



Security forces moving detainees to permanent housing at Camp Delta from Camp X-Ray

U.S. Navy (Shawn P. Etzund)

The basic proposition here is that somebody who comes into the United States of America illegally, who conducts a terrorist operation killing thousands of innocent Americans, men, women, and children, is not a lawful combatant. They don't deserve to be treated as a prisoner of war. They don't deserve the same guarantees and safeguards that would be used for an American citizen going through the normal judicial process . . . they will have a fair trial, but it'll be under the procedures of a military tribunal. . . . We think [it] guarantees that we'll have the kind of treatment of these individuals that we believe they deserve.

—Vice President Dick Cheney, November 14, 2001¹

Guantanamo Bay Undermining the Global War on Terror

By GERARD P. FOGARTY

Prosecution of the war on terror has resulted in the detention of some 650 citizens from over 40 countries at military facilities on the U.S. naval base at Guantanamo Bay, Cuba. Although the Bush administration has held firm to the position outlined by Vice President Cheney in 2001, the legality of this position continues to

elicit worldwide commentary and, most recently, the interest of the Supreme Court. While the administration's position has a number of prominent defenders, much international expert opinion, some sharply critical, has weighed in on the other side. Justice Richard Goldstone, for example, stated in a BBC interview in late 2003 that "a future American President will

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Soldier standing guard at
Camp Delta, Guantanamo Bay

U.S. Navy (David P. Coleman)

have to apologize for Guantanamo."² The question of how to deal with the detainees in the ongoing war on terror is, however, an extremely difficult issue that has generated deep rifts even within the administration. Following 9/11, the administration invoked extraordinary wartime powers to establish a new system of military justice that would match a very different type of conflict. As the administration sought to apply those powers, it became mired in problems it is still struggling to solve.

This essay assesses the competing positions on the legal status of the detainees. First, it outlines why Guantanamo was chosen as a location for detainee operations. It then outlines the position on the prisoner of war (POW) status of the detainees and competing views on the due process protections that should be provided those charged with war crimes. It then discusses the wider effects the administration's poli-

cies in Guantanamo are having on the war on terror and concludes with recommendations for an alternative approach that would regain the initiative for the administration. It seeks to recapture much-needed international legitimacy, creating greater diplomatic space within which opportunities to harness broader international support and involvement in the war on terror can be pursued.

Why Detain at Guantanamo Bay?

The United States and its coalition partners remain at war against al Qaeda and its affiliates in Afghanistan and around the world. Since Osama bin Laden declared war on the United States in 1996, al Qaeda and its partners have launched repeated attacks that have killed thousands of innocent Americans and hundreds of civilians from other countries. The administration states that the law of armed conflict governs

what it terms "the war between the United States and al Qaeda" and therefore establishes the rules for detention of enemy combatants.³ Congress has not formally declared war; instead, the President has authorized the detention, treatment, and trial of noncitizens under a military order derived from the constitutional authority vested in him as the President and Commander in Chief. To protect the Nation, and for the effective conduct of military operations to prevent further terrorist attacks, the administration states that it is necessary to detain certain individuals to prevent them from continuing to fight and, subsequently, to try those who violate the laws of war.

A report prepared by defense lawyers for Secretary of Defense Donald Rumsfeld in 2003 appears to substantiate the selection of Guantanamo as the preferred detention location. The report cited the long-held view of the legal "advantages" Guantanamo offers the administration because it falls outside the jurisdiction of U.S. courts.⁴ The advantages lie principally in removing the rights of detainees to question the legality of their detention in U.S. courts and to facilitate permissive interrogation techniques that would otherwise be constrained by statute. The report was the outcome of a working group of executive branch lawyers appointed by the General Counsel of the Department of Defense to address, *inter alia*, the legal constraints on the interrogation of detained persons.⁵

Some critics have linked the permissiveness of the legal interpretation for interrogation at Guantanamo that underpinned Rumsfeld's approval of 24 interrogation techniques, including "significantly increasing the fear level in a detainee," to abuses at Abu Ghraib in 2003.⁶ The administration has denied such a link despite the Department of Defense (DOD) investigation into Abu Ghraib, which revealed that some of the techniques authorized for "unlawful combatants" in Guantanamo Bay were used in Iraq.⁷ Seymour

