

Is Guantanamo Bay Undermining the Global War on Terror?

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“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. . . . [T]hey 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
14 November 2001¹

Prosecution of the war against terror has resulted in the detention by the United States of at least 650 citizens from more than 40 countries at military detention facilities on the US naval base at Guantanamo Bay, Cuba.² Although the Bush Administration has held firm to the position expressed in the above quotation by the Vice President almost four years ago, the legality of this position continues to elicit significant worldwide commentary and, indeed, the interest of the US Supreme Court.³ While the Administration’s position has a number of prominent defenders,⁴ much international expert opinion has weighed in on the other side of the debate. Some of this opinion has been particularly critical. Justice Richard Goldstone,⁵ for example, the former Chief Prosecutor in the International Criminal Tribunals for Yugoslavia and Rwanda, stated in a BBC interview in late 2003 that “a future American President will have to apologize for Guantanamo.”⁶ In the spring and early summer of 2005, a number of US politicians—Republicans as well as Democrats—suggested that perhaps the time had come to close the Guantanamo prison.

The question of how to deal with the detainees in the ongoing Global War on Terrorism (GWOT) is, however, an extremely difficult issue. The subject has not only generated worldwide commentary, but rifts within the Bush Administration itself.⁷ 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 that it is still struggling to solve.

In this article, the competing positions on the legal status of the detainees are assessed. First, the article outlines why Guantanamo Bay was chosen as a location for detainee operations. It then outlines the competing positions on the Prisoner of War (POW) status of the detainees and the competing views on the due process protections that should be provided detainees charged with war crimes. The article then discusses the wider effects that the Administration's policies in Guantanamo Bay are having on the Global War on Terrorism. The article concludes with recommendations for an alternative approach to deal with the detainees. The recommended approach outlined in this article aims to regain the initiative for the Bush Administration. It seeks to recapture much-needed international legitimacy, thereby creating greater diplomatic space within which opportunities to harness broader international support and involvement in the Global War on Terrorism can be pursued.

Why Guantanamo Bay?

The United States and its coalition partners remain at war against al Qaeda and its affiliates, both in Afghanistan and in further operations around the world. Since Osama bin Laden declared war on the United States in 1996, al Qaeda and its affiliates have launched repeated attacks that have killed thousands of innocent Americans and hundreds of civilians from other countries.⁸ The Bush Administration states that the law of armed conflict governs what it terms "the war between the US and al Qaeda" and therefore establishes the rules for detention of enemy combatants.⁹ The US Congress, however, has not formally declared war. Instead, the President has authorized the detention, treatment, and trial of non-citizens in the Global War on Terrorism under a "Military Order" derived from the constitutional authority vested in his position as the President and Commander in Chief of the armed forces of

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the United States.¹⁰ In order to protect the nation and its citizens, 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.¹¹

A leaked classified report prepared by Defense Department lawyers for Secretary Donald Rumsfeld in 2003 appears to substantiate why Guantanamo Bay was preferred by the Administration as the location to detain individuals in the GWOT. The report cited the long-held view that Guantanamo Bay offers the Administration certain legal “advantages” because its location falls outside the jurisdiction of US courts.¹² These advantages lie principally in the areas of removing detainees’ possible rights to question in US courts the legality of their detention and to facilitate permissive interrogation techniques which would otherwise be constrained by US statutes. The leaked 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 persons detained by the United States.¹³

Some critics have linked the permissiveness of the legal interpretation for interrogation at Guantanamo, which underpinned Defense Secretary Rumsfeld’s approval of 24 specific interrogation techniques there, including “significantly increasing the fear level in a detainee,” to abuses that unfolded late in 2003 at the Abu Ghraib prison in Iraq.¹⁴ The Administration has denied such a link even though the Defense Department’s investigation into Abu Ghraib revealed that some of the techniques authorized for “unlawful combatants” in Guantanamo Bay had been used in Iraq.¹⁵ Seymour Hersh’s 2004 book, *Chain of Command: The Road from 9/11 to Abu Ghraib*, which attributes the Abu Ghraib abuse to the Administration’s interrogation policies in Guantanamo, added fuel to the debate. Hersh’s theory about Guantanamo and Abu Ghraib resonates with an increasingly critical domestic and international audience, and lends credence to the claims of torture by the International Committee of the Red Cross¹⁶ and by four former British detainees who have sued Secretary Rumsfeld and ten others in the military chain of command for mistreatment at Guantanamo.¹⁷

The Administration unsuccessfully argued before the US Supreme Court in June 2004 its position that Guantanamo Bay lies outside the jurisdiction of US courts. The Supreme Court ruled that prisoners at Guantanamo could challenge their detention by writ of *habeas corpus* in US federal court.¹⁸ The ruling means that foreign detainees have the right to use a US court to question the legality of their imprisonment, even though they are being held outside the country. This finding could be the basis for future rulings applica-

ble to other US detention facilities as well. Many critics advocate that Guantanamo is the best-known detention facility, but that there are others operated by the Administration in Afghanistan and elsewhere.¹⁹

Lawful or Unlawful Combatants?

