6. The Supreme Court and the Guantanamo Controversy

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IN THE CASE OF *Rasul v. Bush*, the Supreme Court decided that the statutory writ of habeas corpus should extend to the U.S. naval station in Guantanamo Bay, Cuba.[1] The petitioners, twelve Kuwaitis and two Australians captured in the course of U.S. military operations in Afghanistan, challenged the government's right to detain wartime combatants, alleging that they had not been involved with al Qaeda or the Taliban. Their status must be reexamined by a federal court, the petitioners argued, or at least by a "competent tribunal" under Article 5 of the Third Geneva Convention.[2] The petitioners did not comment on the screening procedures used by the government in the course of combatant captures and transfers, resting on the argument that only a court would do.

This was unfamiliar ground for the Supreme Court, for the capture and internment of prisoners of war and irregular combatants in overseas military operations has not generally engaged the attention of civilian judges. No American court ever sought to review the pres-

1. *Rasul v. Bush*, 124 S. Ct. at 2686 (2004).

2. Article 5, Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 75 UNTS (1950) 287.

ident's procedures for capturing and interning battlefield prisoners in the Second World War, the Korean War, Vietnam, or the First Gulf War.[3] Admittedly, in those wars, it was sometimes easier to tell who was fighting for a mortal enemy.

The Court's innovation in *Rasul* also reached beyond established procedural law, for the statutory writ of habeas corpus has never been available outside U.S. sovereign territory, except in the case of U.S. citizens arrested overseas by American authorities. Without any discussion of the implications of its holding for American military operations around the world, the Court suggested that extraterritorial invocation of the federal court writ by foreign actors captured in Afghanistan was a simple corollary to a 1973 change in domestic criminal practice.[4]

It is one thing to reread a federal statute to make a housekeeping change, allocating criminal cases among federal district courts. It is rather different to say that a federal court, in the absence of any sign of congressional approval, should recast the law of remedies to issue writs worldwide. The potential hazards of this extension cannot be blinked away simply because the president or the secretary of defense is located in Washington, D.C. There has never been a U.S. District Court for Overseas Military Operations. Congress has never entertained a proposal to create such a court. Congress did create a special federal court in 1978 to regulate wiretapping against foreign officials

3. Before the war in Afghanistan, the only modern case inquiring into combatant status was the criminal prosecution of General Manuel Noriega in federal district court in Florida on narcotics charges. The former leader of Panama was captured in the course of American military operations in Panama in 1989, but was held as a criminal defendant. The government agreed to treat him as if he were a prisoner of war, without conceding that status. See *United States v. Manuel Noriega*, 808 F. Supp. 791, 794 (USDC SD FL 1992).

4. See *Rasul*, 124 S. Ct. at 2695, citing *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484 (1973). The *Braden* decision permitted a criminal defendant to challenge his state court indictment, even though he was currently incarcerated out of state, deeming him to be "in custody" in the state where the indictment was issued.

within the United States and later included physical searches as well. But Congress did not see fit to have the courts regulate U.S. intelligence operations against foreign governments or foreign persons located overseas. This long-standing fact might seem to warrant caution on the part of the courts in attempting to manage warfare through judicial writs, even in regard to the delicate issue of capturing alleged al Qaeda and Taliban combatants.

In *Rasul*, the Supreme Court did not claim its innovation was grounded in any legislative colloquy or that Congress had ever specifically contemplated allowing the writ to extend to noncitizens located in nonsovereign territory. Even the *Rasul* Court seemed to hesitate before the potentially radical consequences of the writ's extension. Abandoning its singular focus on the location of the custodian, the Court backtracked and took into account the particular location of the prisoners. The operation of the writ would not extend to Afghanistan or close to the theater of war against the Taliban, but rather only to Guantanamo Bay, an enclave under the "complete jurisdiction and control" of the United States pursuant to a lease from Cuba renewable in perpetuity.

The Court leaped before it looked. It did not stop to inquire whether there were any comparable American leases around the world. The Court did not ask whether other military bases overseas in which the United States has primary jurisdiction could fall within an extension of its new rule. The six-judge majority of the Court did show some awareness of the difficulties potentially created by its new rule, by opining that the extension of the writ of habeas corpus turned upon *both* the custodian's location in the United States and the particular status of the overseas place of internment. One of the justices who joined the majority ruling in favor of the petitioners conspicuously remarked at oral argument that Guantanamo was assumed to be unique.[5] Even so, the Court may not have fully comprehended

5. See transcript of argument, *Rasul v. Bush*, April 20, 2004 (question of Justice

how such a reading of the writ of habeas corpus could thrust the judiciary into the midst of controversies that extend far beyond the ordinary province of courts.

