to an anti-war rally in Chicago, 26 October 2002 at <http://www.tnj.com/archives/2004/september2004/final_word.php>; see also Barack Obama’s Cairo Speech, 4 June 2009, in which he called the Iraq War, ‘a war of choice’, which was contrasted with Afghanistan, which he called throughout his administration ‘a war of necessity’ at <<http://www.guardian.co.uk/world/2009/jun/04/barack-obama-keynote-speech-egypt>>.

US. Yet it offered a different approach to this problem. Echoing Obama's 2002 speech, the 2010 National Security Strategy acknowledged that the use of force is sometimes necessary. In an effort to distance the new administration from the Iraq decision, however, it stated that:

we will exhaust other options before war whenever we can, and carefully weigh the costs and risks of action against the costs and risks of inaction. When force is necessary, we will continue to do so in a way that reflects our values and strengthens our legitimacy, and we will seek broad international support, working with such institutions as NATO and the U.N. Security Council. The United States must reserve the right to act unilaterally if necessary to defend our nation and our interests, yet we will also seek to adhere to standards that govern the use of force. Doing so strengthens those who act in line with international standards, while isolating and weakening those who do not. We will also outline a clear mandate and specific objectives and thoroughly consider the consequences—intended and unintended—of our actions.⁷²

There was no sense, moreover, that force would be used to pursue regime change and promote democracy. The new strategy did not renounce this aspect of the liberal agenda but its liberalism was more obviously republican and exemplarist. American values were still seen as having a universal appeal but the new National Security Strategy demonstrated a pluralist sensitivity. '[D]emocracy and individual empowerment', it noted, 'need not come at the expense of cherished identities'. Moreover, the spread of these values was considered to be in America's interests but Obama would accept that this was a gradual process that had to be sensitive to the international context. The US would advance its values 'by living them'.⁷³ It:

would not seek to impose these values by force. Instead, we are working to strengthen international norms on behalf of human rights, while welcoming all peaceful democratic movements. We are supporting the development of institutions within fragile democracies, integrating human rights as a part of our dialogue with repressive governments, and supporting the spread of technologies that facilitate the freedom to access information. And we recognize economic opportunity as a human right, and are promoting the dignity of all men and women through our support for global health, food security, and cooperative responses to humanitarian crises.⁷⁴

⁷² White House, National Security Strategy, May 2010, 22, at <http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf>.

⁷³ National Security Strategy, May 2010, 36. State Department legal adviser Harold Koh earlier identified this as part of 'an emerging Obama-Clinton doctrine', which is based on four commitments: '1. principled engagement; 2. diplomacy as a critical element of smart power; 3. strategic multilateralism; and 4. the notion that living our values makes us stronger and safer by following rules of domestic and international law; and following universal standards, not double standards': Koh, 'The Obama Administration and International Law', 25 March 2010, n 4 above.

⁷⁴ National Security Strategy, May 2010, 5.

Illiberal states, including those suspected of aspiring to WMD status, were to be engaged in a dialogue, bilaterally and through international institutions. Indeed, the new administration counselled restraint with regard to Iran's alleged WMD programme. The National Security Strategy insisted, moreover, that the security challenge post-9/11 was not a reason to walk away from international institutions. The US had successfully pursued its interests through the UN system since World War II and it would continue to do so in the new world of transnational challenges. It would focus 'engagement on strengthening international institutions and galvanizing the collective action that can serve the common interest such as combating violent extremism; stopping the spread of nuclear weapons and securing nuclear materials'.

This new approach characterized the US response to the 'Arab Spring'. As David Sanger notes, the Obama administration's cautious approach to the revolutions was informed by a sense that history was moving in the right direction and all the US could do was remind leaders like Mubarak of that fact. Fundamentally, the administration saw that these were regional revolutions and 'not about America'. Obama 'did not want to own it any more than he wanted to own Iraq and Afghanistan'.⁷⁵ The situation in Libya was of course different and the decision to intervene militarily alongside NATO allies was articulated in the President's speech of 28 March 2011. The US was 'reluctant' to use force, but it had a responsibility to respond to the humanitarian emergency in Benghazi. He set out the reasons for the intervention by recalling essential aspects of the American identity and echoing the idea that the US was a custodian of liberal values and the global common good.

To brush aside America's responsibility as a leader and—more profoundly—our responsibilities to our fellow human beings under such circumstances would have been a betrayal of who we are. Some nations may be able to turn a blind eye to atrocities in other countries. The United States of America is different. And as President, I refused to wait for the images of slaughter and mass graves before taking action.⁷⁶

At the same time, having decided there was substantive reason to act, the US sought a UN mandate for practical as well as normative reasons. Bush's

⁷⁵ David E Sanger, *Confront and Conceal: Obama's Secret Wars and the Surprising Use of American Power* (New York: Crown Publishers, Kindle edition, 2012) loc 4782.

⁷⁶ President Obama's speech on Libya, 28 March 2011 at <<http://www.whitehouse.gov/photos-and-video/video/2011/03/28/president-obama-s-speech-libya>>. On the influence of Obama's rhetorical commitment to human rights and America's identity, see Sanger. He quotes Obama as greeting the prospect of being a bystander to a crime against humanity with the statement 'That's just not who we are': *Confront and Conceal*, n 75 above, loc 5416.

unilateral approach had exacted ‘extraordinary sacrifice’ in terms of the national interest and realists in the new administration, notably Secretary of Defense Robert Gates, insisted on limited US involvement.⁷⁷ This concern lay behind the quick handover of the American command to NATO and it also explains why the President ruled out an occupation force. Of course, UN Security Council Resolution 1973 would not have been passed had this objective been explicit, but the President’s insistence that the Libyan intervention would not repeat the mistakes of the Iraq War indicated a shift toward a more modest view of intervention. The insistence that the US only act with a UN mandate, in this sense, complemented the realist insistence that the US pursue limited objectives and maintain a wide coalition to share the burden. This compromise was rejected by neoconservatives outside the administration. Any satisfaction in the intervention as ‘a model of international co-operation’ was misplaced. International partners could not be relied on to deliver a concrete solution to the crisis and Obama was criticized for being a liberal that ‘dithers over parchment’.⁷⁸

The neoconservative concern that Obama’s more limited approach would leave the Libyan regime in place ultimately proved unfounded. The perception that NATO had gone beyond the UN mandate was not, however, insignificant. Indeed, Russia explained its veto of a draft resolution condemning Syria as a response to what had happened in Libya. In its view, western governments could no longer be trusted to abide by even the most limited mandate.⁷⁹ It is debatable whether Russia and China would have voted differently on Syria had there been no controversy surrounding the Libyan (or indeed Iraq) operation. It added, however, to the complexity of the violence in Syria and consolidated the administration’s more cautious approach to international intervention. In both cases, Sanger describes an administration that was ‘innately cautious’ and conscious of what Colin Powell called ‘the Pottery Barn rule’ (you break it you own it). He cites the President’s National Security Adviser Tom Donilon as evidence. The President was not going to send ground troops into a conflict while seeking to extract the US from Afghanistan and Iraq. “When you are on the ground”, Sanger quotes Donilon, “you own the result—and it’s not long before you are resented by the local population... We knew we needed a better way.”⁸⁰

⁷⁷ On the internal debate within the administration, see Sanger, *Confront and Conceal*, n 75 above, loc 5310–5416.

⁷⁸ Charles Krauthammer, ‘Obama and Libya: the professor’s war’, n 6 above.

⁷⁹ United Nations S/PV 6627, Meeting of the Security Council, 4 October 2011.

⁸⁰ Sanger, *Confront and Conceal*, n 75 above, loc 5421–7.

OBAMA'S WAR ON TERROR

Despite these changes to the US approach, and despite opposition to the concept of a 'war on terror', the Obama administration continued to insist that the US was in a state of armed conflict with al Qaeda.⁸¹ There was a move away from using the specific phrase 'war on terror' and a preference in some quarters for 'overseas contingency operation', but this kind of shift lacked significance.⁸² Obama's National Security Strategy in fact was unequivocal about being at 'war against a far-reaching network of hatred and violence' or, more specifically, against 'al-Qa'ida, and its terrorist affiliates who support efforts to attack the United States, our allies, and partners'.⁸³ For Obama, the frontline in this war had always been in Afghanistan, which he called a 'war of necessity' to contrast it with what he called the 'war of choice' in Iraq. As he charted the gradual withdrawal from the latter, he would escalate the US commitment to the former, including the commitment of an additional 30,000 troops.⁸⁴ This was done with a view to accelerating the handover of responsibility for security to Afghan forces, and to allow the US to begin the transfer of its forces out of Afghanistan by 2014, something the President reaffirmed in his speech of June 2011 when he ordered the withdrawal of 33,000 troops.⁸⁵ The US focus also would shift to 'disrupting, dismantling and defeating' al Qaeda in Pakistan but here there was a reluctance to put troops on the ground.⁸⁶ Aside from the operation against Osama bin Laden, that war would be fought mostly by the use of unmanned aerial vehicles or drones.⁸⁷ It was, as Sanger put it, the ultimate in light footprint warfare; a weapon for the

⁸¹ For opposition to the war on terror at transition to a new administration, see Seth G Jones and Martin C Libicki, *How Terrorist Groups End: Lessons for Countering al Qa'ida* (Santa Monica: Rand Corporation, 2008); and the speech by UK Foreign Secretary, David Miliband, 'After Mumbai: Beyond the War on Terror', Taj Hotel, Mumbai, 15 January 2009 at <<http://davidmiliband.net/speech/after-mumbai-beyond-the-war-on-terror/>>.

⁸² Al Kamen, 'The end of the global war on terror', *Washington Post*, 23 March 2009.

⁸³ National Security Strategy, May 2010, 20.

⁸⁴ This was part of a longstanding commitment to reorient US priorities: see Remarks by the President in Address to the Nation on the Way Forward in Afghanistan and Pakistan, West Point Military Academy, 1 December 2009. See generally Bob Woodward, *Obama's Wars* (New York: Simon & Schuster, 2010).

⁸⁵ Remarks by the President on the Way Forward in Afghanistan, 22 June 2011 at <<http://www.whitehouse.gov>>.

⁸⁶ The Bush administration began targeting al Qaeda and the Taliban in Pakistan as early as 2004, a tactic which included a ground operation by Navy SEALs in September 2008. David Rohde and Mohammed Khan, 'Ex-fighter for Taliban dies in strike in Pakistan', *New York Times*, 19 June 2004 at <http://www.nytimes.com/2004/06/19/world/the-reach-of-war-militants-ex-fighter-for-taliban-dies-in-strike-in-pakistan.html?_r=1>. On the 'poorly planned and co-ordinated' September 2008 action, see Woodward, *Obama's Wars*, n 84 above, 8.

⁸⁷ For a general history, see Brian G Williams, 'The CIA's Covert Predator Drone War in Pakistan, 2004–2010: The History of an Assassination Campaign', *Studies in Conflict and Terrorism* 3 (2010) 871–92.

age of austerity.⁸⁸ As part of a new commitment to what became known as the 'AfPak' campaign, President Obama escalated the use of Predator drones in the tribal areas of North-Western Pakistan. According to the New America Foundation, for instance, the annual number of drone strikes more than doubled under Obama, from 33 in 2008 to 53 in 2009, 118 in 2010 and 70 in 2011.⁸⁹

The use of drones outside what O'Connell called the 'real wars' in Afghanistan and Iraq was not new. In November 2002, for instance, it was widely reported that the US had used a drone to target al Qaeda operatives in Yemen and the matter was raised by United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Asma Jahengir.⁹⁰ In its response, the US made no comment on the incident itself but submitted:

that inquiries related to allegations stemming from any military operations conducted during the course of an armed conflict with Al Qaida do not fall within the mandate of the Special Rapporteur. . . . Al Qaida and related terrorist networks are at war against the United States. . . . International humanitarian law is the applicable law in armed conflict and governs the use of force against legitimate military targets. Accordingly, the law to be applied in the context of an armed conflict to determine whether an individual was arbitrarily deprived of his or her life is the law and customs of war. Under that body of law, enemy combatants may be attacked unless they have surrendered or are otherwise rendered hors de combat. Al Qaida terrorists who continue to plot attacks against the United States may be lawful subjects of armed attack in appropriate circumstances.⁹¹

This statement captures the sense in which the US under the Bush administration saw the armed conflict against al Qaeda as global or transnational. As O'Connell put it, the Bush administration's definition of war attached itself 'to individuals not to situations of armed hostilities. So wherever a suspected member of a terrorist organization is, there is an armed conflict.'⁹²

⁸⁸ Sanger, *Confront and Conceal* n 75 above, loc 3885.

⁸⁹ 'The Year of the Drone: An Analysis of US Drone Strikes in Pakistan, 2004–2012' at <<http://counterterrorism.newamerica.net/drones>>.

⁹⁰ See, for example, Walter Pincus, 'US missile kills al Qaeda suspects', *The Age*, 6 November 2002 at <<http://www.theage.com.au/articles/2002/11/05/1036308311314.html>>. On 15 November, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Asma Jahengir, sent a letter to the US Secretary of State querying whether the alleged attack was consistent with international norms: cited in Philip Alston, Jason Morgan-Foster and William Abresch, 'The Competence of the UN Human Rights Council and Special Procedures in relations to Armed Conflicts: Extrajudicial Executions in the "War on Terror"', *European Journal of International Law* 19 (2008) 186.

⁹¹ E/CN.4/2003/G/80. Letter dated 14 April 2003 from the Chief of Section, Political and Specialized Agencies, of the Permanent Mission of the United States of America to the United Nations Office at Geneva addressed to the Secretariat of the Commission of Human Rights at <<http://www.unhchr/ch>>.

⁹² Mary Ellen O'Connell, 'The Legal Case against the Global War on Terror', *Case Western Reserve Journal of International Law* 36 (2004) 350.

On this issue, there has been continuity between the two administrations. Speaking at the American Society for International Law (ASIL), for instance, the legal adviser for the State Department, Harold Koh, insisted that the Obama administration was committed to repealing what he called ‘the law of 9/11’, but in the same speech claimed that authority for the US Predator Drone programme existed in the AUMF of September 2001 and the fact that the US was in an ongoing state of armed conflict with al Qaeda. The United States, he stated:

is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law. As a matter of domestic law, Congress authorized the use of all necessary and appropriate force through the 2001 Authorization for Use of Military Force (AUMF). These domestic and international legal authorities continue to this day.⁹³

Any charge of extrajudicial killing, he argued, fails to appreciate 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. Our procedures and practices for identifying lawful targets are extremely robust, and advanced technologies have helped to make our targeting even more precise. In my experience, the principles of distinction and proportionality that the United States applies are not just recited at meetings. They are implemented rigorously throughout the planning and execution of lethal operations to ensure that such operations are conducted in accordance with all applicable law.⁹⁴

Koh repeated this argument when he defended the operation against Osama bin Laden in May 2011. Citing the AUMF and his March 2010 ASIL speech, he argued the following:

Given bin Laden’s unquestioned leadership position within al Qaeda and his clear continuing operational role, there can be no question that he was the leader of an enemy force and a legitimate target in our armed conflict with al Qaeda. In addition, bin Laden continued to pose an imminent threat to the United States that engaged our right to use force, a threat that materials seized during the raid have only further documented.⁹⁵

⁹³ Koh, ‘The Obama Administration and International Law’, n 4 above. For concern that Koh’s speech did not address some of the most central legal issues including: the scope of the armed conflict in which the US asserts it is engaged, the criteria for individuals who may be targeted and killed, the existence of any substantive or procedural safeguards to ensure the legality and accuracy of killings, and the existence of accountability mechanisms, see UN Human Rights Council, A/HRC/14/24/Add.6, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston: Study on Targeted Killings, 28 May 2010, 8.

⁹⁴ Koh, ‘The Obama Administration and International Law’, n 4 above.

⁹⁵ Harold Hongju Koh, ‘The Lawfulness of the U.S. Operation against Osama bin Laden’, *Opinio Juris*, 19 May 2011 at <<http://opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden/>>.

This argument was later echoed by President Obama's chief counter-terrorism adviser John Brennan in a speech to Harvard Law School in September 2011. Brennan reminded his audience of the threat posed by al Qaeda. The death of bin Laden did 'not mark the end of that terrorist organization or its efforts to attack the United States and other countries'. Al Qaeda's capability had been 'severely crippled' in Pakistan but it still retained, Brennan argued, 'the intent and capability to attack the United States and our allies. Al-Qa'ida's affiliates—in places like Pakistan, Yemen, and countries throughout Africa—carry out its murderous agenda', and he referenced the attack at Fort Hood of November 2009 to illustrate his point.⁹⁶ The authority to use force to counter such threats, Brennan further argued, stemmed from the ongoing armed conflict with al Qaeda. 'As the President has said many times, we are at war with al-Qa'ida. . . . Our ongoing armed conflict with al-Qa'ida stems from our right—recognized under international law—to self defense'. Yet before maintaining the notionally global character of the war against al Qaeda, Brennan acknowledged the contentious character of that claim. 'An area in which there is some disagreement' he stated:

is the geographic scope of the conflict. The United States does not view our authority to use military force against al-Qa'ida as being restricted solely to 'hot' battlefields like Afghanistan. Because we are engaged in an armed conflict with al-Qa'ida, the United States takes the legal position that—in accordance with international law—we have the authority to take action against al-Qa'ida and its associated forces without doing a separate self-defense analysis each time. And as President Obama has stated on numerous occasions, we reserve the right to take unilateral action if or when other governments are unwilling or unable to take the necessary actions themselves.⁹⁷

Brennan was speaking just weeks before Anwar al-Awlaki, the radical American-Muslim cleric who had been linked to a series of terrorist attacks including the Fort Hood shootings, was reportedly killed by a Predator drone strike in Yemen.⁹⁸ It was later reported by Charlie Savage of the *New York Times* that the legal basis for that strike was an Office of Legal Counsel (OLC) legal memo completed around June 2010. According to Savage, the document addressed the self-defence case by arguing 'that "imminent" risks could include those by

⁹⁶ Remarks of John O Brennan, Assistant to the President for Homeland Security and Counterterrorism, Harvard Law School, 16 September 2011 at <<http://www.lawfareblog.com/2011/09/john-brennans-remarks-at-hls-brookings-conference/>>.

⁹⁷ Brennan, Harvard Law School, 16 September 2011, n 96 above.

⁹⁸ Scott Shane and Tom Shanker, 'Strike reflects U.S. shift to drones in terror fight', *New York Times*, 1 October 2012 at <<http://www.nytimes.com/2011/10/02/world/awlaki-strike-shows-us-shift-to-drones-in-terror-fight.html>>; 'Obituary. Anwar Al Awlaki', BBC, 30 September 2011 at <<http://www.bbc.co.uk/news/world-middle-east-11658920>>; Daniel Klaidman, *Kill or Capture: The War on Terrorism and the Soul of the Obama Presidency* (Boston, New York: Houghton Mifflin Harcourt, 2012) 261–5.

an enemy leader who is in the business of attacking the United States whenever possible, even if he is not in the midst of launching an attack at the precise moment he is located'.⁹⁹ But the memo also cast Awlaki's case in terms of an ongoing armed conflict. Awlaki could be killed, the OLC reportedly claimed:

if it was not feasible to capture him, because intelligence agencies said he was taking part in the war between the United States and Al Qaeda and posed a significant threat to Americans, as well as because Yemeni authorities were unable or unwilling to stop him. . . . It concluded that Awlaki's geographical distance from the so-called hot battlefield did not preclude him from the armed conflict.¹⁰⁰

The final piece of evidence to illustrate the continuing commitment to the war on terror paradigm is the speech Attorney General Eric Holder gave in March 2012. As subsequent chapters demonstrate, Holder was seen by many as committed to a law enforcement approach to counter-terrorism, particularly with respect to the detention and trial of terrorist suspects and he reiterated that commitment in this speech.¹⁰¹ Yet he also made clear his view that the US was 'a nation at war. And, in this war, we face a nimble and determined enemy that cannot be underestimated.' It was preferable, he argued, 'to capture suspected terrorists where feasible—among other reasons, so that we can gather valuable intelligence from them—but we must also recognize that there are instances where our government has the clear authority—and, I would argue, the responsibility—to defend the United States through the appropriate and lawful use of lethal force'. The US was authorized to take action against its enemy because it was in an armed conflict. 'None of this', Holder concluded 'is changed by the fact that we are not in a conventional war.' Indeed, Holder echoed Brennan in arguing that the continuing war on terror was notionally global in scope.

Our legal authority is not limited to the battlefields in Afghanistan. Indeed, neither Congress nor our federal courts has limited the geographic scope of our ability to use force to the current conflict in Afghanistan. We are at war with a stateless enemy, prone to shifting operations from country to country. Over the last three years alone, al Qaeda and its associates have directed several attacks—fortunately, unsuccessful—against us from countries other than Afghanistan. Our government has both a responsibility and a right to protect this nation and its people from such threats. This does not mean that we can use military force whenever or wherever we want. International legal principles, including respect for another nation's sovereignty, constrain our ability to act unilaterally. But the

⁹⁹ Charlie Savage, 'Secret US memo made legal case to kill a citizen', *New York Times*, 8 October 2011 at <<http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html>>.

¹⁰⁰ Savage, 'Secret US memo', n 99 above.

¹⁰¹ See generally Klaidman, *Kill or Capture*, n 98 above.

use of force in foreign territory would be consistent with these international legal principles if conducted, for example, with the consent of the nation involved—or after a determination that the nation is unable or unwilling to deal effectively with a threat to the United States. Furthermore, it is entirely lawful—under both United States law and applicable law of war principles—to target specific senior operational leaders of al Qaeda and associated forces.¹⁰²

There is therefore strong evidence that on this aspect the US continues to operate according to the Bush administration's framing of counter-terrorism as an ongoing and geographically unlimited armed conflict. It is worth noting, however, that this continuity did not go uncontested. According to Daniel Klaidman's book *Kill or Capture*, the State Department was concerned that the administration's arguments 'grew more tenuous' the more US actions moved from established theatres of conflict.¹⁰³ This doubt about the geographical scope of the armed conflict can help explain why the administration's statements on this issue also drew on the law of self-defence. For instance, Koh argued that the drone strikes and the bin Laden operation were also justified by the fact that al Qaeda continues to pose an imminent threat.¹⁰⁴ Such statements suggested that there may be circumstances where the use of lethal force does not draw on the laws of war because it takes place outside of a state of armed conflict. Indeed, this recalls the Clinton administration's approach to the issue. There was no state of armed conflict between the US and al Qaeda in August 1998 when the US launched cruise missiles at Afghanistan and Sudan in response to the East African embassy bombings. This use of force, the Clinton administration claimed, was neither an act of war nor an extrajudicial killing. It was instead a legitimate act of self-defence because the US had 'compelling information that they [al Qaeda] were planning additional terrorist attacks against our citizens and others with the inevitable collateral casualties we saw so tragically in Africa'.¹⁰⁵ To suggest that the use of force in Pakistan, including the attack that killed bin Laden, might be grounded on the law of self-defence rather than the law of armed

¹⁰² See also Remarks of Attorney General Eric Holder, Northwestern University School of Law, 5 March 2012 at <<http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>>.

¹⁰³ Klaidman, *Kill or Capture*, n 98 above, 203. Klaidman also reports on the initial reluctance of Jeh Johnson, General Counsel to the Department of Defense, to approve the targeting of al Qaeda-affiliated members in Somalia, arguing in February 2010 that 'it was no longer his view that the Shabab was broadly covered by the AUMF': *Kill or Capture*, 213. For more on the internal debates about what constituted the enemy, see Chapter 4.

¹⁰⁴ Koh, 'The Obama Administration and International Law', n 4 above and Koh, 'The Lawfulness of the U.S. Operation against Osama bin Laden', n 95 above. See also Klaidman, *Kill or Capture*, n 98 above, 218–20.

¹⁰⁵ President Clinton, 'Remarks in Martha's Vineyard, Massachusetts, on Military Action Against Terrorist Sites in Afghanistan and Sudan', 20 August 1998 at <<http://www.presidency.ucsb.edu/ws/?pid=54798&st=&st1=>>>.

conflict suggested the US under Obama was attempting to draw a line around the war on terror by limiting the application of international humanitarian law (IHL) to the 'real' wars in Afghanistan and Iraq.

There is, however, an element of continuity here too. As noted, the National Security Strategy of 2002 called for new thinking on the laws governing the resort to force in self-defence. It insisted that international society 'must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries'. This seemingly remained the position of the US almost a decade on, only claims were made that international society had moved to support the US position. In his Harvard speech of September 2011, for instance, John Brennan accepted that the ongoing armed conflict argument was perhaps exceptional among states. 'International legal principles', he noted:

including respect for a state's sovereignty and the laws of war, impose important constraints on our ability to act unilaterally—and on the way in which we can use force—in foreign territories. Others in the international community—including some of our closest allies and partners—take a different view of the geographic scope of the conflict, limiting it only to the 'hot' battlefields. As such, they argue that, outside of these two active theatres [Afghanistan and Iraq], the United States can only act in self-defence against al-Qa'ida when they are planning, engaging in, or threatening an armed attack against U.S. interests if it amounts to an 'imminent' threat.

Yet he noted that on the question of self-defence international society was coming round to the US view.

In practice, the U.S. approach to targeting in the conflict with al-Qa'ida is far more aligned with our allies' approach than many assume. This Administration's counterterrorism efforts outside of Afghanistan and Iraq are focused on those individuals who are a threat to the United States, whose removal would cause a significant—even if only temporary—disruption of the plans and capabilities of al-Qa'ida and its associated forces. Practically speaking, then, the question turns principally on how you define 'imminence.' We are finding increasing recognition in the international community that a more flexible understanding of 'imminence' may be appropriate when dealing with terrorist groups, in part because threats posed by non-state actors do not present themselves in the ways that evidenced imminence in more traditional conflicts. . . . Over time, an increasing number of our international counterterrorism partners have begun to recognize that the traditional conception of what constitutes an 'imminent' attack should be broadened in light of the modern-day capabilities, techniques, and technological innovations of terrorist organizations.¹⁰⁶

¹⁰⁶ Brennan, Harvard Law School, 16 September 2011, n 96 above. See also Holder, Northwestern University School of Law, 5 March 2012, n 102 above, in which he argued that the President was not required 'to delay action until some theoretical end-stage of planning—in which the precise time, place, and manner of an attack become clear. Such a requirement would create an unacceptably high risk that our efforts would fail, and that Americans would be killed.'

Whether the drone strikes are considered as part of an ongoing armed conflict with al Qaeda or actions taken in self-defence, they are criticized by some as politically counter-productive. This is mainly because of the pattern of civilian deaths that is said to accompany these strikes.¹⁰⁷ Indeed, military experts have questioned their use in the context of a counter-insurgency strategy designed to protect the civilian population. The most cited critic in this regard is David Kilcullen, who advised US Army General David Petraeus on the 2007 surge campaign that helped bring stability to Iraq. In congressional testimony he advocated ending the drone strikes in Pakistan.

They are deeply aggravating to the population. And they've given rise to a feeling of anger that coalesces the population around the extremists and leads to spikes of extremism well outside the parts of the country where we are mounting those attacks. Inside FATA [Federally Administered Tribal Areas] itself some people like the attacks because they do actually target the bad guys. But in the rest of the country there's an immense anger about them. And there's anger about them in the military and the intelligence service. I realize it might seem counterintuitive, but we need to take our foot off the necks of these people so they feel that there's a degree of trust. Saying we want to build a permanent relationship, a friendship with them whilst continuing to bomb their population from the air, even if you do it with robot drones is something that they see through straight away.¹⁰⁸

This kind of criticism seemingly began to take hold further into the Obama administration, particularly after US-Pakistan relations worsened following a series of incidents including the raid that killed bin Laden. Indeed, at the time of writing, the number of drone attacks for the first part of 2012 had dropped markedly compared to the number for previous years.¹⁰⁹

According to Klaidman, Koh also developed a theory of “‘elongated imminence”, which he likened to “battered spouse syndrome”. If a husband demonstrated a consistent pattern of activity before beating his wife, it wasn't necessary to wait until the husband's hand was raised before the wife could act in self-defense': *Kill or Capture*, n 98 above, 219–23.

¹⁰⁷ Mary Ellen O'Connell, 'Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004–2009', *Notre Dame Law School*, Legal Studies Research Paper No 09-43 at <<http://ssrn.com/abstract=1501144>> 9; see also Jordan Paust, 'Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan', *Journal of Transnational Law and Policy* 19 (2010) at <<http://ssrn.com/abstract=1520717>> 275.

¹⁰⁸ Hearing of the House Armed Service Committee, *Effective Counterinsurgency: The Future of the US Pakistan Military Partnership*, 23 April 2009. See also David Kilcullen and Andrew McDonald Exum, 'Death from above, outrage down below', *New York Times*, 16 May 2009 at <<http://www.nytimes.com/2009/05/17/opinion/17exum.html>>; Jane Perlez and Eric Schmitt, 'Strikes worsen al Qaeda threat, Pakistan says', *New York Times*, 24 February 2009.

¹⁰⁹ Peter Bergen, 'CIA drone war in Pakistan in sharp decline', CNN, 28 March 2012 at <<http://edition.cnn.com/2012/03/27/opinion/bergen-drone-decline/index.html>>.

CONCLUSION

The framing of the 9/11 attacks as acts of 'war' and the decision to treat al Qaeda terrorists as enemy combatants rather than criminal suspects was always contentious and it was not an inherent feature of American liberal internationalism. Liberals argued that the scale of the 9/11 attack was certainly shocking but it did not, as a matter of law, take place in the context of, nor did it give rise to, a state of armed conflict. This point was repeated by some in the academic community almost a decade after 9/11.¹¹⁰ Yet the decision to treat al Qaeda terrorists and the states that harbour them as enemies in an ongoing armed conflict was understood by the Bush administration to be a political matter. That was supported by Congress to the extent that it authorized the use of force against al Qaeda, as well as Afghanistan and Iraq; and it has essentially been the political reaction against these conflicts, in particular the Iraq War, that has led to the shift in US policy. The human and material costs of these conflicts led the Obama administration to adopt a more cautious and less ambitious National Security Strategy. The neoconservative emphasis on using American power to pursue policies of regime change and democracy promotion has been rejected in favour of the exemplarism of the traditional republican approach. Ironically, the timing of the 'Arab Spring' has meant this approach can claim that history is indeed moving in its direction, although at the time of writing events in Syria were testing the appropriateness of that approach. The Obama administration also committed the US to drawing down the Bush administration's commitment to nation building in Afghanistan and Iraq. But in the fight against al Qaeda there were continuities between the two administrations. Primarily, the US under Obama continued to argue that the US was in an ongoing armed conflict with al Qaeda that was not limited to active theatres of war (or hot battlefields) like Afghanistan or Iraq. The war on terror in this sense remained an essential feature of US post-9/11 national security strategy. It was also still conceived in transnational terms that were notionally global in scope.

¹¹⁰ International Law Association, *Final Report on the Meaning of Armed Conflict in International Law*, 2010 at <<http://www.ila-hq.org/en/committees/index.cfm/cid/1022>>.

Prosecuting Terrorist Suspects after 9/11

As Chapter 2 noted, the Bush administration's response to the situation of exceptional insecurity created by the 9/11 attacks was to claim that the US was in a situation of armed conflict with al Qaeda. This was contested by those like Mary Ellen O'Connell who looked to international law to define armed conflict. It was argued that outside 'the real wars' of Afghanistan and Iraq the level of violence between the US and al Qaeda had been too sporadic and low-intensity to qualify as armed conflict. The President's 'war on terror', O'Connell concluded, did 'not meet the legal definition of war'.¹ An implication of this was that the 9/11 attacks were crimes to be prosecuted in federal courts and indeed this had been the response to the 1993 attack on the World Trade Center. In November 1997, for instance, Ramzi Yousef was convicted by a New York federal court for his part in those attacks and sentenced to life imprisonment.² From this perspective members of al Qaeda were criminals rather than enemies; or at least the description of al Qaeda as an enemy did not invoke the laws of war. For the Bush administration, however, the 9/11 attacks were different. Their scale created a state of armed conflict and the implication of this was that members of al Qaeda and its affiliated forces were to be treated as enemy combatants to be prosecuted in military commissions that would not apply 'the principles of law and rules of evidence generally recognized in the trial of criminal cases in United States district courts'. This was a response, the

¹ Mary Ellen O'Connell, 'When is a War not a War? The Myth of the Global War on Terror', *ILSA Journal of International and Comparative Law* 12 (2005–6) 538 and 534; see also 'The Legal Case against the Global War on Terror', *Case Western Reserve Journal of International Law* 36 (2004) 349–57, and 'The Choice of Law against Terrorism', *Journal of National Security Law and Policy* 4 (2010) 343–68; Marco Sassòli, 'Use and Abuse of the Laws of War in the "War on Terrorism"', *Law and Inequality: A Journal of Theory and Practice* 22 (2005) 198–202; Leila Sadat, 'Terrorism and the Rule of Law', *Washington University Global Studies Law Review* 1 (2004) 140; Allen S. Weiner, 'Hamdan, Terror, War', *Lewis and Clarke Law Review* 11 (2007) 1003–9.

² Benjamin Weiser, 'The Trade Center verdict', *New York Times*, 13 November 1997. See also United States Department of Justice, Fact Sheet: Prosecuting and Detaining Terror Suspects in the U.S. Criminal Justice System, 9 June 2009 at <<http://www.justice.gov/opa/pr/2009/June/09-ag-564.html>>.

President noted, to the nature of international terrorism and the danger to the safety of the United States.³

For some, the Bush administration's approach carried with it a risk that al Qaeda would benefit politically and legally from their new found enemy status. Judge William Young's sentencing of Richard Reid, who was convicted in a US District Court for his attempt to blow up a civilian airliner with explosives hidden in his shoe, is often cited as an illustration of this. In response to Reid's claims that he was a combatant, Young stated:

... you are not an enemy combatant. You are a terrorist. You are not a soldier in any war. You are a terrorist. To give you that reference, to call you a soldier gives you far too much stature. Whether it is the officers of government who do it or your attorney who does it, or that happens to be your view, you are a terrorist. And we do not negotiate with terrorists... We hunt them down one by one and bring them to justice. So war talk is way out of line in this court. You are a big fellow. But you are not that big. You're no warrior. I know warriors. You are a terrorist. A species of criminal guilty of multiple attempted murders.⁴

A reason why terrorists like Reid sought the enemy combatant status being bestowed by the US was because it potentially triggered immunity from prosecution.⁵ The principle that combatants are immune from prosecution for acts that in normal peacetime situations would be criminal helps to define organized violence as 'war'. As Michael Walzer puts it, the modern war convention 'rests first on a certain view of combatants, which stipulates their battlefield equality'.⁶ That is, combatants on both sides of a war were entitled to immunity. The laws of war state in their Westphalian mode that both sides of an *international* armed conflict (IAC) can target each other without the fear of criminal prosecution. Of course, international society maintains that soldiers who target civilians can be prosecuted for war crimes. The Bush administration insisted, however, that in this new kind of war al Qaeda could be prosecuted in military commissions *for targeting US soldiers*. This crime was called 'murder by an unprivileged belligerent' and it was set out in Military Commission Instruction No. 2 of 2003. It essentially treated al Qaeda as foes,

³ President George W Bush, 'Military Order—Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terror', 13 November 2001 at <<http://www.law.cornell.edu/background/warpower/fr1665.pdf>>; and Donald H. Rumsfeld, Military Commission Order No. 1, 21 March 2002 at <<http://www.defense.gov/news/Mar2002/d20020321ord.pdf>>.

⁴ Quoted in Michael Newton, 'Unlawful Belligerency after September 11: History Revisited and Laws Revised', in David Wippman and Matthew Evangelista (eds), *New War, New Laws: Applying the Laws of War in 21st Century Conflicts* (Ardley, NY: Transnational Publishers, 2005) 75.

⁵ See Geoffrey S Corn, 'What Law Applies to the War on Terror?', in Michael W Lewis et al (eds), *The War on Terror and the Laws of War: A Military Perspective* (Oxford: Oxford University Press, 2009) 14.

⁶ Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 2006) 137.

excluding them from the regimes that privileged the enemy combatant and it recalls the Schmittian idea that liberal wars are like the just wars of a pre-Westphalian age.⁷ Soldiers who fought on the unjust side during this period were ‘for that reason alone, deemed criminals—even if they refrained from atrocities such as plunder, rape, and massacre’.⁸

To be certain, battlefield equality has never applied in situations of *non-international* armed conflict (NIAC) where it was normal for non-state actors to be prosecuted for the act of targeting a state’s armed forces.⁹ This is central to the idea that the state remains sovereign over a particular territory and that hostilities taking place within that territory are legally structured along hierarchical lines. Yet the Bush administration’s approach applied the legal hierarchies associated with NIAC to situations where the equalities of IAC would normally apply (e.g. in the war against the Taliban as the armed force of Afghanistan); and, secondly, it applied the legal hierarchies associated with NIAC in territories (e.g. Yemen) where a situation of armed conflict, as defined by the *Tadic* judgement (see Chapter 2), did not exist. In this sense it might be said that the US did, as Schmitt may have anticipated, internationalize and globalize the hierarchies of civil war.¹⁰ The purpose of this chapter, however, is to illustrate how opposition to this approach manifested itself in significant policy positions within the US policymaking community.

⁷ Military Commission Instruction No. 2, 30 April 2003, 13, section 6 B (3) ‘murder by an unprivileged belligerent’ at <<http://www.defense.gov/news/May2003/d20030430milcominstno2.pdf>>.

⁸ Robert D Sloane, ‘The Cost of Conflation: Preserving the Dualism of *Jus ad Bellum* and *Jus in Bello* in the Contemporary Law of War’, *Yale Journal of International Law* 34 (2009) 58, emphasis added. See also Stephen C Neff, *War and the Law of Nations: A General History*, (Cambridge: Cambridge University Press, 2005) 63, who notes that *any* killing done by the unjust side in this period was ‘mere homicide’.

⁹ The law of non-international armed conflict is made up of Article 3 common to all four Geneva Conventions and Additional Protocol II. The US has not ratified Protocol II but normally considered itself bound by its terms, seeing it as an expression of customary international law. It enables states to target, at any time, members of an organized armed group like the Taliban. It also enables states to target unorganized civilians taking part in hostilities, but only for the duration of their direct participation. At the same time, the law of NIAC insists that the state observes a minimal humanitarian standard and prosecutes unlawful activity in ‘a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples’. See generally Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge: Cambridge University Press, 2010).

¹⁰ Carl Schmitt, *The Nomos of the Earth in International Law of the Jus Publicum Europaeum* (New York: Telos Press Publishing, 2003) 28, 305; also Carl Schmitt, *Glossarium: Aufzeichnungen der Jahre 1947–1951*, as cited by Gary L Ulmen, ‘Partisan warfare, terrorism and the problem of the new *nomos* of the earth’, in Louiza Odysseos and Fabio Petito, *The International Political Thought of Carl Schmitt: Terror, Liberal War and the Crisis of Global Order* (London and New York: Routledge, 2007) 97–106. For a conceptualization of the war on terror in these terms, see Nehal Bhuta, ‘States of Exception: Regulating Targeted Killing in a “Global Civil War”’, in Philip Alston and Euan MacDonald (eds), *Human Rights, Intervention, and the Use of Force* (Oxford: Oxford University Press, 2008) 243–74.

It starts by describing the opposition to the Bush administration's decision not to apply the Geneva Conventions to the war on terror. It then describes the debate surrounding the invocation of the 'unlawful combatant' and the crime 'murder by an unprivileged belligerent', as well as the use of military commissions. The final section describes how the Obama administration responded to this practice. The conclusion to be drawn is similar to that offered in the previous chapter. Despite expectations that the new administration would put an end to the war-based approach and prosecute terrorist suspects in federal courts, it has continued the previous administration's practice of using military commissions. This was driven mainly by the political reaction against the idea of transferring detainees like Khaled Sheikh Mohammed to New York to face federal prosecution, as well as a concern within the administration that such an approach would make it look weak on national security.

THE GENEVA CONVENTIONS

As previous chapters have noted, the declaration of a 'war' on terror was more than a rhetorical expression of political determination. It had legal significance in the sense that the Authorization for Use of Military Force (AUMF) 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 11 September 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'. Acting on this authorization, President Bush ordered the invasion of Afghanistan. On 7 February 2002, however, the President announced that the detainees from that conflict would not be covered by the Geneva Conventions.¹¹

The third Geneva Convention and the 1977 first Additional Protocol contain rules governing the treatment of enemy combatants taken prisoner. Not only do these set standards for the humane treatment of prisoners, they also articulate 'combatant immunity', which underpins Walzer's principle of battlefield equality. Article 43 of the first Additional Protocol, for instance, states that 'combatants . . . have the right to participate directly in hostilities'.¹² The International Committee of the Red Cross (ICRC) Commentary explains

¹¹ Memo 11, 'Humane Treatment of al Qaeda and Taliban Detainees, from President George Bush to the Vice-President et al', 7 February 2002, in Karen J Greenberg and Joshua L Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (Cambridge: Cambridge University Press, 2005) 134.

¹² Article 43, Protocol I Additional to the Geneva Conventions at <<http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument>>. The US has not ratified Additional Protocol I, but it was commonly held at this time that the principle of combatant immunity was enshrined in customary international law.

that this 'provides immunity from the application of municipal law prohibitions against homicides, wounding and maiming, or capturing persons and destruction of property, so long as these acts are done as acts of war and do not transgress the restraints of the rules of international law applicable to armed conflict'.¹³ It is not therefore a war crime for the armed forces of parties to the conflict to participate in hostilities by targeting the enemy. Given that the United States had invaded another state (Afghanistan), it was expected that the US would acknowledge the combatant privileges of government forces resisting the invasion. Indeed, US commanders in charge of Afghan operations issued pre-invasion orders insisting on the application of the Geneva Conventions, as well as screening procedures to determine who was entitled to prisoner of war (POW) status.¹⁴ It was argued within the Bush administration's OLC, however, that the Geneva Conventions did not apply because Afghanistan itself was a failed state overrun by non-state militias and because al Qaeda was a non-state enemy.

Having established the President's power to determine whether a treaty had lapsed, the Office of Legal Counsel (OLC) argued that Afghanistan's failure to fulfil its own obligations under the Geneva Convention could justify the President suspending the treaty's application to US forces. 'After the conflict', they noted, 'the President [can] determine that relations under the Geneva Conventions with Afghanistan had been restored, once an Afghan government that was willing and able to execute the country's treaty obligations was securely established.'¹⁵ The US was not bound by the terms of Geneva, in other words, until regime change had occurred in Afghanistan and a liberal law-abiding government had replaced the Taliban. This emphasis on the reciprocal nature of treaty law could also justify reprisals. These were necessary according to the OLC, otherwise 'international law would leave an injured party [the US] effectively remediless if its adversaries committed material breaches of the Geneva Conventions'.¹⁶ Echoing earlier criticism of Protocol I of the Geneva Conventions, which suggests such views were not direct responses to 9/11, they argued

¹³ Commentary on Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, 44 at <<http://www.icrc.org>>.

¹⁴ See J R Schlesinger et al, *Final Report of the Independent Panel to Review DoD Detention Operations* (2004) 80 at <<http://fl1.findlaw.com/news.findlaw.com/wp/docs/dod/abughraibrpt.pdf>>. Cited in Matthew C Waxman, 'United States Detention Operations in Afghanistan and the Law of Armed Conflict', *Columbia Law School, Public Law and Legal Theory Working Paper Group*, Paper No 09-202, 1 May 2009 at <<http://ssrn.com/abstract-13998872>>.

¹⁵ Memo 4, Application of Treaties and Laws to al Qaeda and Taliban Detainees, Memorandum for William J Haynes II, General Counsel Department of Defense, from John Yoo, Deputy Assistant Attorney General, and Robert J Delahunty, Special Counsel, 9 January 2002, in Greenberg and Dratel (eds), *The Torture Papers*, n 11 above, 65. For public expression of this argument, see statements by administration officials in Katharine Seelye and Steven Erlanger, 'A nation challenged: captives; U.S. suspends the transport of terror suspects to Cuba', *New York Times*, 24 January 2002; Kim Sengupta, 'Change Geneva Convention rules says Bush envoy', *The Independent*, 22 February 2002.

¹⁶ Memo 4, Application of Treaties and Laws, n 15 above, 69.

that rules restraining the law-abiding state would be unfair and would ‘reward and encourage non-compliance with the Conventions’. Condemnation by the ICRC and other humanitarian actors had limited effect in this regard. It was powerless to stop terrorists who did not care about international reputation. ‘Without the power to suspend’, the OLC concluded, ‘parties to the Geneva Conventions would only be left with these meagre tools to remedy widespread violation of the Conventions by others’.¹⁷

As it happened, President Bush’s decision on the Geneva Conventions was not based on the illiberal character of the Afghan regime or its behaviour. This was because the President determined that the US was not at war with Afghanistan. It was instead at war with al Qaeda and the Taliban, and while the same argument could be applied to their *actions*, it was their *status* as non-state actors that determined Geneva’s inapplicability. The Conventions, it was argued, only applied to armed conflict between states. A conceptual line was drawn to separate wars within the society of states (wars between enemies) from this ‘new kind of war’ (wars between friends and foes).¹⁸ As the President put it when announcing his decision:

By its terms Geneva applies to conflicts involving ‘High Contracting Parties’, *which can only be States*. Moreover it assumes the existence of ‘regular’ armed forces fighting on behalf of States. However, the war against terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of States. Our nation recognizes this new paradigm—ushered in not by us, but by terrorists—requires new thinking in the law of war . . .¹⁹

The implication of this was that the humanitarian obligations contained within the Geneva Conventions were not necessarily binding on US forces. It also implied that the combatant privileges the Taliban may have been entitled to as the armed forces of the state of Afghanistan need not be observed.

¹⁷ Memo 4, Application of Treaties and Laws, n 15 above, 69–70. For the neoconservative arguments on Protocol I, see Douglas Feith, ‘Law in the Service of Terror—The Strange Case of the Additional Protocol’, *National Interest* 1 (1985) 36–47, and ‘Protocol I: Moving Humanitarian Law Backwards’, *Akron Law Review* 19 (1986) 531–5; The Position of the United States on Current Law of War Agreements, Remarks by Abraham Sofaer, Legal Adviser to the Department of State, 22 January 1987, *American University Journal of International Law and Policy* 2 (1987) 468–9. On Feith’s opinions post-9/11, see David Forsythe, *The Politics of Prisoner Abuse: The United States and Enemy Prisoners after 9/11* (Cambridge: Cambridge University Press, 2011) 70.

¹⁸ The OLC acknowledged that the Geneva Conventions applied to the international armed conflict with Iraq. See John Yoo, ‘The Status of Soldiers and Terrorists under the Geneva Conventions’, *Chinese Journal of International Law* 3 (2004) 135–50. On the distinction between ‘enemy’ and ‘foe’, see Chapter 1.