Unlawful Combatants

The official US position is that the detainees do not meet the criteria of legal combatants as outlined in the 1949 Geneva Conventions and are therefore “unlawful combatants” not entitled to POW status and other privileges specified by the Geneva Conventions.²⁰ The detainees are not being treated as common criminals to be tried in civil courts, as has previously been the case with terrorists in the United States, because criminal law is too weak a weapon.²¹ Instead, the detainees 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 commented 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.”²² One of Rumsfeld’s legal advisers, Ruth Wedgwood, 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.²³

The Administration has not differentiated between al Qaeda or Taliban detainees in its position that the detainees are unlawful combatants. Additionally, it has advocated from as early as 2002 that no doubt exists as to the status of each individual detainee.²⁴ The Administration also advocates that under the law of armed conflict the detainees can be held at Guantanamo Bay until the conclusion of the war against terror²⁵ and without the full-dress procedure of criminal trials.²⁶ Detainees, therefore, have been held in Guantanamo since January 2002 without charges,²⁷ access to lawyers, or, until recently when the Supreme Court intervened, the right to challenge the legality of their detention.

In June 2004 the Administration announced the release of 26 detainees after an internal legal review conducted by Pentagon lawyers in Guantanamo Bay determined that the individuals had been wrongly detained.²⁸ The timing of this announcement was unfortunate for the Administration since it immediately preceded the Supreme Court hearing at which the Administration argued that detainee cases were being properly reviewed. Critics leaped on this fact, suspecting the Administration was releasing some individuals before the Supreme Court case in an attempt to demonstrate to the Court that

it was reviewing the individual status of detainees.²⁹ More recently, the Administration announced that it has continued reviewing the status of detainees before an administrative tribunal.³⁰ While the intent of the internal review conducted early in 2004 may be debatable, the fact is that as a result of the June 2004 Supreme Court ruling, the Administration is now reviewing the individual cases of all detainees.

The Bush Administration announced in September 2004 the format for these reviews. The first is called a “Combatant Status Review Tribunal,” which aims to determine whether each detainee meets the criteria of an enemy combatant. The second is called a “Detainee Administrative Review,” which is an annual review to determine the need to continue to detain the unlawful combatant. Following this review a board will determine whether the detainee should be released, transferred, or continue to be detained.³¹ As of 2 November 2004, 295 Combatant Status Review Tribunals had been conducted. Only one detainee was determined not to be an enemy combatant and was released.³² But once again, the Administration’s procedures attracted the attention of the US courts. A Federal District Court Judge ruled on 8 November 2004 that the Administration must treat the detainees as POWs unless they appear before a special tribunal described in Article 5 of the Third Geneva Convention that determines they are not. The judge ruled that the Combatant Status Review Tribunals do not satisfy the Geneva Convention and are therefore insufficient to deny POW status.³³

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 that POWs are entitled to under the Geneva Conventions.³⁴ The principal area of difference between how an “unlawful combatant” and a POW must be treated lies in more permissible interrogation methods and a reduced entitlement to various due process provisions. POW status under the Geneva Conventions prohibits various methods of interrogation, many of which have been authorized by the Administration for use at Guantanamo Bay, and demands a much higher level of due process protections than that which the Administration has planned for detainees charged with war crimes.³⁵ POW status demands the same due process protections, for example, that a US soldier would receive under a courts-martial proceeding.

The Opposing View

An article in *The New York Times* reported that in the days following the President’s determination that the Geneva Conventions would not apply to detainees in the GWOT, Colin Powell, then Secretary of State, supported by Secretary Rumsfeld and also the Chairman of the Joint Chiefs of Staff, General Richard Myers, asked the President to reconsider applying POW sta-

tus to the Taliban fighters.³⁶ Secretary Powell, and a wide range of critics, believed that since the Taliban fighters were members of the regular armed forces of the de facto government of Afghanistan, they met the criteria for POW status as outlined in the Geneva Conventions.³⁷ Secretary Powell was particularly concerned about the increased risk US troops would face in Afghanistan and future conflicts if the Administration failed to consider the Geneva Conventions as applicable.³⁸ Among other things, POW status would entitle detainees to humane treatment during interrogation and different procedural and evidentiary rights³⁹ to those which the Administration has established for its Military Commissions.⁴⁰

Secretary Powell's view about the POW status of the Taliban fighters is shared by many US and international experts,⁴¹ including subject specialists at the UN.⁴² 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 entitled to POW status.⁴³ Moreover, even if the al Qaeda members do not qualify as members of the Taliban armed forces or as members 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 criteria⁴⁴ outlined in the Conventions.⁴⁵ Regardless, as the critics point out, the Geneva Conventions and US military regulations that precede 9/11⁴⁶ require findings by a competent tribunal before detainees are deprived of POW status.⁴⁷ As discussed, tribunals are being convened by the Administration, but they have been ruled by a Federal District Court Judge as insufficient to deny POW status.