To be sure, the Supreme Court entertained a writ of habeas corpus in World War II to review the criminal jurisdiction of a military commission trial against a Japanese general.[6] But the trial was held by the Allied military authorities in the Philippines, when that country was not yet independent and had the status of a territorial possession of the United States. (A legal realist also might take note that the war was over, and Japan had surrendered.) In stark contrast, the Supreme Court refused to extend the writ of habeas corpus to the Landsberg prison in occupied Germany.[7] The Court turned away the plea of Germans detained by the American military in Landsberg for spying in the Chinese theater, despite the complete control and jurisdiction exercised in postwar occupation by the Allies. Supreme Court Justice Robert Jackson, former prosecutor at Nuremberg, concluded that habeas corpus could not reach to Germany and that the Geneva Conventions were not enforceable by courts. The Geneva Conventions, Jackson said, were designed to apply between countries at war, and their enforcement depended on the reciprocity of states and the vigilance of the political branches.[8] An American court, after

Ruth Bader Ginsburg: "I think Guantanamo, everyone agrees, is an animal—there is no other like it.")

6. *In re Yamashita*, 327 U.S. 1 (1946).

7. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

8. *Id.* at 789 n. 14 (majority opinion of Justice Jackson) ("We are not holding that these prisoners have no right which the military authorities are bound to respect. The United States, by the Geneva Convention of July 27, 1929, . . . concluded with forty-six other countries, including the German Reich, an agreement upon the treatment to be accorded captives. These prisoners claim to be and are entitled to its protection. It is, however, the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention.")

all, has no obvious power to enjoin a foreign adversary or to hold an opposing belligerent in contempt of court. But Justice Jackson's cautionary words were subject to a revised reading by the *Rasul* court, in a manner that came close to a silent overruling. In the oral argument of *Rasul*, several justices remarked that the opinion spent a good deal of time exploring the substance of issues under the Geneva Convention on the way to finding a lack of jurisdiction. Others suggested that Justice Jackson only meant to address the scope of habeas corpus grounded directly in the Constitution rather than the limits of a statutory writ.

But perhaps the most striking feature of the Court's ruling in *Rasul* is that it decides upon remedy without any serious examination of what law might be applicable. Under the habeas corpus statute, available in Title 28 of the United States code, a federal court has jurisdiction to ascertain whether a person is held "in custody in violation of the Constitution or laws or treaties of the United States."[9] Habeas is not a general writ of supervisory jurisdiction or a vehicle for ethical dismay. A writ of statutory habeas does not itself extend the substantive sources of law to an offshore jurisdiction, where the Congress or the Constitution may not intend that they reach. Nor can statutory habeas corpus sidestep the principle of separation of powers or strip the political branches of their constitutional powers in framing rules of international law. In matters of personal freedom, courts understandably feel a great inclination to intervene. But issues of war and armed conflict also depend on a framework of law that is established and enforced through political processes, both domestic and international. Both the content and effective enforcement of this law may depend upon a reciprocity that courts cannot wish into existence.

By asking about remedy before law, the Court indulged the hazard of assuming the conclusion. It would be most surprising to extend

9. 28 U.S.C. § 2241.

a remedy, at the instance of a particular party, and then to step back and conclude there was no substantive law to accompany the writ. Yet each of the possible categories of law that might be applied to overseas military operations presents particular difficulties for a court's role. This includes how international law is made through changing state practice, how courts can ascertain its content independently of the law-interpreting and law-making acts of the political branches, and whether law should be applied asymmetrically in a war with a deadly adversary.

There are four possible sources of law that might be invoked in regard to the overseas capture of belligerents: the U.S. Constitution, treaties, customary international law, and statutes. In *Rasul*, the Court did not venture that the Constitution applies to aliens captured and interned in foreign wars, even where they are held overseas under the "complete jurisdiction and control" of the United States. This may be what the Court was quietly considering without announcement. But to apply the Constitution offshore, to persons who have no connection to the United States, would be a step far beyond established precedent and certainly deserves serious analysis. To be sure, colloquy in the courtroom invoked the transcendent ideal of "due process" to be applied in ascertaining the identity of persons captured on the battlefield. One justice offered the thought that what process is "due" could be informed by the content of treaty law. But treaties do not determine constitutional arguments, and to suggest that the Fifth Amendment might in fact extend offshore to noncitizens is an extension of the Constitution that will affect a host of foreign policy interests—deserving of the most sober thought.[10]

10. One should note that in the case of *United States v. Verdugo-Urquidez*, Justice Kennedy offered in a concurring opinion that the search of a ranch in northern Mexico might be governed by the ultimate limits of the due process clause, where the property owner, an alien defendant, was standing trial in a U.S. federal court on narcotics charges. 494 U.S. 259, 275 (1990). That setting is rather different from a war in which the United States must prevent the ultimate harm of an adversary's threats to use weapons of mass destruction.

Nor did the justices stop to decide whether any particular treaty applied to the war in Afghanistan or the global war against al Qaeda's catastrophic terrorism. In a conventional war, the obvious sources of treaty law include the 1949 Geneva Conventions and the 1907 Hague Convention, alongside the important guarantees of the 1994 Torture Convention. The 1907 and 1949 treaties were avowedly designed for wars between organized states. Although all captured persons must be treated humanely, there is a robust debate whether the Hague and Geneva Conventions are properly applied in all their privileges and provisions to a deadly armed conflict against a private network that has eschewed the laws of war and a belligerent Afghan faction that has sheltered al Qaeda's terrorist operations. The Hague Convention has an "all participation" clause that requires all states in a war to qualify as treaty parties before the treaty can be invoked. The 1949 Geneva Conventions, including the prisoner of war privileges of the Third Geneva Convention, are limited to international armed conflict between two or more "High Contracting Parties." The mere fact that a conflict occurs on a state's territory (for example, a civil war) does not trigger the privileges of the treaty, though a floor of basic humanitarian values applies more broadly through Geneva's "common" Article 3.

