Introduction

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America was put to the test on September 11, 2001, when Al Qaeda jihadists hijacked four commercial airliners and transformed them into passenger-laden missiles. Two terrorist teams struck New York City, the nerve center of U.S. finance, slamming American Airlines Flight 11 into the World Trade Center's North Tower at 8:46 am and United Airlines Flight 175 into the South Tower at 9:03 am. By 10:30 that morning, the twin 100-story skyscrapers had collapsed into smoldering heaps of rubble. At 9:37 am, a third terrorist team attacked the U.S. Department of Defense, crashing American Airlines Flight 77 into the western side of the Pentagon. Meanwhile, brave passengers on United Airlines Flight 93 stormed the cockpit, fought the fourth team of terrorists, and at 10:03 am brought the plane down near Shanksville, Pennsylvania, killing all onboard but averting an assault on either the U.S. Capitol Building or the White House. All told, on September 11, Al Qaeda attacks caused the loss of almost three thousand Americans, the vast majority of whom were civilians, and injured six thousand others. In addition, the attacks resulted in billions of dollars of property damage and tens of billions of dollars in

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lost economic production. And the United States has spent hundreds of billions of dollars more on far-flung wars in the mountains of Afghanistan and the deserts of Iraq aimed at defeating Al Qaeda and thwarting the ambitions of fellow Islamic extremists, other transnational terrorists, and rogue states' seeking unconventional weapons—chemical, biological, radiological, nuclear, and whatever else technology can furnish and the imagination can exploit—to use against civilian populations in the United States and elsewhere.

In addition, the United States has been compelled to operate covertly around the world to foil terrorist plots and to disrupt, degrade, and dismantle transnational terrorist networks. The United States has also pursued diplomatic initiatives to enlist allies and persuade wavering nations to assist in counterterrorism operations and to support sanctions against state sponsors of terrorism. All the while, the United States has been compelled to confront novel and difficult legal questions raised by the struggle against transnational terrorists.

Many progressives at home and in Europe saw in the Bush years an all but unrelieved government evisceration of fundamental human rights. From the establishment of the detention center at Guantánamo Bay, Cuba, to the abuses of prisoners at Abu Ghraib in Iraq, from the legitimization of harsh interrogation techniques on high-value detainees at secret CIA prisons to the use of military tribunals to try those held as unlawful enemy combatants, from extraordinary renditions to warrantless wiretapping—critics claimed that the Bush administration shredded the Constitution and disgraced America's enduring values. Yet notwithstanding an early declaration that torture would no longer be permitted (in fact its statutory prohibition preceded the Bush administration and was further reinforced by the 2005 McCain Amendment), a promise (since broken) to close Gitmo within a year, and an announcement (which it is now reconsidering) that 9/11 mastermind Khaled Sheikh Muhammad would be tried in New York City in federal court, the Obama administration has largely preserved the body of national security law it inherited from the Bush administration. One explanation is that, once in office, the president and his team discovered that many imperfect Bush administration policies flowed neither from malice nor incompetence but rather reflected painful trade-offs involved in reconciling liberty and security in an age in which transnational terrorists who hate America and the principles to which it is dedicated have increasing access to weapons of mass destruction.

The Bush administration certainly made mistakes. Most significantly, it early on pressed extravagantly broad claims of executive power, and throughout it imprudently excluded Congress from the design of laws to deal with complicated problems posed by the need to detain, interrogate, and prosecute transnational terrorists. Yet however questionable some of their constitutional interpretations, at no point did President Bush suggest that, or his administration conduct itself as if, the Constitution was not binding.

Even when it sought to minimize court oversight, as, for example, in its CIA secret prison program, the administration developed legal arguments, grounded in the Constitution, for doing so.

What is remarkable in retrospect is the self-correcting power displayed by the American constitutional order. Indeed, that order provided the framework within which the Bush administration's national security law policies were crafted by administration lawyers, vigorously criticized in the press, subjected to intense public debate, reviewed by the courts and, in some cases, in light of democratic deliberation and judicial decision, revised by the Bush administration itself.

To understand properly the controversies that erupted over national security law during the Bush administration in the wake of the 9/11 attacks, many of which have persisted into the Obama administration, it is necessary to appreciate the novelty and difficulty of the legal questions that our system has confronted and will continue to confront. The challenges began with proper classification. If transnational terrorists were properly thought of as criminals subject to criminal law, then the government could follow well-established legal procedures for investigating, capturing, detaining, interrogating, prosecuting, and punishing them. Similarly, if transnational terrorists were properly thought of as soldiers—that is, combatants fighting in a recognized state's armed forces, carrying their weapons openly, attacking military targets and therefore subject to the internationally recognized law of armed conflict—then we could also follow well-established legal procedures for disabling and defeating them. Transnational terrorists, however, do not fit easily within either paradigm or body of law while sharing characteristics of both.