Due Process Protections

Military Commissions

In the ongoing war against terror, the Bush Administration advocates that US civic ideals should not frustrate an effective defense.⁴⁸ To overcome the limitations of US criminal law, for example, and in keeping with the detainees' status as unlawful combatants, the Administration has established Military Commissions⁴⁹ to try designated detainees.⁵⁰ Military Commissions are a type of US military tribunal last used in World War II for the trial of spies, saboteurs, and war criminals. These commissions are applicable only to non-US 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.⁵¹ The Administration outlines that the commissions are recognized by the Geneva Conventions and have been used by many countries in the past.⁵² Egypt is among the countries that have used military commissions, but when Egypt did use this form of tribunal in 2000 it was

openly rebuked in the US State Department's yearly report on human rights abuses. The State Department report, which was presented to Congress, averred that this type of military court deprived hundreds of civilian defendants of their constitutional rights.⁵³

The Administration's "forward-leaning" system of justice for detainees charged with war crimes was crafted by a small group of young lawyers who were settled into important posts in September 2001 at the White House, the Justice Department, and other agencies. The work was conducted under the direction of Vice President Cheney and coordinated by the White House counsel at that time, Alberto Gonzales, who has since been elevated to Attorney General. The work commenced little more than a week after 9/11.⁵⁴ The idea of using Military Commissions had been investigated thoroughly a decade before when options were being considered to try suspects in the bombing of Pan Am Flight 103 over Lockerbie, Scotland.⁵⁵ 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 work themselves. It has been reported that at this stage all other options were abandoned and planning for Military Commissions moved forward more quickly, but with whole agencies, including the Defense Department, being left out of the discussions completely.⁵⁶ The legal basis for the Administration's approach was laid out on 6 November 2001 in a then-confidential memorandum sent to Mr. Gonzales by the Attorney General's office. Attorney General John Ashcroft subsequently refused congressional requests to provide a copy of the document, but its contents were leaked and reported by *The New York Times*. The memorandum said that the President, as Commander in Chief, has "inherent authority" to establish Military Commissions without congressional authorization and that the Administration could apply international law selectively. In particular, the memorandum outlined the legal precedent under which due process rights do not apply to Military Commissions.⁵⁷

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" a week later, on 13 November 2001. Rear Admiral Don Guter, who was the Navy Judge Advocate General at the time, has commented that many of the Pentagon's experts on military justice were kept in the dark until the day before the order was issued, and when it was issued the order included none of their hastily prepared amendments.⁵⁸ It was also reported that senior staff from the National Security Council and the State Department were also excluded from the

final discussions on the order, with the National Security Adviser and the Secretary of State finding out the details of the order only after it was issued.⁵⁹

In World War II, when the US last used Military Commissions, the tribunals were fashioned generally on the prevailing standard of military justice.⁶⁰ Following 9/11, however, the Administration saw no reason why it could not depart materially from current military justice standards and write new law for the commissions. Those involved believed a paradigm shift was needed to deal with terrorism. The presidential Military Order outlined the concept for 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.⁶¹ The order announced that the exact rules were to be established later by Secretary Rumsfeld.⁶² Criticism of the order was immediate, but not all the criticism came from outside the Administration. It is widely reported that the respective judge advocate generals within the Pentagon supported the use of commissions, but argued strongly that the system would not be fair without amendment.⁶³ In the end, when Secretary Rumsfeld published the rules for the commissions, it became obvious that he had taken their counsel into consideration and had compromised. He granted defendants a presumption of innocence and set “beyond a reasonable doubt” as the standard for proving guilt, but did not allow judicial review of convictions by civilian courts.⁶⁴

On 3 July 2003, the Administration designated six detainees for the first commissions.⁶⁵ Two of the six were British. News of the men’s prosecution became public in the United Kingdom just as British Prime Minister Tony Blair was beginning a major public relations campaign to overcome his unpopular support for the Iraq War. Under pressure from the British Parliament, Blair declared that any tribunals involving British citizens would follow “proper international law.”⁶⁶ Blair was under increasing pressure from his Parliament to secure custody of a total of nine British detainees at Guantanamo. A series of negotiations involving the British Attorney General, Peter Goldsmith, and officials from the Bush Administration were initiated quickly in order to agree on an acceptable process for the trial of the two British detainees. Lord Goldsmith would not budge from a basic demand that civilian courts review verdicts from the commissions.⁶⁷ The Administration argued that such a change would render the commissions unworkable. During a state visit to the UK in late November 2003, President Bush agreed to shelve the cases of the two British suspects for the foreseeable future.⁶⁸ It remains unclear how many detainees will ultimately appear before a Military Commission, but the Administration has indicated that most of the detainees will not face a commission and will simply be released when they no longer pose a threat—or will remain interned for the duration of the Global War on Terrorism.⁶⁹

The Opposing View

The Administration's intent to try selected detainees by Military Commission has received widespread criticism. Spain, for example, has announced it will not extradite terrorist suspects to the United States if they are to face the tribunals.⁷⁰ In essence, the opposing view characterizes the commissions as providing second-class justice. Amnesty International has been most vocal in its criticism, but it has received extensive support from a wide range of scholars and organizations.⁷¹ The critics argue the commissions are discriminatory because they do not apply to US nationals, they allow a lower standard of evidence than is admissible in ordinary courts, there is no right of appeal to an independent and impartial court, and they lack independence from the executive branch.⁷² *The Army Lawyer*, a US Department of the Army periodical, published an article in November 2003 by a retired senior military lawyer that added weight to this view. It noted that the commissions are a departure from long-standing military practice, and they fail to provide the degree of fairness and due process expected in trials conducted by the United States in the 21st century.⁷³