There is also the challenge of how the treaty is updated in practice. The Geneva Conventions have survived for a half century because they have a "pull and tug" built into their fabric. Issues of practical application are debated in important colloquies between participating states and the International Committee of the Red Cross (ICRC) in its special role as a protective body. The ICRC does not issue private "opinion letters" like a tax agency. Yet alumni of the Red Cross movement recount that the ICRC raises issues with a state party, or passes them by, based on a pragmatic sense of what fits the situation of a particular war. It is not a simple reading of the treaty language, but rather a judgment based on state practice, what states are generally willing to accept, and what makes sense in the context

of a particular conflict. In the more contentious setting of press releases and nongovernmental organization (NGO) reporting, it is sometimes hard to recall the importance of that central relationship. Certainly, a court will have little way of recapturing the flexibility that has permitted Geneva to survive as a template treaty, unless at a minimum it grants some "margin of appreciation" (an international lawyer's phrase for interpretive deference) to the state party's good-faith reading of the treaty, as informed by its colloquy with the IRC.

In the hands of an academic lawyer, for example, the Fourth Geneva Convention on the law of occupation might be read to forbid the replacement of totalitarian institutions in postwar Iraq.[11] But a monitoring agency, such as the ICRC, has instead read the convention in light of its purpose—as a safeguard against the displacement of an existing population—welcoming the construction of new democratic institutions by an occupying power that seeks to restore sovereignty to a formerly captive population. It is hard to know how a court would capture that degree of flexibility—needed in treaties intended to operate as political regimes rather than as unyielding regulatory codes.

Then there are human rights treaties, which have appropriately influenced the interpretation of the law of war. In 1992, the United States ratified the International Covenant on Civil and Political Rights.[12] The United Nations Human Rights Committee, as a treaty-monitoring body, has offered the view that the covenant *tout simple* applies to all actions of a state, including extraterritorial military operations, where any person is under the "effective control" of the state party.[13] Could the Supreme Court enforce the provisions of the cov-

11. David Scheffer, *Beyond Occupation Law*, 97 Am. J. Int'l L. 842 (2003).

12. International Covenant on Civil and Political Rights, Dec. 16, 1966, Art. 41, 999 UNTS 171 (entered into force Mar. 23, 1976).

13. See UN Human Rights Committee, General Comment 31, UN Doc. CCPR/C/21/Rev.1/Add. 13 (May 26, 2004); Concluding Observations of the Human Rights Committee, Israel, UN Doc. CCPR/CO/78/ISR (2003).

enant to regulate overseas military capture and internment? The answer is apparently no. The day after the decision in *Rasul*, the Supreme Court delivered its opinion in *Sosa v. Alvarez-Machain*, limiting civil damages jurisdiction under the Alien Tort Statute and barring direct enforcement of the covenant in U.S. courts. "[A]lthough the Covenant does bind the United States as a matter of international law," said the Court, "the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts."[14] Nor was the Supreme Court willing to conclude that every violation of the covenant should be deemed a violation of customary international law. Even apart from the Senate's reservation concerning non-self-execution, a court might hesitate to disregard the unequivocal position taken by the United States in its diplomacy that the covenant does not apply to offshore military operations regulated by the law of war. Indeed, the Senate might well have withheld its advice and consent to the treaty if the pact's domain of application was so encompassing. The covenant thus does not supply an uncontested source of law.

There is also the important body of "customary" international law—variously called "the laws and customs of war" or "international humanitarian law." It has been applied in the International Criminal Tribunals for the former Yugoslavia and Rwanda as a source of law in civil wars, where there are otherwise few applicable treaty provisions.

Customary law has two necessary elements: widespread practice by states and a general view that the practice should be legally obliging. A state can dispute and stand outside a customary law regime by protesting as a "persistent objector." If customary law is applied to a new domain (e.g., an unprecedented kind of warfare), a state might offer a similar objection.

14. *Sosa v. Alvarez-Machain*, 124 S. Ct. at 2739, 2767 (2004) (opinion of Justice Souter).

To enforce customary law under statutory habeas corpus, a federal court would first have to conclude that customary law ranks as a "law of the United States" within the meaning of the habeas statute. This is a surprisingly problematic claim. Customary international law has not been established as a basis for suit under the parallel provisions of "federal question" jurisdiction in 28 U.S. Code, section 1331.[15] In *Sosa*, the Supreme Court looked at the 1789 Alien Tort Statute (28 U.S. Code, section 1350) which provides civil recovery for "a tort . . . committed in violation of the law of nations." But even with that specific grant of jurisdiction, the Court concluded that the law of nations should be made actionable only with great caution. Justice Souter, writing for the Court, suggested that the parallel federal-question jurisdiction would likely not extend to customary law claims.[16] Though Justice Souter did not draw the point, his conclusion carries obvious consequences for customary international law claims under 28 U.S.C. 2241 as well. Justice Scalia also recalled the Supreme Court's late nineteenth-century holding that "'the general laws of war, as recognized by the law of nations' . . . involved no federal question."[17]

15. See 28 U.S.C. 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."). See also Andrew Baak, *The Illegitimacy of Protective Jurisdiction over Foreign Affairs*, 70 U. CHI. L. REV. 1487 (2003); and Curtis A. Bradley, *Customary International Law and Private Rights of Action*, 1 CHI. J. INT'L. L. 421 (2000).