Hersh's *Chain of Command: The Road from 9/11 to Abu Ghraib*, which attributes the abuse in that prison to interrogation policies in Guantanamo, continues to fuel the debate. Hersh's theory resonates with an increasingly critical domestic and international audience and lends credence to the claims of torture by the International Committee of the Red Cross⁸ and four former British detainees who have sued Secretary Rumsfeld and ten others in the military chain of command for mistreatment at Guantanamo.⁹

The administration unsuccessfully argued before the Supreme Court in June 2004 that Guantanamo lies outside the jurisdiction of U.S. courts. The Supreme Court ruled that U.S. law extends to aliens detained by the military outside sovereign national borders.¹⁰ This finding impacts on all detention facilities, including Guantanamo and those in Afghanistan and elsewhere.

Lawful or Unlawful Combatants?

The official U.S. position is that the detainees do not meet the criteria of lawful combatants as outlined in the 1949 Geneva Conventions and are therefore "unlawful combatants" not entitled to POW status. They are not being treated as common criminals to be tried in civil courts, as were previous terrorists in the United States, because criminal law is too weak a weapon. Instead, they are being treated as members of a military force, either al Qaeda or the Taliban, and as combatants in an armed conflict against the United States. Secretary Rumsfeld has advised that:

*the detainees are not being labeled as prisoners of war because they did not engage in warfare according to the precepts of the Geneva Convention—they hide weapons, do not wear uniforms, and try to blur the line between combatant and noncombatant.*¹¹

One of Rumsfeld's legal advisers, Ruth Wedgewood, adds that the detainees are not covered by the Geneva Conventions because they are not

fighting for a state and that there has never been a recognized right to make war on the part of private groups.¹²

The administration has not differentiated between al Qaeda and the Taliban in its position that they are unlawful combatants. Additionally, it has stated since 2002 that no doubt exists as to their status and that, under the law of armed conflict, the detainees can be held at Guantanamo until the conclusion of the war on terror and without the full-dress procedure of criminal trials. Detainees, therefore, have been held since January 2002 without charges, access to lawyers, or, until the Supreme Court intervened, the right to challenge their detention.

The administration announced in June 2004 the release of 26 detainees following an internal legal review conducted by Pentagon lawyers in Guantanamo Bay that determined the individuals had been wrongly held for the past 2 years. The timing was unfortunate since it immediately preceded the Supreme Court hearing at which the administration argued that cases were being properly reviewed. Critics jumped on this fact, suspecting that the administration was releasing some individuals to demonstrate to the court that it was reviewing the individual status of detainees. More recently, the administration announced that it has

the administration states that the law of armed conflict governs the rules for detention of enemy combatants

commenced reviews for all detainees before an administrative tribunal. While the intent of the internal review conducted in early 2004 may be debatable, the individual cases of all detainees are being reviewed as a result of the June 2004 Supreme Court ruling.

The format for these reviews was unveiled in September 2004. The first, called a Combatant Status Review Tribunal, is intended to determine whether each detainee meets the criteria of an enemy combatant. Second is the an-

nual Detainee Administrative Review, which determines the need to continue to hold the unlawful combatant. Following this review, a board will decide whether to release, transfer, or continue to detain the individual.¹³ As of November 2, 2004, a total of 295 Combatant Status Review Tribunals had been conducted. Only one detainee was determined not to be an enemy combatant and was released. But once again, the procedures have attracted the attention of the U.S. Courts. A Federal district court judge ruled on November 8, 2004, that the detainees must be treated as POWs unless a special tribunal described in Article 5 of the Third Geneva Convention determines they are not. The judge ruled that the Combatant Status Review Tribunals do not satisfy the Geneva Conventions and cannot deny POW status.¹⁴

The administration has stated that, despite its determination that the detainees are unlawful combatants, it has treated them humanely at all times and provided privileges similar to those the Geneva Conventions grant to POWs. The principal difference is the more permissible interrogation and a reduced entitlement to due process afforded to the unlawful combatant. POW status under the Geneva Conventions prohibits various methods of interrogation, many of which have been authorized by the administration for Guantanamo, and demands a higher level of due process protection than planned for detainees charged with war crimes.