¹⁹ Memo 11, Humane Treatment of al Qaeda and Taliban Detainees, from President George Bush to the Vice-President et al, 7 February 2002, in Greenberg and Dratel (eds), *The Torture Papers*, n 11 above, 134.

There were several aspects of the President's statement and the thinking behind it that were contested. These started with the OLC's assumption, implicit in the above quote, that the state of Afghanistan did not exist. The OLC argued that Afghanistan was in fact a 'failed state', whose territory had been largely overrun and held by violent militia. Accordingly, Afghanistan was like the frontier lands of old. It was 'without the attributes of statehood' and could not therefore 'continue as a party to the Geneva Conventions'. Thus, the Taliban, which might have claimed privileged combatant status as the armed forces of Afghanistan, was 'not entitled to the protections of the Geneva Conventions'.²⁰ Article 4 of the third Geneva Convention also bestows POW status on militia belonging to a party to the conflict if they are commanded by a person responsible for his subordinates, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and conduct their operations in accordance with the laws and customs of war.²¹ Even if the Taliban was not therefore recognized as the regular army of the sovereign Afghan state, its members might still have been entitled to the protections and privileges of international humanitarian law (IHL). Indeed, Marco Sassòli and George Aldrich argued that it was not implausible that the Taliban might reasonably claim POW status, including immunity from prosecution for engaging in hostilities.²² Yet from their perspective the law of armed conflict extended further than this. Even if the Taliban did not meet the Article 4 criteria and did not therefore qualify as combatants in an IAC, they may have been able to claim humanitarian protection, although not the combatant privilege of immunity from prosecution, under the law of NIAC. This liberal view may have rejected the application of the law of NIAC to global counter-terrorism operations against

²⁰ Memo 4, Application of Treaties and Laws, n 15 above, 50; and Memo 7, Memorandum for the President, Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban, from Alberto R Gonzales, 25 January 2002, in Greenberg and Dratel (eds), *The Torture Papers*, n 11 above, 118; and Letter from US Attorney General John Ashcroft to President Bush, Comments on National Security Council Discussion about Taliban Detainees, 1 February 2002 at <<http://www.torturingdemocracy.org>>. For others holding this view, see Michael Newton, 'Unlawful Belligerency', n 4 above, 107–8; Benjamin Wittes, *Law and the Long War: The Future of Justice in the Age of Terror* (New York: Penguin Press, 2008) 41. For additional commentary, see David D Caron, 'If Afghanistan Has Failed, Then Afghanistan is Dead: "Failed States" and the Inappropriate Substitution of Legal Conclusion for Political Description', in Karen J Greenberg (ed), *The Torture Debate in America* (Cambridge: Cambridge University Press, 2006) 214–22.

²¹ Article 43 of Additional Protocol I on the Protection of Victims of International Armed Conflict, 8 June 1977, states that 'the armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by the adverse Party'.

²² For example, Marco Sassòli, 'The Status of Persons Held in Guantánamo under International Humanitarian Law', *Journal of International Criminal Justice* 2 (2004) 102; George H Aldrich, 'The Taliban, Al Qaeda, and the Determination of Illegal Combatants', *American Journal of International Law* 96 (2002) 894–5.

al Qaeda, but there was no problem applying it to territorially bracketed armed conflicts like Afghanistan.

The contestation of the administration's framing of the war in Afghanistan was not limited to academia. It found expression right at the heart of US government. For instance, the chief legal adviser to the State Department, William Taft IV, advised that as a matter of law 'the Conventions do apply'. The President should know, he continued, that a decision to this effect:

is consistent with the plain language of the Conventions and the unvaried practice of the United States in introducing its forces into conflict over fifty years. It is consistent with the advice of DOS lawyers and, as far as is known, the position of every other party to the Conventions. It is consistent with UN Security Council Resolution 1193 affirming that 'All parties to the conflict (in Afghanistan) are bound to comply with their obligations under international humanitarian law and in particular the Geneva Conventions'.²³

Yet Taft also argued, along realist lines, for applying the Conventions as a matter of policy. The decision to apply the Conventions would demonstrate 'that the United States bases its conduct not just on its policy preferences but on its international legal obligations', whereas a 'decision that the Conventions do not apply . . . deprives our troops there of any claim to the protection of the Convention in the event they are captured and weakens the protections accorded by the Conventions to our troops in future conflicts'. A decision to apply the Conventions was, from this perspective, consistent with the norm. A decision not to apply the Conventions, moreover, carried risks that could harm the national interest. There was little to gain from exceptional practice. As far as the State Department was aware 'a decision that the Conventions apply provides the best legal basis for treating the al Qaeda and Taliban detainees in the way we intend to treat them'.²⁴

This position can also be found in a similar warning by Secretary of State Colin Powell. He wrote that the decision not to apply the Conventions:

will reverse over a century of U.S. policy and practice in supporting the Geneva conventions and undermine the protections of the law of war for our troops, both in this specific context and in general. It has a high cost in terms of negative international reaction, with immediate adverse consequences for our conduct of foreign policy. It will undermine public support among critical allies, making military cooperation more difficult to sustain. Europeans and others will likely have legal problems with extradition or other forms of cooperation in law enforcement, including in bringing terrorists to justice. It may provoke some

²³ Memo 10, Comments on Your Paper on the Geneva Convention, from William H Taft IV to Counsel to the President, 2 February 2002, in Greenberg and Dratel (eds), *The Torture Papers*, n 11 above, 129.

²⁴ Memo 10, Comments on Your Paper on the Geneva Convention, n 23 above, 129.

individual foreign prosecutors to investigate and prosecute our officials and troops.²⁵

As noted, the President rejected this kind of advice. The Geneva Conventions would not restrain the way the US dealt with detainees. Those detainees were not privileged combatants, nor were they mere criminals. They were instead ‘unlawful enemy combatants’ in a ‘new kind of war’. Subsequent chapters deal with what this meant for detention and interrogation policy. The focus here remains on how this decision opened up possibilities for prosecuting detainees in military commissions and for crimes that illustrate the re-emergence of a hierarchical form of warfare. The point of this section was to demonstrate that an alternative response, one that saw the US invasion of Afghanistan in very different terms to the administration, was available. It was, moreover, complemented by the State Department’s liberal realist position, which argued that applying the Conventions was consistent with America’s identity and interests.

THE UNLAWFUL COMBATANT

Those who insisted on applying the third Geneva Convention noted that the decision on whether a detainee qualified for privileged combatant (and therefore POW) status had to be made by a ‘competent tribunal’. They protested that the detainees arriving at Guantánamo were denied this hearing and that they were in effect being held on the say-so of the President and Secretary of Defense.²⁶ Another controversial aspect of the administration’s policy, however, was that the detainees could not be granted privileged combatant status

²⁵ Memo 8, Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan, Memorandum to Counsel to the President, Assistant to the President for National Security Affairs, from Colin L Powell, 26 January 2002, in Greenberg and Dratel (eds), *The Torture Papers*, n 11 above, 123.

²⁶ Human Rights Watch, Letter to National Security Adviser, Condoleezza Rice, 31 January 2002 at <<http://www.hrw.org/en/news/2002/01/31/guantanamo-hrw-spearheads-campaign-respect-geneva-conventions>>; Jamie Fellner, ‘US must take the high road with prisoners of war’, *Newsday*, 15 January 2002 at <<http://www.newsday.com/u-s-must-take-the-high-road-with-prisoners-of-war-1.447527>>. The official US response to the Organization of American States on this question was that Article 5 tribunals ‘were not required where, as here, there is no doubt about the status of the detainees’. See ‘Response of the United States to Request for Precautionary Measures—Detainees in Guantánamo Bay, Cuba’, *International Law Materials* 41 (2002) 1027. This rested on the OLC’s opinion that ‘under the Constitution, the Executive has the plenary authority to determine that Afghanistan ceased at relevant times to be an operating State and therefore that members of the Taliban militia were and are not protected by the Geneva Conventions’. Memo 4, Application of Treaties and Laws, n 15 above, 51. Benjamin Wittes argued that the decision not to convene classification tribunals was ‘a thumb in the eye to international expectations’ and a ‘profoundly stupid decision tactically’ because there were few security costs to such a move. Wittes, *Law and the*

(and combatant immunity) because of the way the President had framed the conflict. The detainees were ‘unlawful enemy combatants’ according to the administration not because they were privileged combatants who had committed atrocities against civilians or individuals *hors de combat*. Their unlawful status followed instead from the executive’s decision that they were waging war against American forces without the proper authority to do so. Clearly, the possibility exists that an individual not attached to the armed forces of a party to an international armed conflict might take up arms during hostilities. All agree that if this happens then that individual would be acting illegally. The point that was contested, however, was whether such individuals were unlawful *combatants* to be prosecuted under the laws of war in a military commission, or whether they were unlawful *civilians* to be prosecuted in a regularly constituted domestic court under the national laws of a state that is party to the conflict.

The Bush administration did not invent the ‘unlawful enemy combatant’ label. It argued that this concept was in fact grounded in the laws and customs of war. Central to that argument was the 1942 US Supreme Court case, *Ex Parte Quirin*.²⁷ In this case eight German soldiers challenged their detention and the denial of combatant immunity. They had been arrested as unlawful combatants because they had entered the US in civilian clothes in order to commit acts of sabotage. The Court held that:

By universal agreement and practice, the law of war draws a distinction between . . . lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants . . . are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.²⁸

The appropriateness of this precedent was contested, however, not least within the Judge Advocate General’s Corps (JAG Corps). According to Lieutenant Colonel Mark Maxwell and Major Sean Watts, for instance, the *Quirin* court ‘confused status and culpability by announcing that the law of war “criminalized” the status of unlawful combatants’.²⁹ The laws of war obviously applied to the individuals in *Quirin* because there was no doubt about their enemy combatant status; they were German soldiers in an international armed

Long War, n 20 above, 41. For a general overview, see Waxman, ‘United States Detention Operations’, n 14 above, 6–12.

²⁷ *Ex Parte Quirin*, 317 U.S. 1 (1942) at <<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=317&invol=1>>. For conservative defenders of the administration’s line, see Lee A Casey and David B Rivkin, ‘The Use of Military Commissions in the War on Terror’, *Boston University International Law Journal* 24 (2006) 123–45.

²⁸ Quoted in Newton ‘Unlawful Belligerency’, n 4 above, 94.

²⁹ Mark David ‘Max’ Maxwell and Sean M Watts, ‘“Unlawful Enemy Combatant”: Status, Theory of Culpability, or Neither?’, *Journal of International Criminal Justice* 5 (2007) 24.

conflict. Their crime, however, was not ‘unlawful combatancy’; it was perfidy, i.e. *a combatant feigning civilian status* rather than a civilian taking up arms. The question of the civilian taking up arms in an international armed conflict and fighting as an unprivileged belligerent was different. The drafters of the Geneva Conventions had in fact considered such behaviour and ruled out criminalizing it under the law of war. Being an unlawful combatant was not therefore a war crime, at least according to this view. As R R Baxter noted in his much cited work in this area, the reason the Geneva Conventions did not criminalize civilians taking up arms in international armed conflict was because many states valued the role that civilians had played in the defence of their nation against foreign invaders.³⁰ According to this reading, then, the Geneva Conventions insisted that anyone who is not a privileged combatant is, by definition, a civilian. A civilian may break the law by engaging in hostilities but they do not lose their civilian status when they do so.³¹

To be certain, the Geneva Conventions did not, as Nathaniel Berman puts it, ‘immunize’ civilians taking part in hostilities. Contending parties were free to punish a civilian taking part in hostilities under their own law, but this would be a civilian crime *in war* (e.g. murder) rather than a war crime and it would be prosecuted in a normal court rather than a military commission.³² Given this, opponents of the Bush administration argued that its interpretation of ‘unlawful combatancy’ was merely ‘a legal convenience more than an objective assessment of the existing laws and customs of war’.³³ If the US had in its custody individuals who had engaged in hostilities without authority to do so (either in Afghanistan or elsewhere) then it should, as a matter of law, hand them over to law enforcement agencies. They would, in the former case, ‘be tried by Afghanistan for murder based on the territorial nexus to the offence or the nationality of the accused. Alternatively, based on the victim’s nationality, international law would likely support prosecution by the United States under its domestic law.’³⁴ Indeed, from 2005, US allies participating in

³⁰ R R Baxter, ‘So-called “Unprivileged Belligerency”: Spies, Guerrillas and Saboteurs’, *British Yearbook of International Law* 28 (1951) 323–45. For a longer historical perspective, see Lester Nurick and Roger W Barrett, ‘Legality of Guerrilla forces under the Laws of War’, *American Journal of International Law* 40 (1946) 563–83; see also Geoffrey S Corn, ‘Thinking the Unthinkable: Has the Time Come to Offer Combatant Immunity to Non-State actors?’, *Stanford Law and Policy Review* 22 (2011) 263–8.

³¹ Corn, ‘Thinking the Unthinkable’, n 30 above, 260.

³² Nathaniel Berman, ‘Privileging Combat? Contemporary Conflict and the Legal Construction of War’, *Columbia Journal of Transnational Law* 43 (2004) 14. See also George P Fletcher, ‘On the Crimes Subject to Prosecution in the Military Commissions’, *Journal of International Criminal Justice* 5 (2007) 43–4; Joseph C Hansen, ‘Murder and the Military Commissions: Prohibiting the Executive’s Unauthorized Expansion of Jurisdiction’, *Minnesota Law Review* 93 (2009) 101–31.

³³ Maxwell and Watts, ‘Unlawful Enemy Combatant’, n 29 above, 19.

³⁴ Maxwell and Watts, ‘Unlawful Enemy Combatant’, n 29 above, 19–25; see also Aldrich, ‘The Taliban’, n 22 above, 893, who writes, ‘persons who were not combatants in hostilities . . . may

Operation Enduring Freedom and the International Stabilization Force transferred detainees to the Afghan government within ninety-six hours of their capture.³⁵ According to Matthew Waxman, however, the US did not articulate ‘any clear procedural mandates imposed by the laws of war for sorting out who is or is not a combatant. Instead it has preferred’, Waxman concluded, ‘to maintain flexibility, relying . . . on procedural mechanisms as a matter of policy.’ This included the option of putting prisoners on trial before US military commissions or detaining them for the duration of the conflict.³⁶

A similar interpretation of the legal obligation to transfer civilians that unlawfully engage in conflict to a national criminal setting is offered by Geoffrey Corn and Eric Jensen. These are also JAG lawyers and their argument is worth repeating to demonstrate how the administration’s interpretations of international norms were contested by national security elites. They of course accepted that non-state belligerents cannot qualify for combatant immunity. That is ‘a privilege reserved for state armed forces engaged in international armed conflicts’. But, they added:

this does not result in the conclusion that acting as a belligerent without qualification for combatant immunity is *ipso facto* a war crime. Instead, it simply permits the application of *domestic criminal jurisdiction* to the acts or omissions of the belligerent. In short, the lack of qualification deprives the belligerent of combatant immunity, subjecting him to criminal jurisdiction of the state in which his conduct occurs, which for a warrior could include murder, assault, arson, kidnapping, etc.³⁷

Other JAGs, however, wrote in academic texts to defend the administration’s position. Lieutenant Colonel Michael Newton, for instance, argued that the law of IAC did not codify a dualistic approach whereby violent individuals were either enemy combatants with immunity from prosecution or civilians to

be lawfully prosecuted and punished under national laws for taking part in hostilities and any other crimes, such as murder and assault, that they may have committed’. In this case, liberals would then emphasize the need to hold Afghan authorities to international human rights standards. For concern that detainees transferred to the Afghan National Detention Facility at Pul-i-Charki prison on the outskirts of Kabul was not operating to such standards, see Human Rights First, *Arbitrary Justice: Trials of Bagram and Guantánamo detainees in Afghanistan*, April 2008 at <<http://www.humanrightsfirst.org/wp-content/uploads/pdf/USLS-080409-arbitrary-justice-report.pdf>>.

³⁵ Waxman, ‘United States Detention Operations’, n 14 above, 3.

³⁶ Waxman, ‘United States Detention Operations’, n 14 above, 9. As Afghan government capabilities increased, the US began to hand certain detainees over. The Afghan government decision to prosecute detainees in Afghan courts was represented as ‘a rebuff’ to US officials who reportedly favoured indefinite detention, along the lines the United States has employed in Guantánamo. See Human Rights First, *Arbitrary Justice*, n 34 above, ii.

³⁷ Geoffrey S Corn and Eric T Jensen, ‘Trial and Punishment for Battlefield Misconduct’, in Michael W Lewis et al, *The War on Terror and the Laws of War: A Military Perspective* (Oxford: Oxford University Press, 2009) 178.

be prosecuted under domestic criminal law. Unlawful combatancy had been a war crime before the Geneva Conventions, as demonstrated by the 1942 *Quirin* ruling, and remained so afterward. He quotes, for example, the British delegates negotiating the 1949 Conventions to demonstrate state support for the crime of unlawful belligerency. They noted that ‘the whole conception of the Civilians Convention was the protection of civilian victims of war and not protection of illegitimate bearers of arms who could not expect full protection under rules of war to which they did not conform’. On this basis, Newton concludes that the 1942 position of unlawful combatants as participants in conflict remained unchanged by the 1949 Geneva Conventions.³⁸ This quote certainly illustrates British nervousness about decriminalizing civilians who take up arms, which, as noted, contributed to the argument that states could prosecute such individuals. Yet it is not necessarily the case that these individuals lose their civilian status or that they could be prosecuted in military commissions for war crimes. Nevertheless, Newton concluded that the modern laws of war do ‘not foreclose the *traditional* category of unlawful combatants’.³⁹

Others looked to the 1977 Additional Protocols to support the Bush administration’s interpretation. Benjamin Wittes, for instance, noted that the ‘unlawful combatant’ category existed before Geneva. He accepted that the modern laws of war ‘tended to rub the category *almost* out of existence’.⁴⁰ Yet he argued that the US rejection of Protocol I, because it notionally extended combatant immunity to certain irregular forces, is evidence that the unlawful combatant category and the policy options it enabled remained available. The US response to 9/11 was, he concluded, ‘revitalizing legal doctrines and propositions that had lapsed in practice, yet persisted in law’.⁴¹ Again, the conclusion that unlawful combatancy can be prosecuted as a war crime in a military commission does not necessarily follow Reagan’s rejection of Protocol I. Certainly Reagan was concerned that non-state fighters might be able to claim immunity under Protocol I, but insisting that terrorist activities are criminalized does not mean those offences have to be prosecuted as war crimes in a military commission. Opposition to Protocol I because it implied

³⁸ Newton, ‘Unlawful Belligerency’, n 4 above, 101.

³⁹ Newton, ‘Unlawful Belligerency’, n 4 above, 101, emphasis added. Judge Advocates writing between the end of World War II and the Geneva Conventions did use the term unlawful combatants. See Nurick and Barrett, ‘Legality of Guerrilla Forces’, n 30 above, 569. However, it is clear that they used the term to describe individuals whose combatant status had not been in doubt because they had been fighting for a state. They became unlawful combatants because they continued to fight after the state had surrendered. Nurick and Barrett reinforce Baxter’s claim that because there was resistance among small nations who may be dependent on civilian armies, international law did not apply the term unlawful combatant to civilians who took up arms.

⁴⁰ Wittes, *Law and the Long War*, n 20 above, 39, emphasis added.

⁴¹ Wittes, *Law and the Long War*, n 20 above, 42.

combatant immunity could, from this perspective, simply mean the terrorist suspect was a criminal suspect to be prosecuted in normal courts.

It was by no means obvious, therefore, that the 'unlawful enemy combatant' is a *war* criminal to be prosecuted in a *military* commission. The administration's reading of *Quirin* was rejected by commentators, including JAG lawyers working within the US military. *Quirin*, however, was not the only precedent cited on behalf of the administration's position. John Yoo, for instance, criticized the argument that non-state actors cannot be prosecuted as unlawful combatants. This argument, he noted:

is a mistaken return to the idea that only states wage war. It would be absurd for the law of war to exempt al Qaeda, which has the destructive capabilities of a nation, because it is not a state. *In civil wars, insurgent groups and other actors are held accountable to the rules of civilized warfare.*⁴²

Likewise, Newton finds precedent for criminalizing 'unlawful belligerency' in the American Civil War and Lieber's instruction that 'squads of men' who commit warlike acts:

with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, . . . are not public enemies, and therefore if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.⁴³

These quotes do prove that battlefield inequality, where only one side can lawfully engage in armed conflict and the other side engages in war crimes the moment it takes up arms, has a long history; but at the same time these quotes illustrate how 'unlawful belligerency' as a war crime was attached to the legal hierarchies of territorially bracketed *civil war* or NIAC.

MURDER BY AN UNPRIVILEGED BELLIGERENT

The inequality of the war on terror battlefield was articulated in Section B of the 2003 Military Commission Instruction No. 2, which included 'murder by an unprivileged belligerent'. This stated that:

⁴² John Yoo, *War by Other Means: An Insider's Account of the War on Terror* (New York: Atlantic Monthly Press, 2006) 228, emphasis added.

⁴³ Newton 'Unlawful Belligerency', n 4 above, 92–4. Again, it is noticeable that Lieber does not mention unlawful belligerency and the reference to 'highway robbers' suggests these 'men or squads of men' were to be treated as common criminals and not enemy combatants. In this sense, the quote could be used as precedent for the Geneva framework rather than the Bush administration's attempt to revise it.

[u]nlike the crimes of wilful killing or attacking civilians, in which the victim's status is a prerequisite to criminality, for this offense [murder by unprivileged belligerent] the victim's status is immaterial. *Even an attack on a soldier would be a crime if the attacker did not enjoy 'belligerent privilege' or 'combatant immunity'*.⁴⁴

Those opposing the Bush administration accepted that non-state groups like al Qaeda could not claim immunity from prosecution. Their point, however, was that terrorists should not be prosecuted for war crimes in military commissions as the US was not in a state of armed conflict with al Qaeda (see Chapter 2).⁴⁵ Yet the 2003 Military Commission Instruction accepted as given the idea that members of the Taliban and al Qaeda were unlawful enemy combatants and made possible their prosecution in a military commission for the war crime 'murder by an unprivileged belligerent'.

In 2006 the Supreme Court ruled on the legality of the military commissions.⁴⁶ It found that the law of NIAC, specifically common article 3 of the Geneva Conventions, *did* regulate US conduct as a matter of law. Under that article, detainees can be prosecuted for engaging in hostilities but only in 'a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples'.⁴⁷ The commissions, as they stood, were deemed illegal because they had been created by an executive order rather than an act of Congress. This ruling was notionally a victory for the administration's opponent and the application of the law of NIAC was a relief to those who were concerned about the mistreatment of detainees. The Bush administration could no longer claim that there was no obligation to observe the basic humanitarian standards set out in common article 3. Yet the humanitarian concern was only 'the tip of an analytical iceberg'.⁴⁸ *Hamdan*, according to Corn and Jensen, compelled a reconsideration of the entire basis for applying the law of armed conflict. Indeed, the application of the laws of NIAC to the war on terror was possibly a Pyrrhic victory for liberals.⁴⁹ This is because it tended to confirm the Taliban's status as unlawful enemy

⁴⁴ Military Commission Instruction No. 2, 30 April 2003, n 7 above, 13, emphasis added.

⁴⁵ On the possibility that transnational non-state actors could be granted combatant immunity as a means of incentivizing them to refrain from targeting civilians, in the same way Protocol I held out the possibility of POW status to national liberation movements, see Corn, 'Thinking the Unthinkable', n 30 above. This would be a profound challenge to the role the laws of war play in helping to constitute the society of states.

⁴⁶ *Hamdan v. Rumsfeld*, US Supreme Court, 2006 at <http://www.oyez.org/cases/2000-2009/2005/2005_05_184>.

⁴⁷ Common article 3, Geneva Conventions.

⁴⁸ Corn, 'What Law Applies', n 5 above, 13.

⁴⁹ See Corn and Jensen, 'Trial and Punishment', n 37 above, 164–5; also Michael W Lewis, 'International Myopia: *Hamdan's* Shortcut to Victory', *University of Richmond Law Review* 42 (2007–8) 687; Weiner, 'Hamdan, Terror, War', n 1 above, 1001.

combatants when they may have had claim to prisoner of war status under the law of IAC. More significantly, *Hamdan* risked confirming the view that al Qaeda terrorists (even those beyond the ‘hot’ battlefield) were enemy combatants in an ongoing armed conflict rather than civilians to be treated under a law enforcement model.⁵⁰

The Supreme Court’s finding that the military commissions were illegal under common article 3 nevertheless presented Congress with an opportunity to change policy. However, the Military Commissions Act (MCA) of 2006 did not do that. In fact, it gave President Bush the legal mandate for his preferred policy. Members of the Taliban and al Qaeda were automatically deemed unlawful enemy combatants and ‘murder by an unprivileged belligerent’ was changed to ‘murder in violation of the laws of war’ to bring it in line with the ruling that the law of NIAC applied. This sustained the legal inequality between combatants by insisting that any unlawful combatant ‘who intentionally kills one or more persons, including lawful combatants, in violation of the law of war shall be punished by death or such other punishment as a military commission under this chapter may direct’.⁵¹

An example of this in practice can be found in the charges filed against Abdal-Rahim Hussein Muhammed Abdu al-Nashiri. On 30 June 2008, al-Nashiri was charged with, among other offences, ‘murder in violation of the laws of war’. The original charge sheet reads as follows:

[that as a] person subject to trial by military commission as an alien unlawful enemy combatant, [al-Nashiri] did, *in or around Aden, Yemen, on or about October 12, 2000, while in the context of and associated with armed conflict*, intentionally and unlawfully kill seventeen persons and members of the United States Armed Forces, in violation of the law of war, by causing two men dressed in civilian clothing and operating a civilian vessel laden with explosives and detonating said boat-bomb alongside the United States Ship (U.S.S.) COLE, with said bombing resulting in the deaths of seventeen U.S. sailors.⁵²

The implication of course is that the sailors on the USS *Cole* were authorized to target al-Nashiri had they realized in 2000 that he was a combatant in an armed conflict, but al-Nashiri was not authorized to target US sailors because he was not a privileged combatant. As noted, this kind of legal hierarchy is

⁵⁰ Most liberals had accepted the situation that Afghanistan had ceased being an IAC and was best characterized as an NIAC by the time the Supreme Court ruled in *Hamdan*. The objection was to the application of the law of NIAC to US operations against al Qaeda outside Afghanistan. On the acceptance that NIAC applied inside Afghanistan after a certain date, see Human Rights Watch, *Enduring Freedom*, March 2004; Amnesty International, *US Detentions in Afghanistan: An Aide-Mémoire for Continued Action*, 7 June 2005 at <<http://www.amnesty.org/en/library/asset/AMR51/093/2005/en/524c40a3-d4de-11dd-8a23-d58a49c0d652/amr510932005en.html>>.

⁵¹ Public Law 109-366, Military Commissions Act 2006, §950v(b)(15) at <http://www.loc.gov/rr/frd/Military_Law/pdf/PL-109-366.pdf>.

⁵² The charge sheet is available at <<http://www.defense.gov/news/nashirichargesheet.pdf>>.

normal in situations of NIAC. But from one perspective the law applicable to NIAC is territorially bracketed. Geoffrey Corn for instance argues that ‘during the five-plus decades between 1949 and 2001, the term “non-international” evolved to become synonymous with internal’.⁵³ Corn also expressed concern that the Supreme Court in *Hamdan* had ruled that article 3 was written in ‘contradistinction’ to common article 2 (the law of international armed conflict). This implied that the law of NIAC could apply to everything that was not included in the law of IAC, *including the so-called ‘new war’ against a transnational terrorist network*. According to Corn, however, this possibility never crossed the minds of those drafting Geneva. The law of NIAC was ‘instead developed to respond to the specific problem of *intra-state* armed conflicts’, i.e. conflict that was territorially bracketed.⁵⁴ From this perspective, the legal hierarchy of NIAC may have applied inside Afghanistan once the situation of IAC had ended, but given that there was no state of armed conflict in Yemen in 2000 (which might explain why the US did not target al-Nashiri as an enemy combatant) the US could not prosecute him for war crimes in a military commission. The civilian nature of the attack (e.g. ‘civilian clothing’, ‘civilian vessel’) was because al Qaeda was nothing more than a civilian criminal network; as such al-Nashiri should have been prosecuted in a US federal court.

Although it was contested, the administration’s position had implications for how the war on terror should be characterized. The decision to charge the likes of al-Nashiri with a new war crime (i.e. murder by unprivileged belligerent) demonstrated that the war on terror was indeed ‘a new kind of war’ where the legal hierarchies associated in the minds of many with territorially bracketed civil wars applied extraterritorially.⁵⁵ And if, as O’Connell suggested (see Chapter 2), the administration’s definition of war attached itself ‘to individuals not to situations of armed hostilities, . . . [s]o wherever a suspected member of a terrorist organization is, there is an armed conflict’,⁵⁶ the legal hierarchies associated with the state of civil war could indeed be applied globally. As

⁵³ Corn, ‘What Law Applies’, n 5 above, 8; see also Gabor Rona, who wrote that the war on terror may ‘amount to non-international armed conflict a) if hostilities rise to a certain level and/or are protracted beyond what is known as mere internal disturbances or sporadic riots, b) if parties can be defined and identified, c) if the territorial bounds of the conflict can be identified and defined, and d) if the beginning and end of the conflict can be defined and identified. Absent these defining characteristics of either international or non-international armed conflict, humanitarian law is not applicable’: Gabor Rona, ‘When is a war not a war? The proper role of the law of armed conflict in the “global war on terror”’, 16 March 2004, emphasis added, at <<http://www.icrc.org/eng/resources/documents/misc/5xcmnj.htm>>.

⁵⁴ Corn, ‘What Law Applies’, n 5 above, 19, emphasis added; see also Corn, ‘Thinking the Unthinkable’, n 30 above, 265.

⁵⁵ On the ‘internationalization’ of common article 3. See Corn, ‘What Law Applies’, n 5 above, 11 and 21–2.

⁵⁶ O’Connell, ‘The Legal Case’, n 1 above, 350.

Schmitt may have anticipated, the war convention is potentially changing in response to the globalized partisan. As a social institution 'war' is no longer confined to the interstate and intra-state varieties. It is giving way to what Schmitt called 'global civil war'.

The charge of 'murder in violation of the laws of war' was also contested in the context of the armed conflict against Afghanistan. As noted, liberals were concerned that certain detainees might have been entitled to combatant immunity as POWs in an international armed conflict. This possibility was raised for instance in the trial of Salim Hamdan and the *habeas* hearing of Ghaleb Nasser al-Bihani.⁵⁷ They were also concerned, however, that the crime of murder in violation of the laws of war was being used to prosecute civilians who might otherwise have been tried in civilian courts. Two cases illustrate this point. Omar Khadr and Mohamed Jawad were charged with the respective crimes of murder, and attempted murder, in violation of the laws of war. Both were alleged to have thrown grenades that either killed or seriously injured US soldiers in Afghanistan. In motions to dismiss on grounds that the military commission lacked subject matter jurisdiction, their defence counsels argued that even if their clients were guilty of the allegations (and the facts of the cases were disputed), they could not be guilty of a *war* crime triable in a military commission.

These arguments, which were made before a military commission in 2007 and 2008, did force government concessions. The prosecution appeared to accept, for instance, that the mere *status* of being an unlawful combatant was not enough for an individual to be found guilty of a war crime. Government lawyers also argued that when Khadr and Jawad threw the grenades at US soldiers, they were guilty of 'perfidy' or 'treacherous killing', and there was no doubt that these crimes are recognized as war crimes in the modern laws of war. Article 504g of the Army Field Manual, for instance, listed 'use of civilian

⁵⁷ Part of the evidence against bin Laden's driver, Salim Hamdan, was that he was in possession of SA7 missiles at the time of his arrest. His defence team argued that this did not prove criminality because those missiles were to be used by the 'Ansars' or 55th Brigade, a conventional al Qaeda field army made up of privileged enemy combatants. While this argument had little impact on the verdict, it did demonstrate a willingness to see hostilities in conventional terms. See the account of the trial by the defence witness Brian Glyn Williams in *Social Science in War: Defending Hamdan*, on file with author. Likewise, Ghaleb Nasser al-Bihani, a cook for the 55th Brigade, has argued that the conflict in which he was detained was an international war between the United States and Taliban-controlled Afghanistan, and that he should have been accorded prisoner of war status. That conflict, he further claimed, officially ended when the Taliban lost control of the Afghan government and at that point he should have been repatriated under article 118 of the Third Geneva Convention. The Court of Appeals, however, rejected al-Bihani's argument arguing it was not clear if al-Bihani was captured in the conflict with the Taliban or with al Qaeda and it was not clear that these wars were over: *Ghaleb Nasser Al-Bihani v. Barack Obama*, US District Court of Appeals, No 09-5051, 5 January 2010 at <<http://caselaw.findlaw.com/us-dc-circuit/1496515.html>>.

clothing by troops to conceal their military character during battle' as a war crime.⁵⁸ Yet Jawad's defence team also argued that this was irrelevant in this particular case. They argued that:

this example makes clear that it is not merely the lack of uniform that converts an ordinary crime into a war crime, rather it is *disguising* oneself as a civilian, or *feigning being a civilian by otherwise lawful combatants—military troops*—that is a law of war violation, namely perfidy. Appearing out of uniform because you are a civilian and possess no uniform, or for purposes other than concealing one's military character, is not a violation of the law of war.⁵⁹

Thus, Jawad's defence team argued that in *Quirin* there was no doubt that the accused German soldiers were enemy combatants that had feigned civilian status by abandoning their uniforms. In contrast, Jawad was not behind enemy lines, he was where he was entitled to be in Afghanistan. He did not attack a civilian target, he threw a grenade at US military forces; and he had not feigned civilian status by abandoning his uniform because he did not have a uniform to discard. On this basis, the defence argued, Jawad should not have been charged with murder in violation of the laws of war, perfidy or any other war crime, and the use of a military commission to hear his case was inappropriate. Jawad was ultimately released and returned to his native Afghanistan in August 2009 after a military tribunal ruled that his confession was inadmissible and a federal district court ordered his release. However, in October 2010, Omar Khadr pleaded guilty to all charges against him and was given an eight-year sentence. He would serve one more year in Guantánamo before returning to Canada.⁶⁰ The broader point is that by convicting Khadr, the military commission system under Obama continued the approach developed by his predecessor.⁶¹

⁵⁸ This is recognized as a war crime in international armed conflict by Article 8(2)(b)(xi) of the Rome Statute, 'killing or wounding treacherously individuals belonging to the hostile nation or army', and in non-international armed conflict by Article 8(2)(e)(ix) 'killing or wounding treacherously a combatant adversary'.

⁵⁹ *United States v. Jawad*. Defense Reply to Government Response to D-007 Motion to Dismiss, 6 June 2008, 3, emphasis added, at <<http://www.defense.gov/news/commissions/jawad.html>>.

⁶⁰ 'Omar Ahmed Khadr', Human Rights First at <<http://www.humanrightsfirst.org/our-work/law-and-security/military-commissions/cases/omar-ahmed-khadr/>>. As well as murder in violation of the laws of war and attempted murder in violation of the laws of war, Khadr was convicted of providing material support for terrorism and spying.

⁶¹ Section 950 of the MCA 2009 defines murder in violation of the laws of war along similar lines to the original crime of murder by an unprivileged belligerent. It states that '[a]ny person subject to this chapter who intentionally kills one or more persons, *including privileged belligerents*, in violation of the law of war shall be punished by death or such other punishment as a military commission under this chapter may direct'.

MILITARY COMMISSIONS

There was a sense among some commentators therefore that the Bush administration's interpretation of 'armed conflict' and 'unlawful enemy combatant' was, to repeat Maxwell and Watts, 'a legal convenience more than an objective assessment of the existing laws and customs of war'.⁶² This begs the question: to what end? Answering this question reveals the hybrid nature of the war on terror. The operations against al Qaeda and the invasion of Afghanistan were not wars fought to assist law enforcement agencies in their task of bringing terrorists to justice through the normal criminal process. They were fought as means of preventing future terrorist attacks. The cry for 'justice', however, meant that this emphasis on prevention was insufficient. It was not enough simply to detain the enemy for the duration of the conflict. He had to be prosecuted in a way that demonstrated his guilt. This posed a problem for security officials whose priority was to prevent another attack. There was, after all, a risk that the trial of a detainee might result in an acquittal; and if the detainee was released by a court, then there was a risk that he would return to the battlefield.⁶³ This risk increased, they argued, if the detainee was put on trial in a federal court.

Indeed, the only federal court case directly relating to the attacks on 9/11 was often cited by supporters of the Bush administration to illustrate 'why the civilian criminal justice system is inadequate to the task of fighting al Qaeda'.⁶⁴ Zacarias Moussaoui was in fact convicted by a federal court in May 2006 for his role in 9/11 and committed to life imprisonment. But for John Yoo the trial can be understood as a victory for al Qaeda. This is because Moussaoui used the openness of the trial to engage in a form of lawfare. It was an opportunity, in other words, to make his political point. In addition, he exploited the rules of evidence and procedure to cause delay and reduce his sentence. Respecting his rights under the US constitution, Yoo explains, required access to other 'enemy combatants' as witnesses, and when the government refused to produce those

⁶² Maxwell and Watts, 'Unlawful Enemy Combatant', n 29 above, 19.

⁶³ On the risks associated with civilian trials of terrorists, see Ruth Wedgwood, 'The case for military tribunals', *Wall Street Journal*, 3 December 2001; and 'Al Qaeda, Terrorism and Military Commissions', *American Journal of International Law* 96 (2002) 328–37. For evidence of detainees being released to return to the 'battlefield', see Wittes, *Law and the Long War*, n 20 above, 167. One former detainee, Abdullah Mehsud, became a Taliban leader in Pakistan until his death in 2007. Griff Witte, 'Taliban leader once held by US dies in Pakistan raid', *Washington Post*, 25 July 2007, A1. In January 2009, on the eve of Obama's inauguration, the Pentagon reported that 61 former Guantánamo detainees had returned to terrorist activities. David Morgan, '61 ex-Guantánamo inmates return to terrorism', 13 January 2009 at <www.reuters.com/article/idUSTRE50C5JX20090113>.

⁶⁴ Yoo, *War by Other Means*, n 42 above, 210. Wittes describes it as 'a circus of a trial' that demonstrated civilian courts were not up to the task: *Law and the Long War*, n 20 above, 156.

witnesses, the judge ruled out the death penalty.⁶⁵ In fact, Yoo paints the picture of Moussaoui holding the government to ransom. It was only when Moussaoui ultimately pleaded guilty that the government was relieved of 'its quandary between protecting national security secrets and prosecution'.⁶⁶ Yoo concluded that the US must find a better way of securing justice while protecting national security. Were the Justice Department to 'do it all over again', he writes, 'they certainly would have sent Moussaoui to a military commission'.⁶⁷ This is because the military commission can use more flexible rules of evidence and these increase the chances of conviction. Moreover, because they are staffed by military personnel, they are (supposedly) less likely to leak sensitive information in ways that threaten security. An additional benefit for Yoo is that the military commission is more secure.⁶⁸

The risk of acquittal, therefore, was an important driver of the Bush administration's position. The crime of providing support for terrorism and the act of opposing US forces was therefore written up as a war crime and military commissions were created to prosecute such crimes. From this perspective, therefore, the task of the military commission was to remove the unlawful enemy combatant from the battlefield and if there was one per cent chance (to paraphrase Cheney on WMD) that the rules of evidence and procedure would deliver an acquittal then the rules had to be changed. Indeed, this was the argument the President used to create the military commission system in his Military Order of 13 November 2001. The US could not risk applying the higher standards of justice to individuals the Secretary of Defense would deem unlawful enemy combatants:

⁶⁵ A similar example involves the case of Mounir el Mottasadeq. He was accused of being part of the 'Hamburg cell', an al Qaeda group that assisted the 9/11 attackers. In February 2003, he was convicted of over 3,000 counts of accessory to murder by a German civilian court. The conviction was overturned on appeal after the US government refused a German Justice Ministry request to allow Ramzi Binalshibh to testify. Binalshibh had been classified an enemy combatant and was being held at Guantánamo. Richard Bernstein, 'Germans free Moroccan convicted of a 9/11 role', *New York Times*, 8 April 2004 at <<http://www.nytimes.com/2004/04/08/world/germans-free-moroccan-convicted-of-a-9-11-role.html?ref=mounirelmotassadeq>>. In January 2007, however, he was rearrested after the court found that there was sufficient evidence that he knew of the plot to hijack the 9/11 planes even if there was doubt about whether he knew of the attack on the World Trade Center and the Pentagon. He was eventually convicted of 246 counts of murder. Mark Sandler, '9/11 associate is sentenced to 15 years in Germany', *New York Times*, 9 January 2007 at <<http://www.nytimes.com/2007/01/09/world/europe/09germany.html?ref=mounirelmotassadeq>>.

⁶⁶ Yoo, *War by Other Means*, n 42 above, 213.

⁶⁷ Yoo, *War by Other Means*, n 42 above, 217. Wittes also suggests the government 'locked out' because Moussaoui was a 'nutcase'. In addition, he notes how the dissatisfaction with the 1990s trial of World Trade Center bomber Sheikh Omar Abdel Rahman contributed to the lead prosecutor in that case advocating the creation of National Security Courts. Wittes, *Law and the Long War*, n 20 above, 170-1.

⁶⁸ Yoo, *War by Other Means*, n 42 above, 219.

Given the danger to the safety of the United States and the nature of international terrorism . . . I find . . . that it is not practicable to apply in military commissions under this order the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts.⁶⁹

In addition to the dangers of physical attack and acquittal, supporters of the military commission system articulated another risk to prosecuting terrorists in federal courts. This involved the impact such trials would have on the rules that guaranteed the American civil liberties. In many ways, proponents of military commissions recognized that some sort of trade-off between security and liberty was inevitable. They did, however, try to protect *American* security by trading it off against *non-American* (or alien) liberty. This was done by limiting the parallel system of military justice to non-Americans. Indeed, John Yoo recognized this as an important task of the military commission. ‘Thoughtful civil libertarians’, he writes:

ought to welcome military commissions. . . . The main worry ought to be that compromises that favor national security will permanently affect our domestic criminal law in times of peace. Military commissions in fact have a civil libertarian function, by confining the more flexible rules for national security cases so they will not seep over to civilian cases. Trying enemy combatants in civilian courts could have the opposite effect, particularly in periods after a major enemy assault like 9/11.⁷⁰

A similar position was held by Senator Lindsey Graham (R-SC). As a former JAG he became a congressional leader in this area.⁷¹ Asked by a British journalist why the US was reluctant to follow the practice of their allies and use civilian courts to prosecute terrorist suspects he responded by noting the pressure that European criminal justice systems were under as they tried to navigate the security versus liberty dilemma. The pressure for preventative action is so intense in terrorist cases that it is, according to Graham, distorting the norms and procedures that protect European liberties. ‘Americans should not have this dilemma’, he stated, ‘because we’re at war with al Qaeda.’⁷² The implication is that the rules that protect American citizens from an abusive state can remain untouched if non-American terrorist suspects are dealt with under the laws of war. Indeed, the 2006 MCA held that military commissions

⁶⁹ President George W Bush, ‘Military Order—Detention’, n 3 above.

⁷⁰ Yoo, *War by Other Means*, n 42 above, 219.

⁷¹ On Graham’s role and the political back channel he had to President Obama through his Chief of Staff Rahm Emanuel, see Daniel Klaidman, *Kill or Capture: The War on Terror and the Soul of the Obama Presidency* (Boston and New York: Houghton Mifflin Harcourt, 2012) 152–4.

⁷² Senator Lindsey Graham’s response to Peter Marshall in ‘US dilemma over how to deal with terrorist suspects’, *Newsnight*, 16 February 2010 at <<http://news.bbc.co.uk/1/hi/programmes/newsnight/8518212.stm>>, accessed 4 August 2010.

were to be used only to prosecute *alien* unlawful enemy combatants.⁷³ To the extent this argument is about the defence of liberty, it might well be described as liberal, and Schmittians might cite it as evidence of the exclusionary hierarchies of liberal wars. From the internationalist perspective of the republican liberal, however, this conclusion is flawed because it ignores the body of international human rights law that does not discriminate on the basis of nationality.⁷⁴

OBAMA'S WAR ON TERROR

In his executive order of 22 January 2009, just as the 9/11 co-conspirators were about to face trial, President Obama suspended the military commission process. He also promised to close the Guantánamo detention facility within a year.⁷⁵ The question of what to do with the remaining detainees would be answered by an interagency task force. This would review each case to 'identify lawful options for the disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations'.⁷⁶ To do this, it would consider 'the threat posed by the detainee, the reliability of the underlying information and the interests of national security'.⁷⁷ After delays that set back the President's timetable, the task force reported its findings on

⁷³ Section 948b(a), Public Law 109-366 Military Commissions Act of 2006, 17 October 2006 at <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_public_laws&docid=f:publ366.109.pdf>. For a defence of this unstated communitarianism, see Wittes, *Law and the Long War*, n 20 above, 178–82. The practice of using federal courts to prosecute unlawful American enemy combatants is consistent with this view. John Walker Lindh, for instance, was captured on the Afghan battlefield but convicted of ten criminal offences by a federal grand jury, including conspiracy to murder Americans. In August 2007, Jose Padilla was convicted of providing material support to terrorists by a civilian court in Miami. Admittedly, the Bush administration had tried to deny Padilla's right to appeal his detention on the grounds that he was an enemy combatant but this argument had been rejected by the Supreme Court. This was also the case with Yaser Esam Hamdi who was eventually released to Saudi Arabia on the condition he renounce his American citizenship.

⁷⁴ See Article 14 of the United Nations International Covenant on Civil and Political Rights at <www.hrweb.org/legal/cpr.html>; Helen Duffy *The 'War on Terror' and the Framework of International Law* (Cambridge: Cambridge University Press, 2005) 316–20.

⁷⁵ On the difficulties this caused the families of the 9/11 victims, see Debra Burlingame 'The president isn't sincere about "swift and certain" justice for terrorists', *Wall Street Journal*, 8 May 2009 at <<http://online.wsj.com/article/SB124174154190098941.html>>.

⁷⁶ Executive Order 13492, Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities, 22 January 2009 at <<http://www.fas.org/irp/offdocs/eo/eo-13492.pdf>>.

⁷⁷ Final Report of the Guantánamo Review Task Force, 22 January 2010, i, at <<http://www.fas.org/irp/eprint/gtmo-review.pdf>>.