The US Constitution is designed to provide a system of checks and balances to prohibit, among other things, unfettered power by the executive branch of government. The recent Supreme Court ruling on Guantanamo Bay is a great 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.⁷⁴ Since the commissions began, their most ardent critics have included the uniformed US lawyers assigned to the defendants.⁷⁵ These lawyers were successful in halting the first of the commissions, gaining a Federal District Court judge's ruling on 9 November 2004 that curtailed the executive's attempts to implement its "forward-leaning" system of justice. The ruling cast doubt on the future of the Military Commissions, as the judge ruled that President Bush had both overstepped his constitutional bounds and improperly brushed aside the Geneva Conventions in establishing Military Commissions.⁷⁶ The Administration has successfully appealed this decision, but at this writing the prospect of a counter-appeal remains.⁷⁷

The Consequences of the Administration's Actions

For the past three years, the Administration has focused publicly on the operational benefits that detainee operations on Guantanamo Bay have generated. It also has downplayed the cascading problems the operations have faced: angry foreign allies, a tarnishing of America's image, and declining cooperation in the Global War on Terrorism.

Operational Benefits

The Administration believes that 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. This information is critical to disrupt the attack plans of al Qaeda and its affiliates throughout the world. 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.⁷⁸ The Administration states that Guantanamo detainees have provided the United States with priceless intelligence: information on individuals connected to al Qaeda's efforts to acquire weapons of mass destruction; information on front companies and accounts supporting al Qaeda; information on surface-to-air missiles, improvised explosive devices, and al Qaeda tactics and training; and detailed information on travel routes potentially used by terrorists to reach the United States via South America.⁷⁹

Detention of enemy combatants during conflict is not an act of punishment; it is a matter of security and military necessity. The information being obtained from the detainees is clearly helping in the GWOT. It is enabling the United States and its coalition partners to be more effective in the planning and conduct of counterterrorist missions. It also is 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 the United States now possesses of jihadist motivation, selection, and training processes.⁸⁰ This information is essential to identifying the root causes of terrorism, which is arguably the key to winning the Global War on Terrorism. The issue for the Administration is whether these benefits are worth the costs that the detainee operations have also generated.

Undermining US Influence and Effectiveness

In March 2004, the Pew Research Center reported that US prestige in the world community had shown a steady decline, and this report was published before the Abu Ghraib incidents were revealed.⁸¹ The Pew findings were supported by other international opinion surveys.⁸² The US Council on Foreign Relations found in 2003 that one of the things the Bush Administration needs to do to reduce this rising anti-Americanism is to "improve its capacity to listen to foreign publics."⁸³ Clearly, the international community, and individual rights groups and academics within the United States, believe that the Administration is ignoring international law in its treatment of the detainees. One Colombian columnist has referred to Guantanamo as the US "Gulag."⁸⁴

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The Military Commissions empowered under President Bush’s military order are the exact types of trials that the United States openly condemns in the international community.⁸⁵ In today’s media environment, inconsistencies such as this are highlighted, evaluated, and then broadcast repeatedly to every corner of the globe. The effect of this apparent double standard is to deny the United States the moral high ground it needs to censure other nations in the future for human rights abuses. Such double standards potentially place the Administration at odds with the values of the American people, thereby creating a fault line that if pressured in the future may degrade the domestic support base for what is going to be a generation-long Global War on Terrorism. General John Gordon, a retired Air Force general and former CIA director who served as both the senior counterterrorism official and homeland security adviser on President Bush’s National Security Council, best described this dilemma with the comment, “There was great concern that we were setting up a process that was contrary to our own ideals.”⁸⁶

The worldwide promotion of human rights is clearly in keeping with America’s most deeply held values.⁸⁷ Colin Powell has said that “respect for human rights is essential to lasting peace and sustained economic growth, goals which Americans share with people all over the world.”⁸⁸ 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 current policies with respect to the Guantanamo detainees. Moreover, President Carter deplored the indefinite detention of the suspects at Guantanamo and added, “I say this because this is a violation of the basic character of my country and it’s very disturbing to me.”⁸⁹ The attacks against the United States on 9/11 were horrific, and it is in the interest of all civilized nations that the perpetrators be tried and punished, but long-held US values on human rights must outweigh the nation’s desire for retribution. As General John Shalikashvili, a former Chairman of the Joint Chiefs of Staff, has so accurately stated, “The US 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 the US has been far more steadfast in the past in keeping faith with its

national commitment to the rule of law.”⁹⁰ To do otherwise only adds to the growing worldwide anti-Americanism that undermines US credibility and, therefore, US influence and effectiveness.

Undermining the Coalition

The US strategy for winning the Global War on Terrorism is predicated on creating an international environment inhospitable to terrorists and all those who support them.⁹¹ There is a realization that in this war, the United States 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,”⁹² because success “will not come by always acting alone, but through a powerful coalition of nations maintaining a strong, united international front against terrorism.”⁹³ A senior official in US Central Command, the regional combatant command responsible for prosecuting both Operation Iraqi Freedom and Operation Enduring Freedom, has stated that America’s Achilles’ heel in these operations is coalition support. US Central Command sees shaping domestic opinion worldwide as essential to maintaining a strong coalition.⁹⁴

In Southeast Asia, an area described by the Asia Pacific Centre for Strategic Studies as a primary fault line in the GWOT, there are serious issues that limit greater cooperation with the United States. The divide between anti-Americanism among citizens and their largely pro-US governments is an issue that places serious limits on the abilities of governments to participate further in the GWOT. Democratically elected leaders must be responsive to their constituents, and many constituents in Southeast Asia remain skeptical about the GWOT, as these nations are faced with more pressing issues that affect their day-to-day well-being.