Terrorists murder civilians and destroy civilian property. These are crimes punishable under the criminal law. But the lethality and the destructive power of the September 11 attacks, and the future attacks they portended, were more akin to acts of war. Combined with Al Qaeda's repeated declaration that it is at war with the United States and Congress's authorization to use military force against it and affiliates, it would appear that the law of armed conflict, also known as the laws of war, applies. But jihadists are, in critical ways, unlike soldiers: they do not wear uniforms to distinguish themselves from noncombatants; they do not carry their arms openly; and they not only do not avoid harming civilians but make killing civilians and destroying civilian property a defining element of their strategy. Accordingly, Islamic terrorists seem to place themselves outside the rules and regulations prescribed for combatants by the law of armed conflict and so appear to disqualify themselves from receiving the special protections provided for those who observe them. Thus, the jihadists can be seen as engaged in both criminal conduct and acts of war while not neatly fitting into the criminal-law paradigm or the law-of-war paradigm. Accordingly, the Obama administration, like the Bush administration before it, concluded that deciding whether to treat any particular terrorist as a criminal

or an enemy combatant is a matter of policy and prudence.

Another source of the novelty and difficulty of the legal questions that the United States has faced since September 11 is the powerful trend in the West, at work for centuries, to legalize warfare. The ambition to bring all aspects of war under legal supervision is rooted in the moral premise of liberal democracy, which is that all human beings are by nature free and equal. Liberal democracies seek to respect this conviction by protecting individual rights through the rule of law. But the rule of law is not monolithic. It distinguishes, for example, between the rights of citizens and noncitizens and the rules that govern in different spheres of life: the family, religion, the marketplace, and so on. At the same time, the universality of the moral premise that undergirds the rule of law in liberal democracies—that all human beings are by nature free and equal—implies that individual rights and the rule of law must be honored in and extended to all activities and spheres, including those devoted to disabling and killing the enemy.

The law of armed conflict aims to give expression to the rights of combatants and noncombatants and what is owed to both in the special conditions of wartime. Its fundamental principles require fighters to use force only when necessary; distinguish noncombatants from combatants; take reasonable steps to ensure that, in the accomplishment of a legitimate military objective, incidental harm to civilians is proportionate to the military advantage gained; and generally avoid inflicting unnecessary suffering on combatants and noncombatants alike.

Since the end of World War II, these principles, which are incorporated in the four Geneva Conventions of 1949 and have attained the status of customary international law, have been subject to increasingly detailed elaboration by civilian lawyers—at the United Nations and the International Committee of the Red Cross, in the academy, and at nongovernmental organizations around the world. They have also been embraced by the uniformed military: the Pentagon is by far the largest employer in the world of lawyers specializing in the laws of war. Indeed, military lawyers have acquired a large and growing role in the formation of strategy, the execution of operations, and the prosecution and punishment of combat-related crimes.

This process has been quickened and expanded by the advent of precision weapons and the development of new communication technologies, which have raised expectations about armies' ability to spare civilians and to hold soldiers and officers accountable. At the same time, the application of the law of armed conflict to armed hostilities has been greatly complicated by the emergence of transnational terrorists. They exploit the restraint of those who respect the law of armed conflict by disguising themselves as civilians, hiding among civilians, using civilians as human shields, and targeting civilians.

The distinguished contributors to this online volume, a project of Hoover's Koret-Taube Task Force on National Security and

Law, have cast their nets widely. Their essays explore a variety of emerging national security law challenges, including the crafting of rules for the detention of unlawful enemy combatants, the proper orientation for the United States toward the International Criminal Court, the deradicalization of terrorists, application of the principle of proportionality to asymmetric warfare, developments in the war-powers doctrine, cyber-warfare, the search for and regulation of weapons of mass destruction and the reform of Congressional oversight of intelligence. This introduction will be revised and expanded as contributions to the volume are completed and posted.

In "Obfuscation and Candor: Reforming Detention in a World in Denial," Benjamin Wittes argues that we have been determinedly disguising—especially from ourselves—the challenge posed by our continuing need to detain transnational terrorists. The call to shutter the detention camp at Guantánamo Bay is a case in point. President Bush wanted to close it. During the 2008 campaign, Senators John McCain and Barack Obama both called for its closure. And, in one of his first official acts upon assuming the presidency, Barack Obama announced that he would close Gitmo within a year. According to Wittes, though, whether to close Gitmo is the wrong question and has functioned to conceal the right question. The issue is not one of location, or where to hold unlawful enemy combatants, but rather the rules under which we detain, interrogate, and prosecute transnational terrorists, who in some cases should be regarded as criminals, in others as unlawful enemy combatants, and in still others as a mix.