22 January 2010.⁷⁸ Of the 242 cases reviewed, 126 were approved for transfer and at the time of the report 44 detainees had already been transferred outside the United States.⁷⁹ Forty-eight detainees were considered too dangerous to release from US custody. These could not be put on trial, however, because the cases against them were ‘not feasible for prosecution’. Like the Bush administration before it, and contrary to the claim President Obama had ended ‘the war on terror’ by promising to close the Guantánamo detention facility, the new administration cited the September 2001 AUMF as grounds for keeping these detainees in ‘prolonged detention’.⁸⁰ A third category made up of Yemeni detainees was designated for ‘conditional’ detention. This was a response to particular concerns regarding al Qaeda activity in Yemen following the 2009 Christmas Day attack (see below).⁸¹ Finally, the task force referred forty-four detainees for prosecution. Within this group were five detainees slated for transfer to the federal court system.⁸² Others, like Omar Khadr, were to be tried by a military commission.

The political difficulties involved in closing Guantánamo Bay are discussed in the following chapter. The purpose of the remaining section of this chapter is to examine the reasons for the continued use of military commissions. The first question to answer is why the task force decided that the 9/11 co-conspirators, which included the plot’s alleged mastermind Khaled Sheikh Mohammed, could be prosecuted in a federal court when it had also referred other cases to trial by military commission. The Attorney General Eric Holder noted in his November 2009 statement that the decision had been based on a two-page protocol that the Departments of Justice and Defense had developed.⁸³ That protocol stated that the interagency task force had operated with the presumption that all cases would be referred to an Article III

⁷⁸ The review was meant to have been completed by the end of July 2009. The task force could only issue an interim finding at that point and extend its work by six months. Peter Finn, ‘Reports on US detention policy will be delayed’, *Washington Post*, 21 July 2009 at <<http://www.washingtonpost.com/wp-dyn/content/article/2009/07/20/AR2009072003578.html>>.

⁷⁹ Final Report of the Guantánamo Review Task Force, n 77 above, i.

⁸⁰ Barack Obama, Remarks at the National Archives, 21 May 2009 at <http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09>. For an example of the overreaction to the President’s inauguration and Executive Order closing Guantánamo Bay, see Dana Priest, ‘Bush’s “war” on terror comes to a sudden end’, *Washington Post*, 23 January 2009, A01.

⁸¹ Peter Baker, ‘Obama says al Qaeda in Yemen planned bombing plot and he vows retribution’, *New York Times*, 2 January 2010 at <<http://www.nytimes.com/2010/01/03/us/politics/03address.html>>.

⁸² Department of Justice, Attorney General Announces Forum Decisions for Guantánamo Detainees, 13 November 2009 at <<http://www.justice.gov/ag/speeches/2009/ag-speech-091113.html>>, accessed 12 August 2010. In addition to the 9/11 co-conspirators, Ahmed Ghailani was transferred to the Southern District of New York to be tried for his alleged role in the 1998 East African embassy bombings.

⁸³ Departments of Defense and Justice, Determination of Guantánamo cases referred for prosecution at <<http://www.justice.gov/opa/documents/ta-ba-prel-rpt-dptf-072009.pdf>>.

(i.e. federal) court. However, where ‘other compelling factors’ existed a case could be made for prosecution in a reformed military commission. These factors included what was called ‘strength of interest’, which was defined as:

the nature of the offenses to be charged . . . the nature and gravity of the conduct underlying the offenses; the identity of victims of the offense; the location in which the offenses occurred; the location and context in which the individual was apprehended; and the manner in which the case was investigated and evidence gathered, including the investigating entities.⁸⁴

The new administration was not therefore abolishing military commissions but it was seemingly identifying objective criteria that might limit their use and bracket the battlefield. Presumably, by this standard, 9/11 *was not considered an act of war* and Sheikh Mohammed’s case was deemed to fall outside the jurisdiction of a military commission. The new administration, it appeared, saw him as a civilian who had conspired to murder other civilians outside a conventionally recognized war zone and should therefore be tried in a federal court.

On this basis, one might argue that the Obama administration was standing the US down from the war on terror. This conclusion must be qualified, however. As noted, the crime murder in violation of the laws of war remained available to prosecutors and, in January 2011, Defense Secretary Robert Gates announced a new round of such cases would go forward, including that of al-Nashiri.⁸⁵ Despite questions within the administration ‘as to whether material support for terrorism or terrorist groups is a traditional violation of the law of war’, moreover, they too remained in the 2009 Military Commissions Act.⁸⁶ Liberals thus continued to express concern that too much weight was being given to the preventative strategies that characterized the Bush administration’s approach. The July 2009 Protocol, for instance, stated that ‘efficiency’ was a factor that made the trial by military commission appropriate. This included ‘legal and evidentiary problems that might attend prosecution in the other jurisdiction [i.e. federal courts]’. The concern among liberals was that the rules guaranteeing a fair trial in a federal court might still be regarded a hindrance to the objective of removing the unlawful enemy combatant from the battlefield. Indeed, they

⁸⁴ Departments of Defense and Justice, Determination of Guantánamo cases, n 83 above.

⁸⁵ Charlie Savage, ‘US prepares to lift ban on Guantánamo cases’, *New York Times*, 19 January 2011 at <<http://www.nytimes.com/2011/01/20/us/20trials.html>>.

⁸⁶ Assistant Attorney General David Kris before the Senate Judiciary Subcommittee on Terrorism and Homeland Security, 28 July 2009 at <http://judiciary.senate.gov/hearings/testimony.cfm?id=4002&wit_id=8156>. Kris in fact warned that there is ‘a significant likelihood that appellate courts will ultimately conclude that material support for terrorism is not a traditional law of war offense, thereby threatening to reverse hard-won convictions and leading to questions about the system’s legitimacy’. See also Deborah Pearlstein, Statement before the Senate Judiciary Subcommittee, 28 July 2009 at <http://judiciary.senate.gov/hearings/testimony.cfm?id=4002&wit_id=8159>.

warned that Obama's commissions would 'function, in perception or reality, as a second-class form of justice for cases involving evidence insufficient to prevail in prosecution in a traditional Article III [i.e. federal court] setting'.⁸⁷

There is another reason for concluding that the original conception of the war on terror survived the change of administration. Even when Obama started on a liberal course he had to reverse himself following a powerful political backlash. The opposition to the decision to transfer Sheikh Mohammed to a federal court illustrates this. It was so strong that the new administration ultimately returned him to the military commission system. The administration's opponents argued that a trial such as this in the heart of New York City, or any urban centre, would expose America to an unnecessary security threat; an argument that was strengthened when New York City Mayor Bloomberg withdrew his support for the trial citing the increased security costs.⁸⁸ Others argued that Mohammed should simply remain in detention. For instance, Benjamin Wittes and Jack Goldsmith suggested that 'instead of expending great energy on a battle over the proper forum for an unnecessary trial of Mohammed and his associates' the administration 'would do well instead to define the contours of the detention system that will, for some time to come, continue to do the heavy lifting in incapacitating terrorists'.⁸⁹

In fact, Sheikh Mohammed's fate was linked to those detainees already in 'prolonged detention'. Congress made clear it would not allow the administration to close Guantánamo Bay by transferring these detainees to the American mainland. Reports in the spring of 2010, however, suggested that the White House would be willing to prosecute Sheikh Mohammed in a military commission in return for congressional support on the transfer of detainees to a new detention facility in Illinois.⁹⁰ Yet Congress was in no mood for such a

⁸⁷ Pearlstein, Statement before Senate Judiciary Subcommittee, n 86 above.

⁸⁸ The opposition was led by the political advocacy group Keep America Safe, whose founding members included Debra Burlingame, sister of the pilot Charles Burlingame, who was killed when the hijackers flew his plane into the Pentagon, Elizabeth Cheney, daughter of the former Vice-President, and William Kristol, conservative pundit and son of neoconservative Irving Kristol. See Jane Mayer, 'The Trial: Eric Holder and the battle over Khalid Sheikh Mohammed', *The New Yorker*, 15 February 2010 at <http://www.newyorker.com/reporting/2010/02/15/100215fa_fact_mayer>; Frank Wolf, 'Keeping Khalid Sheikh Mohammed Out of Civilian Courts' at <www.humanevents.com/article.php?id=35499>; Peter Finn, Carrie Johnson and Anne E Kornblut, 'Trial of alleged Sept. 11 conspirators probably won't be held in Lower Manhattan', *Washington Post*, 30 January 2010. On the contest within the administration between Attorney General Holder, who strongly supported a civilian trial, and Chief of Staff Rahm Emanuel, who was conscious of the President's broader political agenda and the need to maintain congressional support, see Klaidman, *Kill or Capture*, n 71 above, 145–72.

⁸⁹ Benjamin Wittes and Jack L Goldsmith, 'The best trial option for KSM: nothing', *Washington Post*, 19 March 2010 at <<http://www.washingtonpost.com/wp-dyn/content/article/2010/03/17/AR2010031702844.html>>.

⁹⁰ Jonathan Weisman and Evan Perez, 'Deal near on Gitmo, trials for detainees', *Wall Street Journal*, 19 March 2010 at <<http://online.wsj.com/article/SB100014240527487035232045751-30063862554420.html>>.

deal. In fact, it forced the administration to reverse its decision on the trial venues without conceding its position on the detention facility at Guantánamo. In January 2011 it denied the administration funds for transferring detainees to civilian trials and the administration announced that Sheikh Mohammed would be tried in a military commission three months later. For conservatives, including Chairman of the House Homeland Committee, Representative Peter King (R-NY), the decision was ‘a vindication of President Bush’s detention policies’.⁹¹

There is therefore further evidence that continuity exists between the Bush and Obama administrations. It would be inaccurate, however, to imply that the liberal agenda was completely defeated. The Obama administration managed to stick to the liberal preference for Article III courts, especially in relation to terrorist incidents that took place under its watch. On Christmas Day 2009, for instance, Umar Farouk Abdulmuttallab attempted to blow up Northwest Airline 253 as it flew over Detroit. When the plane landed at Wayne County Airport, Abdulmuttallab, who is a Nigerian citizen, was arrested and treated for his injuries, which were caused by the bomb that he had hidden in his underwear. He was also ‘Mirandized’ (read his right to silence) in preparation for trial in a civilian court. However, the designation of Abdulmuttallab as a criminal suspect rather than unlawful enemy combatant was criticized when an al Qaeda cell in Yemen claimed responsibility for the attack.⁹²

Concerned that Abdulmuttallab would exercise his right to remain silent and thereby deny the US a valuable intelligence gathering opportunity in an ongoing war, former CIA Director Michael Hayden openly attacked the government’s handling of the incident.⁹³ Even President Obama’s Director of National Intelligence, Dennis Blair, suggested it may have been better to have classified Abdulmuttallab an unlawful enemy combatant.⁹⁴ This would have meant the US could have detained him without charge and without the right to

⁹¹ Peter Finn and Anne E Kornblut, ‘Obama decries curbs on trying detainees in U.S.’, *Washington Post*, 7 January 2011 at <<http://www.washingtonpost.com/wp-dyn/content/article/2011/01/07/AR2011010706144.html>>; Peter Finn, ‘Khalid Sheik Mohammed to be tried by military commission’, *Washington Post*, 4 April 2011 at <http://www.washingtonpost.com/world/khalid_sheik_mohammed_to_be_tried_by_military_commission_officials_say/2011/04/04/AFhLS8c_story.html>.

⁹² Klaidman, *Kill or Capture*, n 71 above, 173–4.

⁹³ Michael Hayden, ‘Obama administration takes several wrong paths in dealing with terrorism’, *Washington Post*, 31 January 2010 at <<http://www.washingtonpost.com/wp-dyn/content/article/2010/01/29/AR2010012903954.html>>. Hayden was director of the CIA 2006–9.

⁹⁴ Dennis C Blair, Statement to the Senate Committee on Homeland Security and Governmental Affairs, 20 January 2010 at <<http://www.hsgac.senate.gov/download/2010-01-20-blair-leiter-testimony>>. This view is contrary to that voiced by Obama’s counterterrorism aide on the National Security Council, John Brennan, who noted that the terrorist suspects had provided useful intelligence even after the Miranda warning had been issued. Karen DeYoung, ‘Obama aide defends trial for suspect in Christmas Day attempt to bomb plane’, *Washington Post*, 4 January 2010 at <<http://www.washingtonpost.com/wp-dyn/content/article/2010/01/03/AR2010010302191.html?hpid=topnews>>.

silence for as long as he was a useful source of intelligence. While that would have precluded future trial in a federal court, justice could still be done, it was argued, through a military commission. Despite this kind of criticism, the Department of Justice (DoJ) stood by its decision and used federal courts to prosecute other al Qaeda linked terrorist incidents.⁹⁵

This kind of evidence suggests the Obama administration was committed to a counter-terrorism strategy based on a law enforcement approach. As Klaidman notes, by sticking to this position Obama was accused of ‘criminalizing’ the war on terror; an interesting reversal of the argument that the Bush administration was ‘securitizing’ a law enforcement issue. In doing so, the administration, in particular the Attorney General Eric Holder, exposed the President to political attack and this put at risk its wider political agenda, such as health care reform.⁹⁶ Yet, as Klaidman notes, the Abdulmuttallab case was not the only case where it overcame this political resistance. The decision to transfer Ahmed Abdulkadir Warsame, a Somali who was accused of acting as a conduit between al Qaeda on the Arabian peninsula and Somalia, to a federal court for trial was marked down as a success for liberals. This might represent a sense in which the exceptional insecurity that led to the use of military commissions did not entirely dominate US decision making under Obama. For Klaidman the decision reflected the political confidence of the Obama administration following the operation against bin Laden.⁹⁷ The broader point, however, is that the country remained divided on this question, which in many respects remains a political litmus test for whether a politician is ‘hard’ or ‘soft’ on terrorism.⁹⁸

⁹⁵ Despite reported links to Islamist terrorist training camps in the Waziristan region of Pakistan, Faisal Shahzad was Mirandized and charged with civilian crimes for his attempt to explode a car bomb in Times Square, New York on 1 May 2010. Benjamin Weiser and Colin Moynihan, ‘Guilty plea in Times Square bomb plot’, *New York Times*, 21 June 2010. Shahzad was sentenced to life imprisonment on 5 October 2010. See also the decision to transfer senior Hezbollah military commander Ali Mussa Daquduq from Iraqi custody and put him on trial in a US federal court for the 2007 kidnapping and murder of five US soldiers in Karbala, Iraq. This move was opposed by Republican Senators on the Judiciary Committee. See Senator Patrick L Leahy et al, Letter to Attorney General Eric Holder, 16 May 2011 at <<http://www.longwarjournal.org/threat-matrix/images/Daquduq-Senate-Letter-LWJ.pdf>>. This opposition was informed by the federal courts trial of Ahmed Ghailani, the first Guantánamo detainee to be tried in a US federal court under the Obama administration. He was sentenced in January 2011 to life imprisonment for his part in the 1998 East African Embassy bombings. Despite the conviction, which was for conspiracy to destroy government buildings, he was acquitted on 284 other counts of murder and conspiracy. Those opposing the closure of Guantánamo argued the trial further exposed the risk of acquittal in civilian courts. For instance, Republican Congressman Peter King (R-NY) stated that the sentence reflected ‘the absolute insanity of the Obama administration’s decision to try al-Qaeda terrorists in civilian courts’. BBC, ‘Ahmed Ghailani sentence: the future of Guantánamo’, 25 January 2011 at <<http://www.bbc.co.uk/news/world-us-canada-12282218>>.

⁹⁶ Klaidman, *Kill or Capture*, n 71 above, 162, 248.

⁹⁷ Klaidman, *Kill or Capture*, n 71 above, 249–59.

⁹⁸ The division is reflected in these two opinion pieces: ‘Obama administration is right to prosecute alleged Detroit bomber in U.S. court’, *Washington Post*, 31 December 2009, and ‘The

CONCLUSION

In many respects, the Bush administration's post-9/11 prosecution policy exemplifies the Schmittian argument. It insisted that al Qaeda be treated as enemy combatants rather than criminal suspects because of their political agenda and material capacity. It then excluded them from the protections and privileges of the laws of war, effectively treating them as foes rather than enemies. Instead of waging a conventional war based on 'battlefield equality', the Bush administration framed the war on terror as 'a new kind of war' that criminalized the enemy's status as well as its actions. This policy programme stemmed from the hybrid nature of the war on terror. The emphasis on bringing terrorists to justice was mediated by a security imperative to prevent another terrorist attack. Conversely, the emphasis on preventing another terrorist attack was mediated by an imperative to bring terrorists to justice. Detainees could remain in detention for the duration of hostilities under the war paradigm but this implied there was no guilt attached to their actions. The normal processes of establishing guilt in a federal court, however, posed the risk of acquittal that was intolerable to the preventive strategies of realists. By framing the detainees as 'unlawful enemy combatants' and by prosecuting them in military commissions, the administration was able to resolve this dilemma. Before concluding that this reveals an exclusionary and hierarchical character of American liberalism, it is necessary to assess the strength of the opposition to this policy programme and the arguments that, as a matter of principle and national interest, the use of military commissions was not in the US interest. The evidence presented here demonstrates that such arguments were not insignificant, particularly after the election of President Obama and the lobbying of Attorney General Eric Holder. They did in fact occupy significant positions in the national security bureaucracy. This was not always successful, as is evidenced by the reversal of the decision to prosecute Khaled Sheikh Mohammed in a federal court and the continued use of military commissions. But, in other instances, the Obama administration has successfully implemented a preference for treating terrorists as criminals rather than enemies or foes.

Ramzi Yousef standard: the administration has ways of making terrorists not talk', *Wall Street Journal*, 6 January 2010.

Detaining Terrorist Suspects after 9/11

Detainees began arriving at the Guantánamo Bay detention facility in January 2002. A total of 779 different persons have been detained since then. The various camps were at their most crowded in May 2003. A total of 680 detainees were being held at that time. From that point on the number began to fall. The interagency task force set up by President Obama in January 2009 reviewed 242 cases and, as the previous chapter noted, it recommended the release, transfer or trial of the majority of these. However, some forty-eight detainees were put in the category of ‘prolonged detention’.¹ An additional thirty Yemeni detainees were placed in the category of ‘conditional detention’. This was because the administration lacked confidence in Yemen’s ability to prevent them returning to terrorist activity.² On the tenth anniversary of the camps, 171 detainees remained at Guantánamo. This included eighty-nine detainees whose transfer had been approved.³ The legal basis for prolonged detention remained the Authorization for Use of Military Force (AUMF), which was passed on 18 September 2001 (see Chapter 2).⁴ The US under the Obama administration, in other words, was still in an armed conflict with al Qaeda and the government would still draw on the laws of war as the basis for detaining individuals linked to al Qaeda.⁵

¹ Final Report of the Guantánamo Review Task Force, 22 January 2010, i at <<http://www.fas.org/irp/eprint/gtmo-review.pdf>>.

² Final Report of the Guantánamo Review Task Force, n 1 above, i. See also Peter Finn, ‘Justice task force recommends about 50 Guantánamo detainees to be held indefinitely’, *Washington Post*, 22 January 2010; Peter Finn, ‘Return of Yemeni detainees is suspended’, *Washington Post*, 5 January 2010. On the efforts to transfer detainees and its concerns regarding Yemen, see Michael John Garcia et al, ‘Closing the Guantánamo Detention Center: Legal Issues’, Congressional Research Service Report R40139, 11 February 2011, 9 at <<http://www.fas.org/spp/crs/natsec/R40139.pdf>>.

³ Human Rights Watch, Guantánamo Facts and Figures, 11 January 2012 at <<http://www.hrw.org/features/guantanamo-facts-figures>>.

⁴ Peter Finn, ‘Administration won’t seek new detention system’, *Washington Post*, 24 September 2009 at <<http://www.washingtonpost.com/wp-dyn/content/article/2009/09/23/AR2009092304427.html>>. Peter Baker, ‘Obama to use current law to support detentions’, *New York Times*, 24 September 2009 at <<http://www.nytimes.com/2009/09/24/us/politics/24detain.html>>.

⁵ Respondent’s Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantánamo Bay, In re: Guantánamo Bay Detainee Litigation, Misc No 08–442 13 March 2009 at <<http://www.justice.gov/opa/documents/memo-re-det-auth.pdf>>.

What Harold Koh called ‘the law of 9/11’ was being applied in fewer cases but it had not been repealed.⁶ Indeed, Obama’s March 2011 executive order extending the use of military commissions and indefinite detention, and his signature of the 2012 Defense Authorization Act, which affirmed the use of all necessary means to detain a person linked to al Qaeda, suggested a growing acceptance of the war paradigm.⁷

These developments might be seen as additional proof that the Schmittian critique of American liberal internationalism is correct. The persistent identification of al Qaeda as an ‘enemy’ (rather than a criminal network) is perhaps evidence of the irreducibility of politics and the permanence of the exception. Yet this chapter describes a significant liberal pushback against Bush’s detention policy. This is evident in the eventual extension of *habeas* rights to the detainees being held at Guantánamo Bay (i.e. the right to contest the legality of their detention in a federal court). This was originally denied by the Bush administration, which relied on a form of linear thinking to exclude terrorist suspects from regimes that recognized these rights. It was reaffirmed, however, in the *Rasul* (2004) and *Boumediene* (2008) Supreme Court decisions. This influenced Obama’s detention regime, which was subject to regular judicial review.⁸ Liberals committed to ending the war on terror were disappointed that ‘prolonged detention’ remained a policy option. The American Civil Liberties Union (ACLU), for instance, portrayed it as ‘unlawful, unwise and un-American’.⁹ However, their lobbying did have an impact in a way that is not recognized by the Schmittian critique.

The chapter contains six sections. The first outlines relevant international norms, notably the International Covenant on Civil and Political Rights (ICCPR)’s insistence that no one shall be subject to arbitrary arrest or detention. The second, third and fourth sections examine the Bush administration’s claim that because Guantánamo Bay was not sovereign US territory (it was in

⁶ Harold Hongju Koh, Legal Adviser, US Department of State, ‘The Obama Administration and International Law’, Annual Meeting of the American Society of International Law, 25 March 2010 at <<http://www.state.gov/s/l/releases/remarks/139119.htm>>.

⁷ Executive Order 13567, Periodic Review of Individuals at Guantanamo Bay Naval Station Pursuant to the Authorization for the Use of Military Force, 7 March 2011 at <<http://www.gpo.gov/fdsys/pkg/FR-2011-03-10/pdf/2011-5728.pdf>>; also National Defense Authorization Act for Fiscal Year 2012, section 1021 at <<http://www.gpo.gov/fdsys/pkg/BILLS-112hr1540enr/pdf/BILLS-112hr1540enr.pdf>>.

⁸ Executive Order 13567 established a non-military review process for the detainees deemed impossible to put on trial but impossible to release. Critics argued that there was no substantive difference from previous practice, just ‘a new cast of characters’ sitting on the review boards. See Peter Finn and Anne E Kornblut, ‘Obama creates indefinite detention system for prisoners at Guantánamo Bay’, *Washington Post*, 8 March 2011 at <<http://www.washingtonpost.com/wp-dyn/content/article/2011/03/07/AR2011030704871.html>>.

⁹ Anthony Romero, executive director of the American Civil Liberties Union, quoted in Evan Perez, ‘Obama restarts terrorism tribunals’, *Wall Street Journal*, 8 March 2011 at <<http://online.wsj.com/article/SB10001424052748703386704576186742044239356.html>>.

fact leased from Cuba), the government was not bound either by the US constitution or by international human rights law. As noted, this interpretation was rejected by the Supreme Court in the *Rasul* and *Boumediene* decisions, which effectively ruled that human rights obligations applied whenever and wherever US authorities were *in control* of a detainee. The *Boumediene* decision did accept, however, that it may be impractical to impose the writ of *habeas corpus* on the US military in a battlefield setting. In this sense, the Supreme Court was sensitive to those moments of exception when it was reasonable to suspend certain human rights norms, but it rejected entirely the argument that these norms did not apply simply because the authorities were acting outside sovereign US territory. The final sections examine the difficulties the Obama administration has had in closing the Guantánamo Bay detention facility and its continued reliance on ‘the law of 9/11’. This included arguments against extending *habeas* rights to the detention facility at Bagram, which opened up the policy option of transferring detainees to Afghanistan as a way of potentially avoiding judicial review.¹⁰ As with the Military Commission Act of 2009 then (see Chapter 3), President Obama’s policies are double-edged. Liberals welcomed the promise to close the camps at Guantánamo, but if that meant the indefinite detention of terrorist suspects continued in other locations then it could possibly prove to be another Pyrrhic victory.

PREVENTIVE DETENTION

The idea of preventive or administrative detention is a response to the concern discussed in the previous chapter that the liberal ‘reliance on prosecution, along with its usual panoply of defendants’ rights and strict rules of evidence, cannot effectively, expeditiously, or exhaustively remove the threat of dangerous terrorists’.¹¹ It is in this respect an alternative to the trial by military commission. The reasons for not trusting normal prosecutions were summarized as follows by Waxman:

information used to identify terrorists and their plots include extremely sensitive intelligence sources and methods, the disclosure of which during trial would undermine or even negate counterterrorism operations; the conditions under which some suspected terrorists are captured, especially in faraway combat zones

¹⁰ On this possibility, see Kal Raustiala, ‘The new Guantánamo’, *Huffington Post*, 22 May 2009 at <http://www.huffingtonpost.com/kal-raustiala/the-new-guantanamo_b_206556.html>. Richard Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (Oxford: Oxford University Press, 2006) 59.

¹¹ Matthew C Waxman, ‘Administrative Detention of Terrorists: Why Detain, and Detain Whom?’, *Journal of National Security Law and Policy* 3 (2010) 10.

or ungoverned regions, make it impossible to prove criminal cases using normal evidentiary rules; prosecution is designed to punish past conduct, but fighting terrorism requires stopping suspects before they act; and criminal justice is deliberately tilted in favor of defendants so that few if any innocents will be punished but the higher stakes of terrorism cannot allow the same likelihood that some guilty persons will go free.¹²

Liberal opponents of preventive detention generally defend the ability of the criminal justice system to deal with these issues.¹³ Compromising on these standards they further argue has consequences beyond the risk to the individual's liberty. Waxman, for instance, cites Justice Jackson's concern over the preventive detention of Japanese Americans during World War II. He warned that 'by validating repressive actions taken under emergency, "[t]he principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need".¹⁴ And even if that weapon is not picked up by future US administrations it can be used by 'many unsavoury foreign governments that might exploit the precedent for repressive purposes'.¹⁵

The international norm against arbitrary arrest or detention is articulated in the ICCPR, which codifies the right to *habeas corpus*.¹⁶ Specifically, Article 9 of the ICCPR states that:

No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. . . . Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. . . . Anyone arrested or detained on a criminal charge

¹² Waxman, 'Administrative Detention', n 11 above, 11. For an articulation of the high states argument, see Posner, *Not a Suicide Pact*, n 10 above, 63–5.

¹³ See generally, Joanne Mariner, 'Criminal Justice Techniques Are Adequate to the Problem of Terrorism', Human Rights Watch, 11 December 2008 at <<http://www.hrw.org/en/news/2008/12/11/criminal-justice-techniques-are-adequate-problem-terrorism>>; ACLU, 'Gates Suggestion Would Move Guantánamo Bay Onshore', 1 May 2009 at <<http://www.aclu.org/national-security/gates-suggestion-would-move-guantanamo-onshore>>; Testimony of Tom Malinowski, The Legal, Moral, and National Security Consequences of 'Prolonged Detention', for the Senate Judiciary Subcommittee on the Constitution, 10 June 2009 at <<http://www.hrw.org/en/news/2009/06/10/legal-moral-and-national-security-consequences-prolonged-detention>>; Richard B Zabel and James J Benjamin Jr, *In Pursuit of Justice: Prosecuting Terrorism Cases in Federal Courts*, Human Rights First, July 2009 at <<http://www.humanrightsfirst.org/wp-content/uploads/pdf/090723-LS-in-pursuit-justice-09-update.pdf>>.

¹⁴ Justice Jackson's dissenting opinion in *Korematsu v. United States* 323 U.S. (1944) cited in Waxman, 'Administrative Detention', n 11 above, 25.

¹⁵ Waxman, 'Administrative Detention', n 11 above, 25, citing Deborah Pearlstein and Priti Patel, *Behind the Wire: An Update to 'Ending Secret Detentions'*, Human Rights First, July 2005, 24–5 at <<https://www.humanrightsfirst.org/wp-content/uploads/pdf/behind-the-wire-033005.pdf>>.

¹⁶ The US ratified the International Covenant on Civil and Political Rights on 8 September 1992. It is also bound by the American Declaration of the Rights and Duties of Man, Organization of American States Resolution XXX adopted in 1948 at <http://www.hrcr.org/docs/OAS_Declaration/oasrights.html>.

shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. . . . Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.¹⁷

The ICCPR does not, however, prohibit preventive detention in all circumstances and states may derogate from their Article 9 commitments. Article 4 of the ICCPR for instance allows states to take exception to these norms in times of ‘public emergency which threatens the life of the nation’.¹⁸ Following the 9/11 attacks, President Bush did determine that ‘an extraordinary emergency’ existed and, as we saw in Chapter 2, the threat of terrorism, in particular terrorism armed with weapons of mass destruction (WMD), was used to justify preventive measures, including the use of military force.¹⁹ Yet the President’s determination was never understood to be a formal derogation because the US did not ‘inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations’ as required by section 3 of Article 4.²⁰ It instead employed two separate jurisdictional arguments (subject matter and territorial) to defend its policy.

The first argument centred on the claim that the ICCPR (like the Geneva Conventions) was not applicable to US held detainees in the war on terror because they were enemy combatants in an ongoing armed conflict. This was made explicit in the response to the Inter-American Commission on Human Rights, which had requested that the US ‘take urgent measures necessary to have the legal status of the detainees at Guantánamo Bay determined by a competent tribunal . . . in order to ensure that the legal status of each of the detainees is clarified and that they are afforded the legal protections commensurate with the status that they are found to possess, which may in no case fall below the minimum standards of non-derogable rights’.²¹ In a statement that

¹⁷ International Covenant on Civil and Political Rights, Article 9 at <<http://www2.ohchr.org/english/law/ccpr.htm>>.

¹⁸ International Covenant on Civil and Political Rights, n 17 above, Article 4.

¹⁹ Proclamation 7463—Declaration of National Emergency by Reason of Certain Terrorist Attacks, 14 September 2001 at <http://dspace.wrlc.org/doc/bitstream/2041/70940/00110_010914display.pdf>; also, ‘Military Order—Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terror’, 13 November 2001 at <<http://www.law.cornell.edu/background/warpower/fr1665.pdf>>.

²⁰ Derek Jinks, ‘International Human Rights Law and the War on Terrorism’, *Denver Journal of International Law and Policy* 31 (2002) 58–68; Helen Duffy, *The ‘War on Terror’ and the Framework of International Law* (Cambridge: Cambridge University Press, 2005) 393–5. This was in contrast to the actions of the UK government, which derogated from Article 9 of the ICCPR in November 2001. See Duffy, *The ‘War on Terror’*, 347.

²¹ Letter from Juan Méndez, President of the Inter-American Commission on Human Rights, to US Secretary of State, Colin Powell, 12 March 2002 at <<http://www1.umn.edu/humanrts/cases/guantanamo-2003.html>>.

chimes with its response to the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (see Chapter 2) the US claimed that, in making this request, the Commission had exceeded its human rights mandate. It accused the Commission of ‘attempting to blur the distinction between human rights law and humanitarian law’. These two regimes were, the US insisted, completely separate and only the latter could apply to the war on terror. The Commission’s request was, the State Department concluded:

misguided, in part because it rests on the assumption that human rights law is equally applicable during armed conflict and indeed takes precedence over international humanitarian law. In fact, international human rights law is not applicable to the conduct of hostilities or the capture and detention of enemy combatants, which are governed by the more specific laws of armed conflict.²²

Even if a human rights commission did have subject matter jurisdiction, the Inter-American Commission’s request was deemed unnecessary because the Geneva Conventions only required a competent tribunal to be convened where there was doubt as to the status of detainees. In this case the US insisted there was no doubt. This was because the Secretary of Defense had decided the detainees were unlawful enemy combatants captured in an ongoing armed conflict. Finally, the US rejected the Commission’s accusation that the detention regime at Guantánamo Bay was arbitrary and a violation of the right to *habeas corpus*. In making that assessment, the:

Petitioners [i.e. the Commissioners] have ignored or are unaware that enemy combatants—whether lawful or unlawful combatants—have no such right. . . . In yet another example, Petitioners claim that the detainees are being subjected to ‘prolonged detention’ in violation of their human rights. . . . In fact, however, the detainees are being held lawfully as unlawful enemy combatants in connection with an ongoing armed conflict. They are not POWs, but even if they were, the United States would not have any obligation to release and repatriate them until at least the close of hostilities. *See, e.g.*, Geneva Convention Article 118. Petitioners have mistakenly applied the peacetime human rights law concept of ‘prolonged detention’ to the wartime humanitarian law concept of capture and detention of enemy combatants, lawful and unlawful.²³

Liberals opposed this kind of exclusionary approach, arguing that international human rights law applied at all times, *including wartime*. They cited, for instance, the UN Human Rights Commission’s summary of the general legal obligations imposed by ICCPR, which insisted that:

²² ‘Response of the United States to Request for Precautionary Measures—Detainees in Guantánamo Bay, Cuba’, *International Law Materials* 41 (2002) 120–1.

²³ ‘Response of the United States to Request for Precautionary Measures’, n 22 above, 124–5.

the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specifically relevant for the purposes of the interpretation of Covenant rights, both spheres are complementary, not mutually exclusive.²⁴

In this sense, human rights law does not cease to apply in wartime. It must be interpreted in light of the detailed rules of international humanitarian law (IHL) but parties to the armed conflict cannot simply ignore it.²⁵ Where there is doubt about the status of the detainee, and where it is possible to convene a court, then the liberal state should apply human rights law, which of course includes respect for the individual's right to appeal against his detention in an independent court. Moreover, human rights groups argued that there was doubt about the process used to classify detainees in the war on terror. The Guantánamo detainees should have been given access to federal courts therefore. The contingencies of the battlefield, which may in certain situations prevent access to regular courts, was not an issue at Guantánamo. Federal courts were available to hear petitions for *habeas* relief because the detainees had already been removed from the dangers of the conventional battlefield.²⁶

WHY GUANTÁNAMO?

The second argument the Bush administration used to legitimize its policy was based on the nationality principle and the geographical scope of the ICCPR. The detainees at Guantánamo were excluded from human rights regimes because they were not American citizens and they were being held

²⁴ United Nations Human Rights Commission, General Comment No 31 [80], The Nature of the General Legal Obligation Imposed on States Parties, 20 April 2004 at <[http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/CCPR.C.21.Rev.1.Add.13.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/CCPR.C.21.Rev.1.Add.13.En?Opendocument)>. Quoted in John Ip, 'Comparative Perspectives on the Detention of Terrorist Suspects', *Transnational Law and Contemporary Problems* 16 (2006–7) 782.

²⁵ Duffy, *The 'War on Terror'*, n 20 above, 300. In particular, Article 43 of the fourth Geneva Convention states that '[a]ny protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose'. See Jelena Pejic, 'Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict', *International Review of the Red Cross* 858 (2005) at <<http://www.icrc.org/eng/resources/documents/article/review-858-p375.htm>>.

²⁶ Human Rights Watch, 'US Must Take the High Road with Prisoners of War', 15 January 2002 at <<http://www.hrw.org/en/news/2002/01/15/us-must-take-high-road-prisoners-war>>. The first *habeas* petition was filed in January 2002, see *Coalition of Clergy, Lawyers, and Professors v. Bush*, 310 F3d 1153 (9th Cir 2002) at <<http://openjurist.org/310/f3d/1153/coalition-of-clergy-lawyers-and-professors-v-bush>>. The Center for Constitutional Rights filed its first petition on 19 February 2002, see *Rasul v. Bush* at <<http://ccrjustice.org/ourcases/past-cases/rasul-bush>>.

on a territory where the US was not sovereign.²⁷ Central to this interpretation was the detail of the 1903 lease agreement that gave the United States access to the naval base on Guantánamo Bay. It stated that the US would exercise ‘complete jurisdiction and control over and within’ the leased areas, but that Cuba would retain ‘ultimate sovereignty’.²⁸ This was significant because under Article 2 of the ICCPR a state is only obligated to afford rights to ‘individuals within its territory and subject to its jurisdiction’. On this basis, the administration argued, Guantánamo Bay was Cuban territory and US behaviour there was not bound by the ICCPR. When, therefore, the UN Human Rights Commission requested in 2004 that the US should address problems under Article 9 of the ICCPR relating to the detention of persons outside the United States, including Guantánamo Bay, it received a similar response to the Inter-American Commission.

The United States recalls its longstanding position that . . . the obligations assumed by the United States under the Covenant apply only within the territory of the United States. In that regard, the United States respectfully submits that this Committee request for information is outside the purview of the Committee. The United States also notes that the legal status and treatment of such persons is governed by the law of war.²⁹

In fact, the US government had chosen to locate its main detention facility at Guantánamo Bay in part to minimize the risk that federal courts would entertain a *habeas* petition.³⁰ This is made clear in a December 2001 memo from Deputy Assistant Attorney Generals Patrick Philbin and John Yoo to the General Counsel at the Department of Defense, William J Haynes II. US courts had in the past upheld the enemy alien’s right to *habeas* jurisdiction,

²⁷ Section 7 of President Bush’s November 2001 Military Order, which ruled out the right to appeal against detention, applied only to non-citizens. On this basis, John Walker Lindh, ‘the American Taliban’, was not held as an enemy combatant. He was transferred to and convicted in a federal court for supplying services to the Taliban. BBC, ‘American Taliban jailed for 20 years’, 4 October 2002 at <<http://news.bbc.co.uk/1/hi/world/americas/2298433.stm>>.

²⁸ Memo 3, from Deputy Assistant Attorney Generals Patrick Philbin and John Yoo to the General Counsel at the Department of Defense, William J Haynes II, Re: Possible Habeas Jurisdiction over Aliens Held in Guantánamo Bay, Cuba, 28 December 2001, in Karen J Greenberg and Joshua L Dratel (eds.), *The Torture Papers: The Road to Abu Ghraib* (Cambridge: Cambridge University Press, 2005) 29–30.

²⁹ US Department of State, Second and Third Periodic Report of the United States of America to the UN Committee of Human Rights Concerning the International Covenant on Civil and Political Rights CCPR/C/USA/3, para 130, 28 November 2005 at <[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.USA.3.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.USA.3.En?Opendocument)>.

³⁰ The need to think about alternatives to Afghan prisons arose when Tommy Franks, the American General in charge of the invasion, told Pentagon officials he could not maintain adequate security. Guantánamo was chosen because it ‘was isolated and well defended. And because it was technically not part of the US sovereign soil, it seemed like a good bet to minimize judicial scrutiny.’ Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (New York: WW Norton, 2007) 107–8, 195.

not least in the *Ex Parte Quirin* case discussed in the previous chapter.³¹ Philbin and Yoo argued, however, that a clear basis for denying jurisdiction to a *habeas* petition filed by a foreign citizen existed in the 1950 Supreme Court ruling *Johnson v. Eisentrager*. This case involved the imprisonment of German soldiers tried by a military commission in China for providing assistance to Japan after Germany had surrendered. From their prison in occupied Germany they filed an application for *habeas corpus* in a US District Court.³² The Court distinguished *Eisentrager* from *Quirin* and denied the petition on the following grounds:

We have pointed out that the privilege of litigation has been extended to aliens whether friendly or enemy, *only because permitting their presence in the country implied protection*. No such basis can be invoked here, for these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States.³³

This analysis, Philbin and Yoo advised, ‘should apply to bar any *habeas* application filed by an alien held at GBC [Guantánamo Bay, Cuba]’.³⁴ They noted that Cuba’s sovereignty over Guantánamo Bay was beyond doubt and that it was outside the territorial jurisdiction of any court in the United States. In contrast to other island bases that were considered US territories or possessions, Guantánamo Bay was not included within the territory defined for any district court. Philbin and Yoo did note that there was some risk of a court granting the right of *habeas corpus* to detainees in Guantánamo because, as they put it, ‘a non-frivolous’ argument might be constructed that the detention camps are within the jurisdiction of US courts. Indeed, the phrase ‘complete jurisdiction and control’ as it appeared in the lease agreement suggested as much. ‘Although *Eisentrager* seems to permit aliens to bring *habeas* petitions only in areas within the sovereign control of the United States, which by the 1903 agreement does not extend to GBC, a court could find that *Eisentrager*’s mention of territorial jurisdiction does not preclude *habeas* jurisdiction at GBC.’³⁵ Despite this warning, the administration argued

³¹ Kal Raustiala, *Does the Constitution Follow the Flag? The Evolution of Territoriality in American Law* (Oxford: Oxford University Press, 2009) 197–200. See also the *Yamashita* case, which involved the prosecution of the Japanese general for his failure to prevent the February 1945 massacre of civilians in Manila.

³² Memo 3, n 28 above.

³³ *Johnson v. Eisentrager* 339 U.S. 763 (1950) 777–8 at <<http://supreme.justia.com/us/339/763/>>. Quoted by Philbin and Yoo, Memo 3, n 28 above, 30, emphasis added. As Raustiala notes, this made the court’s decision consistent with *Quirin* and *Yamashita* because the petitioners in these cases ‘were plainly captured, imprisoned or tried within US territory’ (*Does the Constitution Follow the Flag*, n 31 above, 199), adding that ‘because the Philippines were still, at this point, an American possession *Yamashita* did not fully answer the question of *habeas*’s extra-territorial reach’: *Does the Constitution Follow the Flag*, n 31 above, 135.

³⁴ Philbin and Yoo, Memo 3, n 28 above, 31.

³⁵ Philbin and Yoo, Memo 3, n 28 above, 34.

in the District Courts that it could detain enemy combatants for the duration of the conflict. This was because the US was in a state of armed conflict and because the detainees were enemy aliens that had never set foot inside the United States.

Before exploring how this litigation developed and what may or may not have changed with the election of President Obama, it is worth stating exactly how the issue sits with the book's central argument. One aspect of the Schmittian argument being interrogated is that the exception manifests itself geographically. The argument the Bush administration used to legitimize preventive detention seems to prove the relevance of that argument. The alien being held by US authorities had a right to judicial review only when that individual was held on US sovereign territory. If the US detained that individual outside this liberal space, the alien had no such right. This argument was tied up with the claim that the US was not restrained by human rights law because the detainees at Guantánamo were enemy combatants in the global war on terror. It did, however, stand independently of the post-9/11 security situation. The argument that the right to *habeas corpus* did not apply to the detainees at Guantánamo was, in other words, *spatial* as well as *situational*. This might be decisive, except the evidence also reflects intense opposition to the Bush administration's practice. The main counter-argument was that the restraints imposed by the US Constitution extended extraterritorially. A republican commitment to the global relevance of the US Constitution thus influenced American liberalism even in the post 9/11 period.

THE RIGHT TO CONTEST DETENTION. DOES THE CONSTITUTION FOLLOW THE FLAG?

In 2001, Shafiq Rasul and two friends, Ruhul Ahmed and Asif Iqbal, travelled to Pakistan for a wedding. While in Pakistan they decided to cross the border into Afghanistan. The three were later captured by the Afghan warlord Rashid Dostum and handed over to US forces. They were transferred to Sherbegan prison near Mazar-i-Sharif and then to Guantánamo Bay where they were detained as unlawful enemy combatants. Rasul's case is remarkable not least because he is a British citizen and his detention under these circumstances caused tensions between close allies. It is most noteworthy, however, because it gave its name to the 2004 US Supreme Court decision *Rasul v. Bush*.³⁶ This ruling occupies a pivotal position in US detention policy since 9/11, but before

³⁶ *Rasul v. Bush*, 542 U.S. 466 (2004). Rasul had in fact been released in March 2004 prior to the Supreme Court ruling. The decision therefore impacted on the consolidated cases of twelve Kuwaitis and two Australians.

exploring its full significance it is worth noting that Rasul and his friends were not the only British nationals detained at Guantánamo Bay. Like Rasul, Feroz Ali Abbasi was captured in Afghanistan by warlords before being handed over to US forces. Abbasi, however, gave his name to a British court ruling after lawyers representing his mother argued he was being held unlawfully. The British Court of Appeal ultimately found that the UK courts could do nothing to help Abbasi. In reaching this judgment, however, it expressed surprise that ‘the writ of the United States courts does not run in respect of individuals held by the government on the territory that the United States hold as lessee under a long term agreement’.³⁷ It also noted that US litigation had not finished and indeed it was not long before the Supreme Court ruled on the issue.

Rasul v. Bush was a setback for the Bush administration, as well as the general argument that the executive could act without restraint beyond the spatial lines that demarcated US sovereign territory. In a six to three decision, the Supreme Court ruled that the detainees had a *statutory* right to appeal to a judge for release. Justice Stevens summarized the majority position. The detainee’s right, he noted, was found in the federal *habeas corpus* statute, which had since 1868 ‘provided that the District Courts have power to issue the writ “within their respective jurisdictions”’.³⁸ As Philbin and Yoo suggested it might, the Court construed the Guantánamo lease agreement to match this statute. It noted that the petitioners were ‘being detained in an area over which the United States does exercise permanent and complete jurisdiction and control’.³⁹ This was reaffirmed in the concurring opinion of Justice Kennedy. The naval base, he wrote, ‘is in every practical respect a United States territory . . . from a practical perspective, the indefinite lease of Guantánamo Bay has produced a place that belongs to the United States, extending the “implied protection” of the United States to it’.⁴⁰ As for the government’s claim that the Supreme Court had previously sanctioned its policy in *Eisenrager*, Stevens dismissed that as irrelevant. The petitioners at Guantánamo, he noted:

differ from the German detainees in Johnson in important respects. They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against this country; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.⁴¹

³⁷ *R (Abbasi and another) v. Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, 6 November 2002 at <www.law.utoronto.ca/documents/Mackin/AbbasiUKCA.doc>.

³⁸ *Rasul v. Bush*, US 03–334, Opinion Announcement by Justice Stevens at <http://www.oyez.org/cases/2000-2009/2003/2003_03_334/opinion>.

³⁹ *Rasul v. Bush* US 03–334 Opinion Announcement by Justice Stevens, n 38 above.

⁴⁰ *Rasul v. Bush*, 542 U.S. 466 (2004) at <<http://supreme.justia.com/us/542/466/case.html>>.

⁴¹ *Rasul v. Bush*, 542 U.S. 466 (2004), n 40 above.