The US Administration therefore faces significant challenges in creating a shared understanding of the terrorist threat and in its essential task of extending cooperation in international counterterrorism efforts. The treatment of detainees at Guantanamo significantly affects the Administration’s ability to undertake this task. General Shalikashvili, and many others, have stated that Guantanamo operations have fostered greater animosity toward the United States and undermined its efforts in the Global War on Terrorism.⁹⁵ Many nations view Guantanamo Bay as the principal example of how the GWOT is to be fought, and people from those nations do not like seeing images of shackled detainees in orange jumpsuits or reading about allegations of abuse and violations of international law. Even governments from nations who are stalwart supporters of the Global War on Terrorism 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 large seg-

ments of their populations view America's treatment of Australian and British detainees as violating the very principles that the Coalition of the Willing aims to uphold. Whether the 7 July terrorist bombings in London will affect those views—and in which direction—at this writing remains to be seen.

A Modified Means

The reviews of individual 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 in order to determine the POW status of the detainees.⁹⁶ The United States cannot proceed with its Military Commissions without first modifying its Combatant Status Review Tribunals. Should a modified tribunal determine in due course that POW status is warranted, then, as already discussed, the Geneva Conventions demand higher levels of due process for POWs than that which is embedded into the Military Commissions. Given the Bush Administration's views on the POW issue, the more likely outcome is that a modified tribunal will determine formally in due course that POW status should be denied and Military Commissions should follow. It appears clear, however, that the outcomes of any Military Commissions will not be viewed as legitimate in the eyes of a world already deeply skeptical of the detentions on 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 discussed previously, the initial 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.⁹⁷ This may have been an option in early 2002 when it was advocated by the Justice Department, but it is now too late given the fact that the detainees have been in custody for three years.⁹⁸ The court-martial option offers some advantages. Foremost, it would safeguard the Administration against potential domestic or international legal challenges attacking the trial process itself.⁹⁹ A court-martial would meet all current standards of fundamental rights under the customary and written rules of law.¹⁰⁰ A court-martial also would offer the Administration the distinct advantage of protecting any sensitive and classified material during the proceedings. The significant disadvantage to a court-martial, however, is that because the Administration has for the past two years created an atmosphere of legal ambiguity, the international community is conditioned to being skeptical and is therefore likely to be suspicious of any outcomes from a US military proceeding.

This leaves the final option of tribunals. The United Nations has established in the past, on an ad hoc basis, tribunals to deal with individual re-

sponsibility for war crimes.¹⁰¹ These tribunals have been empowered by the UN to deal with specific crimes during defined time periods.¹⁰² Relinquishing control of the trials to the UN is not without risk, however, and may in the end prove politically untenable for any US administration. A more politically acceptable option would be to seek a UN-authorized US tribunal, similar to the special courts established in 2000 to try war criminals in Sierra Leone¹⁰³ and East Timor.¹⁰⁴ In these instances the respective governments and the UN set up these courts jointly. The tribunals were mandated to try those charged with war crimes, crimes against humanity, and other serious violations of international humanitarian law. The courts were international bodies, but staffed principally from within the respective countries.

In the current instance, the tribunal would be established under special statute, agreed by the United States and the UN. The statute could include the requirement for a balance of civilian and military, and US and international, judges and prosecutors. The significant advantages of this model, as opposed to the UN ad hoc tribunals, is that the United States would have greater control, and it would bring into the proceedings the values of US judges and prosecutors. Such action would be viewed as a legitimate form of justice in the international community and would therefore assist ongoing US efforts in the Global War on Terrorism. It also would send an important message to the international community about US beliefs on collective legitimization versus unilateralism, most notably that the United States believes that the UN and the Security Council have not become irrelevant and still have a major role to play in international relations.¹⁰⁵ It also would do much to negate the pressure many coalition governments are facing from increasingly skeptical domestic populations. The greatest benefit for the United States, however, lies in the area of recapturing much-needed legitimacy, and consequently 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 Global War on Terrorism.

Conclusion

In the prosecution of the war against terror, the Bush Administration has sought to redefine the borders between civil liberties and public safety. The official position of the Administration remains that the detainees at Guantanamo are unlawful combatants and not POWs, but that they are being treated in accordance with the law. The unlawful combatant status and the due process protections arbitrarily given by the Administration to the 650 foreign nationals detained at Guantanamo Bay have attracted significant domestic and international criticism. Many in the international community, and among individual rights groups and academics within the United States, believe that the Admin-

istration is ignoring international law in its treatment of the detainees. These critics present a strong argument that the United States is, in fact, breaking the law. The US Supreme Court and, more recently, a Federal District Court have weighed into the debate with rulings that curtail significantly the executive's attempts to suspend select human rights in its response to 9/11.