POW status demands the same due process protections, for example, that a U.S. Soldier would receive under a court-martial proceeding.

In the days following the President's determination that the Geneva Conventions would not apply to detainees in the war on terror, Secretary of State Colin Powell, supported by Secretary Rumsfeld and the Chairman of the Joint Chiefs of Staff, General Richard Myers, asked the President to reconsider applying POW status to the

Taliban fighters.¹⁵ A wide range of critics believed that since the fighters were members of the regular armed forces of the de facto government of Afghanistan, they met the Geneva criteria for

the difference between how an unlawful combatant and a POW must be treated lies in more permissible interrogation and reduced entitlement to due process

POW status. Secretary Powell was particularly concerned about the increased risk for troops in Afghanistan and in future conflicts if the administration disavowed the conventions. Among other things, POW status would entitle detainees to humane treatment during interrogation and different procedural and evidentiary rights from those established for illegal combatants.

Secretary Powell's view about the POW status of Taliban fighters is shared by many U.S. and international experts,¹⁶ including the United Nations.¹⁷ These critics also argue that any al Qaeda detainees who were acting as militia or volunteer corps members that formed part of the Taliban armed forces are also eligible. Moreover, even

if the al Qaeda members do not qualify as members of the Taliban armed forces or of its integral militia, they may still qualify for POW status under the Geneva Conventions if they were part of an independent militia and meet the criteria. Regardless, as critics point out, the Geneva Conventions and U.S. military regulations that precede 9/11 require findings by a competent tribunal. As discussed, tribunals have only recently begun but have been ruled by a Federal district court judge as insufficient to deny POW status.

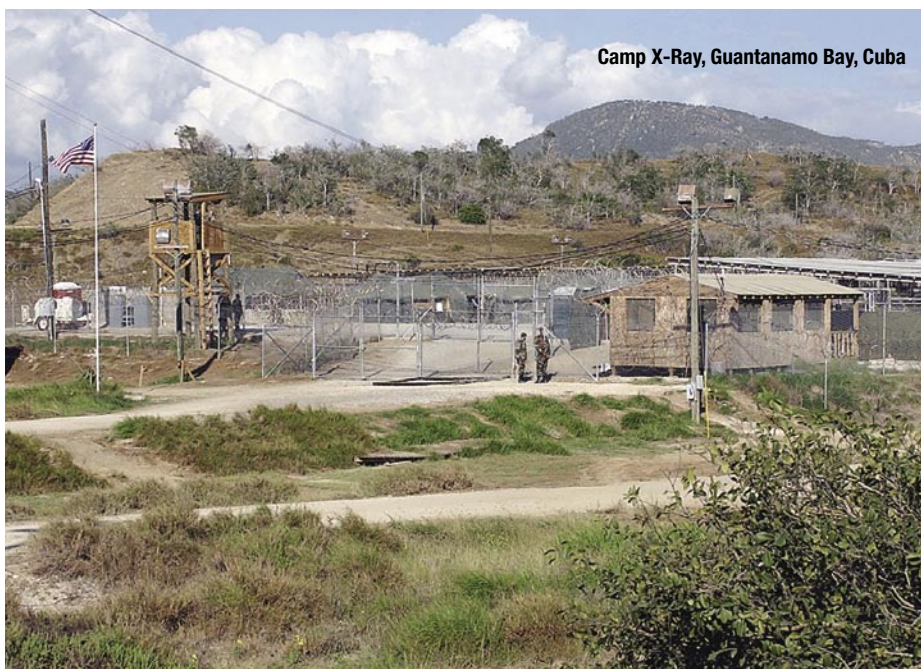
Due Process Protections

The administration believes that civic ideals should not frustrate an effective defense in the war on terror. To overcome the limitations of criminal law, for example, and in keeping with the detainees' status as unlawful combatants, it has established Military Commissions—a type of military tribunal not used since World War II for spies, saboteurs, and war criminals—to try designated detainees. These commissions are applicable only to non-

U.S. citizens and are designed to protect the individual rights of the accused while also safeguarding classified and sensitive information used as evidence in the proceedings. The administration states that the commissions are recognized by the Geneva Conventions and have been used by many countries. However, when Egypt used this form of tribunal in 2000, it was rebuked in the U.S. State Department yearly report on human rights abuses. Presented to Congress, the report stated that this type of military court deprived hundreds of civilian defendants of their constitutional rights.¹⁸