The *Rasul* judgment, then, erased the line that excluded the detainees from human rights regimes. The detainees may have been alien enemy combatants held beyond US sovereign territory but their basic human rights still constrained the government. As Raustiala puts it, the extraterritorial extension of US law in this way ‘serves to mitigate difference’.⁴²

The Supreme Court, however, was not united. The judgment provoked the following dissenting opinion from Justice Scalia:

Since ‘jurisdiction and control’ obtained through a lease is no different in effect from ‘jurisdiction and control’ acquired by lawful force of arms, parts of Afghanistan and Iraq should logically be regarded as subject to our domestic laws. Indeed, if ‘jurisdiction and control’ rather than sovereignty were the test, so should the Landsberg prison in Germany, where the United States held the *Eisentrager* detainees.⁴³

The implication was that by extending US law to another state’s sovereign territory the Court was enabling a judicial form of imperialism. This position argues that sovereignty in fact provided ‘an administrable bright-line rule’ for the application of constitutional rights.⁴⁴ To rule that the executive be burdened by the Constitution in areas where it exercises control rather than sovereignty, in other words, was an exercise in judicial imperialism. From this perspective, it was normal to regard inter-sovereign relations as political in nature. The political branches were, therefore, best placed to negotiate them. As Raustiala puts it, conservatives like Scalia found that:

Westphalian territoriality was attractively straightforward, even if it seemed to many increasingly anachronistic. Most significantly, it gave the executive branch the powers and freedom it desired in a complex and dangerous world.⁴⁵

For liberals, however, Scalia’s conservative position ignores a more pernicious form of imperialism. This flows from the argument that the law should leave US military power unchecked when it acts in other sovereign territories. In addition, the *Rasul* judgment was not as radical as Justice Scalia suggested. For instance, Raustiala notes that US law ‘has exercised power extraterritorially throughout its history without any concomitant claim to sovereignty’.⁴⁶ The fact that the majority of the Court saw that too illustrates the check that republican conceptions of the liberal state had.

⁴² Raustiala, *Does the Constitution Follow the Flag?*, n 31 above, 7.

⁴³ Dissenting Opinion of Justice Scalia in *Rasul v. Bush*, 542 U.S. 466 (2004) at <<http://supreme.justia.com/us/542/466/case.html>>.

⁴⁴ Brief for the Respondent in *Boumediene* (2007) at <http://nytimes.findlaw.com/supreme_court/briefs/06-1195/06-1195.mer.resp.pdf>.

⁴⁵ Raustiala, *Does the Constitution Follow the Flag?*, n 31 above, 204.

⁴⁶ Raustiala, *Does the Constitution Follow the Flag?*, n 31 above, 204; see also Jonathan Hafetz, *Habeas Corpus after 9/11: Confronting America’s New Global Detention System* (New York: New York University Press, 2011) 101–13.

In seeking to defend its position, the Bush administration found willing partners in Congress. Because the Supreme Court had based its judgment in *Rasul* on *statutory* rather than *constitutional* law, Congress had an opportunity to revive the administration's approach. It first did this in the 2006 Military Commissions Act (MCA). As the previous chapter noted, this was passed in response to another important Supreme Court intervention, *Hamdan v. Rumsfeld* (2006), which ruled that the military commissions were illegal. The main purpose of the MCA was to put those commissions on a legislative footing. At the same time, it sought to bar all *habeas* challenges 'by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination'.⁴⁷ If *Rasul's* extension of *habeas* rights to aliens in non-US territory was an example of extraterritoriality, these acts were an example of what Raustiala calls 'intraterritoriality'; and if the former served to mitigate difference, the latter 'generally serves to establish difference'.⁴⁸

The unity of the political branches on this question may have ended the hopes of the detainees, except the United States is a constitutional democracy and the will of the majority does not always rule. Despite Congress's reaffirmation of the *statutory* bar to *habeas corpus*, the Supreme Court insisted in *Boumediene v. Bush* (2008) that the detainees had a *constitutional* right to contest their detention in a US court.⁴⁹ The judgment is significant here for two reasons. It again erased lines of exclusion. As James Schoettler put it: '[t]he *Boumediene* Court's . . . approach to determining the definition and reach of the writ of *habeas corpus* has eliminated any clear geographic bright line as to where the writ does not apply'.⁵⁰ Thus, the Court found, as in *Rasul*, 'that formalistic concepts like sovereignty do not control the matter at hand, but rather objective factors and practical concerns are of primary relevance'.⁵¹ Guantánamo was 'in every practical sense . . . not abroad'. Any other finding would have implied government power to escape Constitutional restraint simply by ceding sovereignty over a particular territory and leasing it back.

⁴⁷ Military Commission Act 2006, Public Law 109-366, 17 October 2006, section 7 at <http://www.loc.gov/rr/frd/Military_Law/pdf/PL-109-366.pdf>.

⁴⁸ Raustiala, *Does the Constitution Follow the Flag*, n 31 above, 7.

⁴⁹ *Boumediene v. Bush* 533 US (2008) at <http://www.oyez.org/cases/2000-2009/2007/2007_06_1195/>. In 2002, Lakhdar Boumediene and five other Algerian nationals were seized by Bosnian police when US intelligence officers suspected their involvement in a plot to attack the US embassy there. They were subsequently released. US forces in Bosnia rearrested them. They were then transferred to Guantánamo Bay and detained as enemy combatants.

⁵⁰ James A Schoettler, 'Detention of Combatants and the Global War on Terror', in Michael W Lewis et al (eds) *The War on Terror and the Laws of War: A Military Perspective* (Oxford: Oxford University Press, 2009) 115.

⁵¹ Justice Kennedy, Opinion Announcement, *Boumediene v. Bush* at <http://www.oyez.org/cases/2000-2009/2007/2007_06_1195/opinion>.

This was inconsistent with America's constitution as a liberal democracy. 'Our basic charter cannot be contracted away like this', Justice Kennedy argued.

The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. Even when the United States acts outside its borders, its powers are not 'absolute and unlimited' but are subject 'to such restrictions as are expressed in the Constitution.' *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885). Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another. The former position reflects this Court's recognition that certain matters requiring political judgments are best left to the political branches. The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say 'what the law is.' *Marbury v. Madison*, 1 Cranch 137, 177 (1803).⁵²

Framing the matter in terms of America's identity ('our basic Charter') and finding that this demanded practice that extended human rights to the detainees shows the significance of the republican ideal even in the post-9/11 period.

Justice Kennedy's majority opinion is also significant because of the way it interpreted America's obligation as a liberal state in an ongoing armed conflict. At issue were situational as well as spatial factors, namely the relevance of the so-called Suspension Clause. This imitates Article 4 of the ICCPR. It allows the political branches to suspend *habeas corpus* in times of national crisis. Article I, Section 9 of the Constitution, however, limits the definition of crisis to 'rebellion' or 'invasion'. Specifically, it states that the 'privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it'. The *Boumediene* Court therefore recognized that there were times when political judgements were best left to the political branches and that in war it may well be impractical and imprudent to impose legal proceedings on the military. Insisting on judicial review, for instance, 'may require expenditure of funds by the Government and may divert the attention of military personnel from other pressing tasks'. Yet on this occasion, these concerns were not 'dispositive'.

Compliance with any judicial process requires some incremental expenditure of resources. Yet civilian courts and the Armed Forces have functioned alongside each other at various points in our history. . . . The Government presents no credible arguments that the military mission at Guantánamo would be compromised if *habeas corpus* courts had jurisdiction to hear the detainees' claims. And in light of the plenary control the United States asserts over the base, none are apparent to us. . . . Were that not the case, or if the detention facility were located

⁵² Justice Kennedy majority opinion in *Boumediene v. Bush* 553 US (2008) 41 at <<http://www.law.cornell.edu/supct/pdf/06-1195P.ZO>>.

in an active theater of war, arguments that issuing the writ would be ‘impracticable or anomalous’ would have more weight. . . . Under the facts presented here, however, there are few practical barriers to the running of the writ.⁵³

This reveals an interesting aspect of the liberal pushback against the Bush administration’s approach. The Court recognized that the application of rules constraining US power had to be understood in the context of an ongoing armed conflict in Afghanistan. It insisted, however, that liberal norms control the exception so that there would be no question of their applicability when circumstances differed. There were occasions, in other words, when effective counter-terrorism and human rights were not mutually exclusive. This was particularly the case outside of the conventionally defined battlefield (‘an active theater of war’). Applying this liberal realist approach to the detainees at Guantánamo, the Court ruled that the security situation was not so pressing that it made it impractical or imprudent to adhere to constitutional rules. Alien enemy combatants held by US forces outside sovereign US territory had the right to contest their detention in US courts.

Again, Justice Scalia argued the Court had no business making that judgment. In another dissenting opinion, he reaffirmed his view that there was a difference between the laws that regulated the government when it acted inside US sovereign borders and those that applied when it acted outside. ‘The writ of *habeas corpus*’, he wrote, ‘does not, and never has, run in favor of aliens abroad; the Suspension Clause thus has no application, and the Court’s intervention in this matter is entirely *ultra vires*.’⁵⁴ The question of how to counter the terrorist threat, in other words, was a political matter and judges had no qualification or right to restrain the political branches when they acted outside the US. He was thus content to repeat the Bush administration’s position. ‘America’, he wrote, ‘is at war with radical Islamists’, and he accused the Court of playing ‘bait-and-switch’ with the Commander-in-Chief. The military would not, in other words, have transported prisoners to Guantánamo had the law been as the Court now claimed it was. Nor would this judgment have been in the interests of the detainees as the military ‘would likely have kept them in Afghanistan, transferred them to another of our foreign military bases, or turned them over to allies for detention’. Indeed, this was now likely he argued. The Court’s decision therefore accomplished little, ‘except perhaps to reduce the well-being of enemy combatants that the Court ostensibly seeks to protect’. Scalia also noted that the decision raised the likelihood that detainees would ‘return to the kill’. Citing evidence that individuals released from Guantánamo had committed atrocities in Iraq, he

⁵³ Kennedy majority opinion in *Boumediene v. Bush*, n 52 above.

⁵⁴ Justice Scalia’s dissenting opinion in *Boumediene v. Bush* 553 US (2008) at <<http://www.law.cornell.edu/supct/html/06-1195.ZD1.html>>.

noted how difficult it was for the military to decide who is an enemy combatant 'where the environment does not lend itself to rigorous evidence collection. Astoundingly, the Court today raises the bar, requiring military officials to appear before civilian courts and defend their decisions under procedural and evidentiary rules that go beyond what Congress has specified.' That, he concluded, 'will make the war harder on us. It will almost certainly cause more Americans to be killed.'⁵⁵

OBAMA'S WAR ON TERROR

The *Boumediene* Court's finding that effective counter-terrorism and human rights are not always mutually exclusive runs through President Obama's rhetoric. In his inaugural address, for instance, he rejected 'as false the choice between our safety and our ideals'. If the founding fathers, 'faced with perils that we can scarcely imagine' could draft 'a charter to assure the rule of law and the rights of man' then present-day Americans could act in accordance with that charter.⁵⁶ And several months later, standing before America's founding documents in the National Archives, he argued that the Bush administration had 'made decisions based on fear rather than foresight. . . . Instead of strategically applying our power and our principles, too often we set those principles aside as luxuries that we could no longer afford.' He acknowledged that 'during this season of fear, too many of us . . . fell silent' and America 'went off course'. His task then was to restore that course by fighting terrorism within a legal framework that guaranteed due process, checks and balances and accountability. To do that, he would close the detention facility at Guantánamo Bay within a year of taking office.⁵⁷ It had, he argued, 'set back the moral authority that is America's strongest currency in the world'. It was, moreover, 'a symbol that helped al Qaeda recruit terrorists to its cause'.⁵⁸ In short, the reasons for closing the detention camps at Guantánamo were principled *and* pragmatic. Obama, it suggested, would combine liberal and realist approaches in opposition to the Bush administration's approach.⁵⁹

⁵⁵ Justice Scalia's dissenting opinion in *Boumediene v. Bush*, n 54 above.

⁵⁶ Barack Obama, 'Inaugural Address', 20 January 2009 at <<http://www.nytimes.com/2009/01/20/us/politics/20text-obama.html>>.

⁵⁷ Executive Order: Review and Disposition of Individuals detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities, 22 January 2009 at <http://www.whitehouse.gov/the_press_office/closureofGuantanamoDetentionFacilities>.

⁵⁸ Remarks by the President on National Security, National Archives, Washington DC, 21 May 2009 at <http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09>.

⁵⁹ Realists from the Bush administration arguing that Guantánamo was no longer serving America's national interest included Defense Secretary Robert Gates and Secretary of State

The new administration, however, found it difficult to deliver on this rhetoric. Having reviewed the Guantánamo cases, it found that it could not simply transfer the detainees to face trial in a federal court (see Chapter 3). As the President explained in his National Archives speech, some detainees could not be prosecuted for past crimes because the evidence against them may have been tainted. At the same time, it was impossible to release these detainees because the review group considered them a threat to the United States. He acknowledged that, after *Boumediene*, US courts could, and in fact had, ordered the release of a number of detainees. The new administration would respect that because ‘the United States is a nation of laws and so we must abide by these rulings’.⁶⁰ It would work with other nations to find ways of safely transferring ‘detainees to their soil for detention and rehabilitation’. Yet in cases where it considered an individual to be dangerous it would insist that the government had the right to detain him in what the President referred to as ‘prolonged detention’.

Examples of that threat include people who’ve received extensive explosives training at al Qaeda training camps, or commanded Taliban troops in battle, or expressed their allegiance to Osama bin Laden, or otherwise made it clear that they want to kill Americans. These are people who, in effect, remain at war with the United States. . . . Al Qaeda terrorists and their affiliates are at war with the United States, and those that we capture—like other prisoners of war—must be prevented from attacking us again.⁶¹

In order to distinguish this aspect of his policy from the previous practice, the President added ‘that these detention policies cannot be unbounded. They can’t be based simply on what I or the executive branch decides alone.’ His administration, he insisted, would ‘work with Congress to develop an appropriate legal regime so that our efforts are consistent with our values and our Constitution’.⁶² The difficulty for the new administration was that leading

Condoleezza Rice: see Thomas Shanker and David E Sanger, ‘New to job, Gates argued for closing Guantánamo’, *New York Times*, 23 March 2007 at <<http://www.nytimes.com/2007/03/23/washington/23gitmo.html>>; John Bellinger, ‘Should Guantánamo Bay Be Closed?’, Council on Foreign Relations, 21 January 2010 at <<http://www.cfr.org/human-rights/should-guantanamo-bay-closed/p21247>>.

⁶⁰ Remarks by the President on National Security, National Archives, n 58 above.

⁶¹ Remarks by the President on National Security, National Archives, n 58 above. General Counsel to the Defense Department Jeh Johnson asserted shortly after the President’s speech that authority existed under the AUMF and the laws of war to detain an individual even after an acquittal. See Testimony on Legal Issues Regarding Military Commissions and the Trials of Detainees for Violations of the Law of War, 7 July 2009, 32–3 at <<http://armed-services.senate.gov/Transcripts/2009/07%20July/09-57%20-%207-7-09.pdf>>. For criticism of the ‘Kafkaesque’ and ‘Orwellian’ concept among those refusing to accept the war paradigm, see Glen Greenwald, ‘The Obama justice system’, *The Salon*, 8 July 2009 at <http://www.salon.com/news/opinion/glenn_greenwald/2009/07/08/obama>.

⁶² Remarks by the President on National Security, National Archives, n 58 above.

congressional Democrats were unwilling to support a preventive detention regime that operated outside wartime conditions. It would, they insisted, be unconstitutional.⁶³ That left the administration having to rely on the Bush administration's new war framework to defend its policy of prolonged detention. Thus, the President accepted that the US was at war with al Qaeda, and in fact lawyers for the Department of Justice (DoJ) continued to claim that the government's authority to detain terrorists derived from the 2001 AUMF. In its memorandum of 13 March 2009, for instance, the DoJ proposed the following 'definitional framework':

The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy forces.⁶⁴

As Schoettler puts it, '[o]ther than the use of the phrase "substantially supporting" in lieu of "supporting", the definitional framework differs little from the definition of "enemy combatant" employed during the Bush Administration'.⁶⁵

This was no doubt disappointing for liberals, but not all opposed Obama's compromise.⁶⁶ Deborah Pearlstein, for instance, argued that detention under the AUMF was preferable to a new preventive detention authority. This was

⁶³ See letter sent to the President by Chairman of the Senate Judiciary Committee, Russ Feingold (D-WI) 22 May 2009 at <<http://www.talkingpointsmemo.com/documents/2009/05/feingold-letter-to-obama-on-preventive-detention.php>>; Peter Finn, 'Administration won't seek new detention system', *Washington Post*, 24 September 2009 at <<http://www.washingtonpost.com/wp-dyn/content/article/2009/09/23/AR2009092304427.html>>.

⁶⁴ Respondent's Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantánamo Bay, In re: Guantánamo Bay Detainee Litigation, Misc No 08–442, 13 March 2009 at <<http://www.justice.gov/opa/documents/memo-re-det-auth.pdf>>.

⁶⁵ Schoettler, 'Detention of Combatants in the War on Terror', n 50 above, 81. The 'substantial support' criteria did have an impact on individual *habeas* cases, however. In May 2009, for instance, a District Court granted the *habeas corpus* petition to Alla Ali Bin Ali Ahmed, who had been detained in Guantánamo since 2002, on the grounds that the government failed to prove by a preponderance of the evidence that Ahmed was 'part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners': *Alla Ali Bin Ali Ahmed v. Obama*, US District Court, District of Columbia, May 2009 at <https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2005cv1678-220>. It was in this case that the government argued that releasing Ahmed would be a mistake even if there was no evidence of his involvement with terrorism. This was because 'Guantánamo itself might have radicalized him, exposing him to militants and embittering him against the United States'. See Scott Shane, 'Detainee's case illustrates bind of prison's fate', *New York Times*, 3 October 2009 at <<http://www.nytimes.com/2009/10/04/world/middleeast/04gitmo.html>>.

⁶⁶ On the National Archives speech and the disappointment among human rights and civil liberties groups see Daniel Klaidman, *Kill or Capture: The War on Terror and the Soul of the Obama Presidency* (Boston and New York: Houghton Mifflin Harcourt, 2012) 128–38.

particularly so if it was applied only to existing Guantánamo cases, was for a limited duration and subject to regular judicial review.⁶⁷ In fact, David Cole had proposed something similar in December 2008. Rather than release dangerous individuals that could not be prosecuted, and rather than create a new (and unconstitutional) preventive detention regime, the Obama administration he argued should adopt a third approach:

one that allows the United States sufficient authority to protect itself from al Qaeda fighters while avoiding the creation of an exception that threatens to swallow the rule of the criminal process. Congress should follow the example of traditional wars and give the administration the option to detain—without criminal trial—those engaged in hostilities with us for the duration of the military conflict with al Qaeda and the Taliban. Detainees should be afforded punctilious procedure to ensure that we are detaining only those who fought for al Qaeda or the Taliban and pose an ongoing threat.⁶⁸

From this perspective, Obama had ‘got it right’ in his National Archives speech. ‘Detaining enemy fighters without criminal charges’, Cole noted, ‘has long been an accepted practice of nations in wartime.’⁶⁹ For human rights and civil liberties groups, however, there was a fundamental mismatch between Obama’s rhetoric and his policies. Amnesty International, for instance, applauded the speech but described prolonged detention as ‘a disturbing step backwards’; and Kenneth Roth of Human Rights Watch called it ‘misguided’ and ‘deeply inconsistent with the values that Obama defended in his speech’.⁷⁰

The Supreme Court had accepted in *Boumediene* that the state could detain enemy combatants without trial in ‘active’ theatres of war but it did not provide guidance on how to define that. Likewise, the Obama administration had indicated terrorist suspects could only be detained as enemy combatants if they provided ‘substantial’ support to al Qaeda, but this too was difficult to define. The answers that *habeas* courts gave to these questions are, therefore, extremely important because they determine the extent to which liberals might support Obama’s compromise. David Cole qualified his support for

⁶⁷ Deborah Pearlstein, ‘Delayed Detention Policy and the Big “Ifs”’, *Opinio Juris*, 21 July 2009 at <<http://opiniojuris.org/2009/07/21/delayed-detention-policy-and-the-big-ifs/>>.

⁶⁸ David Cole, ‘Closing Guantánamo: The Problem of Preventive Detention’, *Boston Review*, 13 December 2008 at <<http://bostonreview.net/BR34.1/cole.php>>. For liberal opposition to Cole’s ideas, see Joanne Mariner, ‘Criminal Justice Techniques Are Adequate to the Problem of Terrorism’, Human Rights Watch, December 2008 at <<http://www.hrw.org/en/news/2008/12/11/criminal-justice-techniques-are-adequate-problem-terrorism>>.

⁶⁹ David Cole, ‘The right path: preventive detention’, *New York Times*, 21 May 2009 at <<http://roomfordebate.blogs.nytimes.com/2009/05/21/obamas-blueprint-and-americas-enemies/#cole>>.

⁷⁰ Amnesty International, ‘President Obama Defends Guantánamo Closure, but Endorses “War” Paradigm and Indefinite Preventive Detention’, 22 May 2009 at <http://www.amnesty.org/en/library/info/AMR51/072/2009/en>; Human Rights Watch, ‘Drop Plan for Detention without Trial’, 21 May 2009 at <<http://www.hrw.org/en/news/2009/05/21/us-drop-plan-detention-without-trial>>.

the war paradigm, for instance, by noting that devils sometimes lurk in the details. Should the Obama administration operate with an overly expansive definition of ‘the battlefield’ and ‘enemy combatant’, and should it apply that definition to new terrorist cases, then it risked losing the support of liberals. These questions are discussed in the following section. Before that, however, it is necessary to explain why in March 2011 President Obama effectively reversed his decision to close the Guantánamo Bay detention facility.⁷¹

KEEPING GUANTÁNAMO OPEN

Of course, the decision to hold terrorist suspects in a state of prolonged detention under the AUMF is sufficient evidence to conclude that ‘the law of 9/11’ continued to influence US national security policy. Where the terrorist suspect is detained is not all that significant once that fact is realized. And yet the detention facility at Guantánamo Bay is so symbolic that the failure to close it is important. The continued use of Guantánamo Bay, like the continuing use of military commissions, was largely a consequence of congressional political pressure and an administration that was committed to ambitious domestic agendas, including health care reform, and anxious not to appear soft on terrorism.⁷² As the previous chapter noted, Congress’s refusal to fund the transfer of detainees like Khaled Sheikh Mohammed put paid to some (although not all) plans for trials by federal courts. The same pattern applied with respect to detention policy. Congress’s refusal to fund the transfer of other detainees to the US mainland in effect ended Obama’s plan to close the camps at Guantánamo.

The idea that the administration would close the facilities at Guantánamo by transferring the detainees to the US mainland was first mooted by Secretary of Defense Robert Gates at the beginning of May 2009.⁷³ In response to that suggestion, the Democrat-led Congress denied the administration the \$80 million it had requested for closing the prison and starting the relocation of detainees. House Republicans went further by proposing legislation dubbed the ‘Keep terrorists out of America Act’.⁷⁴ Not all in Congress were opposed to

⁷¹ See Peter Finn and Anne E Kornblut, ‘Obama creates indefinite detention system for prisoners at Guantánamo Bay’, *Washington Post*, 8 March 2011 at <<http://www.washingtonpost.com/wp-dyn/content/article/2011/03/07/AR2011030704871.html>>.

⁷² On the way, Guantanamo policy lost out to the other priorities: see Klaidman, *Kill or Capture*, n 66 above, 89–90, 162, 166–7.

⁷³ Elisabeth Bumiller and William Glaberson, ‘Hints that detainees may be held on US soil’, *New York Times*, 1 May 2009 at <<http://www.nytimes.com/2009/05/01/us/politics/01gitmo.html>>.

⁷⁴ Perry Bacon Jr, ‘Lawmakers balk at holding Guantánamo detainees in U.S.’, *Washington Post*, 8 May 2009 at <<http://www.washingtonpost.com/wp-dyn/content/article/2009/05/07/AR2009050703985.html>>.

relocation efforts. For instance, the Chairman of the House Appropriations Committee Rep David Obey reminded his colleagues that a prison in Florence, Colorado already housed terrorists, including Zacarias Moussaoui, who had been convicted for his part in the 9/11 attacks (see Chapter 3).⁷⁵ However, critics were concerned that transferring detainees to the mainland did pose additional risks. These included the ‘possibility that the Guantánamo detainees will recruit more terrorists from among the federal inmate population and continue al Qaeda operations from the inside’.⁷⁶ The most significant concern, however, followed on from the *Boumediene* decision. If US courts, for whatever reason, concluded that the continued detention of terrorist suspects was unwarranted they could insist on their release, which was of course a different matter if they were being detained on the mainland. For those who trusted the criminal justice system to reach the right conclusion, the location of the release made little difference. Others, however, continued to insist that it was not the judiciary’s place to decide who was and who was not a threat. If the courts had to be involved, as the *Boumediene* decision insisted, then the risks could be mitigated by keeping the detainees in a place where they would not be released into American society.

This concern is evident in the letter sent by Illinois’ congressional representatives to President Obama in December 2009.⁷⁷ These legislators were particularly concerned given that the administration’s plan to relocate Guantánamo detainees was, by the end of 2009, focused on the maximum security prison at Thomson, Illinois.⁷⁸ Such was the general concern that Congress passed a series of further laws denying funds for the release or transfer of detainees to the mainland and the administration’s plans for what was dubbed ‘Gitmo North’ were ultimately shelved.⁷⁹ The principle of

⁷⁵ Bacon, ‘Lawmakers balk’, n 74 above; see also Robert Creamer, ‘Transferring some Guantánamo detainees to the U.S. will actually make America safer’, *Huffington Post*, 22 May 2009 at <http://www.huffingtonpost.com/robert-creamer/transferring-some-guantan_b_206724.html>. One unexpected argument in favour of transferring detainees to the US rather than to foreign jurisdictions was that there would be no risk of them being released to a hero’s welcome like the Lockerbie bomber Abdel Basset al-Megrahi. See Aaron Zelinsky, ‘Lockerbie’s lesson: move Guantánamo’s detainees to the US’, *Huffington Post*, 20 August 2009 at <http://www.huffingtonpost.com/aaron-zelinsky/lockerbies-lesson-move-gu_b_264741.html>.

⁷⁶ David B Rivkin and Lee A Casey, ‘Why it’s so hard to close Gitmo’, *Wall Street Journal*, 30 May 2009 at <<http://online.wsj.com/article/SB124364036468967905.html>>.

⁷⁷ Lynn Sweet, ‘Obama purchase of Illinois prison for Guantánamo detainees’, *Chicago Sun Times*, 17 December 2009 at <http://blogs.suntimes.com/sweet/2009/12/obama_purchase_of_illinois_pri.html>.

⁷⁸ Presidential Memorandum Directing Certain Actions with Respect to Acquisition and Use of Thomson Correctional Center to Facilitate Closure of Detention Facilities at Guantánamo Bay Naval Base, 75 *Federal Register* 1015, 15 December 2009 at <<http://www.fas.org/irp/news/2010/01/obama-gtmo.pdf>>.

⁷⁹ Nine laws relating to Guantánamo were enacted during the 111th Congress (3 January 2009 to 3 January 2011). Many of these imposed conditions on the use of appropriated funds to transfer or release Guantánamo detainees into the United States: The National Defense

not releasing any Guantánamo detainee into the United States was, moreover, upheld by the Appeals Court. It ruled in the *habeas* case of five Uighur detainees, for instance, that the courts lacked the authority to order release into the United States because the political branches had ‘exclusive power’ to decide which non-Americans could enter the country. Concerned that the courts were not applying the *Boumediene* ruling, which insisted that Guantánamo Bay is US territory, the Uighurs appealed to the Supreme Court. However, it referred the case back to the lower courts noting the Uighurs might be found residency overseas through ongoing diplomatic processes.⁸⁰ This may have been the case for the remaining Uighurs, who had been offered resettlement in Palau, but the more general problem was that other countries would be unlikely to take detainees, even those approved for release by the courts, if the US political branches, backed by the courts, had demonstrated an unwillingness to release them into American society.⁸¹ For its part, the Obama administration blamed Congress, citing ‘several laws barring the use of certain appropriated funds to effect the transfer of any persons detained . . . at Guantánamo Bay into the United States’.⁸²

Not only did this mean the detention camps at Guantánamo Bay remained in use long after President Obama had promised to close them, it meant those camps were now housing an increasing number of detainees that had been cleared for release by the courts. It also left the judges in these *habeas* cases wondering if their rulings had any actual effect on the detainees’ circumstances. For instance, Judge Silberman vented the court’s frustration in *Esmail v. Obama*. If, he wrote:

it turns out that regardless of our decisions the executive branch does not release winning petitioners because no other country will accept them and they will not be released into the United States . . . then the whole process leads to virtual

Authorization Acts for 2011 and 2012. See Michael Garcia, ‘Guantánamo Detention Center: Legislative Activity in the 111th Congress’, CRS Report R40754, 13 January 2011 at <<http://www.fas.org/spp/crs/natsec/R40754.pdf>>; and section 1026 of the Act for 2012 at <<http://www.gpo.gov/fdsys/pkg/BILLS-112hr1540enr/pdf/BILLS-112hr1540enr.pdf>>.

⁸⁰ *Kiyemba v. Obama*, 563 US (2011) at <<http://www.supremecourt.gov/opinions/10pdf/10-775.pdf>>. See also Editorial, ‘Right without a remedy’, *New York Times*, 28 February 2011 at <<http://uhpr.org/articles/4665/1/Right-Without-a-Remedy-/index.html>>. The administration had originally planned to release two of the Uighurs into Virginia and their lawyers agreed that their clients would wear ankle bracelets. It was reported that this plan was stopped after Obama’s political team worried about antagonizing Congress. Massimo Calabressi and Michael Weisskopf, ‘The fall of Greg Craig, Obama’s top lawyer’, *Time*, 19 November 2009 at <<http://www.time.com/time/magazine/article/0,9171,1940673,00.html>>.

⁸¹ William Glaberson, ‘Six detainees are freed as questions linger’, *New York Times*, 12 June 2009 at <<http://www.nytimes.com/2009/06/12/world/12gitmo.html>>. On the Uighur case, see Klaidman, *Kill or Capture*, n 66 above, 98–116.

⁸² Brief for the Respondents in Opposition, February 2011 at <<http://www.lawfareblog.com/wp-content/uploads/2011/02/2011-02-09-Kiyemba.iii-cert-opp.pdf>>.

advisory opinions. It becomes a charade prompted by the Supreme Court's defiant—if only theoretical—assertion of judicial supremacy, sustained by posturing on the part of the Justice Department, and providing litigation exercise for the detainee bar.⁸³

It should be noted that in this specific case Silberman recommended that the petition for a writ of *habeas corpus* should be denied. This was because Esmail was found to be 'part of' al Qaeda at the time of his capture in Afghanistan. This highlights the fact that the political branches were not the only obstacle to the transfer of the detainees and the closure of the camps at Guantánamo. Indeed, as the tenth anniversary of the camps approached, commentators began to question the impact of the Supreme Court's *Boumediene* ruling, particularly in light of the Court of Appeals judgment in the *Latif* case.⁸⁴

Adnan Farhan Abd Al Latif is a Yemeni citizen who had been imprisoned at Guantánamo since 2002. His claim was that he had travelled to Pakistan in 2001 to seek medical treatment and then to Kabul to meet a Yemeni man who had offered to help. In October 2011, a District Court's decision ordering his release was overturned. The Appeals Court insisted that the lower court had 'expressly refused to accord a presumption of regularity to the Government's evidence'. The presumption of regularity, Judge Brown explained, 'supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties'.⁸⁵ In deciding the facts of this case, therefore, there was a presumption in favour of the documents provided by government intelligence agencies. This, according to the *New York Times*, 'unfairly placed the burden on Mr Latif to rebut the presumption that the government's main evidence was accurate'. Instead, 'the government should bear the burden of proving by a preponderance of the evidence that his detention is warranted'. The consequence for the remaining population of Guantánamo was potentially significant. According to the *Times*, it 'eviscerated' the *Boumediene* decision. The 'appellate court's wrongheaded rulings and analyses, which have been followed by federal district judges, have reduced to zero the number of *habeas* petitions granted in the past year and a half'.⁸⁶

⁸³ *Esmail v. Obama*, US Court of Appeals, DC Circuit, 8 April 2011, concurring opinion, 2 at <<http://www.lawfareblog.com/wp-content/uploads/2011/04/2011-04-08-Esmail-opinion.pdf>>. Cited by Benjamin Wittes, 'Thoughts on Judge Silberman's Opinion', 8 April 2011 at <<http://www.lawfareblog.com/2011/04/thoughts-on-judge-silbermans-opinion/#more-1760>>.

⁸⁴ Editorial, 'Reneging on justice at Guantánamo', *New York Times*, 19 November 2011 at <<http://www.nytimes.com/2011/11/20/opinion/sunday/renegeing-on-justice-at-guantanamo.html>>.

⁸⁵ *Latif v. Obama*, US Court of Appeals, DC Circuit, 14 October 2011 at <[http://www.cad.uscourts.gov/internet/opinions.nsf/.../\\$file/10-5319.pdf](http://www.cad.uscourts.gov/internet/opinions.nsf/.../$file/10-5319.pdf)>.

⁸⁶ Editorial, 'Reneging on justice at Guantánamo', n 84 above.

BRACKETING THE BATTLEFIELD?

The close attention paid by the *Boumediene* judgment to the practicality of judicial review is significant. It reflects on the question of whether, and if so how, the Bush administration's global war on terror was adopted. The Supreme Court noted that the lack of *de jure* sovereignty was not a reason for denying *habeas* rights. However, the constraints of military occupation were. The *Eisen-trager* court, which had denied this right to German soldiers, had to weigh up constitutional *and* military necessity. Justice Kennedy concluded that where the latter carried more weight post-World War II, the former carried more weight in Guantánamo.⁸⁷ This was, as noted, a setback for the Bush administration and further reason for President Obama to seek the closure of Guantánamo.

An implication of the judgment, however, was the possibility that the Supreme Court would deny *habeas* rights in situations where the burden on the military was greater. To repeat Justice Kennedy's formulation: 'if the detention facility were located *in an active theater of war*, arguments that issuing the writ would be "impracticable or anomalous" would have more weight'.⁸⁸ Indeed, Justice Scalia warned in his dissenting opinion, that the judgment would prompt the executive to keep enemy combatants in war zones where their security could not be guaranteed and the burden on the military would increase. This concern was echoed by Raustiala who noted that in 'reality, there was little in *Boumediene* that truly stopped the executive branch from switching the Constitution on or off at will. The Bush administration could have held the same detainees in Iraq, or Afghanistan. . . . Indeed, the detainees could be moved to such places now. In these situations the practicality calculus would be very different.' In fact, it appeared the Obama administration had recognized this and, while there is no evidence that it intended to transfer Guantánamo detainees to the 'Bagram Theater Internment Facility', it did argue that the writ of *habeas corpus* did not run in Afghanistan.⁸⁹

It argued this in the *Maqaleh v. Gates* case. This involved the case of a Yemeni, Fadi al Maqaleh, who was claimed to have been captured outside of Afghanistan, designated an enemy combatant and rendered to Bagram in 2004.⁹⁰ Lawyers for the Obama administration filed a motion to dismiss

⁸⁷ *Boumediene v. Bush* US 533 (2008) n 49 above, 32, 40.

⁸⁸ *Boumediene v. Bush* US 533 (2008) n 49 above, 41, emphasis added.

⁸⁹ The US took control of Bagram Air Base, located about forty miles north of Kabul, shortly after the invasion of Afghanistan in 2001. In 2006, the US entered into a lease with Afghanistan, which states that the US 'shall have exclusive, peaceable, undisturbed, and uninterrupted possession' of the facility. The US has the sole power to terminate the lease and pays no rent. Kal Raustiala, 'Al Maqaleh v. Gates', *American Journal of International Law* 104 (2010) 648.

⁹⁰ The original case also involved Haji Wazir, an Afghan captured in Dubai; Amin al Bakri, a Yemeni captured in Thailand; and Redha al Najjar, a Tunisian captured in Pakistan. Raustiala, 'Al Maqaleh v. Gates', n 89 above.

based on the clause in the MCA that stripped federal courts of jurisdiction over *habeas* petitions. This was, as Raustiala notes, ‘precisely the argument advanced by the Bush administration’. Indeed, when the District Court Judge, John Bates, asked the new administration whether it intended to revisit that position ‘the Obama administration declared “the Government adheres to its previously articulated position”’.⁹¹ So, in April 2009, Judge Bates applied the *Boumediene* test to the case. He found that the US was in ‘near-total operational control’ of Bagram. Thus, US constitutional law applied to US forces operating there despite undisputed Afghan sovereignty. ‘Bagram, in short, was much more like Guantánamo than it was like the Landsberg prison at issue in *Eisentrager*.’⁹²

Bates also applied the practicality test and agreed with the government that Afghanistan was an active theatre of war. Unlike the government, however, he noted that the *Boumediene* court was: ‘motivated in no small way by the concern that the Executive could, under its argument, shuttle detainees to Guantánamo “to govern without legal constraint”.’ It is one thing, Bates argued, to capture individuals within Afghanistan and detain them at Bagram. It is ‘quite another thing to apprehend people in foreign countries—far from any Afghan battlefield—and bring them to a theater of war. . . . Such rendition resurrects the same spectre of limitless Executive power the Supreme Court sought to guard against in *Boumediene*.’⁹³ Because their cases originated outside the battlefield, in other words, none of the military contingencies that could deny *habeas corpus* applied.

The District Court’s reasoning in *Maqaleh* is significant for two reasons. Firstly, it reaffirmed the significance of the republican liberal idea that there is ‘no clear geographic bright line’ as to where the writ does not apply. Secondly, it reaffirmed the view that the contingencies of the battlefield might make it impractical to apply the writ. Moving beyond *Boumediene*, however, Judge Bates engaged in a different kind of linear thinking. He in effect inverted the claim that human rights applied only inside the United States and that anywhere beyond that was an anarchic zone of exception where human rights regimes did not apply. The US he recognized was certainly at war in *Afghanistan* but beyond that geographically bounded situation US behaviour was restrained by human rights norms. In other words, it was the battlefield in Afghanistan that was the exception rather than an expression of the global norm; and, conversely, the zone of liberal peace inside the US was an expression of the global norm rather than the exception. This was an important

⁹¹ Kal Raustiala, ‘Is Bagram the New Guantánamo? Habeas Corpus and *Maqaleh v. Gates*’, *ASIL Insights* 13 (2009) at <<http://www.asil.org/files/insight090617pdf.pdf>>.

⁹² Raustiala, ‘Is Bagram the New Guantánamo?’, n 91 above.

⁹³ Raustiala quoting Judge Bates in ‘Is Bagram the New Guantánamo?’, n 91 above.

check on government claims that the battlefield was global and al Qaeda associates were enemy combatants regardless of where they were arrested.

This (re)territorializing or bracketing of the battlefield was consistent with evidence that elements in the Obama administration were pushing a narrower interpretation of ‘the battlefield’. In June 2009, for instance, the *Washington Post* reported an administration official stating that:

Al-Qaeda operatives captured on the battlefield, *which the official defined as Iraq, Afghanistan, Pakistan and possibly the Horn of Africa*, would be held in battlefield facilities. Suspects captured elsewhere in the world could be transferred to the United States for federal prosecution, turned over to local authorities or returned to their home countries.⁹⁴

Had this standard applied earlier, detainees like Lakhdar Boumediene, who had been captured in Bosnia, would not have been labelled as an enemy combatant. They would have been tried in a federal court rather than detained under the laws of war. As Chapter 2 noted, however, the administration seemed to adopt an expansive definition of ‘the battlefield’, arguing that enemy combatant status was not attached only to al Qaeda operatives active in hot (i.e. active) theatres of war.

The Obama administration’s interest in protecting prolonged detention as a policy option was also apparent in its appeal against Judge Bates’s ruling in *Maqaleh*. It argued that Bagram was more like Landsberg, to the extent that the military had to shoulder the practical burdens of occupation and an ongoing armed conflict, than it was like Guantánamo.⁹⁵ In fact, the Court of Appeals agreed with this position in May 2010. It rejected *Maqaleh*’s claim that US control of Bagram was sufficient to trigger the extraterritorial application of the Constitution. Indeed, Taliban forces attacked the base just days before the decision was issued. This was, according to Raustiala, ‘unlikely to have changed the court’s decision, [but] it surely underscored the dangers

⁹⁴ Dafna Linzer and Peter Finn, ‘White House weighs order on detention’, *Washington Post*, 27 June 2009, emphasis added, at <<http://www.washingtonpost.com/wp-dyn/content/article/2009/06/26/AR2009062603361.html>>.

⁹⁵ *Al Maqaleh v. Gates*, Brief for the Respondents, 14 September 2009 at <<https://sites.google.com/a/ijnetwork.org/maqaleh-v-gates/>>. It is interesting to note that, as Solicitor General, the Brief of the Respondents was penned by Elena Kagan, who was later nominated by the Obama administration for Supreme Court Justice. In testimony to Congress, Kagan confirmed that she held a broad view of ‘the battlefield’. Senator Graham for instance noted that he had asked Attorney General Holder about the boundaries of the ‘physical battlefield’ and asked him “if our intelligence agency should capture someone in the Philippines that is suspected of financing al Qaida worldwide, would you consider that person part of the battlefield, even though we’re in the Philippines, if they were involved in al Qaida activity?” Holder said . . . yes, I would.’ Graham then asked Kagan if she agreed with that. Her response was ‘I do’. Jack Kenny, ‘Elena Kagan and the Worldwide “Battlefield”’, 11 February 2010 at <<http://www.thenewamerican.com/opinion/959-jack-kenny/3286-elena-kagan-the-worldwide-qbattlefieldq>>.

there'.⁹⁶ As to Judge Bates's concern that the executive could avoid oversight by transporting terrorist suspects from locations where the *habeas* writ applied to areas where it did not, the Appeals Court dismissed it as speculative. When it happened, the Court would rule on it, but it had not happened in this case. The government had transported Maqaleh to Bagram for reasons other than avoiding *habeas corpus*. The notion that the United States:

deliberately confined the detainees in the theater of war rather than at, for example, Guantánamo, is not only unsupported by the evidence, it is not supported by reason. To have made such a deliberate decision to 'turn off the Constitution' would have required the military commanders or other Executive officials making the situs determination to anticipate the complex litigation history set forth above and predict the *Boumediene* decision long before it came down.⁹⁷

There was another way in which the courts possibly restrained the government. This involved the meaning of the term 'enemy combatant', and specifically what it meant to 'be part of' or to 'support' al Qaeda. The Obama administration was, as noted at the outset of this chapter, quick to separate itself from its predecessor's broad conception of enemy combatant status, which had famously included the 'little old lady in Switzerland' who supported charities linked in some way to al Qaeda or the Taliban.⁹⁸ In March 2009, for

⁹⁶ Raustiala, '*Al-Maqaleh v. Gates*', n 89 above, 648.

⁹⁷ *Al-Maqaleh v. Gates*, US Court of Appeals, DC Circuit, 21 May 2010, 25 at <http://www.haguejusticeportal.net/Docs/NLP/US/Al_Maqaleh_v_Gates_Court_of_Appeals_21-05-2010.pdf>. For the view that 'the appellate judges overestimated the practical difficulty of affording court access and underestimated American control in Bagram', see Editorial, 'Backward at Bagram', *New York Times*, 31 May 2010. The *Times* saw as positive the decision to leave 'open the possibility of a different result in a case where there is a clear showing that the government transferred detainees into an active combat zone in order to evade judicial review of detention decisions' but insisted that the 'ruling was deeply unconvincing in suggesting . . . that this did not apply to the case before it'. Raustiala underscores the dangers from a human rights perspective: 'Still, the weakest link in *Al Maqaleh* is the very troubling incentives it creates. The DC Circuit doubted that the government deliberately used Bagram to nullify the right to *habeas corpus*. While one petitioner claimed to have been captured in Thailand, for instance, the court did not believe he was flown to Bagram in order to escape the reach of federal judges. In a narrow sense, it may be true that there was no *deliberate* effort to circumvent the judiciary: the detainee in question was captured in 2002, a time when few believed that federal courts could intervene in Guantánamo, let alone Bagram. (It is nonetheless unclear why the government chose to fly him into what was, even then, an active war zone.) Yet in the wake of *Al Maqaleh*, the US government has every reason to bring suspected terrorists—wherever in the world they are captured—to Bagram, especially if they can do so quietly. And given the hazardous situation in Afghanistan, it is very hard for outsiders to monitor who is coming in or out of the base. It will be a terrible outcome if Bagram, and the ruling in *Al Maqaleh*, are (mis)used in this way': Raustiala, '*Al Maqaleh v. Gates*', n 89 above, 648.

⁹⁸ The hypothetical 'little old lady in Switzerland' that donated money to an Afghan orphanage, which then found its way to al Qaeda, became famous in 2004 when lawyers representing the government in a district court case suggested that she would be labelled an unlawful enemy combatant. Associated Press, 'US says terrorism net must be wide', *LA Times*, 2 December 2004 at <<http://articles.latimes.com/2004/dec/02/nation/na-gitmo2>>.

instance, the DoJ stopped using the term ‘enemy combatant’ and claimed that it would only detain individuals that were not members of the Taliban or al Qaeda if they provided ‘substantial’ support to these groups.⁹⁹ What was meant by ‘substantial support’, however, was seemingly a matter of dispute across the national security bureaucracy.

Evidence for this is contained in reports that lawyers for the State and Defense Departments clashed when they considered the case of Belkacem Bensayah. Bensayah is an Algerian man who had been arrested in Bosnia—far from the active combat zone in Afghanistan—and was being held at Guantánamo. The government accused Bensayah of facilitating the travel of people who wanted to go to Afghanistan to join al Qaeda. A judge found that such ‘direct support’ was enough to hold him as an enemy combatant, and the Justice Department asked an appeals court to uphold that ruling. That request was reportedly opposed by Harold Koh after he was confirmed as legal adviser to the State Department in June 2009.¹⁰⁰ Koh, according to Charlie Savage, ‘produced a lengthy, secret memo contending that there was no support in the laws of war for the United States’ position in the *Bensayah* case’. From Koh’s perspective, in other words, the US should operate with a relatively narrow conception of ‘the enemy’, particularly when a suspect was arrested outside the active theatre of war. According to Savage, however, ‘Koh found himself in immediate conflict with the Pentagon’s top lawyer, Jeh C. Johnson, a former Air Force general counsel. . . . Johnson produced his own secret memorandum arguing for a more flexible interpretation of who could be detained under the laws of war—now or in the future.’¹⁰¹

When the appeal was argued in September 2009 the government seemingly adopted Koh’s position. In the words of the Court, the government ‘eschewed reliance upon certain evidence the district court had considered’ and abandoned its position that Bensayah’s detention was lawful because of the support he rendered to al Qaeda. That did not mean Bensayah was about to be released. Instead, the government argued that his detention was ‘lawful because he was “part of” that organization’; and the Court agreed with the

⁹⁹ Department of Justice, ‘Department of Justice Withdraws “Enemy Combatant” Definition for Guantánamo Detainees’, press release, 13 March 2009 at <<http://www.usdoj.gov/opa/pr/2009/March/09-ag-232.html>>.

¹⁰⁰ Charlie Savage, ‘Obama team is divided on anti-terror tactics’, *New York Times*, 28 March 2010 at <<http://www.nytimes.com/2010/03/29/us/politics/29force.html>>.