In addition to undermining the rule of law, there have been other harmful unintended consequences of the Administration's policy in Guantanamo Bay: providing fuel to a rising global anti-Americanism that weakens US influence and effectiveness, degrading the Administration's domestic support base, and denying the United States the moral high ground it needs to promote international human rights in the future. It seems clear that these costs have far outweighed the operational benefits that the detainee operations have generated. Consequently the Administration should now adjust its approach. The United States can preserve the moral high ground by adjusting its Combatant Status Review Tribunals to determine adequately the POW status of the detainees. It should then move the detainees' trials into the international arena. This adjustment would be viewed as ensuring a legitimate form of justice in the international community and would do much to reduce the anti-Americanism that is potentially undermining the coalition in the Global War on Terrorism. Such action is needed not just because it is the right thing to do, but because it is in the long-term interests of the United States and the world community to do so. In seeking to redefine the borders between civil liberties and public safety, the Bush Administration might profitably look for guidance to Benjamin Franklin, who said more than two centuries ago in another difficult time, "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."¹⁰⁶

NOTES

1. Vice President Dick Cheney, remarks made during an address at the US Chamber of Commerce, 14 November 2001, <http://www.whitehouse.gov/vicepresident/news-speeches/speeches/vp20011114-1.html>; see also Anton L. Janik, Jr., "Prosecuting Al Qaeda: America's Foreign Policy Interests Are Best Served by Trying Terrorists Under International Tribunals," *Denver Journal of International Law and Policy*, September 2002, <http://static.highbeam.com/d/denverjournalofinternationalallawandpolicy/september222002/prosecutingalqaedaamericashumanrightspolicyinteres.html>.

2. The Administration has not announced the number of detainees and their countries of origin. Various sources indicate different numbers. I have used the numbers indicated by the Lawyers Committee for Human Rights (now Human Rights First), *Imbalance of Powers: How Changes to U.S. Law and Security Since 9/11 Erode Human Rights and Civil Liberties* (New York and Washington: Lawyers Committee for Human Rights, 2003), http://www.humanrightsfirst.org/US_law/loss/imbalance/powers.pdf.

3. In June 2004, in response to a petition from relatives and "friends" of two Australians, two Britons, and 12 Kuwaiti detainees, the US Supreme Court ruled six to three that foreign detainees have the right to use a US court to question the legality of their imprisonment, even though they are being held outside of the country. "Supreme Court Rules on *Rasul v Bush*," *International Law Update*, July 2004, Lexis-Nexis.

4. Among the most notable are Ruth Wedgwood, a Yale law professor; Lloyd Cutler, former White House counsel to Presidents Carter and Clinton; Bernard Meltzer, a Nuremberg prosecutor and University of Chicago law professor; and William Webster, a judge and chief of the FBI under President Carter and of the CIA under President Reagan.

5. Justice Goldstone is the William Hughes Mulligan Visiting Professor at Fordham Law School and a former South African High Court Magistrate.

6. Quoted in Alfred De Zayas, "The Status of Guantanamo Bay and the Status of the Detainees," The Douglas McK. Brown Lecture, University of British Columbia, Vancouver, 19 November 2003, p. 48, http://www.law.ubc.ca/events/2003/November/McK_Brown_Lecture.html.

7. Tim Golden, "Administration Officials Split Over Stalled Military Tribunals," *The New York Times*, 25 October 2004, http://home.blumarble.net/~mattsson/NYT_041025gitmo.html. This article outlines, among other things, the rift that developed between the Vice President and Condoleezza Rice and Colin Powell over how the detainees should be handled.

8. The attacks of 9/11, the US embassy bombings in Africa, the attack on USS *Cole*, the Jemaah Islamiah bombings in Bali and Jakarta, and the rail bombing in Spain, for example. US Department of Defense, "Guantanamo Detainees," fact sheet, 13 February 2004, available at <http://www.defenselink.mil/news/detainees.html>.

9. *Ibid.*, p. 1.

10. See George W. Bush, Military Order, "Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism," 13 November 2001, <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>. Although Congress has not declared war, in a Joint Resolution it authorized the President to use "all necessary and appropriate force" against "organizations or persons he determines planned, authorized, committed or aided the terrorist attacks on Sept. 11, 2001." Authorization for the Use of Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

11. Bush, Military Order.

12. Ingrid Arnesen, "Detainees Not Covered by Geneva Conventions, Report Concluded," CNN.com, 9 June 2004, <http://www.cnn.com/2004/LAW/06/09/detention.report/>.

13. Sean D. Murphy, ed., "U.S. Abuse of Iraqi Detainees at Abu Ghraib Prison," *American Journal of International Law*, 98 (July 2004), 592.

14. *Ibid.*, p. 593.

15. Congressional Research Service, Report for Congress, "Lawfulness of Interrogation Techniques under the Geneva Conventions," 8 September 2004, p. 1, <http://www.fas.org/irp/crs/RL32567.pdf>.

16. Neil Lewis, "Red Cross Finds Detainee Abuse in Guantanamo," *The New York Times*, 30 November 2004, <http://www.nytimes.com/2004/11/30/politics/30gitmo.html>.

17. Charlie Savage, "4 Ex-Detainees Sue Rumsfeld, 10 Others," *The Boston Globe*, available from http://www.boston.com/news/nation/washington/articles/2004/10/28/4_ex_detainees_sue_rumsfeld_10_others/.

18. "Supreme Court Rules on *Rasul v Bush*," *International Law Update*.