The administration's system of justice for detainees charged with war crimes was crafted by a group of lawyers who in September 2001 held posts at the White House, the Justice Department, and other agencies. The work commenced just over a week after 9/11 under the direction of the Vice President and was coordinated by the White House counsel, Alberto Gonzales. The idea of using Military Commissions had been investigated a decade earlier for trying suspects in the bombing of Pan Am Flight 103 over Lockerbie, Scotland. The interagency group investigated four options: Military Commissions, criminal trials, military courts-martial, and tribunals with both civilian and military members like the Nuremberg trials.

By October 2001, the White House lawyers had grown impatient with the "dithering" of the interagency group and took over the effort. At this stage all options were reportedly abandoned, and planning for Military Commissions moved forward more quickly, but whole agencies, including DOD, were completely left out.¹⁹ The legal basis for the administration's approach was laid out on November 6 in a confidential memorandum from the Attorney General's office to White House counsel Gonzales. Attorney General John Ashcroft had refused congressional requests for a copy, but its contents were leaked by *The New York Times*. The memorandum said that the President, as Commander



Camp X-Ray, Guantanamo Bay, Cuba

U.S. Air Force (Greg Kobashigawa)



**Military Commissions
courtroom at Guantanamo Bay**

in Chief, has “inherent authority” to establish Military Commissions without congressional authorization and could apply international law selectively. In particular, the memorandum outlined the legal precedent under which due process rights do not apply to Military Commissions.²⁰

The administration moved quickly after receiving the Attorney General’s advice, releasing the Presidential Military Order on Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism on November 13, 2001. Rear Admiral Donald J. Guter, the Navy Judge Advocate General at the time, commented that many Pentagon experts on military justice were kept in the dark until the day before the order was issued. Moreover, their hastily prepared amendments did not appear with the final document. Senior staff from the National Security Council and the State Department were also excluded from the final discussions, with the National Security Adviser and the Sec-

retary of State finding out the details after the order was issued.²¹

In World War II, when the United States last used Military Commissions, the tribunals were fashioned generally on the prevailing standard of military justice. Following 9/11, however, the administration believed a paradigm shift was needed to deal with terrorism. The Presidential Military Order outlined the revised approach, which enabled a lower standard of proof, expanded secrecy provisions, permitted a more liberal application of the death penalty, and denied judicial review of convictions. It announced that the exact rules were to be established later by Secretary Rumsfeld. Criticism, some of which came from inside the administration, was immediate. It was reported that the respective judge advocates general within the Pentagon supported the use of commissions but argued strongly that the system would not be fair without amendment. When Secretary Rumsfeld finally published

the rules for the commissions, it became obvious that he had settled on a compromise. Although he granted defendants a presumption of innocence and set “beyond a reasonable doubt” as the standard for proving guilt, Rumsfeld did not allow judicial review of convictions by civilian courts.

On July 3, 2003, the administration designated six detainees for the first commissions. Two were British. News of their prosecution became public in the United Kingdom just as Prime Minister Tony Blair began a major public relations campaign to gain support for the Iraq war. Under pressure from Parliament, he declared that any tribunals involving British citizens would follow “proper international law.”²² Blair was under increasing pressure from his Parliament to secure custody of nine British being held at Guantanamo. Negotiations involving the British Attorney General, Peter Goldsmith, and officials from the administration were initiated quickly

to find a process for trying the two British detainees designated to go before Military Commissions. Lord Goldsmith would not budge from a demand that civilian courts review verdicts.²³ The administration argued that the change would render the commissions unworkable. During a state visit to Britain in late November 2003, President Bush agreed to shelve the cases of the

following 9/11, the administration saw no reason it could not depart materially from current standards of military justice

two British suspects for the foreseeable future. It appears that most detainees will not face a commission and will either be released when they no longer pose a threat or remain interned for the duration of the war on terror.