¹⁰¹ Savage, ‘Obama team is divided’, n 100 above. See also Klaidman, *Kill or Capture*, n 66 above, 207–9. The broad view seemed to prevail in other *habeas* cases. For instance, the government argued in the case of the Yemeni detainee Ghaleb Nassar Al-Bihani, that simply cooking meals for the Taliban was ‘more than sufficient support’ to justify his detention. Chisun Lee, ‘Their own private Guantánamo’, *New York Times*, 23 July 2009 at <<http://www.nytimes.com/2009/07/23/opinion/23lee.html>>. The Court of Appeals agreed: *Al-Bihani v. Obama*, US Court of Appeals, DC Circuit, 5 January 2010 at <<http://www.haguejusticeportal.net/Docs/NLP/US/al-bihani-janappeal.pdf>>.

government ‘that its authority under the AUMF extends to the detention of individuals who are functionally part of al Qaeda’.¹⁰² Yet it insisted that the ‘evidence upon which the district court relied in concluding Bensayah supported al Qaeda is insufficient . . . to show he was part of that organization’. It therefore remanded the case for the district court to determine whether, considering all reliable evidence, Bensayah was functionally part of al Qaeda.¹⁰³ These cases are significant because they illustrate the debate about how broadly the US should define ‘the enemy’.

CONCLUSION

The detention camps at Guantánamo Bay are perhaps the most potent symbol of the post-9/11 American exception. To legitimize them and the policy of preventive detention the Bush administration argued that the US was at ‘war’ with al Qaeda and under the laws of war it could detain enemy combatants for the duration of the conflict. It is significant, however, that in December 2001 the Office of Legal Counsel (OLC) considered the question of *habeas* challenges to this policy. It indicated some doubt that the new war paradigm may not have immunized the executive’s policy against judicial review. It had to prepare alternative strategies to defend its preferred strategy. As an additional means of defending preventive detention, therefore, the OLC drew on exclusionary conceptions of the sovereign liberal state. It argued, in other words, that its obligations to observe human rights norms applied only in the territory over which it was *de jure* sovereign. In this respect, the OLC helped to construct anarchy, or what Lord Johan Steyn famously called ‘the legal black hole’, and this in many respects echoes the point contemporary Schmittians argue about the war on terror and the behaviour of liberal states more generally.¹⁰⁴

Of course, the camps remained open long after President Obama promised to close them and his administration continued to frame the conflict with al Qaeda as a ‘war’ in order to legitimize preventive detention. These developments might be interpreted as further evidence that the post-9/11 American exception is indeed permanent. Yet the evidence presented here demonstrates that liberal ideas supportive of a universally and equally applicable human rights regime have not been powerless. The Madisonian insistence (that the US Constitution was but part of a global constitution that protected the rights of humankind) found expression in judicial decisions that restrained the

¹⁰² *Bensayah v. Obama et al.*, US Court of Appeals, DC Circuit, 28 June 2010, 2.

¹⁰³ *Bensayah v. Obama et al.*, 28 June 2010, n 102 above, 2.

¹⁰⁴ Lord Johan Steyn, ‘Guantanamo Bay: The Legal Black Hole’, 27th FA Mann Lecture, British Institute of International and Comparative Law, 25 November 2003.

political branches.¹⁰⁵ These ideas have not been blind to the threat posed by al Qaeda or to the reality of armed conflict in Afghanistan. But they have insisted that liberal norms do control national security exceptions. They have, in other words, been an important check. This kind of check was reinforced, at least at the rhetorical level, by President Obama. He insisted that there was no trade-off between security and liberty. If the Founding Fathers could write the Bill of Rights when faced with the threat of foreign invasion, then modern day Americans could, he insisted, live by its principles even after 9/11. This sentiment did not, however, carry political opinion. It was not possible to close Guantánamo as quickly as the administration would have liked mainly because Congress denied the administration the funds to do so.

¹⁰⁵ See Jonathan Hafetz's chapter 'The Seeds of a Global Constitution' in which he writes Madison 'insisted that his proposed Bill of Rights "expressly declare the great rights of mankind", thus implicitly rejecting the "us" versus "them" dichotomy'. Jonathan Hafetz, *Habeas Corpus after 9/11: Confronting America's New Global Detention System* (New York: New York University Press, 2011).

Interrogating Terrorist Suspects after 9/11

The evidence presented in previous chapters has illustrated how exclusionary conceptions of the liberal state influenced the US response to 9/11. The US, in other words, was not bound by the standards of international human rights or international humanitarian standards because, from the Bush administration's perspective, the war on terror was to be waged outside of the situations or spaces where those standards applied. So, on the question of targeting terrorist suspects (see Chapter 2), the Bush administration argued that the US was at war with al Qaeda, that the laws and customs of war rather than international human rights law was applicable and terrorists who continued to plot attacks against the US could thus be lawful subjects of armed attack. It further argued that as combatants waging war without proper authority to do so al Qaeda and the Taliban were excluded from the privileges and protections of international humanitarian law, which only applied to conventional war (see Chapter 3). So too, on the question of detention, the administration argued that terrorist suspects held at Guantánamo could not appeal against their status because they were enemy combatants that could be held under the laws of war for the duration of the conflict; and even if their status as enemies (rather than criminals) was questionable, international human rights obligations did not apply because they applied only to territory where the US had jurisdiction and that was not the case with Guantánamo (see Chapter 4).

A similar pattern of arguments was made with regard to the international standards governing the interrogation of terrorist suspects after 9/11. The Geneva Conventions extend basic humanitarian protections to detainees in international and non-international armed conflict. Article 17 of the third Geneva Convention, for instance, states explicitly that '[n]o physical or mental torture, nor any form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever'.¹ Likewise, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) covers 'any act by which severe pain or suffering, whether

¹ The 1949 Geneva Conventions and their Protocols at <<http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/index.jsp>>.

physical or mental, is intentionally inflicted on a person for such purpose as obtaining from him or a third person information of a confession'.² Article 2 insists that states take effective measures 'to prevent acts of torture in any territory under its jurisdiction'. It also states that '[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture'. Chapter 3 set out the reasons why, according to the Bush administration, the Geneva Conventions did not apply to the war against al Qaeda. It also demonstrated how the liberal pushback against that manifested itself in the 2006 Supreme Court decision in *Hamdan*, which insisted that the basic humanitarian standards of common article 3 in non-international armed conflict applied to the war on terror.

The purpose of this chapter is to describe how similar arguments influenced the post-9/11 approach to CAT. It does not pass normative judgement on either the legality or legitimacy of these arguments. It seeks instead to demonstrate the existence of an alternative liberal position and to describe the influence that had as a check on the Bush administration's policy. It discusses how, as in the debate over the government's detention powers, the Bush administration interpreted the phrase 'territory under its jurisdiction' in a way that meant CAT's restraints did not apply to American actions outside the US, including the transfer of detainees to other countries for the purpose of interrogation or what became known as extraordinary rendition. The chapter then notes how a more inclusionary interpretation became significant particularly after the disclosure of detainee abuse at Abu Ghraib. This manifested itself in the Detainee Treatment Act (DTA), where Congress effectively erased the line setting geographical limitations on the scope of human rights obligations. In the third section the chapter describes the pushback against the arguments which claimed enhanced interrogation techniques (EITs) could be used because the US faced a moment of exceptional insecurity. Opposition to this idea found expression deep within the national security bureaucracy and it manifested itself in the policies of Barack Obama, who rejected the idea that the threat of terrorism was so grave that it required the US, as he put it, to trade its values for security. In fact, the new administration drew on realist interest-based arguments, as well as liberal identity-based arguments, in ruling out the use of EITs. Echoing the Kantian position (see Chapter 1), Obama argued that they harmed the quest for security by acting as a 'recruitment tool' for al Qaeda. This was immediately rejected by conservatives, including, most significantly, former Vice-President Dick Cheney. Common ground did exist, however, to the extent the new administration did not respond to liberal calls for prosecutions related to the enhanced interrogation programme.

² United Nations, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 1 at <<http://www2.ohchr.org/english/law.htm>>.

ENHANCED INTERROGATION

In his memorandum to the President of 25 January 2002, the White House Counsel Alberto Gonzalez gave expression to the profound insecurity that gave rise to the war on terror. America's 'new war', he stated, placed a 'high premium' on factors 'such as the ability to quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities against American civilians'.³ The pressure to obtain such information contributed to requests to use what became known as enhanced interrogation techniques.⁴ In the summer of 2002, the Office of Legal Counsel (OLC) was asked for its opinion on these techniques as they related to international standards, including CAT. In trying to determine whether the techniques being proposed constituted torture, the OLC turned to Section 2340 of the US criminal code, which arguably contained a narrower definition of torture than CAT.⁵ Section 2340 defined torture as action 'specifically intended to inflict severe physical or mental pain or suffering'. The OLC then focused on the word *severe* and concluded that the 'physical pain amounting to torture must be equivalent in intensity to the pain that is accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death'. In addition, the OLC noted that these methods of interrogation had been used on US military personnel during Survival, Evasion, Resistance and Escape (SERE) training. The fact that these trainees had not suffered prolonged mental harm was presented as further

³ Memo 7, Memorandum for the President, Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban, from Alberto R Gonzales, 25 January 2002, in Karen J Greenberg and Joshua L Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (Cambridge: Cambridge University Press, 2005) 119.

⁴ There were always two tracks to US interrogation practices during the Bush administration. The first involved detainees under the control of the Department of Defense (DoD) at Guantánamo. For details, see US Senate, Inquiry into the Treatment of Detainees in US Custody: Report of the Armed Services Committee, 20 November 2008 at <http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%202022%202009.pdf>. The second track involved those held in CIA custody and transferred between secret detention facilities. In a 2007 memo to the Acting General Counsel to the CIA, the Deputy Assistant Attorney General noted that there had been a total of ninety-eight detainees in the programme. 'Of those 98 detainees', he added, 'the CIA has only used enhanced techniques with a total of 30.' Steven G Bradbury, Memorandum for John A Rizzo, Acting General Counsel CIA Re: 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, 20 July 2007, 5 and 33 at <http://www.washingtonpost.com/wp-srv/nation/documents/2007_0720_OLC_memo_warcrimesact.pdf>; also John Helgerson, Counterterrorism, Detention and Interrogation Activities (September 2001–October 2003), Report of the CIA Inspector General, 7 May 2004, 88 at <http://media.luxmedia.com/aclu/IG_Report.pdf>. See generally David Forsythe, *The Politics of Prisoner Abuse: The United States and Enemy Prisoners after 9/11* (Cambridge: Cambridge University Press, 2011).

⁵ Frederic Kirgis, 'Distinctions between International and US Foreign Relations Law Issues Regarding Treatment of Suspected Terrorists', *ASIL Insights*, June 2004 at <<http://www.asil.org/insigh138.cfm>>.

evidence that the techniques did not amount to torture. There was therefore 'a wide range of such techniques that will not rise to the level of torture'.⁶ These would be officially known as 'enhanced interrogation techniques' and it is claimed that so-called high value detainees such as Mohammed al-Khatani, Abu Zubaydah and Khaled Sheikh Mohammed were subjected to coercive interrogations from the fall of 2002.⁷

The pushback against this policy within the national security policymaking community was immediate. The FBI, for instance, recommended rejecting the use of enhanced interrogation methods because those that employed them 'may be indicted, prosecuted and possibly convicted'.⁸ Likewise, lawyers within the DoD tried to stop enhanced interrogations. When he received reports of prisoner abuse at Guantánamo in December 2002, for instance, General Counsel to the Navy, Alberto Mora, expressed concern to the Army General Counsel, Steven Morello. Morello informed him that prior objections had been rejected by Secretary Rumsfeld who insisted that all legal questions had been settled by the OLC. After reviewing the OLC's advice Mora concluded that it was 'fatally grounded on . . . serious failures of

⁶ Jay Bybee, Memorandum for Alberto R Gonzales Counsel to the President, Standards of Conduct for Interrogation under 18 U.S.C. §§2340–2340A, 1 August 2002, in Greenberg and Dratel (eds), *The Torture Papers*, n 3 above, 172–3; and Jay Bybee, Memorandum for John Rizzo, Acting General Counsel for the CIA, Interrogation of al Qaeda Operative, 1 August 2002, 2–4 at <<http://www.gwu.edu/~nsarchiv/torturingdemocracy/archive/recent.html>>.

⁷ Specifically on the Khatani interrogation, see Philippe Sands, *Torture Team: Uncovering War Crimes in the Land of the Free* (London: Penguin Books, 2009); and Bob Woodward, 'Detainee tortured, says U.S. official', *Washington Post*, 14 January 2009 at <<http://www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011303372.html>>. See also Forsythe, *The Politics of Prisoner Abuse*, n 4 above, 109–10. On the Zubaydah and Mohammed interrogations, see Scott Shane, 'Waterboarding used 266 times on 2 suspects', *New York Times*, 19 April 2009 at <<http://www.nytimes.com/2009/04/20/world/20detain.html>>; and Steven G Bradbury, Memorandum for John A Rizzo, Senior Deputy General Counsel CIA Re: Application of United States Obligations Under Article 16 of the Convention against Torture to Certain Techniques that May be Used in the Interrogation of High Value al Qaeda Detainees, 30 May 2005, 6–11 at <<http://www.justice.gov/olc/docs/memo-bradbury2005.pdf>>. For further evidence on both DoD and CIA actions, see US Senate, Inquiry into the Treatment of Detainees in US Custody, n 4 above; and ICRC Report on the Treatment of Fourteen 'High Value Detainees' in CIA Custody, February 2007 in Mark Danner, 'The Red Cross Torture Report: What It Means', *New York Review of Books*, 30 April 2009 at <<http://www.nybooks.com/articles/archives/2009/apr/30/the-red-cross-torture-report-what-it-means>>; and Mark Danner, 'US Torture: Voices from the Black Sites', *New York Review of Books*, 9 April 2009 at <<http://www.nybooks.com/articles/archives/2009/apr/09/us-torture-voices-from-the-black-sites/>>; David Margolis, 'Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility's Report of Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists', 5 January 2010 at <<http://www.nytimes.com/2010/02/20/us/politics/20justice.html>>, 83–90.

⁸ FBI, Legal Analysis, 27 November 2002 at <<http://www.torturingdemocracy.org/documents/20021127-2.pdf>>; Department of Justice, Office of Professional Responsibility, 'Investigation into the Office of Legal Counsel's Memoranda Concerning the Central Intelligence Agency's use of "Enhanced Interrogation Techniques" on Suspected Terrorists', 29 July 2009, 33, at <<http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf>>.

legal analysis'.⁹ There would, he suggested, be serious legal and political ramifications if the interrogations were allowed to continue. What he called the 'mistreatment' of the detainees:

was illegal and contrary to American values. In addition to their unlawfulness, the abusive practices—once they became known to the American public and military—would have severe policy repercussions: the public and military would both repudiate them; public support for the War on Terror would diminish; there would be ensuing international condemnation; and, as a result, the United States would find it more difficult not only to expand the current coalition, but even to maintain the one that existed. The full political consequences were incalculable but certain to be severe.¹⁰

Mora's advice illustrates how a realist concern for political consequences lines up alongside a liberal view that insists on limiting American power even in moments of exceptional insecurity. It also gave the Secretary of Defense reason to pause. General Counsel William Haynes informed Mora on 15 January 2003 that Rumsfeld had ordered a suspension of the DoD interrogation programme. Yet the outcome of this pause was a reaffirmation of the previous position. The DoD Working Group was told that they would receive further advice from the OLC, which they were to regard as definitive. That advice concluded that for an act 'to constitute torture "severe pain" must rise to a . . . high level—the level that would ordinarily be associated with a physical condition or injury sufficiently serious that it would result in death, organ failure, or serious impairment of body functions'.¹¹

⁹ Alberto Mora, Memorandum for Inspector General Department of the Navy, Office of General Counsel Involvement in Interrogation Issues, 7 July 2004, 6 at <<http://www.newyorker.com/images/pdf/2006/02/27/moramemo.pdf>>. See also Dan Rather's interview with Mora at <<http://www.carnegiecouncil.org/studio/video/data/000022>>. For further opposition within the Pentagon, see Jack L Rives, Memorandum from Deputy Judge Advocate General on the Final Report and Recommendations on the Working Group to Assess the Legal, Policy and Operational Issues Relating to Interrogation of Detainees, 5 February 2003 at <www.torturingdemocracy.org/documents/20030205.pdf>; Thomas Romig, Memorandum for General Counsel of the Department of the Air Force, Draft Report and Recommendations on the Working Group to Assess the Legal, Policy and Operational Issues Relating to Interrogation of Detainees, 3 March 2003 at <<http://www.torturingdemocracy.org/documents/20030205.pdf>>. For an overview of Judge Advocate General's Corps (JAG) opposition, see Dick Jackson, 'Interrogation and Treatment of Detainees in the Global War on Terror', in Michael Lewis et al. (eds), *The War on Terror and the Laws of War: A Military Perspective* (Oxford: Oxford University Press, 2009) 125–59; and on the 'martial honor' of the JAG Corps as a source of non-consequentialist restraint, see Mark Osiel, *The End of Reciprocity: Terror, Torture and the Law of War* (Cambridge: Cambridge University Press, 2009) 329–61.

¹⁰ Mora, Memorandum for the Inspector General, n 9 above, 10.

¹¹ For OLC reaffirmation of the initial advice, see John Yoo, Memorandum for William J Haynes II, General Counsel Department of Defense, Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States, 14 March 2003, 38–9 at <<http://www.torturingdemocracy.org/documents/20030314.pdf>>. See also Office of Professional Responsibility, 'Investigation into the Office of Legal Counsel's Memoranda', n 8 above, 73–81.

Despite losing the internal battle that set the parameters of US interrogation policy, Mora's prediction that the fallout from a public scandal would force a reconsideration of the policy proved correct. Jack Goldsmith, for instance, took over from Jay Bybee as Assistant Attorney General at the OLC in the fall of 2003. He writes that he identified flaws in OLC reasoning before the Abu Ghraib scandal. In his opinion, the OLC's analysis demonstrated an 'unusual lack of care and sobriety'. It 'rested on cursory and one-sided legal arguments' and it was 'tendentious in substance and tone'.¹² Yet he also notes that it was the public exposure of the Bybee memo in June 2004, and a concern for the OLC's 'institutional reputation', that led him to withdraw the opinion.¹³ In December 2004, Acting Assistant Attorney General Daniel Levin reissued the OLC's interpretation of Section 2340. The new memo disagreed with the earlier definition of 'severe' pain. Instead, it offered 'a common understanding', as well as definitions found in judgments involving the Torture Victims Protection Act, which had been dismissed as irrelevant in the earlier memos.¹⁴

¹² Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (New York: WW Norton, 2007) 148–51. The Office of Professional Responsibility (OPR) in the Department of Justice later concluded that, by writing the relevant memos, John Yoo had 'put his desire to accommodate the client above his obligation to provide thorough, objective, and candid legal advice'. This amounted to 'intentional professional misconduct': Office of Professional Responsibility, 'Investigation into the Office of Legal Counsel's Memoranda', n 8 above, 254. This charge was later downgraded to 'poor judgment' by Associate Deputy Attorney General David Margolis. He found that 'John Yoo's loyalty to his own ideology and convictions clouded his view of his obligation to his client and led him to author opinions that reflected his own extreme, albeit sincerely held, views of executive power': Margolis, 'Memorandum of Decision', n 7 above, 67–8. This conclusion, that the OLC's memos were a consequence of ideological conviction rather than 'professional misconduct', led Yoo to argue that 'OPR lawyers and the Obama administration disagreed with the policy choices made by President Bush on the detention and interrogation of terrorists. But instead of arguing against those policies honestly and openly they decided to fight them under the pretext of a cooked-up ethics investigation.' His 2002 analysis was, he insisted, written in 'good faith'. Indeed, given the OPR's political bias, we should, Yoo argued, dismiss its conclusion that his judgement was poor. The finding was instead 'a victory for people fighting the war on terror': John Yoo, 'Finally, an end to Justice Dept. investigation', *Philadelphia Inquirer*, 28 February 2010 at <http://www.cleveland.com/opinion/index.ssf/2010/03/finally_an_end_to_justice_dept.html>. For discussion, see David Cole, 'The Sacrificial Yoo: Accounting for Torture in the OPR Report', *Journal of National Security Law and Policy* 4 (2010) 455–64.

¹³ Goldsmith, *The Terror Presidency*, n 12 above, 158.

¹⁴ Daniel Levin, Memorandum Opinion for the Deputy Attorney General, Legal Standards Applicable under 18 U.S.C. §§ 2340–2340A, 30 December 2004 at <<http://www.usdoj.gov/olc/>>; Daniel Levin, Letter to CIA Acting General Counsel, John A Rizzo, 6 August 2004 at <www.washingtonpost.com/wp-srv/nation/documents/2004_0806_OLC_letter_rizzo.pdf>.

TERRITORY UNDER ITS JURISDICTION

Evidence that a spatial form of exceptionalism informed US policy can be found in the documents interpreting CAT in relation to the transfer or rendition of detainees to other countries. The practice of rendition refers to the transfer of an individual from one state to another in a manner that bypasses due process. It is different, therefore, to extradition. Prior to 9/11, the US 'rendered' suspected terrorists to other countries to face trial and the US Supreme Court ruled that individuals could be prosecuted in the US regardless of the circumstance of their arrest.¹⁵ The practice of rendition for the purpose of interrogation is often referred to as 'extraordinary' rendition.¹⁶ It was claimed openly that there were various reasons (e.g. language and cultural affinity) why a suspect might be transferred for the purpose of interrogation.¹⁷ The concern of human rights groups, however, was that detainees were being rendered to countries that were known to use aggressive interrogation techniques and that this was in breach of US human rights obligations.¹⁸

Article 7 of the International Covenant on Civil and Political Rights (ICCPR), for instance, states that no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment. According to the Office of the UN Human Rights Commissioner, this includes a commitment that states 'must not expose individuals to danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement'.¹⁹ This is echoed in Article 3(1) of CAT, which insists that '[n]o State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'. The US argued in the immediate post-9/11 period, however, that 'article 3 [of the CAT] did not impose legal obligations on it with respect to an individual who was outside its territory'.²⁰ This position had

¹⁵ See, for instance, Presidential Decision Directive-39, US Policy on Counterterrorism, 21 June 1995 at <<http://www.fas.org/irp/offdocs/pdd39.htm>>; *US v. Alvarez-Machain*, 504 U.S. 655 (1992) which upheld the jurisdiction of US courts to try a man abducted from Mexico; and Forsythe, *The Politics of Prisoner Abuse*, n 4 above, 137.

¹⁶ See Margaret Satherthwaite, 'Rendered Meaningless: Extraordinary Rendition and the Rule of Law', *George Washington Law Review* 75 (2007) 1333–88.

¹⁷ Dana Priest and Barton Gellman, 'Stress and distress tactics used on terrorism suspects held in secret overseas facilities', *Washington Post*, 26 December 2002; and John Yoo, 'Transferring Terrorists', *Notre Dame Law Review* 79 (2004) 1187.

¹⁸ Human Rights Watch, 'Statement on US Rendition Legislation', 10 March 2005 at <<http://www.hrw.org/news/2005/03/09/statement-us-rendition-legislation>>.

¹⁹ General Comment No. 20 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Art 7), Office of the United Nations High Commissioner for Human Rights, 10 March 1992 at <<http://www.unhcr.ch/tbs/doc.nsf/0/6924291970754969c12563ed004c8ae5?OpenDocument>>.

²⁰ Committee Against Torture, Summary Record of 703rd Meeting, 5 May 2006, CAT/C/SR.703, 12 May 2006, 7 at <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/418/46/PDF/>

initially been set out by the OLC in 2002, and again by John Yoo as an academic in a *Notre Dame Law Review* article in 2004. According to Yoo, the norm had ‘no extraterritorial effect . . . and, hence, cannot apply to al Qaeda and Taliban prisoners detained *outside* of the United States territory at Guantánamo Bay or in Afghanistan’.²¹ To reach this conclusion, the OLC again focused on specific terms of the relevant statute. It noted that the US Supreme Court had never interpreted the scope of Article 3, but it had interpreted the words ‘expel’ and ‘return’ in cases relating to refugees. The Supreme Court’s interpretation of these words, Yoo and Bybee argued, involved the presence of the individual in the US. Thus, the word *expel* “refers to the deportation or expulsion of an alien which is already present in the host country” . . . the word “return” refers to the involuntary removal of individuals who have not been legally admitted into the territory of the host country, but rather have been turned back or detained at the border’.²² In these cases, as well as extradition cases, the person is either in, or is attempting to get into, the state. Given this interpretation, the OLC concluded, ‘it makes no sense to view the Torture Convention as affecting the transfer of prisoners held outside the United States in another country’.²³ CAT posed ‘no obstacle to transfer because the treaty does not apply extraterritorially’.²⁴

A similar argument appears in the May 2005 OLC memo to CIA Counsel, John Rizzo. The focus for this memo is Article 16 of the CAT. This notes that each state party ‘shall undertake to prevent *in any territory under its jurisdiction* other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture’.²⁵ For the OLC, Article 16 posed no obstacle to the extraordinary rendition programme. Because CIA interrogations did not take place on the territory of the US or in areas where the US exercised ‘at least de facto authority as the government’, Article 16 was ‘inapplicable’.²⁶ The OLC

G0641846.pdf?OpenElement>. For the Committee’s response, see Committee Against Torture, 36th session, 1–19 May 2006, CAT/C/USA/CO/2, 5 at <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/432/25/PDF/G0643225.pdf?OpenElement>>.

²¹ Jay Bybee, Memorandum for William J Haynes II, General Counsel, Department of Defense, Re: The President’s Power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations, 13 March 2002, 24 at <<http://www.justice.gov/opa/documents/memorandumpresidentpower03132002.pdf>>. See also John Yoo, ‘Transferring Terrorists’, n 17 above, 1229.

²² Bybee, The President’s Power as Commander in Chief to Transfer Captured Terrorists, n 21 above, 24.

²³ Bybee, The President’s Power as Commander in Chief to Transfer Captured Terrorists, n 21 above, 24.

²⁴ Bybee, The President’s Power as Commander in Chief to Transfer Captured Terrorists, n 21 above, 1.

²⁵ United Nations, Convention against Torture, n 2 above, emphasis added.

²⁶ Bradbury, ‘Application of United States Obligations Under Article 16’, n 7 above, 2.

noted that when it ratified CAT the Senate wrote a reservation committing the US to Article 16 only insofar as the term ‘cruel, inhuman or degrading treatment or punishment’ meant behaviour prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the US Constitution. This limited the scope of the norm it was argued because Constitutional amendments did not apply to aliens outside the US. The ‘geographic limitation on the face of Article 16 renders it inapplicable to the CIA interrogation program in any event’. For these reasons he concluded ‘that the interrogation techniques where and as used by the CIA are not subject to, and therefore do not violate, Article 16’.²⁷

The significance of these arguments for the main thesis should not go unnoticed. The OLC’s arguments imitated the historical practice of ‘linear thinking’, which Schmittians argue is not beyond liberal states despite their commitment to universalism. As Chapter 1 noted, Schmitt’s concept of linear thinking describes the practice of drawing geographical lines to separate distinct normative spaces. The OLC interpretation of CAT as described above did similar things. The obligations that applied inside the United States did not extend beyond the line that defined the territory under its jurisdiction. Again, this might be offered as evidence that proves the relevance of the Schmittian critique. Yet there is plenty of evidence to suggest that this exclusionary view of the liberal state did not go uncontested. The Madisonian-republican insistence that the US Constitution was but part of a global constitution that protected the rights of humankind, and that the US had little to gain from challenging that, found expression in significant positions both inside and outside the US.

As the previous chapter noted, the republican interpretation of the liberal state’s obligations insisted that human rights norms bound states, including the US, whenever and wherever the state was *in control* of a detainee. The phrase ‘territory under its jurisdiction’ was interpreted broadly in this respect and there were no ‘geographic bright lines’ that could qualify the scope of the norm. Human rights obligations were universal in other words. The same counter-argument applied with respect to CAT. As noted, Article 2 of the CAT insists that ‘[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any *territory under its jurisdiction*’.²⁸ Interpreting the italicized words, the UN Committee Against Torture, a body of ten independent experts that monitors the implementation of CAT, recommended that ‘[t]he State party should recognize and

²⁷ Bradbury, ‘Application of United States Obligations Under Article 16’, n 7 above, 2.

²⁸ United Nations, Convention against Torture, n 2 above. The phrase ‘territory under its jurisdiction’ also appears in Articles 5 (measures to establish criminal jurisdiction), 13 (victim’s right to complain and have case impartially reviewed) and 16 (prohibition of cruel, inhuman or degrading treatment or punishment).

ensure that the provisions of the Convention expressed as applicable to “territory under the State party’s jurisdiction” apply to, and are fully enjoyed by, all persons under *the effective control* of its authorities, of whichever type, *wherever located in the world*.²⁹

This position was echoed in significant US institutions as well. FBI lawyers, for instance, opposed the OLC’s interpretation of CAT on the issue of transfers, arguing against the utilization outside the US of interrogation techniques that were prohibited inside that country.³⁰ The most significant rejection of this kind of exclusionary thinking, however, was the Detainee Treatment Act, which Congress passed in December 2005. This did two things. Section 1002 limited interrogations to the normal practices listed in the Army Field Manual; and Section 1003 effectively erased the line that drew the distinction between interrogations inside and outside the US. It stated explicitly that:

[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment; . . . [and n]othing in this section shall be construed to impose any geographical limitation on the applicability of the prohibition against cruel, inhuman, or degrading treatment or punishment under this section.³¹

The significance of this was noted in an OLC 2007 memo on interrogation. It stated that the change:

in law brought about by the DTA is significant. By its own terms, Article 16 of the CAT applies only in ‘territory under [the] jurisdiction’ of the signatory party. In addition, the constitutional provisions invoked in the Senate reservation to Article 16 generally do not apply of their own force to aliens outside the territory of the United States. . . . Thus, before the enactment of the DTA, United States personnel were not legally required to follow these constitutional standards outside the territory of the United States as to aliens.

The memo went on to state that it was US policy ‘to avoid cruel, inhuman, or degrading treatment, within the meaning of the U.S. reservation to Article 16 of the CAT, of any detainee in U.S. custody, regardless of location or nationality’ but that the DTA had codified this policy into statute.³²

²⁹ UN Committee Against Torture (CAT), Report of the UN Committee against Torture: Thirty-sixth Session (1–19 May 2006), 1 November 2006, A/61/44, 69 at <<http://www.unhcr.org/refworld/docid/45c30bbf0.html>> emphasis added.

³⁰ FBI, Legal Analysis, 27 November 2002, n 8 above, 4. See also UN Committee Against Torture, 2006, n 29 above, 3.

³¹ Detainee Treatment Act, 31 December 2005 at <<http://jurist.law.pitt.edu/gazette/2005/12/detainee-treatment-act-of-2005-white.php>>.

³² Bradbury, Memorandum for John Rizzo, 2007, n 7 above, 27.

TO SHOCK THE CONSCIENCE?

There was then a spatial aspect to the post-9/11 exception, which resonates with the Schmittian claim that American liberalism inevitably draws lines that divide a notionally universal space into separate normative spaces. But there was also a political and legislative check on this kind of thinking, which gained momentum after the prisoner abuse scandals were publicly exposed. This manifested itself in the DTA, which effectively erased any geographical line limiting US obligations. The OLC had also argued, however, that there was potentially a situational aspect to the post-9/11 exception. That is, the threat to the US was so grave that the use of enhanced interrogation methods might be defended as a matter of necessity. CAT of course insisted that ‘no exceptional circumstances whatsoever’ could be used to justify coercive interrogations. Focusing on Sections 2340–2340A of the US Criminal Code, however, the OLC argued that Congress would have been aware of this wording when it embedded the international norm in US law. Its failure to include this phrase suggested that the necessity defence could be available in circumstances of exceptional insecurity and especially in the current conflict.³³ To be certain, the OLC insisted that EITs were not inconsistent with US obligations under CAT. It nevertheless argued in a 2003 memo that if:

interrogation methods were inconsistent with the United States’ obligations under CAT, but were justified by necessity or self-defense, we would view these actions still as consistent ultimately with international law. Although these actions might violate CAT, they would still be in service of the more fundamental principle of self-defense that cannot be extinguished by CAT or any other treaty. . . . Standard criminal law defense of necessity and self-defense could justify interrogation methods needed to elicit information to prevent a direct and imminent threat to the United States and its citizens. . . . It appears to us that the necessity defense could be successfully maintained in response to an allegation of a violation of a criminal statute. Al Qaeda’s September 11, 2001 attack led to the deaths of thousands and losses in the billions of dollars. According to public and governmental reports, al Qaeda has other sleeper cells within the United States that may be planning similar attacks. Indeed, we understand that al Qaeda seeks to develop and deploy chemical, biological and nuclear weapons of mass destruction. Under these circumstances, a particular detainee may possess information that could enable the United States to prevent imminent attacks that could equal or surpass the September 11 attacks in their magnitude. Clearly, any harm that might occur during an interrogation would pale to insignificance compared to the harm avoided by preventing such an attack, which could take hundreds or thousands of lives.³⁴

³³ Yoo, Memorandum for William J Haynes II, 14 March 2003, n 11 above, 76.

³⁴ Yoo, Memorandum for William J Haynes II, 14 March 2003, n 11 above, 58 and 74–5; see also Yoo, *War by Other Means: An Insider’s Account of the War on Terror* (New York: Atlantic Monthly Press, 2006) 181.

A similar argument appeared in a July 2007 memo from the OLC to the Acting General Counsel at the CIA, John Rizzo.³⁵ It responded to the question of whether the CIA could lawfully employ six EITs in the interrogation of high value detainees who were members of al Qaeda and associated groups. This reduced list of EITs was described as ‘the minimum necessary to maintain an effective program for obtaining the type of critical intelligence from a high value detainee that the program is designed to elicit’.³⁶ The techniques included dietary manipulation, extended sleep deprivation, facial hold, attention grasp, abdominal slap and insult (or facial) slap. Waterboarding was not used after March 2003.³⁷ In this memo, the OLC reprised the earlier argument and insisted that these particular techniques did not constitute cruel and inhuman treatment. Nor did they violate the War Crimes Act which had been amended following the *Hamdan* judgment applying common article 3 of the third Geneva Convention.³⁸ It also drew on the necessity or lesser evil argument. By this standard, it argued, EITs might be used because the government interest in extracting information was higher than in normal law enforcement cases. As long as the techniques were used on ‘high value detainees’ in the war on terror then they would not ‘shock the conscience’.

The phrase ‘shock the conscience’ stemmed from the 1952 US Supreme Court case *Rochin v. California*. This involved a complaint that a criminal suspect’s due process rights under the 5th and 14th Amendments had been violated because he had been forced to vomit by police so that he would give up evidence he had swallowed. It was relevant here because the US reservation to CAT had, as noted above, stated cruel, inhuman and degrading treatment would be interpreted according to the US Constitution.³⁹ Any court applying these standards, Bradbury argued, would be forced to balance the suspect’s rights against the public interest. In this particular instance, moreover, a court would be forced to apply ‘a more flexible standard than the inquiry into

³⁵ Bradbury, Memorandum for John Rizzo, 2007, n 7 above. See also George W Bush, Executive Order 13440, Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the CIA, 20 July 2007 at <<http://www.fas.org/irp/offdocs/eo/eo-13440.htm>>; Elisa Massimino, Testimony on US Interrogation Policy and Executive Order 13440 before the US Senate Intelligence Subcommittee, 26 September 2007; and Dick Jackson, ‘Interrogation and Treatment of Detainees in the Global War on Terror’, in Michael W Lewis et al. (eds), *The War on Terror and the Laws of War: A Military Perspective* (Oxford: Oxford University Press, 2009).

³⁶ Bradbury, Memorandum for John Rizzo, 2007, n 7 above, 7.

³⁷ Steven G Bradbury, Prepared Statement for the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, 14 February 2008, 5 at <<http://judiciary.house.gov/hearings/pdf/Bradbury080214.pdf>>.

³⁸ Bradbury, Memorandum for John Rizzo, 2007, n 7 above, 7–26. For internal opposition from the State Department’s legal adviser John Bellinger, see Office of Professional Responsibility, n 8 above, 156–7.

³⁹ U.S. reservations, declarations, and understandings, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01 (daily ed, 27 October 1990) at <<http://www1.umn.edu/humanrts/usdocs/tortres.html>>.

coercion and voluntariness that accompanies the introduction of statements at a criminal trial, and the governmental interests at stake may vary with context'. The Supreme Court, he continued:

has long distinguished the government interest in ordinary law enforcement from the more compelling interest in safeguarding national security. . . . In evaluating the techniques in question, Supreme Court precedent therefore requires us to analyze the circumstances underlying the CIA Interrogation program—limited to High Value terrorist detainees who possess intelligence critical to the global war on terror—and this clearly is not a context that has arisen under existing federal court precedent.⁴⁰

The OLC then argued that the techniques were 'much less invasive' than those that have shocked the conscience of US courts and that the government interest in this case—i.e. national security rather than law enforcement—was much greater than anything previously considered.⁴¹ On this basis, there were compelling reasons why the use of the proposed techniques would not shock the conscience. The programme reflected 'a limited and direct focus to further a critical governmental interest, while at the same time eliminating any unnecessary harm to detainees. In this context', it was concluded, 'the techniques are not "arbitrary in the constitutional sense".'⁴²

Again, there is evidence that these kinds of arguments were contested deep within the US government. For Alberto Mora, the General Counsel to the Navy discussed above, there were limits to the applicability of the necessity argument. Writing in 2004, for instance, he accepted that the ethical problems presented by situations of extreme insecurity (e.g. the ticking bomb scenario) were difficult. But he felt that the ticking bomb scenario was not 'the factual situation' either at Guantánamo or CIA secret prisons.⁴³ The CIA's review of early enhanced interrogations also made this point. While al Qaeda's intention to attack the United States was obvious, the report by the CIA Inspector General 'did not uncover any evidence that these plots were imminent'.⁴⁴ One possible response to this is to recall the elongated notion of 'imminence' that was discussed in Chapter 2. In fact, President Bush set the tone for this kind of response in his 2002 State of the Union address, which conflated the existence of the terrorist with the ticking bomb. 'Thousands of dangerous

⁴⁰ Bradbury, Memorandum for John Rizzo, 2007, n 7 above, 30–1.

⁴¹ Bradbury, Memorandum for John Rizzo, 2007, n 7 above, 35–6.

⁴² Bradbury, Memorandum for John Rizzo, 2007, n 7 above, 33.

⁴³ Mora, Memo for the Inspector General, n 9 above, 11.

⁴⁴ John Helgerson, Counterterrorism, Detention and Interrogation Activities (September 2001–October 2003), Report of the CIA Inspector General, 7 May 2004, 88 at <http://media.luxmedia.com/aclu/IG_Report.pdf>. See also Department of Justice, Professional Responsibility, 'Investigation into the Office of Legal Counsel's Memoranda Concerning the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists', n 12 above, 212, note 168.

killers', President Bush told Congress, 'are now spreading throughout the world like ticking bombs, set to go off without warning'.⁴⁵ And of course the National Security Strategy of 2002 had argued that, in the context of the international law on self-defence, the notion of imminent threat had to be revised to deal with the terrorist threat.

In this vein, the OLC acknowledged in the context of the interrogation question that 'self-defense as usually discussed involves using force against an individual who is about to conduct the attack'. It added, however, that in the current circumstances 'even though a detained enemy combatant may not be the exact attacker—he is not planting the bomb, or piloting a hijacked plane to kill civilians—he still may be harmed in self-defense if he has knowledge of future attacks because he has assisted in their planning and execution'.⁴⁶ Later documents also argued that the programme applied not just to persons who may have information about future attacks but also to those who may provide information about al Qaeda's leadership structure. Thus, the CIA programme was limited to persons whom the Director of the CIA deemed to be:

a member of or a part of or supporting al Qaeda, the Taliban, or associated terrorist organizations and likely to possess information that could prevent terrorist attacks against the United States or its interests *or* that could help locate the senior leadership of al Qaeda who are conducting its campaign of terror against the United States.⁴⁷

In other words, the moment of imminence or exception not only included the prospect of a physical attack that left no moment for deliberation, it also involved the existence of a leadership that was planning and preparing attacks sometime in the future. Indeed, Bradbury reaffirmed this view in 2008 when he told Congress that the President's 'executive order makes clear that the program must be very narrow in scope, to include only those high-value terrorist detainees believed to possess critical knowledge of potential attack planning *or* the whereabouts of senior al Qaeda leadership'.⁴⁸

THE POLITICS OF INTERROGATION

In September 2006, President Bush claimed that the interrogation of Abu Zubaydah 'provided information that helped stop a terrorist attack being

⁴⁵ George W Bush, State of the Union Address to the 107th Congress, US Capitol, Washington DC, 29 January 2002 in *Selected Speeches of President George W. Bush 2001–2008*, 103–14 at <http://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected_Speeches_George_W_Bush.pdf>.

⁴⁶ Yoo, Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States, 2003, n 11 above, 79.

⁴⁷ Bradbury, Memorandum for John Rizzo, 2007, n 7 above, 5, emphasis added.

⁴⁸ Bradbury, Prepared Statement for the House Judiciary Subcommittee on the Constitution, n 37 above, 5, emphasis added. See also Bush, Executive Order 13440, n 35 above.

planned for inside the United States, an attack about which we had no previous information'. Terrorists like Abu Zubaydah may not have planted a ticking bomb but he had 'unparalleled knowledge about terrorist networks and their plans of new attacks'.⁴⁹ Others have contested this claim. Former FBI interrogator Ali Soufan, for instance, argued that 'there was no actionable intelligence gained from using enhanced interrogation techniques on Abu Zubaydah that wasn't, or couldn't have been, gained from regular tactics'.⁵⁰ Still others have argued that the truth lies somewhere in between. President Obama's Director of National Intelligence, Dennis Blair, for instance, stated that 'high value information came from interrogations in which those methods [EITs] were used and provided a deeper understanding of the al Qa'ida organization'. He acknowledged, however, that there was 'no way of knowing whether the same information could have been obtained through other means'. He was certain, however, that 'these techniques have hurt our image around the world, the damage they have done to our interests far outweighed whatever benefit they gave us and they are not essential to our national security'.⁵¹ This kind of argument illustrates how the use of EITs divides realists concerned with the consequences for the national interest. The republican inspired liberal pushback against EITs and other aspects of the Bush administration's approach, in other words, was not simply a matter of reasserting the place of American 'values'. For some, including President

⁴⁹ George W Bush, Speech from the White House, 6 September 2006 at <http://www.nytimes.com/2006/09/06/washington/06bush_transcript.html>; see also *Decision Points* (New York: Random House, 2010) 169. For the Vice-President's defence of waterboarding while in office, see Demetri Sevastopul, 'Cheney endorses simulated drowning', 26 October 2006 at <<http://www.msnbc.msn.com/id/15433467/>>.

⁵⁰ Ali Soufan, 'My tortured decision', *New York Times*, 23 April 2009 at <<http://www.nytimes.com/2009/04/23/opinion/23soufan.html>>; see also Lawrence Wilkerson, 'Some Truths about Guantanamo Bay', *Washington Note*, 17 March 2009 at <http://www.thewashingtonnote.com/archives/2009/03/some_truths_abo/>.

⁵¹ Peter Baker, 'Banned techniques yielded "high value information", memo says', *New York Times*, 22 April 2009 at <<http://www.nytimes.com/2009/04/22/us/politics/22blair.html>>. See also Helgeson, Counterterrorism, Detention and Interrogation Activities, n 4 above, 87–91. This debate restarted after the killing of bin Laden. Senator McCain called into question claims that torture was instrumental in tracking down bin Laden. His account was disputed by Bush's Attorney General Michael Mukasey but supported by CIA chief Leon Panetta. Michael Mukasey, 'The waterboarding trail to bin Laden', *Wall Street Journal*, 6 May 2011 at <<http://online.wsj.com/article/SB10001424052748703859304576305023876506348.html>>; John McCain, 'Bin Laden's death and the debate over torture', *Washington Post*, 12 May 2011 at <http://www.washingtonpost.com/opinions/bin-ladens-death-and-the-debate-over-torture/2011/05/11/AFd1mdsG_story.html>; Marc Thiessen, 'Mukasey responds to McCain's op-ed', *Washington Post*, 12 May 2011 at <http://www.washingtonpost.com/blogs/post-partisn/post/mukasey-responds-to-mccains-op-ed/2011/05/12/AFhhVOIG_blog.html>; Greg Sargent, 'Private letter from CIA chief undercuts claim torture was key to killing bin Laden', *Washington Post*, 16 May 2011 at <http://www.washingtonpost.com/blogs/plum-line/post/exclusive-private-letter-from-cia-chief-undercuts-claim-torture-was-key-to-killing-bin-laden/2011/03/03/AFLFF04G_blog.html?wpisrc=nl_pmpolitics>.

Obama, it was a question of what kind of interrogation policy best suited America's national interest.

On 22 January 2009, President Obama issued Executive Order 13491, which closed, 'as expeditiously as possible', any CIA detention facilities.⁵² A Presidential Task Force later recommended establishing a High Value Detainee Intelligence Group 'that would bring together the most effective and experienced interrogators and support personnel from across the Intelligence Community, the Department of Defense and law enforcement'. It did not recommend ending 'transfers pursuant to intelligence authorities' (i.e. rendition) but made recommendations to 'ensure that U.S. practices in such transfers comply with U.S. law, policy and international obligations and do not result in the transfer of individuals to face torture'. These included 'a recommendation that the State Department be involved in evaluating assurances in all cases and a recommendation that the Inspector Generals of the Departments of State, Defense and Homeland Security prepare annually a coordinated report on transfers conducted by each of their agencies in reliance on assurances. . . . improving the United States' ability to monitor the treatment of individuals transferred to other countries'.⁵³

In explaining its approach, the new President drew on the republican conception of American exceptionalism. There was, from his perspective, a conflict between American values and EITs. What made the US exceptional among nations, however, 'was precisely the fact that we are willing to uphold our values and our ideals . . . when we are afraid and under threat, not just when it is expedient to do so'.⁵⁴ America was different, in other words, not because the free world depended on it for its security. America was different because it pursued that role while exemplifying liberal values. Yet the rejection of his predecessor's approach was also based on a realist calculation that coercive interrogations had negative consequences for the national interest. Thus, the new President stated in his National Archives speech that he categorically rejected the assertion that EITs were effective.

⁵² Executive Order 13491, 'Ensuring Lawful Interrogations', Federal Register, Presidential Documents, 27 January 2009, 4893–6 at <<http://edocket.access.gpo.gov/2009/pdf/E9-1885.pdf>>. See also Leon E Panetta, Message from the Director: Interrogation Policy and Contracts, 9 April 2009 at <<https://www.cia.gov/news-information/press-releases-statements/directors-statement-interrogation-policy-contracts.html>>.

