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## Chapter Three

### **SECURITY, CIVIL LIBERTIES, AND HUMAN RIGHTS: FINDING A BALANCE**

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The 9/11 terrorist attacks led Americans to re–examine their commitment to the Geneva Conventions, the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment of Prisoners, and even the United States Constitution. We live in a moment in history when we shall be judged by how well we handle the balance between safety and human rights at home and abroad. It seem that respect for international human rights and civil liberties cannot be ensured until we ensure our safety. However, such a two–step approach does not apply in such a simple fashion here. We cannot first simply secure our safety and then secure the civil rights of others and ourselves. Often, respect for civil liberties actually *enhances* security. In the case of aliens, it is also not clear that ignoring the Geneva Conventions will increase United States security. A burden of proof lies on those who hold that security rights need to be at the expense of innocent citizens. I will argue that the best security polices are those that protect the civil rights of aliens *and* American citizens.

“An injustice anywhere, Martin Luther King, Jr. once said, is a threat to justice everywhere.” So we must ask whether current United States laws and polices are making the world more or less just. Through the Patriot Act and the Department of Homeland Security’s mandates, the United States Constitution has been weakened. In the current climate, a case can also be made that the Geneva Conventions are being ignored.

Let us review a little history. The Geneva Conventions, dating back to 1864, were to provide written universal laws protecting victims of armed conflict. They were to be multilateral and open to all states, allowing for medical personnel to help the wounded. They were due to the vision of Henry Dunant, who was distraught after seeing the suffering caused by the battle of Solferino. He was committed to the idea that the war injured from both sides should be helped. He worked to establish an international agreement for the protection of medical workers, resulting in the International Committee of the Red Cross (ICRC). Stopping there, he wanted a convention recognizing the importance of protecting medics who helped during times of conflict. The Swiss government offered to host a conference at which representatives of twelve states signed the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, (Convention I). Since then, numerous articles have been added to extend this first nucleus humanitarian right.<sup>1</sup>

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<sup>1</sup>J. Henry Dunant, *A Memory of Solferino*, (Washington, D.C.: The American National Red Cross, 1939), [http://www.icrc.org/WEB/ENG/siteeng0.nsf/htmlall/p0361?OpenDocument&style=Custo\\_Final.4&View=defaultBody2](http://www.icrc.org/WEB/ENG/siteeng0.nsf/htmlall/p0361?OpenDocument&style=Custo_Final.4&View=defaultBody2)

The Bush Administration has taken exception to the Geneva Conventions due to the unique nature of twenty-first Century terrorism. Human rights groups have called the Bush Administration arrogant, stating that Bush cannot pick which international laws he will follow and which he will not. Much of the world is dismayed by a perceived cavalier attitude regarding the Conventions. The Bush Administration maintains the current fight is an exceptional type of war; thus the situation is more complicated than in past wars, so that legitimate reasons exist for bypassing the Conventions. Without rejecting the application of the Conventions in general, they argue that Al Qaeda has committed acts horrendous enough to disqualify them from the protections of the Geneva Conventions.

Al Qaeda declared a holy war on the United States and then targeted non-combatants, consequently violating Geneva Convention IV, relative to the Protection of Civilian Persons in Time of War. Additionally, the fact that it does not conduct its operations in accordance with the laws and customs of war does not, according to specific articles of Geneva Convention III, relative to the Treatment of Prisoners of War, justify the Bush Administration's position that members of Al Qaeda and the Taliban do not merit prisoner of war (POW) status.<sup>2</sup> It may be said that whether the Bush Administration has ignored the Geneva Conventions depends on how these articles are

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<sup>2</sup>Burns H. Weston, Richard A. Falk, and Hilary Charlesworth, *Supplement of Basic Documents to International Law and World Order*, (St. Paul: West Group, 3rd ed., 1997), pp. 169–179. See specifically the Geneva Convention Relative to the Treatment of Prisoners of War, Article 4A(1–3), Article 5, Article 130.

interpreted. But in this case strategic and geopolitical considerations color the interpretation.