16. Justice Souter wrote for the *Sosa* Court as follows:

> Our position *does not* . . . *imply* that every grant of jurisdiction to a federal court carries with it an opportunity to develop common law (so that the grant of federal-question jurisdiction would be equally as good for our purposes as § 1350 [the Alien Tort Statute]. . . . Section 1350 was enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations; and *we know of no reason to think that federal-question jurisdiction was extended subject to any comparable congressional assumption*.

Sosa v. Alvarez-Machain, 124 S. Ct. at 2765, n. 19 (emphasis added).

17. See Opinion of Justice Scalia (writing also for Chief Justice Rehnquist and

The political branches have a central role in framing customary law. In *The Paquete Habana* in 1900, the Supreme Court famously wrote that customary law can be applied by the federal courts as a part of American law, but only where there are no "controlling acts" by the political branches.[18] This does not mean that courts would willingly yield to an open disregard of the law by a political branch, and the *Paquete Habana* Court did not say whether all political acts are "controlling." But the courts have credited the considered view of the political branches as to what customary law requires. One might recall the episode of the Mariel Cubans. During the Carter administration, Fidel Castro emptied his jails and dispatched the

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Justice Thomas, concurring in part and concurring in the judgment), in *Id.* at 2770:

> The nonfederal nature of the law of nations explains this Court's holding that it lacked jurisdiction in *New York Life Ins. Co. v. Hendren*, 92 U.S. 286 (1876), where it was asked to review a state-court decision regarding "the effect, under the general public law, of a state of sectional civil war upon [a] contract of life insurance." *Ibid.* Although the case involved "the general laws of war, as recognized by the law of nations applicable to this case," *ibid.*, it involved no federal question. The Court concluded: "The case, . . . having been presented to the court below for decision upon the principles of general law alone, and *it nowhere appearing that the constitution, laws, treaties, or executive proclamations, of the United States were necessarily involved in the decision, we have no jurisdiction*."

Id., at 287 (emphasis added).

18. As Justice Horace Gray wrote:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and *no controlling executive or legislative act* or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is. *Hilton v. Guyot*, 159 U.S. 113, 163, 164, 214, 215.

The Paquete Habana, 175 U.S. 677, 700 (1900) (emphasis added).

sometimes violent prisoners to the United States in a Caribbean flotilla. The Court of Appeals for the Eleventh Circuit concluded that the decision of the executive branch to intern the Mariel Cubans was a controlling act that defeated any attempt to apply customary international law in favor of their release.[19] The recent decision in *Sosa* is instructive as well. *Sosa* pointed to Congress's controlling voice vis-à-vis the courts in matters of customary law. Noted the Supreme Court: The Congress "may modify or cancel any judicial decision so far as it rests on recognizing an international norm as such."[20]

In the setting of armed conflict, even the name to be given to the field of customary law is contentious. It is sometimes called "the laws and customs of war," emphasizing the central role of the practice and opinions of states. It is also called "international humanitarian law," highlighting that a formal state of war is not required for its application and connoting a relationship to human rights law. Customary law may change over time, in light of changing state practice and accepted analogies to treaty norms. There is no international legislature to adapt customary law. Rather, as commentators have often noted, a state may (in the eyes of some) seek to extend the law in order to change it. The changing nature of customary law may be one of the reasons why the valiant attempt of the ICRC to prepare a "restatement" of the customary law of armed conflict has been delayed for nearly a decade. The political branches retain a central role in determining how customary law should be modified, and when a distinctive American view of customary law should be advanced, even though other state parties may not agree. Customary law has been shaped in large part by the constitutional powers entrusted to the political branches, especially in the conduct of war. The Constitution endows Congress with the power to "define and

19. *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir. 1986). Compare *Clark v. Martinez*, 125 S. Ct. at 716 (2005).

20. *Sosa v. Alvarez-Machain*, 124 S. Ct. at 2765.

punish offences against the laws of nations."[21] The president is charged, as commander-in-chief, with the responsibility to conduct military operations and to punish violations of the laws of war by American troops and the adversary.[22]

There is also the challenge of "finding" the law. Much of customary military practice is captured in operational orders, rules of engagement, and military manuals, yet many countries decline to publish even their manuals. In peacetime, state practice can often be discerned only by collecting recorded incidents and demarches from the files of legal advisers' offices around the world. The published series on "United States Practice in International Law" is an important source for the American view of customary law, but few countries have a comparable recital of their state practice. *The Paquete Habana* can be read as saying that the executive's view of the content of customary law should be given controlling weight by the courts, because of this distinctive problem in "finding" the law—a problem that does not attend ordinary statutory and constitutional adjudication. The judicial caution of *Paquete Habana* also prefigures the Supreme Court's modern view of "political questions"—in some circumstances, the courts will defer because a choice has been committed to another branch or because a government cannot afford to speak with discordant voices.