⁵³ Department of Justice, Office of Public Affairs, Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President, 24 August 2009 at <<http://www.justice.gov/opa/pr/2009/August/09-ag-835.html>>. For expressions of concern among human rights groups, see David Johnston, 'U.S. says rendition to continue, but with more oversight', *New York Times*, 24 August 2009 at <<http://www.nytimes.com/2009/08/25/us/politics/25rendition.html>>.

⁵⁴ Barack Obama, Remarks to CIA Employees, 20 April 2009 at <http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-to-CIA-employees-at-CIA-Headquarters/>.

I know some have argued that brutal methods like waterboarding were necessary to keep us safe. I could not disagree more. As Commander-in-Chief, I see the intelligence. . . . And I categorically reject the assertions that these are the most effective means of interrogation. . . . What's more, they undermine the rule of law. They alienate us in the world. They serve as a recruitment tool for terrorists, and increase the will of our enemies to fight us, while decreasing the will of others to work with America. They risk the lives of our troops by making it less likely that others will surrender to them in battle, and more likely that Americans will be mistreated if they are captured. In short, they did not advance our war and counterterrorism efforts—they undermined them, and that is why I ended them once and for all.⁵⁵

This approach takes a more long-term, or diffuse, view of America's interests than the realism of the previous administration. Even if exceptional practice delivered intelligence that helped to prevent attacks by leading the US to the al Qaeda leadership, in other words, those benefits did not necessarily outweigh the costs, which manifested themselves in increased radicalization and a greater terrorist threat. The US would win the war on terror, according to this liberal realist view, by living its values. 'To overcome extremism', he told Congress in his first State of the Union address:

we must also be vigilant in upholding the values our troops defend—because there is no force in the world more powerful than the example of America. That is why I have ordered the closing of the detention center at Guantanamo Bay, and will seek swift and certain justice for captured terrorists—because living our values doesn't make us weaker, it makes us safer and it makes us stronger. And that is why I can stand here tonight and say without exception or equivocation that the United States of America does not torture.⁵⁶

The conservative response to this argument was clear and instant. Former Vice-President Dick Cheney, for instance, directly addressed the liberal

⁵⁵ Barack Obama, Remarks on National Security at the National Archives, 21 May 2009 at <http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/>. For evidence supporting the liberal realist claim that US actions act as a 'recruitment tool' for terrorists, see Matthew Alexander, 'An interrogator speaks: I'm still tortured by what I saw in Iraq', *Washington Post*, 30 November 2008; Thomas R Pickering and William S Sessions, 'Why a presidential commission on torture is critical to America's security', *Washington Post*, 23 March 2009; Jan Schakowsky, 'Refuting the self-fulfilling torture Prophecy: a response to Hayden and Mukasey', *Huffington Post*, 21 April 2009 at <http://www.huffingtonpost.com/rep-jan-schakowsky/refuting-the-self-fulfill_b_189441.html>. See also United States Senate, Inquiry into the Treatment of Detainees in US Custody, Report of the Armed Services Committee, 20 November 2008 at <http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf>. This begins with a quote from General David Patraeus, 'What sets us apart from our enemies in this fight . . . is how we behave' and concludes that aggressive interrogation techniques increase resistance to co-operation with the US and 'creates new enemies'.

⁵⁶ Barack Obama, Remarks of the President, Address to Joint Session of Congress, 24 February 2009 at <http://www.whitehouse.gov/the_press_office/Remarks-of-President-Barack-Obama-Address-to-Joint-Session-of-Congress>.

realist argument literally hours after Obama spoke at the National Archives in May 2009. There were three aspects to his conservative realist position. The first point was that the liberal assessment of consequences was incorrect and naive. The recruitment tool theory, former Vice-President Cheney argued:

excuses the violent and blames America for the evil that others do. It's another version of that same old refrain from the Left, 'We brought it on ourselves.' It is much closer to the truth that terrorists hate this country precisely because of the values we profess and seek to live by, not by some alleged failure to do so.⁵⁷

This view reflects a Schmittian conception of the political and its essentialized view of the friend-enemy distinction. Whereas liberal realists worry that US hypocrisy might act as a recruitment tool for the enemy, conservative realists like Cheney tend to see exceptional practice as necessary to defeat the enemy that is already and always out there. US policymakers from Cheney's perspective need not be concerned about avoiding the perception of double standards when they confront American enemies. If behaviour that might shock the liberal conscience helps the US to defeat illiberal enemies then that reflects the reality of the situation, the responsibility for which rests with the enemy not US policymakers.

Secondly, conservative realists like Cheney agreed with Obama that there is no trade-off between security and American values, but this is because for them security is America's number one value. From this perspective, the values liberals prioritize are in fact contingent on security and must therefore give way when the security of the nation is threatened. As Cheney put it:

Nor are terrorists or those who see them as victims exactly the best judges of America's moral standards, one way or the other. Critics of our policies are given to lecturing on the theme of being consistent with American values. But no moral value held dear by the American people obliges public servants ever to sacrifice innocent lives to spare a captured terrorist from unpleasant things. And when an entire population is targeted by a terror network, nothing is more consistent with American values than to stop them.⁵⁸

⁵⁷ Richard B Cheney, Remarks at the American Enterprise Institute, 21 May 2009 at <<http://www.aei.org/speech/100050>>. See also Michael Hayden and Michael B Mukasey, 'The President ties his own hands on terror', *Wall Street Journal*, 17 April 2009 at <<http://online.wsj.com/article/SB123993446103128041.html>> who write 'Somehow, it seems unlikely that the people who beheaded Nicholas Berg and Daniel Pearl, and have tortured and slain other American captives, are likely to be shamed into giving up violence by the news that the U.S. will no longer interrupt the sleep cycle of captured terrorists even to help elicit intelligence that could save the lives of its citizens.' For neoconservative admiration of Cheney's response, see William Kristol, 'Cheney vs. Obama: A Mismatch', 21 May 2009 at <http://www.weeklystandard.com/weblogs/TWSFP/2009/05/cheney_vs_obama_a_mismatch.asp>.

⁵⁸ Cheney, Remarks at the American Enterprise Institute, n 57 above.

For Cheney, then, enemies exist independently of American actions and the liberal insistence that republican exemplarism resolves the moral dilemmas involved in combating terrorism is ‘recklessness cloaked in righteousness’.⁵⁹ In this context, and this is the third point, Cheney argued that the prosecution of American officials would be ‘a serious injustice to intelligence operators and lawyers who deserve far better for their devoted service’. Unlike at Abu Ghraib, ‘where a few sadistic prison guards abused inmates in violation of American law, military regulations, and simple decency’, the CIA and OLC’s hands were clean. Echoing President Bush’s earlier insistence that America owes the interrogator ‘thanks for saving lives and keeping America safe’, Cheney argued it would be ‘deeply unfair . . . to equate the disgraces of Abu Ghraib with the lawful, skilful, and entirely honorable work of CIA personnel trained to deal with a few malevolent men’.⁶⁰ In fact, Cheney went further. As John Yoo would later argue in the context of the Office of Professional Responsibility ethics investigation,⁶¹ Cheney accused liberals of engaging in a kind of ‘lawfare’. Investigations were not necessary because what was at issue were ‘political disagreements’ about how best to fight the terrorist threat.⁶² Such a course, he insisted, would have a dangerous impact on American democracy. ‘It’s hard to imagine a worse precedent, filled with more possibilities for trouble and abuse, than to have an incoming administration criminalize the policy decisions of its predecessors.’⁶³

⁵⁹ Cheney, Remarks at the American Enterprise Institute, n 57 above.

⁶⁰ Cheney, Remarks at the American Enterprise Institute, n 57 above. See also Bush, Speech from the White House 6 September 2006, n 49 above, and *Decision Points*, n 49 above, 171, where he describes the suggestion that intelligence personnel violated the law as ‘insulting and wrong’. There was much support for this position among conservatives. See Marc Thiessen’s claim that US interrogators ‘aren’t torturers, they’re heroes’, quoted in Setyam Khanna, ‘Former Bush Speechwriter: CIA Torturers Are “American Heroes”’, 26 January 2009 at <<http://think-progression.org/2009/01/26/mark-thiessen-bush/>>. In a similar vein, William Kristol wrote that those ‘who have been on the front and rear lines of that war—in the military and the intelligence agencies, at the Justice Department and, yes, in the White House—have much to be proud of. The rest of us, who’ve been asked to do little, should be grateful’: William Kristol, ‘Preening & posturing’, *Weekly Standard*, 4 May 2009 at <<http://www.weeklystandard.com/Content/Public/Articles/000/000/016/419lgkxx.asp>>. See also John Yoo, ‘Yes we did plan for Mumbai-style attacks in the U.S.’, *Wall Street Journal*, 7 March 2009 at <<http://online.wsj.com/article/SB123638439733558185.html>>; Jack Goldsmith, ‘No new torture probes’, *Washington Post*, 26 November 2008 at <<http://www.washingtonpost.com/wp-dyn/content/article/2008/11/25/AR2008112501897.html>>; US Attorney General Michael B Mukasey, Keynote Address at Annual Meeting of the American Federalist Society, 20 November 2008 at <http://www.fed-soc.org/publications/pubid.1189/pub_detail.asp>; Michael Hayden and Michael B Mukasey, ‘The president ties his own hands on terror’, n 57 above.

⁶¹ See n 12 above.

⁶² This explains why President Bush defied certain expectations and did not issue pardons before leaving the White House. See Evan Perez, ‘Sweeping pardons “unnecessary”’, *Wall Street Journal*, 25 November 2008 at <<http://online.wsj.com/article/SB122756675347954409.html>>.

⁶³ Cheney, Remarks at the American Enterprise Institute, n 57 above.

This last point was shared by the Obama administration. Despite their differences, President Obama's statement accompanying the April 2009 release of CIA documents echoed Cheney's concerns on the question of prosecutions. 'In releasing these memos', Obama stated:

it is our intention to assure those who carried out their duties relying in good faith upon legal advice from the Department of Justice that they will not be subject to prosecution. The men and women of our intelligence community serve courageously on the front lines of a dangerous world. Their accomplishments are unsung and their names unknown, but because of their sacrifices, every single American is safer.⁶⁴

The US was, he added, still faced with great challenges and 'nothing would be gained by spending our time and energy laying blame for the past'. He would 'resist the forces that divide us, and instead come together on behalf of our common future'.⁶⁵ This was a major disappointment for those human rights groups who argued for 'a full-scale criminal investigation into senior-level responsibility for the abusive interrogation practices'.⁶⁶ This was placated somewhat when the President told reporters that the decision on whether to prosecute was the Attorney General's. By passing the buck in this way, however, it was clear that the new President was not providing the lead some human rights groups hoped for.

⁶⁴ Statement of President Barack Obama on Release of OLC Memos, White House, 16 April 2009 at <http://www.whitehouse.gov/the_press_office/statement-of-president-barack-obama-on-release-of-olc-memos/>.

⁶⁵ Statement of President Barack Obama on Release of OLC Memos, n 64 above. A December 2009 Pew opinion poll is indicative of the divided nature of the country on this question. It showed that 54 per cent of Americans thought torture was sometimes or often justified. Pew Research Center, *America's Place in the World: An Investigation of Public and Leadership Opinion About International Affairs*, 2009 at <www.foreignpolicy.com/images/091203_12-03-09_America_s_Place_in_the_World_V_12-3-09.pdf>. Likewise, polling on the question of prosecutions presented a mixed picture. A CBS/*New York Times* poll revealed 62 per cent wanted no investigation, while Gallup found the exact same proportion wanted some sort of investigation. See CBS, 'Public does not want torture probe', 27 April 2009 at <<http://www.cbsnews.com/stories/2009/04/27/opinion/polls/main4972844.shtml>>; and Sam Stein, 'Gallup to release poll on Bush investigations', *Huffington Post*, 24 April 2009 at <http://www.huffingtonpost.com/2009/04/24/gallup-to-release-poll-on_n_190817.html>.

⁶⁶ Human Rights Watch, Counterterrorism and Human Rights: A Report Card on President Obama's First Year, January 2010 at <http://www.hrw.org/sites/default/files/related_material/CT_US_Obama1Yr_Jan2010.pdf>; International Center for Transitional Justice, *Prosecuting Abuses of Detainees in US Counterterrorism Operations*, 1 November 2009 at <<http://ictj.org/publication/criminal-justice-criminal-policy-prosecuting-abuses-detainees-us-counterterrorism>>. See also liberal disappointment on the new President's use of the state secrets doctrine: John Schwartz, 'Obama backs off a reversal on secrets', *New York Times*, 9 February 2009 at <http://www.nytimes.com/2011/05/22/opinion/22sun1.html?_r=1&ref=statesecretsprivilege>; Glenn Greenwald, 'Obama fails his first test on civil liberties and accountability', *The Salon*, 9 February 2009 at <http://www.salon.com/news/opinion/glenn_greenwald/2009/02/09/state_secrets/>; and 'Malign neglect', *New York Times*, 21 May 2011 at <http://www.nytimes.com/2011/05/22/opinion/22sun1.html?_r=1&ref=statesecretsprivilege>.

CONCLUSION

This chapter has advanced a central theme of the book, which is that the US response to 9/11 was informed by the kind of linear thinking that Schmittian International Relations theorists see as inherent in American liberalism. The Bush administration understood, based on the arguments advanced in OLC memos, that American obligations under various human rights treaties were limited to what it did inside the territory over which the US government had jurisdiction. As in other chapters, this was rejected by liberals inspired by a more inclusionary understanding of human rights regimes. From this perspective, it did not matter where US forces were acting. The obligations that applied when acting inside territory under its jurisdiction applied extraterritorially to wherever a state was in control of the detainee. As Chapter 4 illustrated, the more inclusionary view gradually asserted itself through the judgments of the Supreme Court, which extended the right of detainees to contest the terms of their detention so long as that did not interfere with the contingencies of the battlefield. It asserted itself in the context of the interrogation question through a legislative check, notably the Detainee Treatment Act, which ruled out any geographical limitation on the applicability of the prohibition against cruel, inhuman, or degrading treatment or punishment.

This DTA was the product of the political backlash that gained momentum following the Abu Ghraib prisoner abuse scandal. As the arguments of insiders like Alberto Mora illustrate, the political wisdom of using EITs was always a matter of contention within the US national security community and the argument that such methods were counter-productive manifested itself in the campaign and presidency of Barack Obama. On this issue there was a clear change of tone and policy. The Executive Orders of January 2009 closed, 'as expeditiously as possible' any CIA detention facilities.⁶⁷ Daniel Klaidman in his book *Kill or Capture* also provides evidence that high value detainees captured under Obama were treated 'above and beyond international standards' and that this provided effective intelligence. In the case of Ahmed Abdulkadir Warsame—who, it will be recalled (see Chapter 3), was detained on the US warship *Boxer* before the administration decided where to transfer him to a federal court—non-coercive methods appeared to deliver valuable intelligence. According to Klaidman's sources it took two weeks, but eventually Warsame 'sang like a bird'. He reportedly provided information on

⁶⁷ Executive Order 13491, 'Ensuring Lawful Interrogations', Federal Register, Presidential Documents, 27 January 2009, 4893–6 at <<http://edocket.access.gpo.gov/2009/pdf/E9-1885.pdf>>. See also Message from the Director: Interrogation Policy and Contracts, see n 52 above.

Anwar al-Awlaki and intelligence on the structures of al Qaeda affiliates in Somalia and the Arabian Peninsula.⁶⁸

The Obama administration also stuck to a more liberal approach when it decided to release the memos related to the enhanced interrogation programme. Some feared that was the first step toward prosecution but on that question the Obama administration has shared the view that ‘nothing would be gained by spending our time and energy laying blame for the past’. He would ‘resist the forces that divide us, and instead come together on behalf of our common future’.⁶⁹ Underlying this was, as Klaidman notes, a calculation as to the political cost of being seen to back prosecutions. The broad public ‘just didn’t seem to care’, there was no groundswell for an investigation within Congress and those charged with delivering the President’s domestic agenda reinforced the opposition of the intelligence community which warned such a move would ‘devastate morale’.⁷⁰ While the Obama administration has consolidated change in this area, therefore, the politics of the situation meant it was not as much as human rights and civil liberties groups campaigned for.

⁶⁸ Daniel Klaidman, *Kill or Capture: The War on Terror and the Soul of the Obama Presidency* (Boston and New York: Houghton Mifflin Harcourt, 2012) 249–52.

⁶⁹ Statement of President Barack Obama on Release of OLC Memos, see n 64 above.

⁷⁰ Klaidman, *Kill or Capture*, n 68 above, 73–4.

Conclusion

The starting question for this book was whether the post-9/11 state of exception, which manifested itself in a new kind of war against al Qaeda, continued to influence US policy more than a decade after the attacks on New York and Washington DC. Chapter 1 examined how International Relations theory approached this question. It criticized the Schmittian-inspired idea that the 9/11 attacks had revealed something inherent in American liberal internationalism. From this perspective, the exclusionary hierarchies of the war on terror offered ‘an exceedingly exemplary manifestation of the paradox of liberal modernity and war’.¹ This stemmed from the irreducibility of politics, defined in Schmittian terms by the friend-enemy-foe distinction. Despite the US commitment to a cosmopolitan order and its universally and equally applicable law, politics inevitably drew lines that excluded al Qaeda and its affiliates from regimes that might otherwise have applied. There was, from this perspective, nothing unusual or temporary about the US response to 9/11. The friend-enemy-foe distinction is an irreducible feature of human and international relations and the exception is a permanent feature of liberal internationalism.

The argument offered in this book is that politics is of course a permanent feature of human relations but the friend-enemy-foe distinction is not the only form of politics. While this distinction and a liberal paradox did characterize the war on terror, the Bush administration’s policy programme did not go uncontested. The republican form of liberalism that underpinned the cosmopolitan order of the post-1945 order was not entirely silent during this period and it did in fact act as a check on the Bush administration’s approach. This empirical evidence reinforces David Luban’s critique of Schmittian theory. Luban insists, for instance, that the friend-enemy construct is far too narrow a view of politics. Schmitt’s focus on enmity completely ignores the constructive side of politics. Schmitt dismisses the organization of co-operation and civil

¹ Louiza Odysseos, ‘Crossing the Line? Carl Schmitt on the “spaceless universalism” of cosmopolitanism and the War on Terror’, in Louiza Odysseos and Fabio Petito (eds), *The International Political Thought of Carl Schmitt: Terror, Liberal War and the Crisis of Global Order* (London and New York: Routledge, 2007) 137.

institutions as 'banal', but for Luban this is 'the stuff of peaceable human politics'. Luban certainly recognizes the importance of Schmitt's warnings. Politics *can* lead to mortal enmity and wars on behalf of humanity *can* be the most inhumane wars of all. He even suggests that Schmitt should be saluted as 'a prophet of Hiroshima'.² But politics, particularly liberal politics, does not *necessarily* follow Schmitt's path to absolute enmity and absolute war. Liberal politics seeks to transcend the friend-enemy distinction and the insistence that law is universally and equally applicable is a useful institution in achieving that goal. These kinds of approaches 'are not alien extrusions into politics or evasions of politics; they are part of politics'.³

In the context of the war on terror, this alternative approach manifested itself in the argument that the terrorist attacks on 9/11, shocking as they were, were not exceptional and did not necessarily give rise to a situation of armed conflict. Al Qaeda need not have been portrayed as 'an enemy' in the Schmittian sense. This means unpacking the Schmittian tendency to see politics through the friend-enemy binary. This is done on one side of that equation, with the concept of 'foe' identifying enemies that are excluded from the laws of war because they hold real or absolute enmity rather than conventional enmity.⁴ Where states could compromise with states that held conventional enmity and tolerate each other's existence after war, they could only set out to annihilate those that held absolute enmity. Unpacking the friend side of the Schmittian binary is also necessary because of course liberals did not claim terrorist suspects were friends. They did, however, resist categorizing them as enemies and foes. It was not necessary to exclude terrorists, as criminal suspects, from the international regimes that were universally and equally applicable; and to the extent they were engaged in geographically bracketed conventional armed conflict it was not necessary to exclude them from humanitarian regimes such as the Geneva Conventions. For Luban, this more inclusionary form of liberalism was significant as a check on the policies of the Bush administration. 'The fact is', Luban writes, 'that in nine years of conventional war [following 9/11],

² David Luban, 'Carl Schmitt and the Critique of Lawfare', Georgetown Public Law and Legal Theory Research Paper no 11-33, 28 March 2011, 12 at <<http://ssrn.com/abstract=1797904>>.

³ Luban, 'Carl Schmitt and the Critique of Lawfare', n 2 above, 13.

⁴ Carl Schmitt, *The Theory of the Partisan: A Commentary/Remark on the Concept of the Political* (Berlin: Duncker and Humboldt, 1963). For Schmitt, conventional enmity is that held by the enemy that can be contained and tolerated after defeat. Real enmity is held by the modern partisan who 'expects neither justice nor mercy from his enemy. He has turned away from the conventional enmity of the contained war and given himself up to another—the real—enmity that rises through terror and counter-terror, up to annihilation': *Theory of the Partisan*, 7. Schmitt uses the term 'real enmity' to distinguish the irregular combatant fighting for conventional ends, e.g. national liberation and 'absolute enmity' for the irregular combatant fighting for more revolutionary ends. For further discussion, see Jason Ralph, 'War as an Institution of International Hierarchy: Carl Schmitt's *Theory of the Partisan* and Contemporary American Practice', *Millennium: Journal of International Studies* 39 (2010) 279–98.

the United States *has* significantly bracketed war-fighting, even against enemies who do not recognize duties of reciprocity.⁵

The purpose of this book has been to describe the debate that manifested itself in these terms. The evidence does support Luban's conclusion. An inclusionary form of liberalism asserted itself through the judicial and legislative branches to, for instance, reapply the Geneva Conventions. But with the election of President Obama there was an expectation that the very concept of a 'war' on terror would end and that US national security policy would somehow return to normalcy. These expectations were probably misplaced and as the Obama Presidency progressed liberals gradually began to realize that. The terrorist threat evolved and the Obama administration continued to argue that the US was in a state of armed conflict against al Qaeda and affiliated groups. The purpose of this final chapter is to summarize these continuities as a way of characterizing the state of the post-9/11 exception. It makes three points by way of conclusion. Firstly, it identifies the persistent portrayal of al Qaeda and its affiliates as an enemies rather than as criminal organizations; secondly, it comments on the ongoing debate of what constitutes the enemy, the scope of the battlefield and when the law enforcement model should apply; and, thirdly, it offers some thoughts on the ongoing debate as to when force can be used in self-defence outside of situations of armed conflict. Following Klaidman, the chapter concludes that the Obama administration has indeed adopted a 'hybrid approach' that combines the war and law-enforcement paradigms and it offers some thoughts on the politics underpinning this.⁶

CRIMINALS AND ENEMIES

The first and most fundamental aspect of the post-9/11 exception is the framing of al Qaeda as an enemy rather than a criminal organization. As Chapter 2 noted, the concept of 'war' and 'the enemy' are legal concepts and liberal commentators like Mary Ellen O'Connell rejected that these concepts could be applied to counter-terrorism operations against al Qaeda outside of what she called the 'real' conflicts in Afghanistan and Iraq. The conflict was 'too sporadic and low-intensity to qualify as armed conflict'.⁷ The Bush administration and its supporters rejected this, arguing that al Qaeda activity

⁵ Luban, 'Carl Schmitt and the Critique of Lawfare', n 2 above, 13.

⁶ Daniel Klaidman, *Kill or Capture: The War on Terror and the Soul of the Obama Presidency* (Boston and New York: Houghton Mifflin Harcourt, 2012) 259.

⁷ Mary Ellen O'Connell, 'When is a War not a War? The Myth of the Global War on Terror', *ILSA Journal of International and Comparative Law* 12 (2005-6) 538.

had indeed reached a level of intensity that reflected state-like levels of violence and the fact that it was a non-state actor made little difference to the question of whether it was capable of waging armed conflict. John Yoo, for instance, argued that al Qaeda was different to normal criminal enterprises like the mafia because it was intensely political, and the fact that it had 'killed more people than the Japanese at Pearl Harbor' meant it was reasonable to define 9/11 as part of an armed conflict.⁸ The 'war' against al Qaeda was thus underpinned by a materialist (as opposed to ideational) conception of war. Complementing this was the underlying assumption that the decision to wage war was a political one that was not subject to judicial scrutiny. '[D]etermining whether war exists is a question for the political branches.'⁹ From this perspective, the fact that Congress had 'authorized the all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on 11 September 2001' meant the US was at war with al Qaeda.

This thinking underpinned what Harold Koh called 'the law of 9/11'.¹⁰ It is perhaps the most significant indicator of continuity between the two administrations that, as the State Department's legal adviser under Obama, Koh insisted that the US remained in a state of armed conflict with al Qaeda. As Chapter 2 illustrated, this argument was used to justify the escalated Predator drone programme, as well as the ground operation that killed Osama bin Laden in May 2011. Thus, Koh argued that the US 'is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law'. The authority for this was the congressional authorization to the use of all necessary and appropriate force through the 2001 Authorization for Use of Military Force.¹¹ Likewise, in May 2011, Koh argued that given bin Laden's 'unquestioned leadership position within al Qaeda and his clear continuing operational role, there can be no question that he was the leader of an enemy force and a legitimate target in our armed conflict with al Qaeda'.¹² This suggests that the US definition of war remains

⁸ John Yoo, *War By Other Means: An Insider's Account of the War on Terror* (New York: Atlantic Monthly Press, 2006) 4.

⁹ Memorandum from Deputy Assistant Attorney General Patrick F. Philbin to White House Counsel to the President, Legality of the Use of Military Commissions to Try Terrorists, 6 November 2001 at <http://dspace.wrlc.org/doc/bitstream/2041/70944/00117_011106display.pdf>.

¹⁰ Harold Hongju Koh, Legal Adviser, US Department of State, 'The Obama Administration and International Law', Annual Meeting of the American Society of International Law, 25 March 2010 at <<http://www.state.gov/s/l/releases/remarks/139119.htm>>.

¹¹ Koh, 'The Obama Administration and International Law', n 10 above.

¹² Harold Hongju Koh, 'The Lawfulness of the U.S. Operation against Osama bin Laden', *Opinio Juris*, 19 May 2011 at <<http://opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden/>>.

attached, as O'Connell put it in the context of the early Bush administration's approach, 'to individuals not to situations of armed hostilities. So wherever a suspected member of a terrorist organization is, there is an armed conflict.'¹³

Indeed, statements from the Obama administration insisted that 'the battlefield' extends beyond situations of conventional armed conflict, or what is euphemistically called the 'hot' battlefield. This was stated explicitly by John Brennan around the tenth anniversary of the 9/11 attacks. The United States, he insisted, 'does not view our authority to use military force against al-Qa'ida as being restricted solely to "hot" battlefields like Afghanistan'.¹⁴ This argument reflects continuity within the context of a changing perception of the terrorist threat. As Chapter 2 noted, President Obama had always opposed the Iraq War, seeing it as a distraction from war against al Qaeda, which was being fought in Afghanistan. In office he shifted the US focus to Afghanistan, but also extended it to Pakistan where the core of al Qaeda's leadership was thought to be based. That decision was vindicated with the discovery that Osama bin Laden himself had been living in Pakistan, but as Brennan also noted, his passing did not bring an end to the war on terror. The terrorist threat was evolving and from the Obama administration's perspective the armed conflict was spreading. Thus, Brennan told his Harvard audience that although the core of al Qaeda had been 'severely crippled' in Pakistan, it still retained 'the intent and capability to attack the United States and our allies. Al-Qa'ida's affiliates—in places like Pakistan, Yemen, and countries throughout Africa—carry out its murderous agenda.'¹⁵

This question of the geographic scope of the battlefield also impacted on detention policy. Although the Supreme Court's intervention in *Boumediene* extended the constitutional right to appeal against detention, it also recognized that if a detention facility was located 'in an active theatre of war', arguments against an appeal would be stronger. As Chapter 4 noted, what is meant in this context by 'active theatre of war' was tested by the *Maqaleh* case, which involved a Yemeni detainee, captured outside of Afghanistan but detained at Bagram. The concern here was that the government might transfer terrorist suspects to 'hot battlefields' in order to avoid judicial scrutiny, particularly after the Obama administration argued against applying *habeas corpus* in Afghanistan. The initial ruling in this case ruled that, although Afghanistan is an active theatre of war, none of the military contingencies applied to this case because Maqaleh had initially been detained outside the battlefield. This is significant because it suggests that the concept of the

¹³ Mary Ellen O'Connell, 'The Legal Case against the Global War on Terror', *Case Western Reserve Journal of International Law* 36 (2004) 350.

¹⁴ Remarks of John O Brennan, Assistant to the President for Homeland Security and Counterterrorism, Harvard Law School, 16 September 2011 at <<http://www.lawfareblog.com/2011/09/john-brennans-remarks-at-hls-brookings-conference/>>.

¹⁵ Brennan, Harvard Law School, 16 September 2011, n 14 above.

battlefield does not follow the individual terrorist suspect. As Chapter 4 noted, the court geographically bracketed ‘armed conflict’, limiting it to Afghanistan, making the battlefield the exception rather than the norm. The further the terrorist suspect was from that bracketed area the more likely he was to be treated as a criminal suspect through normal law enforcement processes.

Within this context there has been debate about what constitutes ‘the enemy’ and what kind of activity constitutes ‘support’ for al Qaeda. To illustrate the broad definition the Bush administration operated under, reference is often made to the 2004 statement by government lawyers, which intimated that the hypothetical little old lady in Switzerland that donated money to an Afghan orphanage could be held as an enemy combatant.¹⁶ How far this definition could be narrowed has been the subject of much debate within the Obama administration, with the State Department generally arguing for a narrower definition. This came to public attention when Charlie Savage of the *New York Times* reported on the debate surrounding the treatment of Belkacem Bensayah, the Algerian detainee who had been arrested in Bosnia far from an active theatre of war and held in Guantánamo for facilitating the travel of people who wanted to go to Afghanistan (see Chapter 4).¹⁷ As Klaidman more recently reports, the State Department’s legal adviser Harold Koh argued that under the laws of war ‘Bensayah was no more detainable than a little old lady who had unwittingly donated money to al Qaeda’. Yet for the General Counsel at the Defense Department, ‘Bensayah’s activities amounted to “substantial support” of al-Qaeda and that he could be detained indefinitely under the laws of war’. Klaidman adds that the debate between Koh and Johnson had an additional significance because how the enemy was defined did not relate simply to the detention question. ‘[T]he same legal arguments that applied to the question of who could be detained without trial directly implicated who could be targeted to death.’¹⁸

Indeed, Klaidman reports that such a debate took place in the fall of 2010 with regard to the targeting of suspects of the al Qaeda affiliated al-Shabab group in Somalia. According to Klaidman, Koh had by then established criteria for identifying the enemy.

First, the prospective target would have to be clearly ‘part of al Qaeda’. Second, he would have to be a ‘senior’ member of the organization. For that Koh developed a theory of ‘uniqueness versus fungibility’. A low-level member, like a driver or a cook, was easily replaced and therefore posed no unique threat to the United States or its interests. Third, to justify a killing, the target would also have to be ‘externally

¹⁶ Associated Press, ‘US says terrorism net must be wide’, *LA Times*, 2 December 2004 at <<http://articles.latimes.com/2004/dec/02/nation/na-gitmo2>>.

¹⁷ Charlie Savage, ‘Obama team is divided on anti-terror tactics’, *New York Times*, 28 March 2010 at <<http://www.nytimes.com/2010/03/29/us/politics/29force.html>>.

¹⁸ Klaidman, *Kill or Capture*, n 6 above, 208.

focused'. Groups like AQAP and al-Shabab were insurgencies preoccupied with local struggles. Koh's view was that only those militants who were predisposed to attacking America could be killed.¹⁹

This was put to the test, according to Klaidman, when Koh again clashed with the General Counsel at the Pentagon over the proposed targeting of al-Shabab members. Koh objected to the targeting of one member because there were 'credible reports' that he 'represented a moderate faction of the Shabab that was opposed to attacking America or Western interests'. This, for Koh, was a political matter. He asked, according to Klaidman, 'what kind of message it would send "if we killed the leader of the faction who was advocating *against* targeting Americans"'. More than that, however, the issue was a legal matter. If this individual was not committed to targeting Americans then for Koh he was not part of the enemy and could not be targeted under the laws of war. In this instance, Klaidman reports, the White House did not authorize the targeting of the individual in question. This is because it feared public scandal if word got out that it had overridden Koh's objections.²⁰ This kind of evidence suggests an internal process has been limiting the use of US power. The war on terror may continue to the extent that, under Obama, terrorist suspects are detained and targeted as enemy combatants, even those far removed from those theatres of war that the US is actively engaged in. But it is clear that the definition of the enemy is not open ended and that this has limited the use of American power.

Klaidman reports that Koh applied a fourth test to the targeting of terrorist suspects. This related to the question of using force in self-defence. What is interesting about the fourth test, as reported by Klaidman, is how it offers further evidence of continuity with the Bush administration. Describing Koh's tests, Klaidman notes how:

[u]nder international law, states could kill in self-defense when they were faced with a 'continuing and imminent threat'. But in an age of terror and asymmetric warfare, it was too late if you waited for a specific plot to unfold. Koh developed a theory of 'elongated imminence', which he likened to 'battered spouse syndrome'. If a husband demonstrated a consistent pattern of activity before beating his wife, it wasn't necessary to wait until the husband's hand was raised before the wife could act in self-defense. Similarly terrorists wouldn't have to be boarding the plane with bombs before American commandos could take them out. It was enough that they were designing the suicide vests.²¹

If this is correct then it of course has echoes of the doctrine of pre-emption that Bush set out in 2002, first in his West Point speech. The US, Bush then

¹⁹ Klaidman, *Kill or Capture*, n 6 above, 219.

²⁰ Klaidman, *Kill or Capture*, n 6 above, 220–3.

²¹ Klaidman, *Kill or Capture*, n 6 above, 220–1.

insisted, would not wait for a threat to materialize before acting. It would act to 'confront the worst threats before they emerge'.²² This was followed up in the National Security Strategy, which insisted the concept of imminent threat had to be adapted to the capabilities and objectives of the new adversary.²³ In this respect, the 9/11 exception continues to influence US national security policy. Those attacks revealed the threat posed by a new kind of enemy, which not only gave rise to a new kind of war in the minds of US elites, it also gave rise to calls to adapt concepts such as the right to use force in self-defence. As Chapter 2 noted, this kind of thinking remains significant and it informed the Obama administration's approach. It has not, to be certain, translated into arguments for changing the regime of rogue states that defy the international community by pursuing weapons of mass destruction, as was arguably the case during the Bush administration. Post-Iraq, the Obama administration held a more modest view of what US power could achieve and what was necessary to defend the United States and its allies against future terrorist attacks. But Koh's notion of 'elongated imminence', as well as the argument that the US remains at war with al Qaeda, all suggest a strong continuity between the Bush and Obama administrations.

The most obvious symbol of continuity was President Obama's failure to close the detention facilities at Guantánamo Bay. The promise to close those facilities was of course the centrepiece of his foreign policy as presidential candidate and amongst his first acts as President.²⁴ There are two aspects to the fact that the camps remain open. The first and perhaps most significant is that despite the promise to close the detention camps the US under Obama did not stop claiming the right to detain terrorist suspects as enemy combatants. The administration's review of the cases at Guantánamo led them to the conclusion that there were indeed detainees that, in the words of the President, could not be prosecuted but who 'pose a clear danger to the United States'.²⁵ Once this was acknowledged, a system of preventive detention was necessary and, as Chapter 4 noted, implementing this through domestic legislation proved impossible given the opposition from the liberal left, who saw it as a threat to American civil liberties, and from the conservative right, who saw it

²² President George Bush, Remarks by the President at the 2002 Graduation of the United States Military Academy, West Point, New York, 1 June 2002 in *Selected Speeches of President George W. Bush 2001–2008*, 125–38, at <http://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected_Speeches_George_W_Bush.pdf>.

²³ White House, The National Security Strategy of the United States of America, September 2002, 15, at <<http://www.state.gov/documents/organisation/63562.pdf>>.

²⁴ Executive Order: Review and Disposition of Individuals Detained at the Guantánamo Bay Naval base and Closure of Detention Facilities, 22 January 2009 at <http://www.whitehouse.gov/the_press_office/closureofGuantanamoDetentionFacilities>.

²⁵ Remarks by the President on National Security, National Archives, Washington DC, 21 May 2009 at <http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09>; see Klaidman, *Kill or Capture*, n 6 above, 234.

as a step away from the war on terror paradigm and therefore a weakening of national security. Still, there was no reason why the detainees had to be kept at Guantánamo and the Obama administration did explore options of transferring those in prolonged detention to the US mainland as a means of keeping its promise to close the most potent symbol of the Bush administration's war on terror. It is here that congressional pressure has worked to sustain that policy programme. It denied the administration funding to implement any such plan.

The same pattern emerged with respect to the Obama administration's preference for transferring the terrorist suspects held in Guantánamo to face trial in US federal courts. Alongside the promise to close Guantánamo Bay was the decision to suspend military commissions. But, as with the detention issue, following the review of cases, the Obama administration found it necessary to proceed with trials by military commissions. As Chapter 3 notes, it based its decisions on such things as the nature and gravity of the conduct underlying the offences, the identity of victims, the location in which the offences occurred and the manner in which the case was investigated and evidence gathered. This in many respects reflected the difficulty of pursuing justice in the context of an ongoing armed conflict, but the issue is complicated of course by the question of how the US defines armed conflict, and the decision to prosecute Khaled Sheikh Mohammed in a New York federal court illustrates how this question is politically highly charged. As Chapter 3 notes, the Obama administration was again forced to reverse its initial position after congressional and local opposition made clear that such a plan would cost the administration politically. Khaled Sheikh Mohammed was returned back to the military commission system. Within that system was the option of prosecuting America's enemies with the crime of 'murder in violation of the laws of war'. This had originally been conceived as 'murder by an unprivileged belligerent' in 2003 but had been included in its new format in the Military Commissions Act that followed. This provides evidence, following the analysis offered in Chapter 3 and elsewhere, that the war convention continues to be recalibrated along the hierarchical lines associated either with a pre-modern normative order or post-Westphalian conception of global civil war.²⁶ To be certain, the Obama administration was able to sustain its preference for federal court cases with regard to the terrorist incidents that took place during its period in office, the arrest and trial of Umar Farouk Abdulmuttallab the most high profile example of this, but such moves are criticized particularly by conservatives keen to continue the Bush administration's war-based approach.

The policy that emerged under the Obama administration did then take on a 'hybrid' character, as Klaidman concludes. 'Sometimes a military model made the most sense. Other times a law-enforcement model was the way to

²⁶ For further discussion, see Ralph, 'War as an Institution of International Hierarchy', n 4 above.

go.²⁷ It is important to add, however, that there are two aspects to this. The first is an acknowledgement within the Obama administration itself that the terrorist threat is evolving, that the character of threat is unconventional and that the ‘new war’ paradigm—albeit in a very different form to that the Bush administration introduced after 9/11—remains useful in terms of protecting national security. The second is that when the Obama administration did see scope for moving policy away from the war-based approach, it was checked by political considerations. Indeed, Klaidman captures this in his description of the Obama administration being split between factions that he calls ‘the Aspen Institute’ and ‘Tammany Hall’. The former represented ‘the idealists and policy wonks who found a philosophical home at think tanks like the Aspen Institute, known for its lofty seminars to creating a more just society’; the latter ‘was made up of the political operatives, the hardheaded realists’. It indicates the strength of support for the war on terror that the Tammany faction saw the President’s promises of reform, such as closing Guantánamo and federal court trials, as politically risky. As Klaidman puts it, ‘Tammany came to believe that many of the President’s promises to reform the war on terror were simply out of step with the American people’.²⁸

CONCLUSION

The Schmittian argument that the post-9/11 exception reveals the paradoxical and exclusionary character of American liberal internationalism only takes us so far in understanding the war on terror. The friend-enemy-foe distinction and the way this sometimes manifests itself in exclusionary practices certainly sheds light on aspects of the US reaction to 9/11. By describing the war on terror as the ‘quintessential liberal cosmopolitan war’ (see Chapter 1), however, the Schmittian argument does not adequately distinguish between alternative approaches within the liberal tradition, and in that respect it does not provide the framework for understanding the extent to which the US response to the state of exceptional insecurity after 9/11 was contested. The defence of liberal values does not inevitably lead to a world view that is structured along the friend-enemy-foe distinction, and the fact that there were those arguing against the portrayal of terrorist suspects as enemy combatants (and then against the portrayal of enemy combatants as unlawful enemy combatants) demonstrates that this more inclusionary view was not without significance. The possibility that terrorists could be treated as criminal suspects and dealt with under the same legal regimes as applied before the 9/11 attacks never

²⁷ Klaidman, *To Kill or Capture*, n 6 above, 259.

²⁸ Klaidman, *To Kill or Capture*, n 6 above, 3–4, 151.

entirely disappeared from the American discourse. What has changed, however, is the politics surrounding that course of action. There was little political reaction, for instance, to the criminal prosecution of Ramzi Yousef for his part in the 1993 attack on the World Trade Center. It was expected that this was the most appropriate response. Two decades on, however, there is an understanding that the US is at war with terror. As the Obama administration discovered, being seen to be ‘criminalizing’ the war on terror carries with it political costs. Klaidman captures this when he writes about the political reaction to the death of Osama bin Laden. One might have expected this, he writes, to be a transformative event, ‘But this was no ordinary time.’ It was a time of ‘such partisan animus’ that this event ‘failed to stop the bickering. It was only a matter of days before Republicans resumed their attacks against Obama’s “criminalized” war on terror.’²⁹ It is this ‘partisan animus’ as well as the continuing existence of the terrorist threat that has helped ensure a degree of continuity in US policy since 9/11.

²⁹ Klaidman, *Kill or Capture*, 248, n 6 above.

Bibliography

- Abi-Saab, Georges, 'The Proper Role of International Law in Combating Terrorism', *Chinese Journal of International Law* 1 (2002) 305–13.
- Ackerman, Bruce and Oona Hathaway, 'Obama's Illegal War', *Foreign Policy*, 1 June 2011 at <http://www.foreignpolicy.com/articles/2011/06/01/obamas_illegal_war>.
- ACLU (American Civil Liberties Union), 'Gates Suggestion Would Move Guantanamo Bay Onshore', 1 May 2009 at <<http://www.aclu.org/national-security/gates-suggestion-would-move-guantanamo-onshore>>.
- Addicott, Jeffrey, 'The Yemen Attack: Illegal Assassination or Lawful Killing', *Jurist*, 7 November 2002 at <<http://jurist.law.pitt.edu/forum/forumnew68.php>>.
- Aldrich, George H, 'The Taliban, Al Qaeda, and the Determination of Illegal Combatants', *American Journal of International Law* 96 (2002) 891–8.
- Alexander, Matthew, 'An interrogator speaks: I'm still tortured by what I saw in Iraq', *Washington Post*, 30 November 2008.
- Alston, Philip, Jason Morgan-Foster and William Abresch, 'The Competence of the UN Human Rights Council and Special Procedures in Relations to Armed Conflicts: Extrajudicial Executions in the "War on Terror"', *European Journal of International Law* 19 (2008) 183–209.
- Amnesty International, *US Detentions in Afghanistan: An Aide-Mémoire for Continued Action*, 7 June 2005 at <<http://www.amnesty.org/en/library/asset/AMR51/093/2005/en/524c40a3-d4de-11dd-8a23-d58a49c0d652/amr510932005en.html>>.
- Amnesty International, 'President Obama Defends Guantánamo Closure, but Endorses "War" Paradigm and Indefinite Preventive Detention', 22 May 2009 at <<http://www.amnesty.org/en/library/info/AMR51/072/2009/en>>.
- Anghie, Anthony, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004).
- Anghie, Anthony, 'The War on Terror and Iraq in Historical Perspective', *Osgoode Hall Law Journal* 43 (2005) 45–66 at <http://www.ohlj.ca/archive/articles/43_12_anghie.pdf>.
- Annan, Kofi, 'An Illegal War', *New York Review of Books*, 16 September 2004 at <<http://www.nybooks.com/articles/archives/2004/oct/21/an-illegal-war/>>.
- Anonymous, 'Obama faces friendly fire at the White House', *Newsweek*, 20 May 2009 at <<http://www.newsweek.com/2009/05/20/friendly-fire-at-the-white-house.html>>.
- Associated Press, 'US says terrorism net must be wide', *LA Times*, 2 December 2004 at <<http://articles.latimes.com/2004/dec/02/nation/na-gitmo2>>.
- Bacon, Perry Jr, 'Lawmakers balk at holding Guantanamo detainees in U.S.', *Washington Post*, 8 May 2009 at <<http://www.washingtonpost.com/wp-dyn/content/article/2009/05/07/AR2009050703985.html>>.
- Baker, Peter, 'Banned techniques yielded "high value information", memo says', *New York Times*, 22 April 2009 at <<http://www.nytimes.com/2009/04/22/us/politics/22blair.html>>.