19. Lawyers Committee for Human Rights, "Imbalance of Powers," p. 49.

20. US Department of Defense, "Guantanamo Detainees," p. 4.

21. Ruth Wedgwood and Kenneth Roth, "Combatants or Criminals? How Washington Should Handle the Terrorists," *Foreign Affairs*, 83 (May/June 2004), 126. See also Bush, Military Order, which outlines that it is "not practicable" to apply the principles of law and the rules of evidence as recognized in criminal courts.

22. Janik, p. 118.

23. Ruth Wedgwood and Major General Geoffrey Miller, interview by Jeffrey Kaye, 22 January 2003, http://www.pbs.org/newshour/bb/military/jan-june03/detainees_1-22.html.

24. Zayas, p. 31.

25. Ruth Wedgwood and David Cole, interview by Margaret Warner, 1 May 2002, http://www.pbs.org/newshour/bb/terrorism/jan-june02/tribunals_5-1.html.

26. Wedgwood and Roth, p. 126.

27. As of 6 January 2004, four of the detainees had been charged with crimes and were scheduled to appear before Military Commissions.

28. Demetri Sevastopulo, "Guantanamo Prisoners Wrongly Held," *London Financial Times*, 19 June 2004.

29. *Ibid.*

30. Guy Taylor, "Tribunals Set for Guantanamo Detainees," *Washington Times*, 17 July 2004, Lexis-Nexis.

31. As of August 2004, 156 detainees had departed Guantanamo either for release or for transfer to another government. For further details see US Department of Defense, "Guantanamo Detainee Processes," fact sheet, 31 January 2005, available at <http://www.defenselink.mil/news/detainees.html>.

32. Tony Locy, "Detainee Cases Show Another Side of GITMO," *USA Today*, 4 November 2004, p. 19A.

33. Neil Lewis, "Judge Halts War-Crime Trial at Guantánamo," *The New York Times*, 9 November 2004.

34. US Department of Defense, "Guantanamo Detainees," p. 4.

35. Congressional Research Service, "Lawfulness of Interrogation Techniques."

36. Tim Golden, "After Terror, A Secret Rewriting of Military Law," *The New York Times*, 24 October 2004, <http://207.44.245.159/article7122.htm>.

37. Evan J. Wallach, "Afghanistan, Quirin, and Uchiyama: Does the Sauce Suit the Gander?" *The Army Lawyer*, p. 26.

38. Golden, "After Terror, A Secret Rewriting of Military Law."

39. Granting POW status would require detainees charged with war crimes to be given the same legal protections at trial that a US soldier charged with the same crime would be given. See Kenneth Anderson, "Who Owns the Rules of Law?" *The New York Times Magazine*, 13 April 2003, <http://www.genocidewatch.org/WhoOwnstheRulesofWar.htm>.
40. Janik, p. 118.
41. Including experts at the United Nations 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, the American Civil Liberties Union, the US Lawyers Committee for Human Rights, the US Anti-Defamation League, the Association of the Bar of the City of New York, the Law Society of England and Wales, the US National Association of Criminal Defense Lawyers, and the Carter Institute, to name a few.
42. United Nations, "United Nations Rights Expert 'Alarmed' over United States Implementation of Military Order," 7 July 2003, <http://www2.unog.ch/news2/documents/newsen/hr0349e.htm>.
43. Wallach, p. 26.
44. Among the criteria, they must report to a commanding authority, have a recognized military insignia, openly carry their arms, and conduct their operations in accordance with the laws and customs of war. Janik, p. 119.
45. Wallach, p. 26.
46. US Army, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*, Army Regulation 190-8 (available at <http://www.au.af.mil/au/awc/awcgate/law/ar190-8.pdf>), requires that a "competent tribunal" determine the status of any person not appearing to be entitled to POW status. Wallach, p. 29.
47. Anderson.
48. Wedgwood and Roth, p. 127.
49. Frederick L Borch III, "Why Military Commissions Are the Proper Forum and Why Terrorists Will Have 'Full and Fair' Trials: A Rebuttal to Military Commissions: Trying American Justice," *The Army Lawyer*, November 2003, p. 10.
50. Bush, Military Order.
51. Borch, p. 10.
52. US Department of Defense, "Guantanamo Detainees," p. 8.
53. US State Department, "Egypt: Country Reports on Human Rights Practices – 2000," 23 February 2001, <http://www.state.gov/g/drl/rls/hrrpt/2000/nea/784.htm>.
54. Golden, "After Terror, A Secret Rewriting of Military Law."
55. *Ibid.*, p. 4.
56. *Ibid.*, p. 6.
57. *Ibid.*
58. *Ibid.*, p. 7.
59. *Ibid.*, p. 8.
60. *Ibid.*, p. 5.
61. Kevin J. Barry, "Military Commissions: Trying American Justice," *The Army Lawyer*, November 2003, p. 1.
62. Bush, Military Order, pp. 2-3.
63. Admiral Guter was the Navy Judge Advocate General at the time. After retiring he was a signatory to the "Friends of the Court" brief in the June 2004 Guantanamo case that went before the Supreme Court. His views on the inadequacies of the rules for the commissions and the limited role military lawyers were allowed to have in designing those rules can be found in Golden, "After Terror, A Secret Rewriting of Military Law," p. 9.
64. US Department of Defense, "Military Commission Order No. 1," available under "Military Commission Orders" at <http://www.defenselink.mil/news/commissions.html>.
65. Ruth Wedgwood, "Justice, and Security Too," *Los Angeles Times*, 10 July 2003, <http://www.beadorassociates.com/article/458.html>.
66. Golden, "Administration Officials Split Over Stalled Military Tribunals."
67. *Ibid.*
68. *Ibid.*
69. Wedgwood and Cole interview.
70. Barry, "Military Commissions: Trying American Justice," p. 1.
71. The British High Court, the Canadian High Court, the Spanish government and the Special Rapporteur on the independence of judges and lawyers of the UN Commission on Human Rights, to name a few.
72. Amnesty International, "USA—Military Commissions: Second-Class Justice," 22 March 2002, <http://web.amnesty.org/library/index/ENGAMR510492002>.
73. Barry, "Military Commissions: Trying American Justice," p. 1.
74. Jed Rubenfield, "The Two World Orders," *The Wilson Quarterly*, Autumn 2003, http://wwics.si.edu/index.cfm?fuseaction=wq.essay&essay_id=56056.