Courts often rely on scholarship as a secondary source in unfamiliar areas of the law. But here too there are hazards. Few professors have diplomatic or military experience. The moral vocation undertaken by modern law schools is a worthy thing, but it can, as well, lead scholars away from a sober account of state practice to a statement of what they would like the law to be. Advocacy scholarship, from either side, cannot necessarily be relied upon for an account of the operational code of states.[23]

21. U.S. Const., Art. I, Sec. 8.
22. U.S. Const., Art. II, Sec. 2.
23. One may note the mordant view of Judge Jose Cabranes in *United States v.*

A habeas writ can also look to statutory law. Congress has been notably silent during the several years since September 11 on some of the most difficult issues. The House and Senate have approved changes to criminal law and intelligence law and provided oversight hearings after the scandalous abuse of Iraqi prisoners at Abu Ghraib. But the Congress has not attempted, as of yet, to provide a complete or "reticulated" code for the conduct of military or intelligence operations in the war against al Qaeda terrorism. The Court can look to the Uniform Code of Military Justice (UCMJ), approved by the Congress as the basis for courts-martial. But the UCMJ has a careful savings clause that recognizes and defers to the president's authority to use other forms of military tribunals, including military commissions, to exercise the nation's powers of prosecuting a war. The Congress deserves some attention, even by the Supreme Court, as an alternative source of safeguard, for even Congress's acquiescence may signal a substantive view. Checks and balances are distributed among three branches of government, and the Congress could have been asked by interested parties to extend the statutory writ of habeas corpus beyond its customary domain or to legislate on the subject of wartime captures. One question for political theorists will be whether the Supreme Court's recasting of remedies in *Rasul* has, in some measure, trenched upon the legislative and oversight role of the Congress.

In applying the Supreme Court's ruling in *Rasul*, federal courts will, at a minimum, need to be aware of their limitations in seeking to draw upon these intricate sources of law, especially in the minefield of military operations. The courts have no power to bind foreign adversaries. Courts do not fight wars and cannot issue binding orders

Yousef, 327 F.3d 56, 101–2 (2nd Cir. 2003): "Some contemporary international law scholars assert that they themselves are an authentic source of customary international law, perhaps even more relevant than the practices and acts of States. . . . [This assertion] may not be unique, but it is certainly without merit."

to al Qaeda. The contentious wartime problems of reciprocity, reprisals, and deterrence are one of the primary reasons for deference to an executive's interpretation of international law.

And then there are the desperate problems of asymmetry and perfidy. An opponent on the battlefield or in the shadows of a guerrilla war may try to take advantage of the law-mindedness of a democratic state in order to gain a fatal advantage. An opponent may use white flags of surrender with the misleading intent of surprise. Or he may force civilians to serve as shields in a battle area to prevent the other side from firing back. He may store his weapons or position his snipers in a mosque or church, holy places that are supposed to be protected in war. He may masquerade as a civilian, attempting to use the protected status of civilians as a method of surprise in the deployment of weapons of mass destruction. The cynical exploitation of humane standards—using the other side's forbearance as a way of gaining an advantage—poses a grave problem for democracies that wish to maintain moral conduct in war. In a democracy, wars are fought by citizen soldiers, whose lives are also valuable. Soldiers share the minimum claims of any human being. One reason why the Geneva tradition has conditioned some privileges upon the lawful status of a combatant is precisely to maintain an incentive system for an adversary—to persuade him to conduct warfare according to the standards of humanity.

Judges should notice as well the retrospective nature of treaty regimes, adapted to new exigencies through the interpretive practice of the executive branch. Treaties are renegotiated after a conflict is over, not while a war is on. The Western democracies have been called upon before to fit war's regulatory rules to new circumstances, by interpretation and distinction, as well as by amendment. Adapting the laws of war in the face of unprecedented challenges has depended upon sensible judgments that most often must be made by the president.

In the Second World War, for example, the trial procedures used by the Nuremberg Tribunal were in tension with the requirements of Articles 63 and 64 of the 1929 Geneva Convention on Prisoners of War. The Nuremberg trials were key in establishing the accountability of the Nazi leadership and advancing the political reconstruction of Germany. To proceed with the trials, despite the treaty, the Allies were put to argue that the unconditional surrender of a belligerent state placed its leaders in a different category from wartime captures.[24] So, too, the postwar rebuilding of Japan and Germany was arguably in tension with the rules of the 1907 Hague Convention. But the collapse of the Axis, argued the Allies, created the legal condition of *debellatio*—or total defeat—to which Hague occupation law could not apply. These lawyers' arguments were designed to advance a postwar regime that would help the world recover from a disastrous war. It is not clear, though, whether these distinctions would have enjoyed unanimous agreement among any nation's judiciary.