Cognizant of the many and varied concerns that critics have raised about the ICC's legitimacy, impartiality, accountability, and practicality, Tod Lindberg nonetheless argues in "A Way Forward with the International Criminal Court," that the United States' long term interest involves cooperating with it. Although the U.S. government has expressed serious concerns about the Court's governing structure since the Clinton administration and turned hostile to the Court in the first term of George W. Bush, a turning point, according to Lindberg, came with the Bush administration's laudable decision to permit the passage of a 2005 Security Council resolution referring the situation in Darfur to the ICC. He argues that the Court's consistent record of careful investigation and restraint in using its powers should be reassuring to critics. The Bush administration decision, moreover, is an indication that the operation of the Court can be consistent with U.S. national interests. While the time is not ripe, in Lindberg's judgment, for the U.S. to ratify the Rome Statute (which brought the ICC into being) and join the Court, he recommends the adoption of a policy of cooperation with the ICC and its important work bringing the worst perpetrators of war crimes and crimes against humanity to justice.

Jessica Stern's essay, "Deradicalization or Disengagement of Terrorists: Is it Possible?" examines several efforts "to counter-radicalize, disengage, or prevent the

recruitment of radical Muslims to Al Qaeda and related groups." Based on experience in the Netherlands, Iraq, and Saudi Arabia, Stern maintains that a clear understanding of terrorists' motives is essential. Successful de-radicalization programs depend, she argues, on appreciating that while some become terrorists out of true belief in jihad's goals, a considerable number are radicalized in response to discrimination in the workplace and society, because of unemployment, in the quest for identity and community, out of fear and humiliation, and perhaps owing to widespread sexual abuse in Islamic religious schools. Stern reports that Saudi Arabia's expensive, intrusive, and labor intensive deradicalization program is working and suggests that it has implications for counterterrorism efforts around the world. It addresses individual terrorist's motives in prison, and provides extensive services to assist in the transition to civilian life and considerable services following release. According to government statistics, the recidivism rate of its approximately 4000 graduates is 10–20 percent, significantly lower than criminal rehabilitation programs in the United States.

In "The Power to Make War in an Age of Global Terror," Philip Bobbitt explores the debate over how the Constitution distributes war powers between the president and Congress. The debate, he observes, is a relatively new one. Before the Korean War, it was understood that the president had wide latitude to initiate armed conflict and to command soldiers in the field. In contrast, controversy raged throughout the Cold War over the limits of the president's power to enter into hostilities and the meaning of Congress's constitutionally assigned role to declare war. The controversy has roots, according to Bobbitt, in the strategic context, which gave rise to fears that a reckless executive could unilaterally order a devastating nuclear strike. In the contemporary strategic context, the debate over war powers is shifting. The struggle against transnational terrorism requires attention to "doctrines of preclusive warfare, which includes armed intervention abroad, aggressive intelligence collection, noncriminal detention abroad and at home, and a host of measures designed to address our ever-growing vulnerability to disruption and deterritorialized attacks." This debate will revolve around the extent to which Congress can regulate the waging of war. Effective congressional regulation, Bobbitt contends, will depend on the reintegration of law and strategy.

Matthew Waxman's essay, "Self-Defense and the Limits of WMD Intelligence," addresses a hard question raised by the United States' 2003 invasion of Iraq: How certain must a state be about an impending threat to legitimately use force preemptively? He rejects the two dominant approaches: the first "defends unilateral decisions to use self-defensive force in the face of perceived WMD threats, even in the face of substantial uncertainty as to the timing and maturation of the threat"; the second "holds that states cannot resort to force absent U.N. Security Council authorization unless attacked first, except perhaps in very narrow

circumstances where a specifically identified attack is 'imminent.'" Waxman argues that the doctrine of reasonable necessity is superior to both. It declares that, "the use of force against another state believed to pose a WMD threat is justified when a reasonable state would conclude a WMD threat is sufficiently likely and severe that forceful measures are necessary." This approach, Waxman argues, best serves the long-term interests of peace and security. It does this by balancing states' needs, in the face of uncertain conditions and potentially grave danger, to act with dispatch, and to respect the authority, under international law, of the U.N. Security Council and other international bodies.

The future is upon us. The daunting challenges examined in this volume are intensifying; as yet unseen ones are undoubtedly gestating. Saudi Arabia and Iran continue to export and fund the teaching of radical Islam. As technologies for curing disease and facilitating communication constantly improve, so too will the technologies for spreading devastating biological and computer viruses. If Iran acquires a nuclear weapon, we are likely to see the rise of a poly-nuclear Middle East as Saudi Arabia, the United Arab Emirates, Kuwait, Turkey, and Egypt rush to equip themselves with nuclear weapons. This will greatly heighten the threat of weapons of mass destruction falling into the hands of terrorists. At the same time, expectations for bringing war under legal supervision will grow even as terrorists become more devious and adept at using those expectations against nations that seek to uphold the law of armed conflict.

The need to reconcile our demands for security with our commitment to rights and the rule of law has never been more urgent or complex. We are fortunate to have the flexible and sturdy framework provided by the Constitution in our enduring quest to strike the proper balance.

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