75. Golden, "Administration Officials Split Over Stalled Military Tribunals."
76. Lewis, "Judge Halts War-Crime Trial at Guantánamo," p. A19.
77. R. Jeffrey Smith, "Detainee Trials Are Upheld," *The Washington Post*, 16 July 2005, p. A01.
78. US Department of Defense, "Guantanamo Detainees," p. 3.
79. Ibid.
80. Ibid.
81. Pew Research Center, Global Attitudes Project, "A Year After Iraq War: Mistrust of America in Europe Ever Higher, Muslim Anger Persists," 16 March 2004, <http://pewglobal.org/reports/display.php?ReportID=206>.
82. Patrick Tyler, "The World Backs Kerry International Polls Indicate," *The New York Times*, 16 October 2004. The 2005 Pew report shows a marginal improvement among some allies: Pew Research Center, Global Attitudes Project, "U.S. Image Up Slightly, But Still Negative," 23 June 2005, <http://pewglobal.org/reports/display.php?ReportID+247>.
83. Independent Task Force on Public Diplomacy, Council of Foreign Relations, "Finding America's Voice: A Strategy for Reinvigorating U.S. Public Diplomacy," July 2002, http://www.cfr.org/pdf/public_diplomacy.pdf.
84. Michael Shifter, "The US and Latin America Through The Lens of Empire," *Current History*, 103 (February 2004).
85. US State Department, "Egypt: Country Reports on Human Rights Practices 2000."
86. Cited in Golden, "After Terror, A Secret Rewriting of Military Law."
87. The US National Security Strategy states, "In pursuit of our goals, our first imperative is to clarify what we stand for: The United States must defend liberty and justice because these principles are right and true for all people everywhere." George W. Bush, *The National Security Strategy of the United States of America* (Washington: The White House, September 2002), p. 3.
88. Janik, p. 132.
89. The Carter Center, Conference Report, *Human Rights Defenders on the Frontlines of Freedom: Protecting Human Rights in the Context of the War on Terror*, 11-12 November 2003, <http://www.cartercenter.org/documents/1682.pdf>.
90. These comments were included in a letter sent to the US Senate Judiciary Committee in January 2005 by a dozen high-ranking retired military officers. The letter expressed 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*, 4 January 2005, p. A02, <http://www.washingtonpost.com/ac2/wp-dyn/A45727-2005Jan3>.
91. George W. Bush, *National Strategy for Combating Terrorism* (Washington: The White House, February 2003), p. 11.
92. Ibid., p. 2.
93. Ibid., p. 19.
94. Based on remarks by a speaker participating in a formal discussion in Florida with International Fellows from the US Army War College.
95. Eggen.
96. Lewis, "Judge Halts War-Crime Trial at Guantánamo," p. A19.
97. As an example, most of the information obtained during interrogations at Guantanamo would be inadmissible in a civil court, without significant modification to existing law.
98. Golden, "After Terror, A Secret Rewriting of Military Law," p. 5.
99. As previously discussed, challenges on the legality of the Military Commissions are already before the US courts.
100. Wallach, "Afghanistan, Quirin, and Uchiyama: Does the Sauce Suit the Gander?" p. 46.
101. The 1993 Tribunal to deal with war crimes committed in the Former Yugoslavia and the 1994 Tribunal to deal with the genocide in Rwanda.
102. Janik.
103. The Special Court for Sierra Leone was set up jointly by the government of Sierra Leone and the UN. It was mandated to try those charged with war crimes, crimes against humanity, and other serious violations of international humanitarian law. The court is an international body, but staffed principally from within Sierra Leone.
104. The Special Court for East Timor was set up jointly by the UN Transitional Administration in East Timor. For further information on the details of the court, see Michael Reisman, "Attitudes and Types of Reaction Toward Past War Crimes and Human Rights Abuses," *The Yale Journal of International Law*, 29 (Summer 2004), 343-61.
105. President Bush redefined US strategic and security policy goals in a formal address in Canada on 1 December 2004. He stated that his new term in office provided an opportunity to reach out to US friends and foster wide international consensus for building effective multinational and multilateral institutions. George W. Bush, "President Discusses Strong Relationship With Canada," Halifax, Nova Scotia, Canada, 1 December 2004, <http://www.whitehouse.gov/news/releases/2004/12/20041201-4.html>.
106. Barry, "Military Commissions: Trying American Justice," p. 9.