The administration's intent to try selected detainees by Military Commissions has received widespread criticism. Spain, for example, has announced that it will not extradite terrorist suspects to the United States if they are to face the tribunals. In essence, the opposing view characterizes the commissions as providing second-class justice. Amnesty International has been vocal in its criticism and has received extensive support from a wide range of scholars and organizations. The critics argue that the commissions are discriminatory because they do not apply to U.S. nationals, they allow a lower standard of evidence than is admissible in ordinary courts, they offer no right of appeal to an independent and impartial court, and they lack independence from the Executive. *The Army Lawyer*, a Department of the Army periodical, published an article that added weight to this view, noting that the commissions are a departure from long-standing military practice and fail to provide the fairness and due process expected in trials conducted by the United States.²⁴

The Constitution is designed to provide a system of checks and balances to prohibit, inter alia, unfettered power by the Executive. The Supreme

Court ruling on Guantanamo is an example of the system working, with the judiciary deciding that the Executive does not have the authority to suspend the detainees' habeas corpus rights. Many believe the proposed commissions provide unfettered and unchallengeable power to the Executive, which contravenes the most basic law principles of independence and impartiality. Since the commissions began, the most ardent critics have been the uniformed lawyers assigned to the defen-

dants. These lawyers have succeeded in halting the first of the commissions, gaining a Federal district court judge's ruling on November 9, 2004, that once again curtails the Executive's attempts to implement its "forward-leaning" system of justice. The ruling, which stated that President Bush had both overstepped his constitutional bounds and improperly brushed aside the Geneva Conventions in establishing Military Commissions, throws the future of the commissions into doubt.²⁵ The administration is appealing the decision.

Consequences of Administration Actions

For the past 3 years, the administration has focused publicly on the operational benefits that detainee operations in Guantanamo have generated while downplaying the cascading problems it has faced: angry allies, a tarnishing of America's image, and declining cooperation in the war on terror.

Operational benefits. The administration believes the interrogation of the detainees has improved the security of the United States and coalition partners by expanding their understanding of al Qaeda and its affiliates. Interrogation has revealed al Qaeda leadership structures, operatives, funding mechanisms, communication methods, training and selection programs, travel patterns, support infrastructures, and plans for attacking the United States and other nations. The administration

states that Guantanamo detainees have also provided information on individuals connected to al Qaeda's efforts to acquire weapons of mass destruction, front companies and accounts supporting the organization, acquisition of surface-to-air missiles and improvised explosives devices, tactics and training, and travel routes to reach the United States via South America.²⁶

Detaining enemy combatants during conflict is not punishment but a security and military necessity. The information obtained is enabling the United States and its partners to be more effective in planning and conducting counterterrorist missions. It is also assisting in the development of countermeasures to disrupt terrorist activities and focusing information collection on al Qaeda financing and network operatives. Perhaps the greatest operational benefit from interrogating Guantanamo detainees, however, lies in the expanded understanding of jihadist motivation, selection, and training processes. This information is essential to identifying the root causes of terrorism, which is arguably the key to winning the conflict. The issue for the administration is whether the benefits are worth the cascading problems that the detainee operations have generated.

Undermining U.S. influence and effectiveness. In March 2004, the Pew Research Center reported that U.S. prestige throughout the world was at its lowest level in history.²⁷ This report was published before the Abu Ghraib incident. The Pew findings are supported by other international opinion surveys. The U.S. Council on Foreign Relations found in 2003 that an important way for the administration to reduce rising anti-Americanism is to "improve its capacity to listen to foreign publics."²⁸ The international community, along with individual rights groups and academics in the United States, believe the administration is ignoring international law in its treatment of the detainees. Critics have referred to Guantanamo as the American Gulag.

The Military Commissions empowered under President Bush's military order are the exact types of trials that the United States condemns in the international community. In today's media environment, such inconsistencies are highlighted, evaluated, and broadcast repeatedly to every corner of the globe. This apparent double standard denies Washington the moral high ground needed to censure other nations for human rights abuses. It could also place the administration at odds with the values of the American people, creating a fault line that could degrade domestic support for a generation-long war on terror. John Gordon, a retired Air Force general and former Central Intelligence Agency deputy director who served as both the senior counterterrorism official and homeland security adviser on President Bush's National Security Council, described the dilemma: "There was great concern that we were setting up a process that was contrary to our own ideals."²⁹