The Bush Administration has been inconsistent regarding its willingness to adhere to the Geneva Conventions. In February 2002, President Bush declared that the United States would apply the rules of the Geneva Conventions to Taliban soldiers captured during the war in Afghanistan, but would not afford the same recognition to members of the Al Qaeda terrorist network. The Administration determined that the Taliban were fighting for the former Afghanistan government, and so, the Geneva Conventions would apply. However, the Al Qaeda fighters were viewed as rogue terrorists and thus not entitled to the protections of the Conventions. Yet, in a somewhat twisted logic, the administration said that both the Taliban and Al Qaeda detainees would be treated humanely as specified by the Geneva Conventions while not being classified as POWs. It is difficult to understand how the Bush Administration could claim that the Geneva Conventions would apply to the Taliban while simultaneously claiming that members of the Taliban should not be treated as POWs. It is unclear how the Bush Administration could justify selectively picking and choosing pieces of the Geneva Conventions that would apply to Taliban fighters and still claim to be honoring the Conventions. So far, the Administration has only stated that the apparent logical inconsistency is based on the fact that the War on Terror is an unprecedented war.

The geopolitical reasons behind these decisions are illuminating. The Bush Administration does not want detainees to be designated as POWs because, if it did, there could be no interrogation interviews. Prisoners would only be required to state their

name, rank, and serial number. By not designating detainees as POWs, the Bush Administration can question the detainees for an indeterminate amount of time. Another point for not giving detainees POW status is that it offers the administration greater flexibility since they have of option of not repatriating the detainees even if “the war” is over.<sup>3</sup>

If anyone peruses the memos addressed to the White House from the White House Council, it becomes apparent that the Bush Administration was anticipating trouble justifying why they would not be offering the Taliban protection under the Geneva Conventions. Colin Powell sent a memorandum to Alberto R. Gonzales, the Council to the President, and Condoleeza Rice, Assistant to the President for National Security Affairs, on 26 January 2002. In an attachment to the memorandum, this argument was given:

The Memorandum should note that any determination that Afghanistan is a failed state would be contrary to the official U.S. government position. The United States and the international community have consistently held Afghanistan to its treaty obligations and identified it as a party to the Geneva Conventions. The Memorandum should note that the OLC [Office of Legal Counsel] interpretation does not preclude the President from reaching a different conclusion. It should also note that the OLC opinion is likely to be rejected by foreign governments and will not be respected in foreign courts or international tribunals which may assert jurisdiction over the subject

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<sup>3</sup>Richard A. Serrano, “Response to Terror; U.S. Will Apply Geneva Rules to Taliban Fighters,” *Los Angeles Times on the Web*, February 8, 2002, <http://www.latimes.com>

matter. It should also note that OLC views are not definitive on the factual questions which are central to its legal conclusions.<sup>4</sup>

Even if the Bush Administration were honoring the spirit of the Geneva Conventions by stating that all detainees are being treated humanely, a look at another memo is illuminating. In a memorandum from Gonzales to the President dated 25 January 2002, Gonzales is planning a response to complaints from critics, anticipating that other countries will balk at the idea of turning terrorists over to the United States or giving the United States legal assistance if it does not honor its obligation to comply with the Geneva Conventions.

In the treatment of detainees, the U.S. will continue to be constrained by (i) its commitment to treat the detainees humanely, and *to the extent appropriate and consistent with military necessity* (italics are mine), in a manner consistent with the principles of the GPW, (Geneva Convention in Relation to Prisoners of War) (ii) its applicable treaty obligations, (iii) minimum standards of treatment universally recognized by the nations of the world, and (iv) applicable military regulations regarding the treatment of detainees.<sup>5</sup>

What is military necessity? Does the possibility of extracting *potentially* useful information from a detainee justify inhumane treatment? Gonzales's rationale appears incompatible with international law. Even if the Bush Administration can find a loophole

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<sup>4</sup>Michael Ratner and Ellen Ray, *Guantánamo: What the World Should Know*, (White River Junction: Chelsea Green Publishing, 2004), pp. 127–128.