In the present circumstances, it is crucial to design procedures that take into account the need to protect intelligence sources, while providing a sound method of ensuring that innocent persons are not swept up in wartime operations. Though the executive branch took some time in creating a comprehensive administrative law framework, it now has in operation three separate kinds of hearings. The first are identity hearings, designed to reconfirm whether someone was involved on the battlefield as a combatant.[25] These hearings are an additional safeguard beyond prior ongoing administrative screening devices.[26] They are designed to allow a detainee to call witnesses of

24. See Anthony Carter and Richard Smith, Sir Gerald Fitzmaurice and the World Crisis: A Legal Adviser in the Foreign Office, 1932–1945, at 599–609 (2000).

25. Order Establishing Combatant Status Review Tribunal, Memorandum for the Secretary of the Navy, July 7, 2004, available at http://www.defenselink.mil/news/Jul2004/d20040707review.pdf.

26. Briefing by Paul Butler, Principal Deputy Assistant Secretary of Defense for

his own, to present reasonably available information from his family and home country, to have the assistance of a military officer, and to see and confront, directly or through his representative, the government's classified information. Though they are not called Article 5 hearings under the Geneva Conventions, the three-officer tribunal would satisfy Article 5's requirement of a "competent tribunal" for the determination of an alleged combatant's involvement. The tribunals have not been invited to revisit the president's determination that al Qaeda and Taliban fighters do not qualify as lawful combatants under the Geneva Conventions. But even in a conventional war, this deference to the treaty interpretation of the commander-in-chief would be applied. One would not wish each panel of majors and colonels to offer variant readings of the same treaty. Although a lawyer is not provided for the identity hearings, the Geneva Conventions do not call for a lawyer in these circumstances.

There are also quasi parole hearings, to be held at least once a year, to determine whether a combatant is still dangerous or could safely be released.[27] Under both the Geneva Conventions and customary law, a captured combatant can be detained until the end of active hostilities. In the ongoing war against al Qaeda, it is hard to apply that standard in an ordinary way, since the war may be long in duration. Hence, the dangerousness hearings are designed to see if we can declare that a particular person's war was over, because he

Special Operations and Low Intensity Conflict, and Army Major General Geoffrey D. Miller, Commander, Joint Task Force Guantanamo, February 13, 2004, transcript available at http://www.defenselink.mil/transcripts/2004/tr20040213-0443.html. See also "Existing Procedures," described in Administrative Review Procedures for Enemy Combatants in the Control of the Department of Defense at Guantanamo Bay Naval Base, Cuba, Deputy Secretary of Defense Order OSD 06942-04 (May 11, 2004), available at http://www.defenselink.mil/news/May2004/d20040518gtmo review.pdf.

27. Administrative Review Procedures for Enemy Combatants in the Control of the Department of Defense at Guantanamo Bay Naval Base, Cuba, Deputy Secretary of Defense Order OSD 06942-04 (May 11, 2004).

has convincingly shown that he would not engage in further conflict. These hearings have sometimes resulted in false negatives—five or more persons released have reportedly returned to fighting in Afghanistan and elsewhere. Nonetheless, the intention is to mitigate the potential harshness of a war in which a nonstate terrorist network has sworn to perpetually target Americans, Christians, Jews, and dissenting Muslims, regardless of their status.

The third hearings are criminal trials before military commissions for the war crimes committed by members of al Qaeda and the Taliban.[28] The procedural safeguards of the commissions seek to preserve fundamental guarantees of the common-law system.[29] These include proof beyond a reasonable doubt, burden of proof on the government, the disclosure of exculpatory evidence, the assistance of counsel, the right to confront witnesses either directly or through counsel, the right to call defense witnesses, and the right to an appeal to a panel of distinguished judges. The appellate judges include Judge Griffin Bell, a former attorney general of the United States and former judge of the U.S. Court of Appeals for the Fifth Circuit, and William T. Coleman Jr., a former secretary of transportation in the Ford administration. The commissions' procedural rules were framed with the advice of leaders of the bar, including former Nuremberg prosecutor Bernard Meltzer and former White House counsel Lloyd Cutler.

It is worth noting that the tribunal procedures meet the requirements of Article 72 of the 1977 First Protocol Additional to the Geneva Conventions (a protocol that the United States has chosen not to ratify). As in the 1929 Geneva Convention, Article 102 of the

28. Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 F.R. 57833 (Nov. 16, 2001).

29. Military Commission Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, available at http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf.