The worldwide promotion of human rights is clearly in keeping with America's most deeply held values. Colin Powell has said, "Respect for human rights is essential to lasting peace and sustained economic growth, goals which Americans share with people all over the world." At the Human Rights Defenders of the Frontlines of Freedom Conference at The Carter Center in November 2003, former President Jimmy Carter was disturbed to find that many participants believed the United States is contributing directly to an erosion of human rights by its policies with respect to the Guantanamo detainees. Moreover, Carter deplored the indefinite detention of the suspects, adding, "This is a violation of the basic character of my country."³¹ The 9/11 attacks were horrific, and it is in the interest of all civilized nations that the perpetrators be tried and punished, but long-held American values on human rights must outweigh the desire for retribution. As General John Shalikashvili, former Chairman of the Joint Chiefs of Staff, has stated,

"The United States has repeatedly faced foes in its past that, at the time they emerged, posed threats of a nature unlike any that it had previously faced, but . . . has been far more steadfast in the past in keeping faith with its national commitment to the rule of law."³² To do otherwise only adds to the growing worldwide anti-Americanism that undermines U.S. credibility, influence, and effectiveness.

Undermining the coalition. The U.S. strategy for winning the war on terror is predicated on creating an international environment inhospitable to terrorists and all who support them. There is a realization that the Nation does not have the option of going it alone. President Bush has stated that the United States will "constantly strive to enlist the support of the international community in this fight against a common foe" because success "will not come by always acting alone, but through a powerful coalition of nations maintaining a strong, united international front against terrorism."³³ A senior official in U.S. Central Command, the regional combatant command responsible for prosecuting Operations *Iraqi Freedom* and *Enduring Freedom*, called coalition support the Achilles' heel in these operations. The command sees the shaping of domestic opinion worldwide as essential to maintaining a strong coalition.

Democratically elected leaders must be responsive to their constituents. The treatment of detainees at Guantanamo, having fostered animosity toward the United States, thus undermines U.S. ef-

a politically viable option would be to seek a UN-authorized U.S. tribunal

forts to gather international support.³⁴ Even governments stalwartly behind the war are under siege from their populations. In Australia and the United Kingdom, for example, the governments are under increasing pressure to withdraw from the coalition because of public belief that America's treatment of

Australian and British detainees violates the principles that the coalition of the willing aims to uphold.

A Modified Means

The reviews of cases that the administration is conducting in the wake of the June 2004 Supreme Court ruling have now been ruled as insufficient and must be modified to determine the POW status of the detainees. The United States cannot proceed with its Military Commissions without first modifying its Combatant Status Review Tribunals. Should a modified tribunal determine that POW status is warranted, then, as already discussed, the Geneva Conventions demand higher levels of due process for POWs than the Military Commissions allow. Given the administration's views on the POW issue, the more likely outcome is that a modified tribunal will determine formally that POW status should be denied and Military Commissions should follow. It appears, however, that the outcomes of any Military Commissions will not be viewed as legitimate in the eyes of a world already skeptical of the detentions in Guantanamo. The United States can preserve the moral high ground by revisiting the initial interagency group's options and moving the trials into the international arena.

As stated previously, the interagency group investigated four options: Military Commissions, criminal trials, military courts-martial, and tribunals with both civilian and military members. Criminal courts would provide insufficient latitude without Congress toughening criminal laws and adapting the courts. This may have been an option in early 2002 when it was advocated by the Justice Department, but

it is now too late given that the detainees have been in custody 3 years. A court-martial offers advantages. Foremost, it safeguards the administration against domestic or international legal challenges attacking the trial process itself. A court-martial meets all current standards of fundamental rights under



Detainee being led into Camp Four, a medium security facility at Camp Delta

U.S. Navy (John F. Williams)

the customary and written rules of law. It also protects sensitive and classified material during the proceedings. The disadvantage, however, is that because the administration has for the past 2 years created an atmosphere of legal ambiguity, the international community is conditioned to being skeptical and is likely to be suspicious of any outcomes from a U.S. military proceeding.

This leaves tribunals as the final option. The United Nations (UN) has established ad hoc tribunals to deal with individual responsibility for war crimes. The tribunals have been empowered to deal with specific crimes during defined periods. Relinquishing control of the trials to the UN is not without risk, however, and may prove politically untenable for an American administration. A more politically viable option would be to seek a UN-authorized U.S. tribunal, similar to the courts established in 2000 to try war criminals in Sierra Leone and East Timor. The respective governments and the UN set up the courts jointly, giving them the mandate to try those charged with war crimes, crimes against humanity, and other serious violations of international humanitarian law.