- Baker, Peter, 'Obama to use current law to support detentions', *New York Times*, 24 September 2009 at <<http://www.nytimes.com/2009/09/24/us/politics/24detain.html>>.
- Baker, Peter, 'Obama says al Qaeda in Yemen planned bombing plot and he vows retribution', *New York Times*, 2 January 2010 at <<http://www.nytimes.com/2010/01/03/us/politics/03address.html>>.
- Baxter, R R, 'So-called "Unprivileged Belligerency": Spies, Guerrillas and Saboteurs', *British Yearbook of International Law* 28 (1951) 323–45.
- BBC, 'American Taliban jailed for 20 years', 4 October 2002 at <<http://news.bbc.co.uk/1/hi/world/americas/2298433.stm>>.
- BBC, 'Ahmed Ghailani sentence: the future of Guantánamo', 25 January 2011 at <<http://www.bbc.co.uk/news/world-us-canada-12282218>>.
- Bellinger, John, 'Legal Issues in the War on Terrorism', *International Humanitarian Law Project Lecture Series*, London School of Economics, 31 October 2006 at <http://www2.lse.ac.uk/PublicEvents/pdf/20061031_JohnBellinger.pdf>.
- Bellinger, John, 'Should Guantanamo Bay Be Closed?', Council on Foreign Relations, 21 January 2010 at <<http://www.cfr.org/human-rights/should-guantanamo-bay-closed/p21247>>.
- Bergen, Peter, 'CIA drone war in Pakistan in sharp decline', CNN, 28 March 2012 at <<http://edition.cnn.com/2012/03/27/opinion/bergen-drone-decline/index.html>>.
- Berman, Nathaniel, 'Privileging Combat? Contemporary Conflict and the Legal Construction of War', *Columbia Journal of Transnational Law* 43 (2004) 1–71.
- Bernstein, Richard, 'Germans free Moroccan convicted of a 9/11 role', *New York Times*, 8 April 2004 at <<http://www.nytimes.com/2004/04/08/world/germans-free-moroccan-convicted-of-a-9-11-role.html?ref=mounirelnotassadeq>>.
- Bhuta, Nehal, 'States of Exception: Regulating Targeted Killing in a "Global Civil War"', in Philip Alston and Euan MacDonald (eds), *Human Rights, Intervention, and the Use of Force* (Oxford: Oxford University Press, 2008) 243–74.
- Bishai, Linda S and Andreas Behnke, 'War, Violence and the Displacement of the Political', in Louiza Odysseos and Fabio Petito (eds), *The International Political Thought of Carl Schmitt: Terror, Liberal War and the Crisis of Global Order* (London and New York: Routledge, 2007) 107–23.
- Blair, Dennis C, Statement to the Senate Committee on Homeland Security and Governmental Affairs, 20 January 2010 at <<http://www.hsgac.senate.gov/download/2010-01-20-blair-leiter-testimony>>.
- Blair, Tony, *A Journey* (London: Hutchinson, 2010).
- Bobbitt, Philip, 'Waging War against Terror: An Essay for Sandy Levinson', *Georgia Law Review* 40 (2005–6) 753–78.
- Boot, Max, 'Neocons', *Foreign Policy* 140 (2004) 20–8.
- Bradbury, Steven G, Memorandum for John A Rizzo, Senior Deputy General Counsel CIA Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May be Used in the Interrogation of High Value al Qaeda Detainees, 30 May 2005 at <<http://www.justice.gov/olc/docs/memo-bradbury2005.pdf>>.
- Bradbury, Steven G, Memorandum for John A Rizzo, Acting General Counsel CIA Re: 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, 20 July 2007 at <http://www.washingtonpost.com/wp-srv/nation/documents/2007_0720_OLC_memo_warcrimesact.pdf>.
- Bradbury, Steven G, Prepared Statement for the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, 14 February 2008 at <<http://judiciary.house.gov/hearings/pdf/Bradbury080214.pdf>>.
- Braithwaite, Tom, 'CIA interrogation methods to be scrutinised', *Financial Times*, 24 August 2009.
- Brennan, John O, Remarks of Assistant to the President for Homeland Security and Counterterrorism, Harvard Law School, 16 September 2011 at <<http://www.lawfareblog.com/2011/09/john-brennans-remarks-at-hls-brookings-conference/>>.
- Brown, Gordon, '42 day detention: a fair solution', *The Times*, 2 June 2008 at <http://www.timesonline.co.uk/tol/comment/columnists/guest_contributors/article4045210.ece>.
- Buchanan, Allen and Robert O Keohane, 'The Preventive Use of Force: A Cosmopolitan Institutional Proposal', *Ethics and International Affairs* 18 (2004) 1–22.
- Buckley, Mary and Robert Singh (eds), *The Bush Doctrine and the War on Terrorism: Global Responses, Global Consequences* (London and New York: Routledge, 2006).
- Bugnion, François, 'Just Wars, Wars of Aggression and International Humanitarian Law', *International Review of the Red Cross* 84 (2002) 523–46.
- Bull, Hedley, *The Anarchical Society: A Study of Order in World Politics* 2nd edn (Basingstoke: Palgrave Macmillan, 1995).
- Bumiller, Elisabeth and William Glaberson, 'Hints that detainees may be held on US soil', *New York Times*, 1 May 2009 at <<http://www.nytimes.com/2009/05/01/us/politics/01gitmo.html>>.
- Burke, Anthony, 'Against the New Internationalism', *Ethics and International Affairs* 19 (2005) 73–89.
- Burkeman, Oliver, 'America signals withdrawal of troops from Saudi Arabia', *The Guardian*, 30 April 2003 at <<http://www.guardian.co.uk/world/2003/apr/30/usa.iraq>>.
- Burlingame, Debra, 'The president isn't sincere about "swift and certain" justice for terrorists', *Wall Street Journal*, 8 May 2009 at <<http://online.wsj.com/article/SB124174154190098941.html>>.
- Bush, George W, 'Address to a Joint Session of Congress and the American People', United States Capitol, Washington DC, 20 September 2001.
- Bush, George W, 'Military Order—Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terror', 13 November 2001 at <<http://www.law.cornell.edu/background/warpower/fr1665.pdf>>.
- Bush, George W, State of the Union Address to the 107th Congress, US Capitol, Washington DC, 29 January 2002 in *Selected Speeches of President George W. Bush 2001–2008*, 103–14 at <http://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected_Speeches_George_W_Bush.pdf>.
- Bush, George W, Memo 11, 'Humane Treatment of al Qaeda and Taliban Detainees, from President George Bush to the Vice-President et al', 7 February 2002, in Karen J Greenberg and Joshua L Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (Cambridge: Cambridge University Press, 2005) 134–5.
- Bush, George W, Remarks by the President at the 2002 Graduation of the United States Military Academy, West Point, New York, 1 June 2002 in *Selected Speeches of President*

- George W. Bush 2001–2008, 125–38 at <http://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected_Speeches_George_W_Bush.pdf>.
- Bush, George W, Address to the UN General Assembly, 12 September 2002 at <<http://www.guardian.co.uk/world/2002/sep/12/iraq.usa3>>.
- Bush, George W, Speech from the White House, 6 September 2006 at <http://www.nytimes.com/2006/09/06/washington/06bush_transcript.html>.
- Bush, George W, Executive Order 13440: Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the CIA, 20 July 2007 at <<http://www.fas.org/irp/offdocs/eo/eo-13440.htm>>.
- Bush, George W, *Decision Points* (New York: Random House, 2010).
- Bybee, Jay, Memorandum for William J Haynes II, General Counsel, Department of Defense, Re: The President's Power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations, 13 March 2002 at <<http://www.justice.gov/opa/documents/memorandumpresidentpower03132002.pdf>>.
- Bybee, Jay, Memorandum for Alberto R Gonzales, Counsel to the President, and William J Haynes II, General Counsel of the Department of Defense, 22 January 2002, in Karen J Greenberg and Joshua L Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (Cambridge: Cambridge University Press, 2005) 81–117.
- Bybee, Jay, Memo 6, Memorandum for Alberto R Gonzales, Counsel to the President, Standards of Conduct for Interrogation under 18 U.S.C. §§2340–2340A, 1 August 2002, in Karen J Greenberg and Joshua L Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (Cambridge: Cambridge University Press) 172–217.
- Bybee, Jay, Memorandum for John Rizzo, Acting General Counsel for the CIA, Interrogation of al Qaeda Operative, 1 August 2002 at <<http://www.gwu.edu/~nsarchiv/torturingdemocracy/archive/recent.html>>.
- Byers, Michael, 'Terrorism, the Use of Force and International Law after September 11', *International Relations* 16 (2002) 155–70.
- Calabressi Massimo and Michael Weisskopf, 'The fall of Greg Craig, Obama's top lawyer', *Time*, 19 November 2009 at <<http://www.time.com/time/politics/article/0,8599,1940537-2,00.html>>.
- Caron, David D, 'If Afghanistan Has Failed, Then Afghanistan is Dead: "Failed States" and the Inappropriate Substitution of Legal Conclusion for Political Description', in Karen J Greenberg (ed), *The Torture Debate in America* (Cambridge: Cambridge University Press, 2006) 214–22.
- Casey Lee A and David B Rivkin Jr, 'Europe in the Balance: The Alarming Undemocratic drift of the European Union', *Policy Review* 107 (2001) 41–53.
- Casey Lee A and David B Rivkin Jr, 'Rethinking the Geneva Conventions', in Karen J Greenberg (ed), *The Torture Debate in America* (Cambridge: Cambridge University Press, 2006) 203–13.
- Casey Lee A and David B Rivkin Jr, 'The Use of Military Commissions in the War on Terror', *Boston University International Law Journal* 24 (2006) 123–45.
- Casey Lee A and David B Rivkin Jr, 'Why it's so hard to close Gitmo', *Wall Street Journal*, 30 May 2009 at <<http://online.wsj.com/article/SB124364036468967905.html>>.
- Cassese, Antonio, 'The International Community's "Legal" Response to Terrorism', *International and Comparative Law Quarterly* 38 (1989) 589–608.

- Cassese, Antonio, 'Terrorism is also Disrupting Some Crucial Legal Categories of International Law', *European Journal of International Law* 12 (2001) 993–1001.
- Caverley, Jonathan D, 'Power and Democratic Weakness: Neoconservatism and Neo-classical Realism', *Millennium Journal of International Studies* 38 (2010) 593–614.
- CBS, 'Public does not want torture probe', 27 April 2009 at <<http://www.cbsnews.com/stories/2009/04/27/opinion/polls/main4972844.shtml>>.
- Cheney, Richard B, Remarks at the American Enterprise Institute, 21 May 2009 at <<http://www.aei.org/speech/100050>>.
- Clinton, Bill, 'Remarks in Martha's Vineyard, Massachusetts, on Military Action Against Terrorist Sites in Afghanistan and Sudan', 20 August 1998 at <<http://www.presidency.ucsb.edu/ws/?pid=54798&st=&st1=>>>.
- Cole, David, 'Closing Guantanamo: The Problem of Preventive Detention', *Boston Review*, 13 December 2008 at <<http://bostonreview.net/BR34.1/cole.php>>.
- Cole, David, 'The right path: preventive detention', *New York Times*, 21 May 2009 at <<http://roomfordebate.blogs.nytimes.com/2009/05/21/obamas-blueprint-and-americas-enemies/#cole>>.
- Cole, David, 'The Sacrificial Yoo: Accounting for Torture in the OPR Report', *Journal of National Security Law and Policy* 4 (2010) 455–64.
- Constitution Project, *A Critique of National Security Courts*, 23 June 2008 at <http://www.constitutionproject.org/pdf/Critique_of_the_National_Security_Courts.pdf>.
- Cook, Robin, Personal Statement, House of Commons, 17 March 2003 at <<http://www.publications.parliament.uk/pa/cm200203/cmhansrd/vo030317/debtext/30317-33.htm>>.
- Corn, Geoffrey S, 'What Law Applies to the War on Terror?', in Michael W Lewis et al (eds), *The War on Terror and the Laws of War: A Military Perspective* (Oxford: Oxford University Press, 2009) 1–36.
- Corn, Geoffrey S, 'Thinking the Unthinkable: Has the Time Come to Offer Combatant Immunity to Non-State Actors?', *Stanford Law and Policy Review* 22 (2011) 253–94.
- Corn, Geoffrey S and Eric T Jensen, 'Trial and Punishment for Battlefield Misconduct', in Michael W Lewis et al (eds), *The War on Terror and the Laws of War: A Military Perspective* (Oxford: Oxford University Press, 2009) 161–86.
- Council of Europe, Alleged Secret Detentions and Unlawful Interstate Transfers Involving Council of Europe Member States, 7 June 2006 at <<http://assembly.coe.int/Documents/WorkingDocs/doc06/edoc10957.pdf>>.
- Craig, Alan 'The Struggle for Legitimacy: A Study of Military Lawyers in Israel', PhD thesis, University of Leeds, 2011.
- Crawford, Neta 'The Slippery Slope to Preventive War', *Ethics and International Affairs* 17 (2003) 30–9.
- Crawford, Neta, 'The Justice of Preemption and Preventive War Doctrines', in Mark Evans (ed), *Just War Theory: A Reappraisal* (Edinburgh: Edinburgh University Press, 2005) 25–49.
- Crawford, Neta, 'The False Promise of Preventive War: The "New Security Consensus" and a More Insecure World', in Henry Shue and David Rodin (eds) *Preemption* (Oxford: Oxford University Press, 2007) 89–125.

- Creamer, Robert, 'Transferring some Guantanamo detainees to the U.S. will actually make America safer', *Huffington Post*, 22 May 2009 at <http://www.huffingtonpost.com/robert-creamer/transferring-some-guantan_b_206724.html>.
- Crocker, Thomas, 'Is the Rule of Law Nothing?', *The Faculty Lounge*, 17 April 2009 at <<http://www.thefacultyounge.org/2009/04/is-the-rule-of-law-nothing.html>>.
- Cullen, Anthony, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge: Cambridge University Press, 2010).
- Daalder, Ivo H and James M Lindsay, *America Unbound: The Bush Revolution in Foreign Policy* (Washington DC: Brookings, 2003).
- Danner, Mark, 'US Torture: Voices from the Black Sites', *New York Review of Books*, 9 April 2009 at <<http://www.nybooks.com/articles/archives/2009/apr/09/us-torture-voices-from-the-black-sites/>>.
- Danner, Mark, 'The Red Cross Torture Report: What It Means', *New York Review of Books*, 30 April 2009 at <<http://www.nybooks.com/articles/archives/2009/apr/30/the-red-cross-torture-report-what-it-means>>.
- Deeks, Ashley, 'Pakistan's Sovereignty and the Killing of bin Laden', *ASIL Insights* 15 (2011) at <<https://outlook.leeds.ac.uk/owa/auth/logoff.aspx?Cmd=logoff>>.
- Dershowitz, Alan M, *Preemption: A Knife That Cuts Both Ways* (New York and London: WW Norton, 2006).
- Deudney, Daniel H, *Bounding Power: Republican Security Theory From the Polis to the Global Village* (Princeton and Oxford: Princeton University Press, 2007).
- DeYoung, Karen, 'Obama aide defends trial for suspect in Christmas Day attempt to bomb plane', *Washington Post*, 4 January 2010 at <<http://www.washingtonpost.com/wp-dyn/content/article/2010/01/03/AR2010010302191.html?hpid=topnews>>.
- Dickason, Oliver P, 'Concepts of Sovereignty at the Time of First Contacts', in L C Green and Olive P Dickason (eds), *The Law of Nations and the New World* (Edmonton: University of Alberta Press, 1989).
- Dombey, Daniel, 'White House looks to talks with Taliban', *Financial Times*, 5 May 2011 at <<http://www.ft.com/cms/s/0/e7d2341a-773e-11e0-aed6-00144feabdc0.html>>.
- Donnelly, Jack, 'Human Rights: A New Standard of Civilization?', *International Affairs* 74 (1998) 1–24.
- Dratel, Joshua L, 'The Curious Debate', in Karen J Greenberg (ed), *The Torture Debate in America* (Cambridge: Cambridge University Press, 2006) 111–17.
- Drolet, Jean-François, *American Neoconservatism: The Politics and Culture of a Reactionary Idealism* (London: Hurst, 2011).
- Drumbl, Mark, 'Victimhood in our Neighborhood: Terrorist Crime, Taliban Guilt and the Asymmetries of the International Legal Order', *North Carolina Law Review* 8 (2002) 1–113.
- Drury, Shadia B, *Leo Strauss and the American Right* (London: Macmillan Press, 1999).
- Duffy, Helen, *The 'War on Terror' and the Framework of International Law* (Cambridge: Cambridge University Press, 2005).
- Dyer, Clare, 'There is no war on terror', *The Guardian*, 24 January 2007.
- Ehrman, John, *The Rise of Neoconservatism: Intellectuals and Foreign Affairs, 1945–1994* (New Haven, CT: Yale University Press, 1995).
- Farer, Tom, *Confronting Global Terrorism and Neoconservatism: The Framework of a Liberal Grand Strategy* (Oxford: Oxford University Press, 2008).

- FBI, Legal Analysis, 27 November 2002 at <<http://www.torturingdemocracy.org/documents/20021127-2.pdf>>.
- Feingold Russ, Letter to the President from the Chairman of the Senate Judiciary Committee, 22 May 2009 at <<http://www.talkingpointsmemo.com/documents/2009/05/feingold-letter-to-obama-on-preventive-detention.php>>.
- Feinstein, Lee and Anne-Marie Slaughter, 'A Duty to Prevent', *Foreign Affairs* 83 (2004) 136–50.
- Feith, Douglas, 'Law in the Service of Terror—The Strange Case of the Additional Protocol', *National Interest* 1 (1985) 36–47.
- Feith, Douglas, 'Protocol I: Moving Humanitarian Law Backwards', *Akron Law Review* 19 (1986) 531–5.
- Fellner, Jamie, 'US must take the high road with prisoners of war', *Newsday*, 15 January 2002 at <<http://www.newsday.com/u-s-must-take-the-high-road-with-prisoners-of-war-1.447527>>.
- Finn, Peter, 'Reports on US detention policy will be delayed', *Washington Post*, 21 July 2009 at <<http://www.washingtonpost.com/wp-dyn/content/article/2009/07/20/AR2009072003578.html>>.
- Finn, Peter, 'Administration won't seek new detention system', *Washington Post*, 24 September 2009 at <<http://www.washingtonpost.com/wp-dyn/content/article/2009/09/23/AR2009092304427.html>>.
- Finn, Peter, 'Return of Yemeni detainees is suspended', *Washington Post*, 5 January 2010.
- Finn, Peter, 'Justice task force recommends about 50 Guantánamo detainees to be held indefinitely', *Washington Post*, 22 January 2010.
- Finn, Peter, 'Embassy bomber receives life sentence', *Washington Post*, 26 January 2011.
- Finn, Peter, 'Khalid Sheik Mohammed to be tried by military commission', *Washington Post*, 4 April 2011 at <http://www.washingtonpost.com/world/khalid_sheik_mohammed_to_be_tried_by_military_commission_officials_say/2011/04/04/AFhLS8c_story.html>.
- Finn, Peter, Carrie Johnson and Anne E Kornblut, 'Trial of alleged Sept. 11 conspirators probably won't be held in Lower Manhattan', *Washington Post*, 30 January 2010.
- Finn Peter and Anne E Kornblut, 'Obama decries curbs on trying detainees in U.S.', *Washington Post*, 7 January 2011 at <<http://www.washingtonpost.com/wp-dyn/content/article/2011/01/07/AR2011010706144.html>>.
- Finn, Peter and Anne E Kornblut, 'Obama creates indefinite detention system for prisoners at Guantanamo Bay', *Washington Post*, 8 March 2011 at <<http://www.washingtonpost.com/wp-dyn/content/article/2011/03/07/AR2011030704871.html>>.
- Finn, Peter and Del Quentin, 'U.S. retires "enemy combatant," keeps broad right to detain', *Washington Post*, 14 March 2009 at <<http://www.washingtonpost.com/wp-dyn/content/article/2009/03/13/AR2009031302371.html>>.
- Fisher, William, 'Growing number of Guantanamo detainees cleared for release remain imprisoned', *The Public Record*, 6 September 2009 at <<http://pubrecord.org/world/4759/growing-number-guantanamo-detainees/>>.

- Fletcher, George P, 'On the Crimes Subject to Prosecution in the Military Commissions', *Journal of International Criminal Justice* 5 (2007) 39–47.
- Forsythe, David, *The Politics of Prisoner Abuse: The United States and Enemy Prisoners after 9/11* (Cambridge: Cambridge University Press, 2011).
- Fukuyama, Francis, *The End of History and the Last Man* (New York: Maxwell Macmillan, 1992).
- Garcia, Michael, 'Guantanamo Detention Center: Legislative Activity in the 111th Congress', Congressional Research Service Report R40754, 13 January 2011 at <<http://www.fas.org/sgp/crs/natsec/R40754.pdf>>.
- Garcia, Michael John, Jennifer K Elsea, R Chuck Mason and Edward C Liu, 'Closing the Guantánamo Detention Center: Legal Issues', Congressional Research Service Report R40139, 11 February 2011 at <<http://www.fas.org/sgp/crs/natsec/R40139.pdf>>.
- Glaberson William, 'President's detention plan tests American legal tradition', *New York Times*, 23 May 2009 at <<http://www.nytimes.com/2009/05/23/us/politics/23detain.html>>.
- Glaberson, William, 'Six detainees are freed as questions linger', *New York Times*, 12 June 2009 at <<http://www.nytimes.com/2009/06/12/world/12gitmo.html>>.
- Goldsmith, Jack, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (New York: WW Norton, 2007).
- Goldsmith, Jack, 'No new torture probes', *Washington Post*, 26 November 2008 at <<http://www.washingtonpost.com/wp-dyn/content/article/2008/11/25/AR2008112501897.html>>.
- Goldsmith, Peter, Letter from the Attorney General to Rt Hon Geoff Hoon, Secretary of State for Defence, 28 March 2002 at <<http://www.iraqinquiry.org.uk/media/42845/goldsmith-hoon-letter.pdf>>.
- Goldsmith, Peter, Oral Evidence to the Iraq Inquiry, 27 January 2010 at <<http://www.iraqinquiry.org.uk/transcripts/oralevidence-bydate/100127.aspx>>.
- Gonzalez, Alberto J, Memo 7, Memorandum for the President, Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban, from Alberto R Gonzales, 25 January 2002, in Karen J Greenberg and Joshua L Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (Cambridge: Cambridge University Press, 2005) 118–21.
- Gray, Christine, *International Law and the Use of Force* (Oxford: Oxford University Press, 2000).
- Greenberg, Jan Crawford, Howard L Rosenberg and Ariane de Vogue, 'Top Bush advisors approved enhanced interrogation', *ABC News*, 9 April 2008 at <<http://abcnews.go.com/print?id=4583256>>.
- Greenwald, Glenn, 'Obama fails his first test on civil liberties and accountability', *The Salon*, 9 February 2009 at <http://www.salon.com/news/opinion/glenn_greenwald/2009/02/09/state_secrets>.
- Greenwald, Glen, 'The Obama justice system', *The Salon*, 8 July 2009 at <http://www.salon.com/news/opinion/glenn_greenwald/2009/07/08/obama>.
- Greenwood, Christopher, 'War, Terrorism and International Law', *Current Legal Problems* 56 (2003) 505–30.
- Grenier, John, *The First Way of War: American War Making on the Frontier, 1607–1814* (Cambridge: Cambridge University Press, 2004).

- Gross, Oren, 'The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the "Norm-Exception" Dichotomy', *Cardoza Law Review* 21 (1999–2000) 1825–68.
- Gross, Oren and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press, 2006).
- Gude, Ken, 'A welcome new initiative on Guantánamo', *The Guardian*, 7 March 2011 at <<http://www.guardian.co.uk/commentisfree/cifamerica/2011/mar/07/guantanamo-bay-obama-administration>>.
- Haass, Richard, *War of Necessity, War of Choice: A Memoir of Two Iraq Wars* (New York: Simon & Schuster, 2009).
- Hafetz, Jonathan, *Habeas Corpus after 9/11: Confronting America's New Global Detention System* (New York: New York University Press, 2011).
- Halper, Stefan and Jonathan Clarke, *America Alone: The Neo-Conservatives and the Global Order* (Cambridge: Cambridge University Press, 2004).
- Hampsher-Monk, Iain, *A History of Modern Political Thought: Major Political Thinkers from Hobbes to Marx* (Oxford: Blackwell Publishing, 1992).
- Hansen, Joseph C, 'Murder and the Military Commissions: Prohibiting the Executive's Unauthorized Expansion of Jurisdiction', *Minnesota Law Review* 93 (2009) 101–31.
- Hassner, Pierre, 'The United States: The Empire of Force or the Force of Empire?' *Chaillot Papers No 54* (Paris: Institute for Security Studies, 2002) 1–49.
- Hayden, Michael, 'Obama administration takes several wrong paths in dealing with terrorism', *Washington Post*, 31 January 2010 at <<http://www.washingtonpost.com/wp-dyn/content/article/2010/01/29/AR2010012903954.html>>.
- Hayden, Michael and Michael B Mukasey, 'The president ties his own hands on terror', *Wall Street Journal*, 17 April 2009 at <<http://online.wsj.com/article/SB123993446103128041.html>>.
- Haynes II, William J, Memorandum from General Counsel of the Department of Defense to Members of the ASIL-CFR Roundtable, 12 December 2002 at <http://www.cfr.org/publication/5312/enemy_combatants.html>.
- Helgerson, John, Counterterrorism, Detention and Interrogation Activities (September 2001–October 2003), Report of the CIA Inspector General, 7 May 2004 at <http://media.luxmedia.com/aclu/IG_Report.pdf>.
- Hersh, Joshua, 'Republican debate: candidates call for military strikes on Iran, return of waterboarding', *Huffington Post*, 13 November 2011 at <http://www.huffingtonpost.com/2011/11/12/gop-debate-iran-waterboarding_n_1090667.html>.
- Hewes, James E, 'Henry Cabot Lodge and the League of Nations', *Proceedings of the American Philosophical Society* 114 (1970) 245–55.
- Hider, James, 'Leon Panetta's mission to stop Israel bombing Iranian nuclear plant', *Sunday Times*, 15 May 2009 at <http://www.timesonline.co.uk/tol/news/world/middle_east/article6289593.ece>.
- Hoffman, Stanley, 'American Exceptionalism: The New Version', in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton: Princeton University Press, 2005) 225–40.
- Holder, Eric, Remarks of the Attorney General, Northwestern University School of Law, 5 March 2012 at <<http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>>.

- Holland, Jack, 'Foreign Policy and Political Possibility', *European Journal of International Relations*, forthcoming (first published 23 August 2011 at <<http://ejt.sagepub.com/content/early/2011/08/23/1354066111413310.full.pdf>>).
- Horton, Scott, 'Licensed to kill', *Harper's Magazine*, 10 April 2009 at <<http://www.harpers.org/archive/2009/04/hbc-90004755>>.
- Howard, Michael, 'What's in a Name? How to Fight Terrorism', *Foreign Affairs* 81 (2002) 8–13.
- Human Rights First, *Arbitrary Justice: Trials of Bagram and Guantanamo Detainees in Afghanistan*, April 2008 at <<http://www.humanrightsfirst.org/wp-content/uploads/pdf/USLS-080409-arbitrary-justice-report.pdf>>.
- Human Rights Watch, 'US Must Take the High Road with Prisoners of War', 15 January 2002 at <<http://www.hrw.org/en/news/2002/01/15/us-must-take-high-road-prisoners-war>>.
- Human Rights Watch, Letter to National Security Adviser, Condoleezza Rice, 31 January 2002 at <<http://www.hrw.org/en/news/2002/01/31/guantanamo-hrw-spearheads-campaign-respect-geneva-conventions>>.
- Human Rights Watch, 'Statement on US Rendition Legislation', 10 March 2005 at <<http://www.hrw.org/news/2005/03/09/statement-us-rendition-legislation>>.
- Human Rights Watch, 'Drop Plan for Detention without Trial', 21 May 2009 at <<http://www.hrw.org/en/news/2009/05/21/us-drop-plan-detention-withouttrial>>.
- Human Rights Watch, Counterterrorism and Human Rights: A Report Card on President Obama's First Year, January 2010 at <http://www.hrw.org/sites/default/files/related_material/CT_US_ObamaYr_Jan2010.pdf>.
- Human Rights Watch, Guantanamo Facts and Figures, 11 January 2012 at <<http://www.hrw.org/features/guantanamo-facts-figures>>.
- Ignatieff, Michael, 'Introduction: American Exceptionalism and Human Rights', in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton: Princeton University Press, 2005) 1–27.
- Independent International Commission on Kosovo, *The Kosovo Report*, 21 June 2006 at <http://sitemaker.umich.edu/drwcasebook/files/the_kosovo_report_and_update.pdf>.
- International Center for Transitional Justice, *Prosecuting Abuses of Detainees in US Counterterrorism Operations*, 1 November 2009 at <<http://ictj.org/publication/criminal-justice-criminal-policy-prosecuting-abuses-detainees-us-counterterrorism>>.
- International Committee of the Red Cross, Commentary on Common Article 3 of the 1949 Geneva Conventions, 12 August 1949 at <<http://www.icrc.org/ihl.nsf/COM/365-570006?OpenDocument>>.
- International Committee of the Red Cross, The Relevance of IHL in the Context of Terrorism, 21 July 2005 at <<http://www.icrc.org/eng/resources/documents/misc/terrorism-ihl-210705.htm>>.
- International Committee of the Red Cross, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts', *International Review of the Red Cross* 89 (2007) at <<http://www.icrc.org/eng/assets/files/other/irrc-867-ihl-challenges.pdf>>.
- International Committee of the Red Cross, Report on the Treatment of Fourteen 'High Value Detainees' in CIA Custody, February 2007 at <<http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf>>.

- International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, May 2009 at <<http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>>.
- International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua v. United States*, 26 November 1984 at <<http://www.icj-cij.org/docket/?p1=3&p2=3&code=nus&case=70&k=66>>.
- International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Dusko Tadic: Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995 at <<http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>>.
- International Law Association, *Final Report on the Meaning of Armed Conflict in International Law*, August 2010 at <<http://www.ila-hq.org/en/committees/index.cfm/cid/1022>>.
- Ip, John, 'Comparative Perspectives on the Detention of Terrorist Suspects', *Transnational Law and Contemporary Problems* 16 (2006–7) 775–871.
- Jackson, Dick, 'Interrogation and Treatment of Detainees in the Global War on Terror', in Michael Lewis et al (eds), *The War on Terror and the Laws of War: A Military Perspective* (Oxford: Oxford University Press, 2009) 125–59.
- Jahn, Beate, 'Kant, Mill, and Illiberal Legacies in International Affairs', *International Organization* 59 (2005) 177–207.
- Jinks, Derek, 'International Human Rights Law and the War on Terrorism', *Denver Journal of International Law and Policy* 31 (2002) 58–68.
- Jinks, Derek, 'State Responsibility for the Acts of Private Armed Groups', *Chicago Journal of International Law* 4 (2003) 83–95.
- Johnson, Carrie, 'Administration wanted loyalist as justice dept. legal adviser', *Washington Post*, 17 July 2008 at <<http://www.washingtonpost.com/wp-dyn/content/article/2008/07/16/AR2008071602563.html>>.
- Johnson, Carrie, 'Obama to set higher bar for keeping state secrets', *Washington Post*, 23 September 2009 at <<http://www.washingtonpost.com/wp-dyn/content/article/2009/09/22/AR2009092204295.html>>.
- Johnston, David, 'U.S. says rendition to continue, but with more oversight', *New York Times*, 24 August 2009 at <<http://www.nytimes.com/2009/08/25/us/politics/25rendition.html>>.
- Jones, Charles A, 'War in the Twenty-First Century: An Institution in Crisis', in Richard Little and John Williams (eds), *The Anarchical Society in a Globalized World* (Basingstoke: Palgrave Macmillan, 2006).
- Jones, Seth G and Martin C Libicki, *How Terrorist Groups End: Lessons for Countering al Qaeda* (Santa Monica: Rand Corporation, 2008).
- Judis, John, *The Folly of Empire: What George W. Bush Could Learn from Theodore Roosevelt and Woodrow Wilson* (Oxford: Oxford University Press, 2006).
- Kagan, Robert, *Paradise and Power, America and Europe in the New World Order* (London, Atlantic Books, 2003).
- Kahn, Imran, 'Terrorists should be tried in court', *The Guardian*, 12 October 2001.
- Kamen, Al, 'The end of the global war on terror', *Washington Post*, 23 March 2009.
- Kant, Immanuel (translated with introduction and notes by M Campbell Smith), *Perpetual Peace: A Philosophical Essay* (London: George Allen and Unwin, 1915).

- Kaplan, Lawrence F and William Kristol, *The War over Iraq: Saddam's Tyranny and America's Mission* (San Francisco: Encounter Books, 2003).
- Keen, Edward, *Beyond the Anarchical Society: Grotious, Colonialism and Order in World Politics* (Cambridge: Cambridge University Press, 2002).
- Kenny, Jack, 'Elena Kagan and the Worldwide "Battlefield"', 11 February 2010 at <<http://www.thenewamerican.com/opinion/959-jack-kenny/3286-elena-kagan-the-worldwide-qbattlefieldq>>.
- Khanna, Setyam, 'Former Bush Speechwriter: CIA Torturers Are "American Heroes"', 26 January 2009 at <<http://thinkprogress.org/2009/01/26/mark-thiessen-bush>>.
- Khong, Yuen Foong, 'Neoconservatism and the Domestic Sources of American Foreign Policy', in Steve Smith, Amelia Hadfield and Tim Dunne (eds), *Foreign Policy: Theories, Actors, Cases* (Oxford: Oxford University Press, 2007) 251–68.
- Kilcullen David and Andrew McDonald Exum, 'Death from above, outrage down below', *New York Times*, 16 May 2009 at <<http://www.nytimes.com/2009/05/17/opinion/17exum.html>>.
- King, Peter, 'Why Holder must resign', *New York Post*, 7 April 2011 at <http://www.nypost.com/p/news/opinion/opedcolumnists/why_holder_must_resign_qHeha3gcT6IGcZESKkndIK>.
- Kirgis, Frederic, 'Distinctions between International and US Foreign Relations Law Issues Regarding Treatment of Suspected Terrorists', *ASIL Insights*, June 2004 at <<http://www.asil.org/insigh138.cfm>>.
- Klaidman, Daniel, *Kill or Capture: The War on Terrorism and the Soul of the Obama Presidency* (Boston, New York: Houghton Mifflin Harcourt, 2012).
- Klaidman, Daniel and Evan Thomas, 'Palace revolt', *Newsweek*, 5 February 2006 at <<http://www.thedailybeast.com/newsweek/2006/02/05/palace-revolt.html>>.
- Koh, Harold Hongju, 'The Case against Military Commissions', *American Journal of International Law* 96 (2002) 337–44.
- Koh, Harold Hongju, 'America's Jekyll-and-Hyde Exceptionalism', in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton: Princeton University Press, 2005) 111–44.
- Koh, Harold Hongju, Legal Adviser, US Department of State, 'The Obama Administration and International Law', Annual Meeting of the American Society of International Law, 25 March 2010 at <<http://www.state.gov/s/l/releases/remarks/139119.htm>>.
- Koh, Harold Hongju, 'The Lawfulness of the U.S. Operation against Osama bin Laden', *Opinio Juris*, 19 May 2011 at <<http://opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden/>>.
- Koskenniemi, Martti, 'International law as Political Theology: How to Read *Nomos der Erde*?' *Constellations* 11 (2004) 492–511.
- Krauthammer, Charles, 'Obama and Libya: the professor's war', *Washington Post*, 25 May 2010 at <http://www.washingtonpost.com/opinions/obama-and-libya-the-professors-war/2011/03/24/ABPjvmRB_story.html>.
- Kris, David, Assistant Attorney General's Statement before the Senate Judiciary Subcommittee on Terrorism and Homeland Security, 28 July 2009 at <http://judiciary.senate.gov/hearings/testimony.cfm?id=4002&wit_id=8156>.
- Kristol, William, 'Preening & posturing', *Weekly Standard*, 4 May 2009 at <<http://www.weeklystandard.com/Content/Public/Articles/000/000/016/419lgkxx.asp>>.

- Kristol, William, 'Cheney vs. Obama: A Mismatch', 21 May 2009 at <http://www.weeklystandard.com/weblogs/TWSFP/2009/05/cheney_vs_obama_a_mismatch.asp>.
- Kristol, William and Robert Kagan, 'Towards a Neo-Reaganite Foreign Policy', *Foreign Affairs* 75 (1996) 18–32.
- Kristol, William and Robert Kagan, 'National Interest and Global Responsibility', in Irwing Stelzer (ed), *The Neocon Reader* (New York: Grove Press, 2004) 55–74.
- Leahy, Patrick L et al, Letter to Attorney General Eric Holder, 16 May 2011 at <<http://www.longwarjournal.org/threat-matrix/images/Daquad-Senate-Letter-LWJ.pdf>>.
- Lee, Barbara, 'Why I opposed the resolution to authorize force', *San Francisco Chronicle* 23 September 2001.
- Lee, Chisun, 'Their own private Guantanamo', *New York Times*, 23 July 2009 at <<http://www.nytimes.com/2009/07/23/opinion/23lee.html>>.
- Lee, Roy S, 'An Assessment of the ICC Statute', *Fordham International Law Journal* 25 (2002) 750–66.
- Lee, Steven, 'A Moral Critique of the Cosmopolitan Institutional Proposal', *Ethics and International Affairs* 19 (2005) 99–107.
- Levin, Daniel, Letter to CIA Acting General Counsel, John A Rizzo, 6 August 2004 at <http://www.washingtonpost.com/wp-srv/nation/documents/2004_0806_OLC_letter_rizzo.pdf>.
- Levin, Daniel, Memorandum Opinion for the Deputy Attorney General, Legal Standards Applicable under 18 U.S.C. §§ 2340–2340A, 30 December 2004 at <<http://www.usdoj.gov/olc/>>.
- Levinson, Stanford, 'Torture in Iraq and the Rule of Law in America', *Daedalus* 133 (2004) 5–9.
- Levinson, Stanford, 'Constitutional Norms in a State of Permanent Emergency', *Georgia Law Review* 40 (2006) 699–751.
- Levinson, Stanford, 'Preserving Constitutional Norms in Times of Permanent Emergencies', *Constellations* 13 (2006) 59–73.
- Lewis, Michael W, 'International Myopia: Hamdan's Shortcut to Victory', *University of Richmond Law Review* 42 (2007–8) 687–730.
- Linzer, Dafna and Peter Finn, 'White House weighs order on detention', *Washington Post*, 27 June 2009, emphasis added, at <<http://www.washingtonpost.com/wp-dyn/content/article/2009/06/26/AR2009062603361.html>>.
- Lowry, Annie, 'Torture Timeline', *Foreign Policy*, 23 April 2009 at <http://www.foreignpolicy.com/articles/2009/04/22/the_torture_timeline>.
- Luban, David, 'Liberalism, Torture and the Ticking Bomb', in Karen J Greenberg (ed), *The Torture Debate in America* (Cambridge: Cambridge University Press, 2006) 35–83.
- Luban, David, 'Lawfare and Legal Ethics in Guantánamo', *Stanford Law Review* 60 (2008) 1981–2026.
- Luban, David, 'David Margolis is wrong', *Slate*, 22 February 2010 at <http://www.slate.com/articles/news_and_politics/jurisprudence/2010/02/david_margolis_is_wrong_single.html>.
- Luban, David, 'Carl Schmitt and the Critique of Lawfare', Georgetown Public Law and Legal Theory Research Paper No 11–33, 28 March 2011 at <<http://ssrn.com/abstract=1797904>>.

- Lubell, Noam, *Extraterritorial Use of Force Against Non-State Actors* (Oxford: Oxford University Press, 2010).
- Lukes, Steven, 'Liberal Democratic Torture', *British Journal of Political Science* 36 (2006) 1–16.
- MacAskill, Ewan, 'White House confirms Guantanamo detainees may go to Michigan or Kansas', *The Guardian*, 3 August 2009 at <<http://www.guardian.co.uk/world/2009/aug/03/guantanamo-detainees-fort-leavenworth-michigan>>.
- Maguire, Peter, *Law and War: An American Story* (New York: Columbia University Press, 2001).
- Malinowski, Tom, 'The Legal, Moral, and National Security Consequences of "Prolonged Detention"', Testimony for the Senate Judiciary Subcommittee on the Constitution, 10 June 2009 at <<http://www.hrw.org/en/news/2009/06/10/legal-moral-and-national-security-consequences-prolonged-detention>>.
- Manning, David, 'Oral Evidence before the Iraq Inquiry', 30 November 2009 at <<http://www.iraqinquiry.org.uk/media/40459/20091130pm-final.pdf>>.
- Margolis, David, 'Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility's Report of Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists', 5 January 2010 at <<http://www.nytimes.com/2010/02/20/us/politics/20justice.html>>.
- Mariner, Joanne, 'Criminal Justice Techniques Are Adequate to the Problem of Terrorism', Human Rights Watch, 11 December 2008 at <<http://www.hrw.org/en/news/2008/12/11/criminal-justice-techniques-are-adequate-problem-terrorism>>.
- Marshall, Peter, 'US dilemma over how to deal with terrorist suspects', *Newsnight*, 16 February 2010 at <<http://news.bbc.co.uk/1/hi/programmes/newsnight/8518212.stm>>.
- Massimino, Elisa, 'Testimony on US Interrogation Policy and Executive Order 13440 before the US Senate Intelligence Subcommittee', 26 September 2007.
- Maxwell, Mark David 'Max' and Sean M Watts, '"Unlawful Enemy Combatant": Status, Theory of Culpability, or Neither?', *Journal of International Criminal Justice* 5 (2007) 19–25.
- Mayer, Jane, 'The Trial: Eric Holder and the battle over Khalid Sheikh Mohammed', *The New Yorker*, 15 February 2010 at <http://www.newyorker.com/reporting/2010/02/15/100215fa_fact_mayer>.
- Mazzetti, Mark, 'Letters give CIA tactics legal rationale', *New York Times*, 27 April 2008 at <<http://www.nytimes.com/2008/04/27/washington/27intel.html>>.
- Mazzetti, Mark, 'Report provides new details on C.I.A. prisoner abuse', *New York Times*, 23 August 2009.
- McCain, John, 'Bin Laden's death and the debate over torture', *Washington Post*, 12 May 2011 at <http://www.washingtonpost.com/opinions/bin-ladens-death-and-the-debate-over-torture/2011/05/11/AFd1mdsG_story.html>.
- McCarthy, Andrew C, 'Why the al Qaeda seven matter', *National Review Online*, 9 March 2010 at <<http://nationalreview.com/articles/229281/why-al-qaeda-seven-matter/andrew-c-mccarthy>>.
- McCarthy, Andrew C and Alykhan Velshi, 'We Need a National Security Court', 1 October 2006, available at <<http://www.defenddemocracy.org/media-hit-we-need-a-national-security-court/>>.

- Mearsheimer, John, 'Hans Morgenthau and the Iraq War: realism versus neoconservatism', 18 May 2005 at <http://www.opendemocracy.net/democracy-americanpower/morgenthau_2522.jsp>.
- Mégret, Frédéric, 'War? Legal Semantics and the Move to Violence', *European Journal of International Law* 13 (2002) 361–99.
- Melzer, Nils, *Targeted Killing in International Law* (Oxford: Oxford University Press, 2008).
- Melzer, Nils, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law', *International Review of the Red Cross* 872, 31 December 2008 at <<http://www.icrc.org/eng/resources/documents/article/review/review-872-p991.htm>>.
- Méndez, Juan, Letter from the President of the Inter-American Commission on Human Rights to US Secretary of State, Colin Powell, 12 March 2002 at <<http://www1.umn.edu/humanrts/cases/guantanamo-2003.html>>.
- Mertens, Thomas, 'Kant's Cosmopolitan Values and Supreme Emergencies', *Journal of Social Philosophy* 38 (2007) 222–41.
- Miliband, David, 'After Mumbai: Beyond the War on Terror', Speech by UK Foreign Secretary, Taj Hotel, Mumbai, 15 January 2009 at <<http://davidmiliband.net/speech/after-mumbai-beyond-the-war-on-terror>>.
- Miller, Benjamin, 'Democracy Promotion: Offensive Liberalism versus the Rest (of IR Theory)', *Millennium: Journal of International Studies* 38 (2010) 561–91.
- Miller, Robert J, 'The Doctrine of Discovery in American Indian Law', *Idaho Law Review* 42 (2005) 1–96.
- Mora, Alberto, Memorandum for Inspector General Department of the Navy Office of General Counsel Involvement in Interrogation Issues, 7 July 2004 at <<http://www.newyorker.com/images/pdf/2006/02/27/moramemo.pdf>>.
- Morgan, David, '61 ex-Guantánamo inmates return to terrorism', 13 January 2009 at <<http://www.reuters.com/article/idUSTRE50C5JX20090113>>.
- Mukasey, Michael B, Keynote Address at Annual Meeting of the American Federalist Society, 20 November 2008 at <http://www.fed-soc.org/publications/pubid.1189/pub_detail.asp>.
- Mukasey, Michael, 'The waterboarding trail to bin Laden', *Wall Street Journal*, 6 May 2011 at <<http://online.wsj.com/article/SB10001424052748703859304576305023876506348.html>>.
- Muravchik, Joshua, 'The Abandonment of Democracy', *Commentarymagazing.com*, July/August 2009.
- Murphy, Sean D, 'Terrorism and the Concept of "Armed Attack" in Article 51 of the UN Charter', *Harvard International Law Review* 43 (2002) 41–51.
- Murphy, Sean D, 'The International Legality of US Military Cross-Border Operations from Afghanistan into Pakistan', George Washington University Law School Public Law and Legal Theory Working Paper no 451, 6 November 2008 at <<http://ssrn.com/abstract=1296733>>.
- Myers, Steven Lee, 'Veto of bill on C.I.A. tactics affirms Bush's legacy', *New York Times*, 9 March 2008 at <<http://www.nytimes.com/2008/03/09/washington/09policy.html>>.
- Myjer, Eric and Nigel White, 'The Twin Towers Attack: An Unlimited Right to Self-Defence?', *Journal of Conflict and Security Law* 7 (2002) 1–17.

- Nanda, Ved P, 'International Law Implications of the United States' "War on Terror"', *Denver Journal of International Law and Policy* 37 (2009) 513–37.
- Neff, Stephen C, *War and the Law of Nations: A General History* (Cambridge: Cambridge University Press, 2005).
- New York Times Editorial, 'Supreme disgrace', *New York Times*, 11 October 2007 at <<http://www.nytimes.com/2007/10/11/opinion/11thu1.html>>. New York Times Editorial, 'Backward at Bagram', *New York Times*, 31 May 2010.
- New York Times Editorial, 'Right without a remedy', *New York Times*, 28 February 2011 at <<http://uhrp.org/articles/4665/1/Right-Without-a-Remedy-/index.html>>.
- New York Times Editorial, 'Malign neglect', *New York Times*, 21 May 2011 at <http://www.nytimes.com/2011/05/22/opinion/22sun1.html?_r=1&ref=statesecretsprivilege>.
- New York Times Editorial, 'Reneging on justice at Guantánamo', *New York Times*, 19 November 2011 at <<http://www.nytimes.com/2011/11/20/opinion/sunday/rene-ging-on-justice-at-guantanamo.html>>.
- Newton, Michael, 'Unlawful Belligerency after September 11: History Revisited and Law Revised', in David Wippman and Matthew Evangelista (eds), *New Wars, New Laws: Applying the Laws of the War in the 21st Century* (Ardsley, NY: Transnational Publishers, 2005).
- Nurick Lester and Roger W Barrett, 'Legality of Guerrilla Forces under the Laws of War', *American Journal of International Law* 40 (1946) 563–83.
- Nye, Joseph, *Soft Power: The Means to Success in World Politics* (New York: Public Affairs, 2004).
- Obama, Barack, 'Wars of Reason, Wars of Principle', speech to an anti-war rally in Chicago, 26 October 2002 at <http://www.tnj.com/archives/2004/september2004/final_word.php>.
- Obama, Barack, 'Inaugural Address', 20 January 2009 at <<http://www.nytimes.com/2009/01/20/us/politics/20text-obama.html>>.
- Obama Barack, Executive Order 13492, Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities, 22 January 2009 at <<http://www.fas.org/irp/offdocs/eo/eo-13492.pdf>>.
- Obama, Barack, Executive Order 13491, 'Ensuring Lawful Interrogations', *Federal Register*, Presidential Documents 74 (2009) 4893–6 at <<http://edocket.access.gpo.gov/2009/pdf/E9-1885.pdf>>.
- Obama, Barack, Remarks of the President, Address to Joint Session of Congress, 24 February 2009 at <http://www.whitehouse.gov/the_press_office/Remarks-of-President-Barack-Obama-Address-to-Joint-Session-of-Congress>.
- Obama, Barack, Executive Order 13567, Periodic Review of Individuals at Guantanamo Bay Naval Station Pursuant to the Authorization for the Use of Military Force, 7 March 2011 at <<http://www.gpo.gov/fdsys/pkg/FR-2011-03-10/pdf/2011-5728.pdf>>.
- Obama, Barack, Statement of President on Release of OLC Memos, White House, 16 April 2009 at <http://www.whitehouse.gov/the_press_office/statement-of-president-barack-obama-on-release-of-olc-memos/>.
- Obama, Barack, Remarks to CIA Employees, 20 April 2009 at <http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-to-CIA-employees-at-CIA-Headquarters/>.
- Obama, Barack, Remarks on National Security, National Archives, 21 May 2009 at <http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09>.