1949 Geneva Convention provides that a lawful combatant should have his appeal determined by the same courts under the same procedure as a citizen soldier. But the members of al Qaeda and the Taliban are justifiably disqualified as lawful combatants, due to their organizations' consistent violation of the laws of war as well as al Qaeda's status as a nonstate terror network. It is also worth recalling that under the Uniform Code of Military Justice, even American soldiers can, theoretically, be tried under military commissions for war crimes, although as a matter of policy, courts-martial are used instead.[30]

Modern democratic states have played a key role in the development of the laws of war—both the issues of *jus ad bellum* (when war is permitted) and *jus in bello* (how war can be fought). The process of attempting to curb the harshness of war by applying rules of humanity is not a simple one. As noted above, there are treaty frameworks, but they are usually negotiated after a conflict is over to fit the last war. There is customary law, but it is a form of obliging custom that is in a constant process of change and to which states can make objections. There is a controversial category called *jus cogens*, or peremptory law, embracing a handful of norms binding on states, regardless of consent—but the membership and existence of this category has been disputed. There is the Martens clause, a natural law cousin of the Ninth Amendment of the U.S. Constitution, stating that even in the absence of an enumerated code to govern particular problems, some principles of humane conduct should apply.[31] There

30. Constitutional guarantees of due process are also directly applicable to citizen-soldiers.

31. International lawyers are less inclined to take alarm from the absence of a treaty instrument than domestic lawyers may be because of a nonpositivist view that some minimum standards must apply regardless of the absence of a written code. The Martens clause, ratified by the U.S. Senate as part of the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, 36 Stat. 2277, 1 Bevans 631—has a voice reminiscent of the American Constitution's Ninth Amendment. It

is the long-standing reluctance of states to regulate the conduct of civil wars. The customary law applicable in internal conflicts—or, in the language of the ICRC, in "internal conflicts with an international aspect"—does not embrace every feature of the treaty law applicable to international conflicts. For internal conflicts, treaty law is limited to the basic guarantees of "common" article 3 of the Geneva Conventions (the United States is a state party to this) and the sparing provisions of the 1977 Geneva Protocol II, which the United States has signed but not ratified.

In most international conflicts, the ICRC has played a crucial role as a monitor under the Geneva Conventions, substituting for the role of protecting powers and third-party states. The ICRC is granted the right of access to places of detention and, in turn, is tasked to give confidential advice to the belligerents. In a real sense, the ICRC serves as an ombudsman for the military commander, reporting news that his subordinates might prefer to ignore. It is for this reason that the U.S. government contributes one-quarter of the organization's operating expenses, and would contribute more if the organization permitted. Any historian of the ICRC will note the committee's occasional temptation to indulge in public statements of moral equivalence—in order not to alienate one particular side and lose access. In addition, in recent years, the ICRC has felt increasing pressure

famously reads as follows:

> Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

The Martens clause was meant to preclude any claim of heedless license and to ensure a minimum standard of respect for persons who are hors de combat. But it does not, as such, incorporate or anticipate every rule of the 1949 Geneva Conventions or any other domain-specific treaty.

from donors and some staff members to act in the public mode of ordinary nongovernmental organizations—using press releases and public remonstrances, rather than confidential advice. But experienced ICRC personnel recount that one important way the ICRC has adapted the law to new circumstances of warfare is by treating the treaties as a presumption but not as a procrustean bed. In the setting of trial courts and trial lawyers, this may be a harder result to achieve.

There will be times when the United States differs with the interpretations offered by the ICRC. Some ICRC staff have argued, for example, that the 1949 Geneva Conventions should be read "seamlessly" to cover all cases that could arise in wartime, leaving nothing to customary law. One contestable claim has been that a combatant who does not qualify as a prisoner of war under Geneva III must therefore be treated as a "civilian" under Geneva IV. This is lacking in common sense, since unlawful combatants would gain greater privileges through their unlawful behavior, and Sir Adam Roberts has noted the difficulty of any use of the ICRC role to extend the law beyond its domain.[32] But the point remains that the workability of

32. Sir Adam Roberts, the Montague Burton Professor of International Relations at Oxford University, has remarked upon the problem of confusion between the ICRC role of monitoring and its newer inclination to expand the law. See "The Laws of War in the War on Terror," 32 *Israel Yearbook on Human Rights* 193, 243 (2002):

> This war [in Afghanistan] occasioned a greater degree of tension between the US on the one hand, and international humanitarian and human rights bodies on the other, than any of the wars of the post-Cold War period. The handling of certain laws-of-war issues by the ICRC and various other humanitarian organisations left much to be desired. . . . [T]hey were on legally dubious ground when they pressed the US to view detainees as being entitled to be PoWs, and in their insistence that if they were not given PoW status then they must be classed as civilians. . . . Overall, the stance of such bodies, while leading to certain useful clarifications of US policy, may also have had the regrettable effect of reinforcing US concerns (well publicised in debates about the

the Geneva regime depends on an adaptive interpretation that may fall outside the "law only" powers of a domestic court.

The necessary interplay between humanitarian principles and practical experience is one reason why judge advocates general are sent into the field with military commanders to address problems in a practical way. It is why, at times, there may be some differences in view between the ICRC and national militaries—for nations must assume that the law is not always self-executing and governments are charged with the active defense of vulnerable populations. One may wonder whether the federal courts are prepared to take over this task of grit and realism, to adapt treaty principles and write rules of engagement for an unprecedented kind of war where the survival of civilians is so desperately in issue. Certainly, the province of courts in issuing a writ of statutory habeas corpus—to test whether a detention satisfies the "laws or treaties of the United States"—would not seem to authorize the Court to disregard the evolution of state practice and the law-making role of its own political branches.