<sup>5</sup>Ratner and Ray, *Guantánamo*, pp. 122–123.

in the Geneva Convention to bypass it, does that mean it comes out legally free and clear?

There is also the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment to consider. Part 1, Article 1 states:

For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is having suspected of committing, or intimidating or coercing him or a third party, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>6</sup>

Is the United States in compliance with the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment? The usually neutral and silent ICRC has felt compelled to break their silence and voice its concerns. It has said that if allegations from some of the detainees are true, then the United States may be guilty of war crimes.

What are some of these allegations? There have been many allegations from many detainees. For example, a letter from Shafiq Rasul and Asif Iqbal to Members of the Senate Armed Service Committee alleged that at Khandahar they were questioned by United States interrogators on their knees, in chains, with guns pointed at their heads and

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<sup>6</sup>Weston, Falk, and Charlesworth, *Supplement*, p. 513.

beaten. They were also interrogated in Guantanamo for extended periods of time. The men alleged that it became standard practice to use plastic chairs during the interviews because they were easy to clean off when the detainees relieved themselves during the interrogations. They were not allowed to go to the toilet during interrogations, which could last up to fourteen hours.<sup>7</sup>

Several people who worked at the prison in Guantanamo have reported that prisoners were subjected to harsh treatment. Uncooperative prisoners were stripped to their underwear, with a hand and foot shackled to a bolt in the floor, maximizing the amount of cool air coming from air conditioners (supposedly this was especially difficult for detainees, since most of them have lived in warm climates), playing loud rock music, and using strobe lighting. David Sheffer, a senior State Department human rights official in the Clinton administration and a law professor at George Washington University, said that he believes treating detainees in such a way amounts to satisfying the pain and suffering requirement that is prohibited by the Convention Against Torture.<sup>8</sup>

The Bush Administration could be guilty of yet another international law violation, namely the Martens clause. This clause was adopted from a declaration written by

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<sup>7</sup>Shafiq Rasul and Asif Iqbal, *The Center for Constitutional Rights*, May 13, 2004, <http://www.ccr-ny.org/v2/reports/docs/ltr%20to%20Sentate%2012may04v2.pdf>

<sup>8</sup>Neil A. Lewis, "Broad Use of Harsh Tactics Is Described at Cuba Base," *New York Times* (Late Edition, East Coast), October 17, 2004, p. 1.1, <http://ezproxy.lib.ipfw.edu:2089/pqdweb?did=713958331&sid=1&Fmt=3&clientId=17827&RQT=309&VName=PQD>.

Professor Friedrich von Martens, the Russian delegate at the Hague Convention in 1899.

It was adopted and included in the preamble of the Hague Convention (II) and states:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.<sup>9</sup>

Certainly, members of Al Qaeda have not restricted their activities to those that fall within the parameters of laws (or principles) of humanity and the requirements of public conscience. But what about the United States? The Martens Clause is vague. For example, what is public conscience? Is it majority opinion? If so, then the United States has detained people in such a way that has outraged public conscience. If the majority of opinion does not constitute public conscience, then what criteria should be used? The Geneva Conventions utilize the Martens Clause (common Article 63/62/142/158) in order to make the point that even if a party chooses not to honor the Conventions, they are still

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<sup>9</sup>Rupert Ticehurst, "The Martens Clause and the Laws of Armed Conflict," *International Review of the Red Cross*, 317 (April 30, 1997), pp. 125–134,  
<http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList133/32AEA038821EA35EC1256B66005A747C>

bound by the principles of humanity.<sup>10</sup> The Martens Clause is important to international law because it embodies its spirit, which is to respect human dignity and minimize the catastrophe of war and conflict.