The courts were international bodies staffed principally from within the respective countries.

The tribunal would be established under special statute, agreed to by the United States and the United Nations. The statute could include, inter alia, the requirement for a balanced membership of civilian and military, U.S. and international, and judicial and prosecutorial members. The advantage of this model, as opposed to the UN ad hoc tribunals, is that the United States has greater control, and it brings the values of U.S. judges and prosecutors into the proceedings. Such action would be viewed as a legitimate form of justice in the international community and would therefore assist ongoing efforts in the war against terrorism. It would also send a message to the international community about U.S. beliefs on collective legitimization versus unilateralism, most notably that the United States believes that the United Nations and the Security Council have not become irrelevant and still have a major role in international relations. It would also do much to negate the pressure many coalition governments face from their

increasingly skeptical domestic populations. The principal benefit for Washington, however, lies in recapturing legitimacy and thereby reducing widespread anti-Americanism. International legitimacy will generate greater diplomatic space for the administration, providing opportunities to harness the broader international cooperation it needs to win the war on terror.

In the prosecution of the war on terror, the administration has sought to redefine the borders between civil liberties and public safety. The official position remains that the detainees are unlawful combatants and not POWs, but that they are being treated in accordance with the law. The unlawful combatant status and the withholding of due process protections to the approximately 500 foreign nationals detained at Guantanamo have attracted domestic and international criticism. The international community and individual rights groups and academics within the United States believe the administration is ignoring international law and in fact is breaking the law. The U.S. Supreme Court, and most

recently a Federal district court, have weighed into the debate with a ruling that curtails the Executive's attempts to suspend selected human rights in its response to 9/11.

In addition to undermining the rule of law, the consequence of the policy at Guantanamo has been to fuel global anti-Americanism, which undermines U.S. influence and effectiveness, degrades the domestic support base, and denies the United States the moral high ground it needs to promote international human rights. It appears that these costs have far outweighed the operational benefits that the detainee operations have generated. The administration must now adjust its approach. The United States can preserve the moral high ground by adjusting its Combatant Status Review Tribunals to adequately determine the POW status of the detainees. It must then move the detainees' trials into the international arena. This adjustment would be viewed as a legitimate form of justice in the international community and would do much to reduce the anti-Americanism that, among other things, could undermine the coalition. Such action is needed because it is in the Nation's and world's long-term interests. In seeking to redefine the borders between civil liberties and public safety, the administration need look no further for guidance than Benjamin Franklin, who said, "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."³⁵

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NOTES

¹ Anton L. Janik, Jr., "Prosecuting Al Qaeda: America's Human Rights Policy Interests Are Best Served by Trying Terrorists Under International Tribunals," *Denver Journal of International Law and Policy* 30, no. 4 (September 2002).

² Alfred De Zayas, "The Status of Guantanamo Bay and the Status of the Detainees," The Douglas Brown Lecture, University of British Columbia, Vancouver, November 19, 2003, available at <www.law.ubc.ca/files/pdf/events/2003/november/GUANTANA.pdf>.

³ U.S. Department of Defense, "Guantanamo Detainees," available at <www.defenselink.mil/news/detainees.html>.

⁴ Ingrid Arnesen, "Detainees Not Covered by Geneva Conventions," CNN Online, June 9, 2004, available at <http://cnn.com/2004/LAW/06/09/detention.report/index.html>. [For more information see "DOD Provides Details on Integration Process," release of declassified documents at <www.defenselink.mil>, June 22, 2004.—Ed.]

⁵ Sean D. Murphy, ed., "U.S. Abuse of Iraqi Detainees at Abu Ghraib Prison," *American Journal of International Law* 98 (July 2004), 592. [For more information see "DOD Provides Details on Integration Process," release of declassified documents at <www.defenselink.mil>, June 22, 2004.—Ed.]

⁶ *Ibid.*, 593.

⁷ Jennifer K. Elsea, "Lawfulness of Interrogation Techniques under the Geneva Conventions" (Washington, DC: Congressional Research Service, September 8, 2004).