Nonetheless, as a social scientist, one can see why the Supreme Court was likely to act in the setting of June 2004. Some have pointed to the Court's committed sense of relevance. Both the executive and the Congress have taken momentous decisions in the first three years after September 11, 2001. The Supreme Court had been spared any occasion to rule upon central legal issues arising from the war, and some longtime observers predicted that the justices would want to have a role. The second impetus was the justified public outcry at the abuses of Abu Ghraib and the mistreatment of a number of civilians and combatants detained in the Iraqi war. News stories about

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International Criminal Court) about zealous international lawyers standing in unsympathetic judgement of the actions of US forces.

See also Adam Roberts, "What Is a Military Occupation?" 55 *British Yearbook on International Law*, 249, 302 (1984) ("Both the ICRC and the United Nations have on numerous occasions asserted the applicability of international humanitarian law to particular situations, irrespective of the issue as to whether they count as international armed conflicts and/or occupations.").

the events in Iraq and concern about any possible similar practices at Guantanamo framed the public mood while the Court drafted its opinions. The Congress and the military undertook investigations, which are still ongoing, and the uniformed military has shown a willingness to discipline its own ranks. The Supreme Court has no modern practice of holding cases over until a following term and, thus, could not see how the matter unfolded in the remedial response of the other two branches of government.

The third influence on the Court was the disclosure of Office of Legal Counsel memos that took an unwarranted view of executive power. It is one thing to debate the extent to which the law of war is justiciable. It is another matter entirely for a government lawyer to inform the executive that there are no limits at all that deserve attention—whether in treaty law, customary law, human rights standards, or the core commitments of the Martens clause. In February 2002, President Bush publicly committed the United States to the humane treatment of all persons captured in the war on terrorism, including members of al Qaeda and the Taliban.[33] The president also pledged the application of the principles of Geneva wherever possible in the fight against al Qaeda.[34] But an August 2002 memo of the Office of the Legal Counsel[35] took a casual and distorted view of the applicable standards of the Torture Convention and has now been officially rescinded. The memos certainly gave decision makers an incomplete account of the law and did not report variant legal views taken by other departments and other governments.[36] The Supreme Court may have felt impelled to step in, to reassert that there is some law

33. Ari Fleischer, White House Spokesman, Special White House Announcement Re: Application of Geneva Conventions in Afghanistan, Feb. 7, 2002, at LEXIS, Legis Library, Fednew File.

34. *Id.*

35. Standards of Conduct for Interrogation under 18 U.S.C. 2340–2340A, Memorandum for Alberto R. Gonzales, Counsel to the President, Aug. 1, 2002.

36. See Ruth Wedgwood and James Woolsey, *Law and Torture*, WALL ST. J., June 28, 2004.

applicable to our conduct abroad, even if it should fall within executive competence.[37]

Mr. Dooley once observed that the Supreme Court follows the election returns.[38] In a modern age of media, it is a rare judge who can abstain from reaction to public concerns or an immediate moral crisis. The psychological posture of a judge, as Jerome Frank might have remarked, is inevitably influenced by the public conversation. The divisions in American society, and criticism from Europe, unsurprisingly might have an effect on human judges.

But one of the cautions against an overambitious theory of jurisdiction is precisely the fact that on some issues there may be no settled rules to apply. This is not a nihilistic claim of lawless space—indeed, the imprudent and dismaying argument that there are no legal principles that should ever constrain American power is precisely the point of view that tempts a court to act. But the federal courts have never taken the primary role in developing the law of armed conflict, and no developed body of rules fits all the dilemmas of this new type of warfare. The Swiss government, as depository of the Geneva Conventions, has implicitly acknowledged this problem, convening several conferences to discuss whether to seek a new treaty instrument for the war against catastrophic terrorism.

In creating a limited remedy to address the question of mistaken identity, the Court has not blockaded the laws of war. In the companion case of a Saudi-American citizen, Yaser Hamdi, Justice O'Connor offered a plurality opinion suggesting that questions of combatant identity can be ascertained through the procedures of military tribunals, including the use of hearsay evidence.[39] But the Court should stop and think before considering further predictable pleas to assume control of the many other complicated questions of military captures, including the qualification of unlawful combatants and the

37. Compare the views of Justice Jackson, supra note 8.
38. Finley P. Dunne, Mr. Dooley's Opinions 26 (1901).
39. *Hamdi v. Rumsfeld*, 124 S. Ct. at 2633 (2004).

release of persons found to be no longer dangerous. The role of Guantanamo as an offshore operating base in overseas refugee crises also might be of passing interest to judges in recasting the scope of a remedial writ.

The Supreme Court may be inclined to maintain a type of "strategic ambiguity" on questions of review, in order to summon the executive branch and Congress to appropriate moral attention. But a judge should hesitate, and hesitate again, before assuming the conduct of a war in some new form of "managerial judging." Mindful of America's historic concern about fairness to all individuals and commitment to procedural regularity, a judge must also acknowledge a democratic government's abiding duty to protect civilians from catastrophic harm at the hands of a ruthless adversary. Ultimately, the propriety of American government and our country's conduct in the world depend upon the alertness of a democracy and the attention of its electors, as well as the quality of its judges.