Even if the Bush Administration could make a case for their hit and miss compliance with the Geneva Conventions and the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment, they have still lost a great deal of public good will by undiplomatic comments. For example, one quotation that infuriated many people and probably added fuel to much of the world's frustration with the Bush Administration was given by Defense Secretary Donald. H. Rumsfeld,

. . .who, when he was asked in January 2002 why the Geneva Convention did not apply to the detainees, replied that he did not have "the slightest concern" about their treatment after what they had done. The Economist magazine, hardly an anti-American newsweekly, called Rumsfeld's remarks "unworthy of a nation which has cherished the rule of law from its very birth."<sup>11</sup>

Charges that the Administration is arrogant and acting above the law have come, in part, from quotations such as this one.

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<sup>10</sup>Theodore Meron, *The American Journal of International Law*, 94:1 (January 2000), pp. 78–89.

<sup>11</sup>Richard Cohen, "Lawless in Guantánamo," *Washington Post on the Web*, January 20, 2004, <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&contentId=A30721-2004Jan20&notFound=true>

When John Ashcroft resigned as the United States Attorney General, President Bush nominated his White House Legal Counsel, Alberto Gonzales, to be his successor and has stated in a memorandum for the president that “this ‘new paradigm’ of the war on terrorism ‘renders obsolete Geneva’s strict limitations on questioning of enemy prisoners and renders quaint some of its provisions.’”<sup>12</sup> The defense of that position is that the Geneva Conventions do not apply to members of international terrorist groups or militias. The reasoning is twofold. First, terrorist groups will not follow the rule of law; therefore the United States is under no obligation to follow the laws of war. Secondly, the United States should reward people who do abide by the Geneva Conventions by giving them the same reciprocal special concessions.

One problem with this reasoning is an unstated premise that goes like this: anyone whom the Bush Administration *believes* is a terrorist is, indeed, a terrorist. Clearly, the fact that the Bush Administration *believes* that someone is a member of an international terrorist group or militia, does not mean that a person *is* a member of such a group. The Bush Administration was sure that Iraq had weapons of mass destruction, too. Also, they were convinced that Portland lawyer, Brandon Mayfield, was a terrorist. Given errors such as this, it is easy to conceive the possibility that the Bush Administration could be

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<sup>12</sup>Alberto Gonzales, “Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda the Taliban,” January 25, 2002, <http://www.visaportal.com/downloads/12502memo.pdf?>

making decisions based on either faulty intelligence or a misinterpretation of intelligence.<sup>13</sup>

Secondly, the evidence indicates that America has not been made safer by ignoring treaties such as the Geneva Conventions. Once again, there were reasons for the Bush Administration's decision to bypass the Geneva Conventions.

There was tremendous concern in the interagency process about letting someone go who might come back to haunt us,' Mr. White, the former Army secretary, recalled. The desire to release men who might be innocent, he added, 'was a fairly small upside, compared to the possible downside of misjudging some guy who then goes out and commits some terrible acts.<sup>14</sup>

However, this concern does not justify indefinitely holding potentially innocent people. Does the phrase *inter arma silent leges* (laws are silent amidst arms) apply here? It is ominous to argue that certain laws should be silent during times of war.

The American legal system should be robust enough to stand as it is during times of war. This war on terror has had the utility of bringing certain questions into focus. What

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<sup>13</sup>Richard Cohen, "It's Not the American Way," *Washington Post on the Web*, June 3, 2004, <http://www.washingtonpost.com/wp-dyn/articles/A11253-2004Jun2.html>

<sup>14</sup>Tim Golden and Don Van Natta Jr., "Administration Officials Split Over Stalled Military Tribunals: Tough Justice – Second of two articles: A Policy Unravels," *New York Times* (Late Edition, East Coast), October 25, 2005, p. A1, <http://ezproxy.lib.ipfw.edu:2089/pqdweb?did=723228441&sid=5&Fmt=3&clientId=17827&RQT=309&VName=PQD>

rights do American citizens have? What rights do aliens have? Does it matter if a person is captured on American or foreign soil? Does it matter where the person is detained? The Bush Administration has maintained that anyone they deem an “enemy combatant” should not have certain rights. They have also maintained that the courts should not second guess their decisions on these matters. However, three cases challenging the Bush Administration’s stance made it to the Supreme Court.