⁸ Neil Lewis, "Red Cross Finds Detainee Abuse in Guantanamo," *The New York Times*, November 30, 2004.

⁹ Charlie Savage, "4 Ex-Detainees Sue Rumsfeld, 10 Others," *The Boston Globe*, October 28, 2004.

¹⁰ "Supreme Court Rules on *Rasul v. Bush*," *International Law Update*, July 2004.

¹¹ Janik, 118.

¹² Jeffrey Kaye, interview with Ruth Wedgewood and Geoffrey Miller, *Online News Hour*, January 22, 2003, available at <www.pbs.org/newshour/bb/military/jan-jun03/detainees_1-22.html>.

¹³ As of August 2004, 156 detainees had departed Guantanamo either for release or for transfer to another government. U.S. Department of Defense, "Guantanamo Detainee Processes," accessed at <www.defenselink.mil>.

¹⁴ Neil Lewis, "Rules Bush Overstepped Bounds—Doubt Cast Over Tribunals," *The New York Times*, November 9, 2004, A19.

¹⁵ Tim Golden, "After Terror, a Secret Rewriting of Military Law," *The New York Times*, October 24, 2004.

¹⁶ Experts such as the UN Commission on Human Rights, the International Federation for Human Rights, the International Committee of the Red Cross, the British High Court, the Bosnia-Herzegovina High Court, the Canadian High Court, the governments of Malaysia and Germany, Amnesty International, Human Rights Watch, American Civil Liberties Union, U.S. Lawyers Committee for Human Rights, the U.S. Anti-Defamation League, the Association of the Bar of the City of New York, the Law Society of England and Wales, the U.S. National Association of Criminal Defense Lawyers, and the Carter Institute, to name a few.

¹⁷ United Nations, "United Nations Rights Expert 'Alarmed' over United States Implementation of Military Order," July 7, 2003, accessed at <www.unhcr.ch>.

¹⁸ U.S. Department of State, "Egypt: Country Reports on Human Rights Practices 2000," February 23, 2001, available at <www.state.gov/g/drl/rls/hrrpt/2000/nea/index.cfm?docid=784>.

¹⁹ Golden, 6.

²⁰ *Ibid.*

²¹ *Ibid.*, 8.

²² Tim Golden, "Administration Officials Split Over Stalled Military Tribunals," *The New York Times*, October 25, 2004, accessed at <www.globalexchange.org/countries/unitedstates/democracy/2632.html>.

²³ *Ibid.*

²⁴ Kevin J. Barry, "Military Commissions: Trying American Justice," *The Army Lawyer* (November 2003), 1.

²⁵ Lewis, "Rules Bush Overstepped Bounds," A19.

²⁶ U.S. Department of Defense, 3.

²⁷ Kevin J. Barry, "Guantanamo: Disorder of the Day," August 22, 2004, accessed at <publicfolders/AY05seminar/teamfolders/seminar10/documents/course/ items/guantanamo>.

²⁸ Independent Task Force on Public Diplomacy, Council of Foreign Relations, "Finding America's Voice: A Strategy for Reinvigorating U.S. Public Diplomacy," September 18, 2003.

²⁹ Golden, 2–3.

³⁰ Janik, 132.

³¹ The Carter Center, Conference Report, "Human Rights Defenders on the Frontlines of Freedom: Protecting Human Rights in the Context of the War on Terrorism," November 11–12, 2003, available at <www.cartercenter.org/search/viewindexdoc.asp>.

³² These comments were included in a letter sent to the U.S. Senate Judiciary Committee in January 2005 by a dozen high-ranking retired military officers expressing concern over the nomination of White House counsel Alberto Gonzales as Attorney General, given his role in shaping legal policies on detainee operations. Dan Eggen, "Gonzales Nomination Draws Military Criticism," *The Washington Post*, January 4, 2005.

³³ George W. Bush, *National Strategy for Combating Terrorism* (Washington, DC: The White House, February 2003), 11.

³⁴ Eggen.

³⁵ Qtd. in Barry, "Military Commissions: Trying American Justice," 9.

The *Hamdan* decision was overruled in mid-July 2005, after the Chairman's Essay Contest. —Ed.