- Obama, Barack, Remarks in Address to the Nation on the Way Forward in Afghanistan and Pakistan, West Point Military Academy, West Point, New York, 1 December 2009.
- Obama, Barack, Presidential Memorandum Directing Certain Actions with Respect to Acquisition and Use of Thomson Correctional Center to Facilitate Closure of Detention Facilities at Guantanamo Bay Naval Base, *Federal Register*, Presidential Documents 75 (2010) 1015–16 at <<http://www.fas.org/irp/news/2010/01/obama-gtmo.pdf>>.
- O'Connell, Mary Ellen, 'To Kill or Capture Suspects in the Global War on Terror', *Case Western Reserve Journal of International Law* 35 (2003) 325–32.
- O'Connell, Mary Ellen, 'The Legal Case against the Global War on Terror', *Case Western Reserve Journal of International Law* 36 (2004) 349–57.
- O'Connell, Mary Ellen, 'When is a War not a War? The Myth of the Global War on Terror', *ILSA Journal of International and Comparative Law* 12 (2005–6) 535–9.
- O'Connell, Mary Ellen, 'Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004–2009', Notre Dame Law School, Legal Studies Research Paper No 09–43, 6 November 2009 at <<http://ssrn.com/abstract=1501144>>.
- O'Connell, Mary Ellen, 'The Choice of Law against Terrorism', *Journal of National Security Law and Policy* 4 (2010) 343–68.
- Odysseos, Louiza and Fabio Petito (eds), *The International Political Thought of Carl Schmitt: Terror, Liberal War and the Crisis of Global Order* (London and New York: Routledge, 2007).
- Odysseos, Louiza, 'Crossing the Line? Carl Schmitt on the "spaceless universalism" of cosmopolitanism and the War on Terror', in Louiza Odysseos and Fabio Petito (eds), *The International Political Thought of Carl Schmitt: Terror, Liberal War and the Crisis of Global Order* (London and New York: Routledge, 2007) 124–43.
- Odysseos, Louiza and Fabio Petito, 'Introduction: The International Political Thought of Carl Schmitt', in Louiza Odysseos and Fabio Petito (eds), *The International Political Thought of Carl Schmitt: Terror, Liberal War and the Crisis of Global Order* (London and New York: Routledge, 2007) 1–17.
- Office of the United Nations High Commissioner for Human Rights, General Comment No 20 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Art 7), 10 March 1992 at <<http://www.unhchr.ch/tbs/doc.nsf/0/6924291970754969c12563ed004c8ae5?Opendocument>>.
- Orakhelashvili, Alexander, 'Overlap and Convergence: The Interaction between *Jus ad Bellum* and *Jus in Bello*', *Journal of Conflict and Security Law* 12 (2007) 157–96.
- Osiel, Mark, *The End of Reciprocity: Terror, Torture and the Law of War* (Cambridge: Cambridge University Press, 2009).
- Panetta, Leon E, Message from the Director: Interrogation Policy and Contracts, 9 April 2009 at <<https://www.cia.gov/newsinformation/press-releases-statements/directors-statement-interrogation-policy-contracts.html>>.
- Parmar, Inderjeet, 'Foreign Policy Fusion: Liberal Interventionists, Conservative Nationalists and Neoconservatives—the New Alliance Dominating the US Foreign Policy Establishment', *International Politics* 46 (2009) 177–209.
- Paust, Jordan, 'Use of Armed Force against Terrorists in Afghanistan, Iraq and Beyond', *Cornell International Law Journal* 34 (2002) 533–59.

- Paust, Jordan, 'The Absolute Prohibition on Torture and Necessary and Appropriate Sanctions', *Valparaiso University Law Review* 43 (2009) 1535–76.
- Paust, Jordan, 'Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan', *Journal of Transnational Law and Policy* 19 (2010) at <<http://ssrn.com/abstract=1520717>>.
- Pearlstein, Deborah, 'Delayed Detention Policy and the Big "Ifs"', *Opinio Juris*, 21 July 2009 at <<http://opiniojuris.org/2009/07/21/delayed-detention-policy-and-the-big-ifs/>>.
- Pearlstein, Deborah, Statement before the Senate Judiciary Subcommittee, 28 July 2009 at <http://judiciary.senate.gov/hearings/testimony.cfm?id=4002&wit_id=8159>.
- Pearlstein, Deborah and Priti Patel, *Human Rights First, Behind the Wire: An Update to 'Ending Secret Detentions'*, July 2005, 24–5 at <<https://www.humanrightsfirst.org/wp-content/uploads/pdf/behind-the-wire-033005.pdf>>.
- Pejic, Jelena, 'Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict', *International Review of Red Cross* 858 (2005) at <<http://www.icrc.org/eng/resources/documents/article/review-858-p375.htm>>.
- Pellet, Alain, "'No, This is not War!' The Attack on the World Trade Center: Legal Responses', *European Journal of International Law Discussion Forum*, 3 October 2001 at <http://www.ejil.org/forum_WTC/ny-pellet.html>.
- Perez, Evan, 'Sweeping pardons "unnecessary"', *Wall Street Journal*, 25 November 2008 at <<http://online.wsj.com/article/SB122756675347954409.html>>.
- Perez, Evan, 'Obama restarts terrorism tribunals', *Wall Street Journal*, 8 March 2011 at <<http://online.wsj.com/article/SB10001424052748703386704576186742044239356.html>>.
- Perlez, Jane and Eric Schmitt, 'Strikes worsen al Qaeda threat, Pakistan says', *New York Times*, 24 February 2009.
- Pew Research Center, *America's Place in the World: An Investigation of Public and Leadership Opinion About International Affairs*, December 2009 at <http://www.foreignpolicy.com/images/091203_12-03-09_Americas_Place_in_the_World_V_12-3-09.pdf>.
- Philbin, Patrick F, Memorandum from Deputy Assistant Attorney General to White House Counsel to the President, Legality of the Use of Military Commissions to Try Terrorists, 6 November 2001 at <http://dspace.wrlc.org/doc/bitstream/2041/70944/00117_011106display.pdf>.
- Philbin, Patrick F and John Yoo, Memo 3, From Deputy Assistant Attorney Generals to the General Counsel at the Department of Defense, William J Haynes II, Re: Possible *Habeas* Jurisdiction over Aliens Held in Guantánamo Bay, Cuba, 28 December 2001, in Karen J Greenberg and Joshua L Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (Cambridge: Cambridge University Press, 2005) 29–37.
- Pickering, Thomas R and William S Sessions, 'Why a presidential commission on torture is critical to America's security', *Washington Post*, 23 March 2009.
- Pincus, Walter, 'US missile kills al Qaeda suspects', *The Age*, 6 November 2002 at <<http://www.theage.com.au/articles/2002/11/05/1036308311314.html>>.
- Pipes, Daniel, 'Who is the Enemy?' *Commentary*, January 2002 at <<http://www.danielpipes.org/103/who-is-the-enemy>>.
- Pitter, Laura, 'Why Obama Can't Hide behind Congressional Restriction on Gitmo', 16 March 2011 at <<http://www.hrw.org/en/news/2011/03/16/why-obama-cant-hide-behind-congressional-restrictions-gitmo>>.
- Podhoretz, Norman, *World War IV: The Long Struggle against Islamofascism* (New York: Doubleday, 2007).

- Posner, Eric and Adrian Vermeule, 'A "torture" memo and its tortuous critics', *Wall Street Journal*, 6 July 2004 at <<http://www.ericposner.com/torturememo.html>>.
- Posner, Richard, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (Oxford: Oxford University Press, 2006).
- Powell, Colin L, Memo 8, Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan, Memorandum to Counsel to the President, Assistant to the President for National Security Affairs, 26 January 2002, in Karen J Greenberg and Joshua L Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (Cambridge: Cambridge University Press, 2005) 122–5.
- Priest, Dana, 'Al Qaeda-Iraq link recanted', *Washington Post*, 1 August 2004 at <<http://www.washingtonpost.com/wp-dyn/articles/A30909-2004Jul31.html>>.
- Priest, Dana, 'Bush's "war" on terror comes to a sudden end', *Washington Post*, 23 January 2009.
- Priest, Dana and Barton Gellman, 'Stress and distress tactics used on terrorism suspects held in secret overseas facilities', *Washington Post*, 26 December 2002.
- Rabkin, J, 'The Politics of the Geneva Conventions: Disturbing Background to the ICC debate', *Virginia Journal of International Law* 44 (2003) 169–205.
- Ralph, Jason, 'The Laws of War and the State of the American Exception', *Review of International Studies* 35 (2009) 643–4.
- Ralph, Jason, 'War as an Institution of International Hierarchy: Carl Schmitt's *Theory of the Partisan* and Contemporary US Practice', *Millennium: Journal of International Studies* 39 (2010) 279–98.
- Ralph, Jason, 'After Chilcot: Blair's "Doctrine of International Community" and the UK Decision to Invade Iraq', *British Journal of Politics and International Relations* 13 (2011) 304–25.
- Raustiala, Kal, *Does the Constitution Follow the Flag? The Evolution of Territoriality in American Law* (Oxford: Oxford University Press, 2009).
- Raustiala, Kal, 'Is Bagram the New Guantánamo? Habeas Corpus and *Maqaleh v. Gates*', *ASIL Insights* 13 (2009) at <<http://www.asil.org/files/insight090617pdf.pdf>>.
- Raustiala, Kal 'The new Guantánamo', *Huffington Post*, 22 May 2009 at <http://www.huffingtonpost.com/kal-raustiala/the-new-guantanamo_b_206556.html>.
- Raustiala, Kal, '*Al Maqaleh v. Gates*', *American Journal of International Law* 104 (2010) 647–54.
- Reus-Smit, Christian, 'Liberal Hierarchy and the Licence to Use Force', *Review of International Studies* 31 special issue (2005) 71–92.
- Rives, Jack L, Memorandum from Deputy Judge Advocate General on the Final Report and Recommendations on the Working Group to Assess the Legal, Policy and Operational Issues Relating to Interrogation of Detainees, 5 February 2003 at <<http://www.torturingdemocracy.org/documents/20030205.pdf>>.
- Roberts, Anthea, 'Righting Wrongs or Wronging Rights? The United States and Human Rights Post-September 11', *European Journal of International Relations* 15 (2004) 721–49.
- Robertson, Geoffrey, 'There is a legal way out of this', *The Guardian*, 14 September 2001.
- Robertson, Geoffrey, 'Lynch mob justice or a proper trial', *The Guardian*, 5 October 2001.
- Robertson, Geoffrey, 'Kangaroo courts can't give justice. We need an international tribunal for terrorist suspects', *The Guardian*, 5 December 2001.

- Robinson, Eugene, “‘Al Qaeda 7’ smear is an assault on American values’, *Washington Post*, 9 March 2010 at <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/08/AR2010030803122.html?wpisrc=nl_opinions>.
- Rockefeller IV, John D, Release of Declassified Narrative Describing the Department of Justice Office of Legal Counsel’s Opinions on the CIA’s Detention and Interrogation Program, 22 April 2009 at <<http://intelligence.senate.gov/pdfs/olcopinion.pdf>>.
- Rohde, David and Mohammed Khan, ‘Ex-fighter for Taliban dies in strike in Pakistan’, *New York Times*, 19 June 2004 at <http://www.nytimes.com/2004/06/19/world/the-reach-of-war-militants-ex-fighter-for-taliban-dies-in-strike-in-pakistan.html?_r=1>.
- Romig, Thomas, Memorandum for General Counsel of the Department of the Air Force: Draft Report and Recommendations on the Working Group to Assess the Legal, Policy and Operational Issues Relating to Interrogation of Detainees, 3 March 2003 at <<http://www.torturingdemocracy.org/documents/20030205.pdf>>.
- Rona, Gabor, ‘When is a War not a War? The Proper Role of the Law of Armed Conflict in the “Global War on Terror”’, 16 March 2004 at <<http://www.icrc.org/eng/resources/documents/misc/5xcmnj.htm>>.
- Rivkin Jr, David B and Lee A Casey, ‘Rule of law: friend or foe?’, *Wall Street Journal*, 11 April 2005.
- Rivkin Jr, David B, Lee A. Casey and Mark Wendell DeLaquil, ‘Not Your Father’s Red Cross’, *National Review Online*, 20 December 2004 at <<http://www.nationalreview.com/articles/213182/not-your-fathers-red-cross/david-b-rivkin-jr>>.
- Rubin, Michael, ‘Taking Tea with the Taliban’, *Commentarymagazing.com*, February 2010.
- Rumsfeld, Donald H, ‘A new kind of war’, *New York Times*, 27 September 2001.
- Rumsfeld, Donald H, Military Commission Order No. 1, 21 March 2002 at <<http://www.defense.gov/news/Mar2002/d20020321ord.pdf>>.
- Ruys, Tom, ‘Armed Attack’ and Article 51 of the UN Charter: *Evolutions in Customary Law and Practice* (Cambridge: Cambridge University Press, 2010) Kindle edition.
- Sadat, Leila, ‘Terrorism and the Rule of Law’, *Washington University Global Studies Law Review* 1 (2004) 135–54.
- Sandler, Mark, ‘9/11 associate is sentenced to 15 years in Germany’, *New York Times*, 9 January 2007 at <<http://www.nytimes.com/2007/01/09/world/europe/09germany.html?ref=mounirelmotassadeq>>.
- Sands, Philippe, *Torture Team: Uncovering War Crimes in the Land of the Free* (London: Penguin Books, 2009).
- Sanger, David E, *Confront and Conceal: Obama’s Secret Wars and the Surprising Use of American Power* (New York: Crown Publishers, 2012) Kindle edition.
- Sargent, Greg, ‘Private letter from CIA chief undercuts claim torture was key to killing bin Laden’, *Washington Post*, 16 May 2011 at <http://www.washingtonpost.com/blogs/plum-line/post/exclusive-private-letter-from-cia-chief-undercuts-claim-torture-was-key-to-killing-bin-laden/2011/03/03/AFLFF04G_blog.html?wpisrc=nl_pmpolitics>.
- Sassòli, Marco, ‘The Status of Persons Held in Guantánamo under International Humanitarian Law’, *Journal of International Criminal Justice* 2 (2004) 96–106.
- Sassòli, Marco, ‘Use and Abuse of the Laws of War in the “War on Terrorism”’, *Law and Inequality: A Journal of Theory and Practice* 22 (2005) 198–202.
- Sassòli, Marco, ‘*Ius ad Bellum* and *Ius in Bello*: The Separation between the Legality of the Use of Force and Humanitarian Rules to be Respected’, in Michael Schmitt and

- Jelena Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines* (Boston: Martinus Nijhoff Publishers, 2007).
- Satherthwaite, Margaret, 'Rendered Meaningless: Extraordinary Rendition and the Rule of Law', *George Washington Law Review* 75 (2007) 1333–88.
- Savage, Charlie, 'Obama team is divided on anti-terror tactics', *New York Times*, 28 March 2010 at <<http://www.nytimes.com/2010/03/29/us/politics/29force.html>>.
- Savage, Charlie, 'US prepares to lift ban on Guantánamo cases', *New York Times*, 19 January 2011 at <<http://www.nytimes.com/2011/01/20/us/20trials.html>>.
- Savage, Charlie, 'Secret US memo made legal case to kill a citizen', *New York Times*, 8 October 2011 at <<http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html>>.
- Schakowsky, Jan, 'Refuting the self-fulfilling torture prophecy: a response to Hayden and Mukasey', *Huffington Post*, 21 April 2009 at <http://www.huffingtonpost.com/rep-jan-schakowsky/refuting-the-self-fulfill_b_189441.html>.
- Scheuerman, William E, 'International Law as Historical Myth', *Constellations* 11 (2004) 537–50.
- Scheuerman, William E, 'Carl Schmitt and the Road to Abu Ghraib', *Constellations* 13 (2006) 108–24.
- Schmalenbach, Kirsten, 'The Right of Self-Defence and the War on Terrorism', *German Law Journal* 3 (2002) at <<http://www.germanlawjournal.com/index.php?pageID=11&artID=189>>.
- Schmitt, Carl (translation by A C Goodson) *The Theory of the Partisan: A Commentary/Remark on the Concept of the Political* (Berlin: Duncker and Humbolt, 1963).
- Schmitt, Carl (translation, introduction and notes by George Schwab) *The Concept of the Political* (Chicago: University of Chicago Press, 1996).
- Schmitt, Carl (translated and annotated by G L Ulmen) *The Nomos of the Earth in International Law of the Jus Publicum Europaeum* (New York: Telos Press Publishing, 2003).
- Schmitt, Carl (translation and introduction by George Schwab) *Political Theology: Four Chapters on the Concept of Sovereignty* (Chicago: University of Chicago Press, 2005).
- Schmitt, Michael, 'Counter-Terrorism and the Use of Force in International Law', The Marshall Center Papers No 5, The George C Marshall European Center for Security Studies, November 2002.
- Schmitt, Michael N, 'The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis', *Harvard National Security Journal* 1 (2010) 5–44.
- Schoettler, James A, 'Detention of Combatants and the Global War on Terror', in Michael W Lewis et al (eds), *The War on Terror and the Laws of War: A Military Perspective* (Oxford: Oxford University Press, 2009) 67–124.
- Schwab, G, 'Enemy or Foe: A Conflict of Modern Politics', *Telos* 72 (1987) 194–201.
- Schwartz, John, 'Obama backs off a reversal on secrets', *New York Times*, 9 February 2009 at <<http://www.nytimes.com/2009/02/10/us/10torture.html>>.
- Seelye, Katherine and Steven Erlanger, 'A nation challenged: captives; U.S. suspends the transport of terror suspects to Cuba', *New York Times*, 24 January 2002, A1.
- Sengupta, Kim, 'Change Geneva Convention rules, says Bush envoy', *The Independent*, 22 February 2002.

- Sevastopol, Demetri, 'Cheney endorses simulated drowning', 26 October 2006 at <<http://www.msnbc.msn.com/id/15433467/>>.
- Shane, Scott, 'Waterboarding used 266 times on 2 suspects', *New York Times*, 19 April 2009 at <<http://www.nytimes.com/2009/04/20/world/20detain.html>>.
- Shane, Scott, 'Detainee's case illustrates bind of prison's fate', *New York Times*, 3 October 2009 at <<http://www.nytimes.com/2009/10/04/world/middleeast/04gitmo.html>>.
- Shane, Scott and Tom Shanker, 'Strike reflects U.S. shift to drones in terror fight', *New York Times*, 1 October 2012 at <<http://www.nytimes.com/2011/10/02/world/aw-laki-strike-shows-us-shift-to-drones-in-terror-fight.html>>.
- Shanker, Thomas and David E Sanger, 'New to job, Gates argued for closing Guantánamo', *New York Times*, 23 March 2007 at <<http://www.nytimes.com/2007/03/23/washington/23gitmo.html>>.
- Sharp, Jeremy M, 'Yemen: Background and US Relations', *Congressional Research Service*, 3 March 2011 at <<http://fpc.state.gov/documents/organization/158485.pdf>>.
- Sievert, R J, 'War on Terrorism or Global Law Enforcement Operation', *Notre Dame Law Review* 78 (2002) 307–53.
- Slaughter, Anne-Marie, 'A defining moment in the parsing of war', *Washington Post*, 16 September 2001.
- Slaughter, Anne-Marie, 'Good reasons for going around the U.N.', *New York Times*, 18 March 2003 at <<http://www.nytimes.com/2003/03/18/opinion/good-reasons-for-going-around-the-un.html>>.
- Slaughter, Anne-Marie, 'The Crisis of American Foreign Policy: Wilsonianism in the Twenty-First Century', Carnegie Council, 21 January 2009 at <<http://www.cceia.org/resources/transcripts/0108.html>>.
- Sloane, Robert D, 'The Cost of Conflation: Preserving the Dualism of *Jus ad Bellum* and *Jus in Bello* in the Contemporary Law of War', *Yale Journal of International Law* 34 (2009) 47–112.
- Smith, Ben, 'Cheney group questions loyalty of justice lawyers', *Politico*, 2 March 2010 at <http://www.politico.com/blogs/bensmith/0310/Cheney_group_questions_loyalty_of_justice_lawyers.html>.
- Smith, Ben, 'Republicans scold Liz Cheney', *Politico*, 8 March 2010 at <<http://www.politico.com/news/stories/0310/34050.html>>.
- Smith, Tony, *A Pact with the Devil: Washington's Bid for World Supremacy and the Betrayal of the American Promise* (New York and London: Routledge, 2007).
- Sofaer, Abraham D, 'The Position of the United States on Current Law of War Agreements: Remarks of the Legal Adviser, United States Department of State', 22 January 1987, *American University Journal of International Law and Policy* 2 (1987) 468–9.
- Sofaer, Abraham D, 'On the Necessity of Pre-emption', *European Journal of International Law* 14 (2003) 209–26.
- Soufan, Ali, 'My tortured decision', *New York Times*, 23 April 2009 at <<http://www.nytimes.com/2009/04/23/opinion/23soufan.html>>.
- Stein, Sam, 'Gallup to release poll on Bush investigations', *Huffington Post*, 24 April 2009 at <http://www.huffingtonpost.com/2009/04/24/gallup-to-release-poll-on_n_190817.html>.

- Steyn, Lord Johan, 'Guantanamo Bay: The Legal Black Hole', 27th FA Mann Lecture, British Institute of International and Comparative Law, 25 November 2003.
- Strong, Tracy, 'The Sovereign and the Exception: Carl Schmitt, Politics, Theology and Leadership', foreword to Schmitt, *Political Theology* (Chicago: University of Chicago Press, 1996).
- Suskind, Ron, *The One Percent Doctrine: Deep Inside America's Pursuit of Its Enemies since 9/11* (New York: Simon & Schuster, 2007).
- Sweet, Lynn, 'Obama purchase of Illinois prison for Guantanamo detainees', *Chicago Sun Times*, 17 December 2009 at <http://blogs.suntimes.com/sweet/2009/12/obama_purchase_of_illinois_pri.html>.
- Taft IV, William H, Memo 10, Comments on Your Paper on the Geneva Convention, from William H Taft IV to Counsel to the President, 2 February 2002, in Karen J Greenberg and Joshua L Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (Cambridge: Cambridge University Press, 2005) 129–34.
- Taft IV, William H, Memorandum from Legal Adviser to the State Department, to Members of the ASIL-CFR Roundtable, 'The Legal Basis for Preemption', 18 November 2002 at <<http://www.cfr.org/international-law/legal-basis-preemption/p5250>>.
- Taft IV, William H, 'War not Crime', in Karen J Greenberg (ed), *The Torture Debate in America* (Cambridge: Cambridge University Press, 2006) 223–8.
- Thiessen, Marc A, 'The "al-Qaeda seven" and selective McCarthyism', *Washington Post*, 8 March 2010 at <<http://www.washingtonpost.com/wp-dyn/content/article/2010/03/08/AR2010030801742.html>>.
- Thiessen, Marc A, 'Mukasey responds to McCain's op-ed', *Washington Post*, 12 May 2011 at <http://www.washingtonpost.com/blogs/post-partisan/post/mukasey-responds-to-mccains-op-ed/2011/05/12/AFhhVO1G_blog.html>.
- Travalio, Greg, 'Terrorism, International Law and the Use of Military Force', *Wisconsin International Law Journal* 18 (2000) 145–92.
- Travalio, Greg and John Altenberg, 'Terrorism, State Responsibility and Military Force', *Chicago Journal of International Law* 4 (2003) 97–119.
- Tucker, W, 'The Triumph of Wilsonianism?', *World Policy Journal* 10 (1993) 83–99.
- UK Government, 'Responsibility for the Terrorist Atrocities in the US, 11 September 2001', 4 October 2001 available at <<http://www.fas.org/irp/news/2001/11/ukreport.html>>.
- Ulmen, Gary L, 'Return of the Foe', *Telos* 72 (1987) 187–93.
- Ulmen, Gary L, 'Partisan Warfare, Terrorism and the Problem of the New *Nomos* of the Earth', in Louiza Odysseos and Fabio Petito (eds), *The International Political Thought of Carl Schmitt: Terror, Liberal War and the Crisis of Global Order* (London and New York: Routledge, 2007) 97–106.
- United Nations, *Report of the Panel on United Nations Peace Operations* [Brahimi Report], August 2000 at <http://www.un.org/peace/reports/peace_operations/>.
- United Nations, Committee Against Torture, Summary Record of 703rd Meeting, 5 May 2006, CAT/C/SR.703, 12 May 2006 at <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/418/46/PDF/G0641846.pdf?OpenElement>>.
- United Nations, Committee Against Torture, *Report of the UN Committee against Torture: Thirty-sixth Session (1–19 May 2006)*, 1 November 2006, A/61/44, 69 at <<http://www.unhcr.org/refworld/docid/45c30bbf0.html>>.

- United Nations High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, 2004 at <<http://www.un.org/secureworld>>.
- United Nations Human Rights Council, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston*, A/HRC/14/24/Add.6, 28 May 2010 at <<http://www2.ohchr.org/english/issues/executions/index.htm>>.
- United States, 'Response of the United States to Request for Precautionary Measures—Detainees in Guantánamo Bay, Cuba', *International Law Materials* 41 (2002) 1027.
- United States, Department of Defense, Office of the Administrative Review of the Detention of Enemy Combatants, Summary of Evidence on Combatant Status Review Tribunal—Muhammad, Khalid Shayk, 8 February 2007 at <<http://www.defense.gov/news/ISN10024.pdf>>.
- United States, Department of Defense and Department of Justice, Determination of Guantánamo cases referred for prosecution at <<http://www.justice.gov/opa/documents/ta-ba-prel-rpt-dptf-072009.pdf>>.
- United States, Department of Justice, 'Department of Justice Withdraws "Enemy Combatant" Definition for Guantánamo Detainees', press release, 13 March 2009 at <<http://www.usdoj.gov/opa/pr/2009/March/09-ag-232.html>>.
- United States, Department of Justice, Attorney General Announces Forum Decisions for Guantánamo Detainees, 13 November 2009 at <<http://www.justice.gov/ag/speeches/2009/ag-speech-091113.html>>.
- United States, Department of Justice, Office of Professional Responsibility, 'Investigation into the Office of Legal Counsel's Memoranda Concerning the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists', 29 July 2009 at <<http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf>>.
- United States, Department of Justice, Office of Public Affairs, Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President, 24 August 2009 at <<http://www.justice.gov/opa/pr/2009/August/09-ag-835.html>>.
- United States, Department of Justice, Respondent's Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantánamo Bay, In re: Guantánamo Bay Detainee Litigation, Misc No 08-442, 13 March 2009 at <<http://www.justice.gov/opa/documents/memo-re-det-auth.pdf>>.
- United States, Department of Justice et al, Final Report of the Guantánamo Review Task Force, 22 January 2010 at <<http://www.fas.org/irp/eprint/gtmo-review.pdf>>.
- United States Senate, Inquiry into the Treatment of Detainees in US Custody, Report of the Armed Services Committee, 20 November 2008 at <http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf>.
- Walker, Thomas C, 'Two Faces of Liberalism: Kant, Paine, and the Question of Intervention', *International Studies Quarterly* 52 (2008) 449–68.
- Wall Street Journal Editorial, 'The Ramzi Yousef standard: the administration has ways of making terrorists not talk', *Wall Street Journal*, 6 January 2010.
- Walzer, Michael, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 2006).
- Washington Post Editorial, 'Obama administration is right to prosecute alleged Detroit bomber in U.S. court', *Washington Post*, 31 December 2009.

- Watson, Blake A, 'John Marshall and Indian Land Rights: A Historical Rejoinder to the Claim of "Universal Recognition" of the Doctrine of Discovery', *Seton Hall Law Review* 36 (2006) 481–549.
- Waxman, Matthew C, 'United States Detention Operations in Afghanistan and the Law of Armed Conflict', Columbia Law School, Public Law and Legal Theory Working Paper Group Paper No 09-202, 1 May 2009 at <<http://ssrn.com/abstract-13998872>>.
- Waxman, Matthew C, 'Administrative Detention of Terrorists: Why Detain, and Detain Whom?', *Journal of National Security Law and Policy* 3 (2010) 1–37.
- Wedgwood, Ruth, 'Responding to Terrorism: The Strikes against Bin Laden', *Yale Journal of International Law* 24 (1999) 599–76.
- Wedgwood, Ruth, 'The case for military tribunals', *Wall Street Journal*, 3 December 2001.
- Wedgwood, Ruth, 'Al Qaeda, Terrorism and Military Commissions', *American Journal of International Law* 96 (2002) 328–37.
- Wedgwood, Ruth, 'Propositions on the Law of War after the Kosovo Campaign', in Andru E Wall (ed), *Legal and Ethical Lessons of NATO's Kosovo Campaign* (Newport, RI: Naval War College, 2002) 433–42.
- Wedgwood, Ruth, 'The Fall of Saddam Hussein: Security Council Mandates and Pre-emptive Self-Defense', *American Journal of International Law* 97 (2003) 576–85.
- Wedgwood, Ruth, 'Combatants or Criminals? How Washington Should Handle Terrorists', *Foreign Affairs*, May/June 2004 at <<http://www.foreignaffairs.com/articles/59902/ruth-wedgwood-kenneth-roth/combatants-or-criminals-how-washington-should-handle-terrorists>>.
- Weiner, Allen S, 'Hamdan, Terror, War', *Lewis and Clarke Law Review* 11 (2007) 997–1021.
- Weiner, Allen S, 'Law, Just War, and the International Fight Against Terrorism: Is it War?', in Steven Lee (ed), *Intervention, Terrorism, and Torture: Contemporary Challenges to Just War Theory* (Dordrecht: Springer, 2007) 137–53.
- Weiser, Benjamin, 'The Trade Center verdict', *New York Times*, 13 November 1997.
- Weiser, Benjamin and Colin Moynihan, 'Guilty plea in Times Square bomb plot', *New York Times*, 21 June 2010.
- Weisman, Jonathan and Evan Perez, 'Deal near on Gitmo, trials for detainees', *Wall Street Journal*, 19 March 2010 at <<http://online.wsj.com/article/SB10001424052748703523204575130063862554420.html>>.
- Whitaker, Brian and Oliver Burkeman, 'Killing probes the frontiers of robotics and legality', *The Guardian*, 6 November 2002 at <<http://www.guardian.co.uk/world/2002/nov/06/usa.alqaida>>.
- White House, The National Security Strategy of the United States of America, September 2002 at <<http://www.state.gov/documents/organisation/63562.pdf>>.
- White House, National Security Strategy, May 2010 at <http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf>.
- Wilkerson, Lawrence, 'Some Truths about Guantanamo Bay', *Washington Note*, 17 March 2009 at <http://www.thewashingtonnote.com/archives/2009/03/some_truths_abo/>.
- Williams, Brian G, 'The CIA's Covert Predator Drone War in Pakistan, 2004–2010: The History of an Assassination Campaign', *Studies in Conflict and Terrorism* 3 (2010) 871–92.

- Williams, Michael C, 'What is the National Interest? The Neoconservative Challenge in IR Theory', *European Journal of International Relations* 11 (2005) 307–37.
- Williams, Michael C, 'Morgenthau Now: Neoconservatism, National Greatness and Realism', in Michael Williams (ed), *Realism Reconsidered: The Legacy of Hans Morgenthau in International Relations* (Oxford: Oxford University Press, 2007) 216–40.
- Williams, Robert A, *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford: Oxford University Press, 1992).
- Williamson, Myra, *Terrorism, War and International Law: The Legality of the Use of Force Against Afghanistan in 2001* (Farnham: Ashgate, 2009).
- Wilmshurst, Elizabeth, Oral Evidence to the Iraq Inquiry, 26 January 2010 at <<http://www.iraqinquiry.org.uk/media/44211/20100126pm-wilmshurst-final.pdf>>.
- Witte, Griff, 'Taliban leader once held by US dies in Pakistan raid', *Washington Post*, 25 July 2007.
- Wittes, Benjamin, *Law and the Long War: The Future of Justice in the Age of Terror* (New York: Penguin Press, 2008).
- Wittes, Benjamin, 'Balancing authority with principles' *New York Times*, 21 May 2009.
- Wittes, Benjamin, 'Obama's Dick Cheney moment', *Washington Post*, 29 September 2009 at <<http://www.washingtonpost.com/wp-dyn/content/article/2009/09/28/AR2009092802492.html>>.
- Wittes, Benjamin, 'Thoughts on Judge Silberman's Opinion', 8 April 2011 at <<http://www.lawfareblog.com/2011/04/thoughts-on-judge-silbermans-opinion/#more-1760>>.
- Wittes, Benjamin and Jack L Goldsmith, 'Will Obama follow Bush or FDR?', *Washington Post*, 29 June 2009 at <<http://www.washingtonpost.com/wp-dyn/content/article/2009/06/28/AR2009062802288.html>>.
- Wittes, Benjamin and Jack L Goldsmith, 'The best trial option for KSM: nothing', *Washington Post*, 19 March 2010 at <<http://www.washingtonpost.com/wp-dyn/content/article/2010/03/17/AR2010031702844.html>>.
- Woodward, Bob, *Plan of Attack* (New York: Simon & Schuster, 2004).
- Woodward, Bob, 'Detainee tortured, says U.S. official', *Washington Post*, 14 January 2009 at <<http://www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011303372.html>>.
- Woodward, Bob, *Obama's Wars* (New York: Simon & Schuster, 2010).
- Wolf, Frank, 'Keeping Khalid Sheikh Mohammed Out of Civilian Courts' at <<http://www.humanevents.com/article.php?id=35499>>.
- Wolfe, Alan, *The Future of Liberalism* (New York: Vintage Books, 2010).
- Wolfowitz, Paul, Interview with *Vanity Fair*, 9 May 2003 at <<http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2594>>.
- Wolfowitz, Paul, Interview on the Pentagon Channel, 4 May 2004, at <<http://www.defenselink.mil/transcripts>>.
- Yoo, John, Memo 1, The President's Constitutional Authority to Conduct Military Operations against Terrorists and Nations Supporting Them: Memorandum for Deputy Counsel to the President, Timothy Flanigan, 25 September 2001, in Karen J Greenberg and Joshua L Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (Cambridge: Cambridge University Press, 2005) 3–24.

- Yoo, John, Memo 4, Application of Treaties and Laws to al Qaeda and Taliban Detainees: Memorandum (Draft) for William J Haynes II, General Counsel Department of Defense, from John Yoo, Deputy Assistant Attorney General, and Robert J Delahunty, Special Counsel, 9 January 2002, in Karen J Greenberg and Joshua L Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (Cambridge: Cambridge University Press, 2005).
- Yoo, John, Memorandum for William J Haynes II, General Counsel Department of Defense, Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States, 14 March 2003 at <<http://www.torturingdemocracy.org/documents/20030314.pdf>>.
- Yoo, John, 'International Law and the War in Iraq', *American Journal of International Law* 97 (2003) 563–76.
- Yoo, John, 'The Status of Soldiers and Terrorists under the Geneva Conventions', *Chinese Journal of International Law* 3 (2004) 135–50.
- Yoo, John, 'Transferring Terrorists', *Notre Dame Law Review* 79 (2004) 1183–235.
- Yoo, John, *War By Other Means: An Insider's Account of the War on Terror* (New York: Atlantic Monthly Press, 2006).
- Yoo, John, 'Yes we did plan for Mumbai-style attacks', *Wall Street Journal*, 7 March 2009 at <<http://online.wsj.com/article/SB123638439733558185.html>>.
- Yoo, John, 'Finally, an end to Justice Dept. investigation', *Philadelphia Inquirer*, 28 February 2010 at <http://www.cleveland.com/opinion/index.ssf/2010/03/finally_a_n_end_to_justice_dept.html>.
- Zabel, Richard B and James J Benjamin Jr, *In Pursuit of Justice: Prosecuting Terrorism Cases in Federal Courts*, Human Rights First, July 2009 at <<http://www.humanrights-first.org/wp-content/uploads/pdf/090723-LS-in-pursuit-justice-09-update.pdf>>.
- Zelinsky, Aaron, 'Lockerbie's lesson: move Guantanamo's detainees to the US', *Huffington Post*, 20 August 2009 at <http://www.huffingtonpost.com/aaron-zelinsky/lockerbie-lesson-move-gu_b_264741.html>.
- Zuckert, Catherine and Michael Zuckert, *The Truth about Leo Strauss* (Chicago: University of Chicago Press, 2006).

This page intentionally left blank

Index

- Abassi, Feroz Ali 94
Abdulmuttallab, Umar Farouk 81–2, 144
Abu Ghraib 115, 119, 132, 134
Afghanistan 16, 28–9, 58–9, 63, 65–6
 Bagram 107–8
Ahmed, Ruhai 93
al-Awlaki, Anwar 49–50, 135
al-Bihani, Ghaleb Nasser 72
al-Maqaleh, Fadi 107–10, 140
al-Khatani, Mohammed 117
al-Nashiri, Abdal-Rahim Hussein
 Muhammed Abdu 19, 70–1, 79
al-Qaeda
 relationship to Taliban 28–9
 status as non-state actor 25–6
 as unlawful enemy combatant 70, 85
al-Shabab 141–2
American Civil Liberties Union 85
Anghie, Anthony 16–17, 33–4
Arab Spring 16, 44, 54
Authorization to Use Military Force
 (AUMF) 15, 23–4, 58
 and the Obama administration 24, 45, 78,
 84, 101, 103, 112, 139
battlefield
 contingencies of 90
 equality 83; *see also* Walzer, Michael
 geographical scope 47–52, 68, 71, 79, 98,
 107–12, 138, 140–1
 inequality 68
 (re)territorializing of 109
Baxter, R. R. 65
Bensayah, Belkacem 111–12, 141
bin Laden, Osama 46–9, 51, 139
Binalshibh, Ramzi 75 n.65
Blair, Dennis 81, 128
Bloomberg, Michael 80
Bosnia 111
Boumediene, Lakhdar 109
Boumediene, *see* United States
 Supreme Court
Bradbury, Steven 125–7
Brennan, John 16, 17, 49
Bull, Hedley 2
Burlingame, Debra 80 n.88
Bush, George
 on enhanced interrogation 127–8
 Military Order 27, 75–6
 State of the Union speech 2002 126
 West Point speech 31–2, 142
Bush doctrine 33–7
Bybee, Jay 119, 121
Cheney, Dick 21, 35, 115, 129–32
 conservative realism of 131
Christmas day attack, *see* Abdulmuttallab,
 Umar Farouk
Clinton, Bill 1, 31, 51
Cole, David 102–3
Convention against Torture 13, 20, 114–16,
 120–3
Corn, Geoffrey 2, 66, 69, 71
Daquduq, Ali Musa 82 n.95
Defense Authorization Act of 2012, 85
Detainee Treatment Act 20, 115, 123–4, 134
Deudney, Daniel 12
Donilon, Tom 45
Donnelly, Jack 13
drones 46–8, 53
Eisentrager, *see* United States Supreme Court
Emanuel, Rahm 80 n.88
enhanced interrogation techniques 20–1,
 116–19, 128–33
Ex Parte Quirin, *see* United States
 Supreme Court
failed state 59–60
Federal Bureau of Investigation 117, 123, 128
Fort Hood 49
Fukuyama, Francis 10
Gates, Robert 45, 79, 103
Geneva Conventions 3–4, 18, 58–63, 89,
 115–16, 137–8
Ghailani, Ahmed 78, n.82, 82 n.95
Goldsmith, Jack 80, 119
Gonzalez, Alberto 116
Graham, Lindsey 76
Guantánamo Bay 19, 20, 63, 84–93, 143–4
 closing of 82 n.95, 99–101
 and the Inter-American Commission on
 Human Rights 88–9
 interagency task force 77–9, 84
 keeping open 103–6, 112–13
 lease of 91

- Guantánamo Bay (*cont.*)
 ‘legal black hole’ 112
- Hafetz, Jonathan 11, 113
- Hamdan, Salim 72
- Hamdan*, see United States Supreme Court
- Hamdi, Yaser Esam 77 n.73
- Hayden, Michael 81
- Haynes, William 27, 91, 118
- health care reform 82
- Hoffman, Stanley 11–12
- Holder, Eric 50–1, 78, 80 n.88, 82–3
- Human Rights Watch 102
- Inter-American Commission on Human Rights 88
- International Covenant on Civil and Political Rights 85, 87–90, 97, 120
 derogation from 88
- International Criminal Tribunal for the former Yugoslavia
 Tadic case 26, 57
- intraterritoriality 96
- Iran 44
- Iraq War 34, 36–42, 98–9
- Irish Republican Army 2
- Iqbal, Asif 93
- Jahengir, Asma 47
- Jawad, Mohamed 72–3
- Jensen, Eric 66, 69
- Johnson, Jeh 51, 111, 141
- just war
 Justa causa 6
- Kagan, Robert 9
- Kaplan, Lawrence 37
- Khadr, Omar 72–3, 78
- Killcullen, David 53
- King, Peter 81
- Klaidman, Daniel 20, 51, 134–5, 138, 141–2, 145–6
- Koh, Harold 48, 51, 85, 111, 139, 141–2
- Kristol, William 9, 37
- Latif, Adnan Farhan Abd Al Latif 106
- lawfare 11, 132
- Levin, Daniel 119
- liberal internationalism 6–8, 11–14, 23, 77, 85, 134, 136, 145–6
- Libya, see Arab Spring
- Luban, David 136–8
- Margolis, David 119 n.12
- Maxwell, Mark 64, 74
- Mertens, Thomas 13–14
- Military Commissions 17–18, 56–7, 74–7
- Military Commissions Act (2006) 70, 76–7, 96
- Military Commissions Act (2009) 79–80, 86
- murder by an unprivileged belligerent 18, 68–73, 144
- Mohammed, Khaled Sheikh 3, 19, 58, 78–80, 81, 83, 103, 117, 144
- Mora, Alberto 117–18, 126, 134
- Morello, Steven 117
- Mottasadeq, Mounir el 75 n.65
- Moussaoui, Zacarias 74–5, 104
- National Security Strategy
 of 2002 16, 31–3, 52, 127
 of 2010 16, 43–4, 46
- neoconservatism 8–11, 37
- Newton, Michael 66–8
- North Atlantic Treaty Organization (NATO) 31
- Obama, Barack
 on Afghanistan 29, 46
 on enhanced interrogation 129–30, 133–5
- executive orders 77, 85, 129
- on Iraq 16, 42
- liberal realism of 99, 129–30
- National Security Archives speech 20, 99–102, 129
- on prolonged detention 84, 100
- on recruitment tool theory 99, 115
- Obama doctrine 20
- Obey, David 104
- O’Connell, Mary Ellen 15, 26, 47, 71, 138, 140
- Odysseos, Louiza 7
- Office of Professional Responsibility, Department of Justice 119 n.12, 132
- One Percent Doctrine, see Suskind, Ron
- Organization of American States (OAS) 31
- Padilla, Jose 77 n.73
- Pearl Harbor 26–7, 139
- Pearlstein, Deborah 101–2
- Philbin, Patrick 27–8, 91–2
- Powell, Colin 62–3
- preventive detention 86–90, 112
- Rasul, Shafiq 93
- Rasul*, see United States Supreme Court
- Raustiala, Kal 95–6, 107–10
- Reagan, Ronald 67
- Reid, Richard 56
- rendition 120, 129
- Rizzo, John 121, 125

- Roth, Kenneth, *see* Human Rights Watch
 Rumsfeld, Donald 117–18
 Ruys, Tom 31
- Schmitt, Carl 5–7, 10–11, 136–7
 self-defence
 Caroline case 32
 interrogation 124–7
 Nicaragua case 30–1
 pre-emptive 22–3, 29–36, 49–53, 142–3
 preventive 32
- Slaughter, Anne-Marie 24–5, 35–6, 40–1
 Somalia 82, 135, 141–2
 Soufan, Ali 128
 Strauss, Leo 9–10
 Strong, Tracey 5
 Suskind, Ron 35
 Syria, *see* Arab Spring
- Tadic*, *see* International Criminal Tribunal for
 the former Yugoslavia
 Taft, William IV 62
 Taliban 59–61, 69, 70, 109
 terrorism 25
 Times Square plot 19, 82 n.95
 torture 13–14; *see also* Convention against
 Torture
- Uighur detainees 105–6
 United Kingdom 2, 38–9
 United Nations Charter
 Article 5 129–30
 United Nations Committee Against
 Torture 122–3
 United Nations Human Rights
 Commission 89, 91, 120
 United Nations Special Rapporteur on
 Extrajudicial, Summary or Arbitrary
 Executions 47, 89
- United States Constitution 93–5, 97, 109,
 122, 125
 part of a global constitution 111–13, 122
 United States Supreme Court 94
 Boumediene 85–6, 96–9, 100, 104–7, 140
 Eisentrager 92
 Ex Parte Quirin 64–5, 92–3
 Hamdan 69–70, 96, 115, 125
 Rasul 85, 93–6
 Rochin 125
 unlawful enemy combatant 58, 63–8
 definition under Obama 101–3,
 110–12, 141
 unmanned aerial vehicles, *see* drones
 USS *Cole* 70
- Walker, Thomas 14
 Walzer, Michael 18, 56–7
 war 1–2, 16, 23–9, 46–50, 54–5, 79, 84,
 98, 138–9
 active theatre of 107–8, 140
 Civil War, American 68
 Civil War, global 57, 71–2, 144–5
 hybrid character of 144–5
 Warsame, Ahmed Abdulkadir 82, 134–5
 Watts, Sean 64, 74
 Waxman, Matthew 66, 86–7
 Westphalian territoriality 95
 Wittes, Benjamin 67, 74 n.64, 80
 Wolfowitz, Paul 37–8
 World Trade Center
 1993 attack 1, 55–6, 146
- Yemen 47, 49, 70–1, 78, 81, 84
 Yoo, John 26–7, 68, 74–6, 91–2, 119 n.12,
 121, 132
 Yousef, Ramzi 55, 146
- Zubaydah, Abu 117, 127–8