First, *Hamdi v. Rumsfeld*. Yaser Hamdi was captured by the soldiers of the Northern Alliance and shipped off to Guantanamo. The U.S. military found out that Hamdi had been born in Louisiana and, thus, was legally a citizen of the United States. Once it was determined that he was a United States citizen, he was sent to a naval brig in Norfolk, Virginia, and classified as an “enemy combatant.” The Bush Administration argued that Hamdi was not entitled to habeas corpus because of his classification as an “enemy combatant.” Hamdi, of course, needed the right of habeas corpus if he was to ever prove that he was not an enemy combatant. Thus he was caught in a vicious judicial circle that would be impossible to escape. However the Supreme Court intervened, agreeing that such a summary procedure violated the Constitution.

Second, *Rumsfeld v. Padilla*. Jose Padilla is an American citizen who was captured at O’Hare International Airport, when he disembarked from a flight from Pakistan. John Ashcroft accused him of plotting to launch a “dirty bomb” in the United States. Thus, Padilla was declared an “enemy combatant” and sent to a naval brig in Charleston, South Carolina. However, Padilla’s habeas corpus petition suffered from a fatal defect on jurisdictional grounds. Essentially, the Supreme Court held that the head of the military

brig in South Carolina, Commander Melanie Marr, not Defense Secretary Rumsfeld, was the person Padilla should have sued. So, Padilla is still in jail awaiting trial because the Supreme Court threw his case out on a technicality.

Regarding American citizens such as Padilla, who are classified as “enemy combatants,” the Cato Institute argues: “If America can no longer ‘afford the luxury’ of the Fourth Amendment, proponents of that view must try to persuade their fellow citizens to amend the Constitution.”<sup>15</sup>

Third, *Rasul v. Bush*. The Supreme Court had to decide whether the federal judiciary has jurisdiction to consider the legality of detainees who are foreign nationals and captured on foreign soil. The Supreme Court ruled that the federal courts do have the right to consider the legality of such detentions. Rasul was interrogated over 200 times by American and British security. He spent twenty-six months imprisoned in Afghanistan and Guantanamo. His situation is similar to two hundred people who have been detained, released and never charged with a crime.<sup>16</sup>

According to the conservative Cato Institute, an ever-present argument justifying some of the Bush Administration’s behavior has been that “non citizens do not have the same rights as citizens.” It points out that the claim that non-citizens do not have the same rights as citizens is both true and false. It depends on which passage is invoked.

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<sup>15</sup>Timothy Lynch, “Power and Liberty in Wartime,” *The Cato Institute*, September 17, 2004, p. 32, <http://www.cato.org/pubs/scr/docs/2004/powerandliberty.pdf>

<sup>16</sup> “LAW OF WAR: Defining the Detainees” (Editorial), *Los Angeles Times*, (November 21, 2004), pg. M2.

Sometimes the Constitution uses terms such as “citizens,” but other provisions use words such as “persons” or “the people” or “the accused.” For example, the Fourteenth Amendment states that, “the right of citizens of the United States to vote shall not be denied or abridged . . .” while the Fifth Amendment states that, “no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . .” Also, the Supreme Court has held that constitutional guarantees generally apply to aliens and citizens, such as the *Wong Wing v. United States* decision that stated that an unlawful alien could not be imprisoned without a writ of habeas corpus.<sup>17</sup>

Regarding enemy combatants in general, the Cato Institute also point out that in addition to the Fourth Amendment prohibition against unreasonable search and seizures, the Fifth Amendment guarantees due process and the Sixth Amendment guarantees a speedy and a public trial. The Bush Administration evaded these Constitutional guarantees by declining to file any official criminal charges. Thus defense council for prisoners have appealed to habeas corpus, often seen as a vital right that protects individual liberty. It is often referred to as the “Great Writ.”

The President has always had less drastic options. One option, if there were not enough evidence to prosecute someone, would be for a suspect can be placed under surveillance. Another option, drastic but nonetheless less so, would be for the President to seek to persuade the Congress to suspend the Writ of Habeas Corpus. The President does not have the right to bypass habeas corpus by merely designating “enemy combatants.”

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<sup>17</sup>Lynch, “Power and Liberty,” p. 37.

The Non-Detention Act, 18 U.S.C. 4001(a) states, “no citizen shall be imprisoned or otherwise detained by the United States except as pursuant to an act of congress.”<sup>18</sup> But even if some of the Administration’s policies did not violate civil liberty or international law, pragmatic concerns remain. It is not clear that these tactics increase American security. The Center for Constitutional Rights has challenged Bush on many of the Administration’s policies, and has been in the forefront of the fight for detainee rights. Their attorney, Shane Kadidal, illustrates once more the need for habeas corpus:

Yaser Hamdi spent two and a half years in detention not on suspicion of committing any crime but rather on suspicion that he might know something—anything—useful to the government. The government was wrong at every stage about the legality of his detention; it’s not much of a reach to think they were probably wrong about whether he had useful intelligence as well.<sup>19</sup>

Unfortunately this case does not seem to be an anomaly. It is not clear that the United States is gathering detainees in the most efficient and effective way, nor that it is going about its intelligence gathering in the most useful way. Rumsfeld had hoped that Guantanamo detainees would provide a valuable source of intelligence. However, this does not seem to be the case. There has been a problem finding experienced analysts, interpreters, and interrogators. According to the *New York Times*, very few (if any)

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<sup>18</sup>Lynch, “Power and Liberty,” p, 34.

<sup>19</sup>“Hamdi Release Proves Need for Access to Counsel And Courts,” *The Center for Constitutional Rights*, (n.d.), <http://www.ccr-ny.org/v2/reports/report.asp?ObjID=QTArOLU0QU&Content=445>

military intelligence officers had any significant expertise on Afghanistan or Al Qaeda.

Also, the caliber of detainees apprehended posed a problem. Lt. Col. Thomas S. Berg, a member of the original military legal team set up to work on the prosecutions, said “it became obvious to us as we reviewed the evidence that, in many cases, we had simply got the slowest guys on the battlefield. We literally found guys who had been shot in the butt.”<sup>20</sup>

The downside of the Administration’s intelligence gathering strategies may be more serious than the monetary, manpower, and moral cost of rounding people up based on country of origin or hauling in whoever was shot in the butt. According to a *Washington Post* article dated 6 October 2004, Army Brig. Gen. Martin Lucenti said that most of the alleged Al Qaeda and Taliban inmates at the U.S. military prison at Guantanamo will be either released or sent to their home countries for further investigations. According to Army Brig. Gen. Martin Lucenti, most of the detainees rounded up in this fashion are either not a big threat or are of very little intelligence gathering value.<sup>21</sup> Thus The United States is perceived by many people to have contravened international law and civil liberties, without gaining any demonstrable increased security benefit.

Some individuals held at Guantanamo for years without being charged with anything may become more radicalized as time goes by, and it is unlikely that they can in fact be

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<sup>20</sup>Lewis, “Broad Use,” p. A1.

<sup>21</sup>John Mintz, “Most at Guantanamo to Be Freed or Sent Home, Officer Says,” *Washington Post on the Web*, October 6, 2004, <http://www.washingtonpost.com/ac2/wp-dyn/A9626-2004Oct5?language=printer>

held indefinitely. The United States must be careful. If the detainees cannot be held indefinitely, the United States must seriously consider the gains by controversial interrogation techniques versus the costs of radicalizing detainees and losing international approval. By taking universal human rights seriously, the United States would be able to reconcile security and human rights more effectively than it has in the post 9/11 era. By respecting international law and human rights for detainees, security might actually be *increased*.

Humanitarian law has a rich and evolving history. *Jus in Bello* (Justice in War) is not a new concept. Throughout history, attempts have been made to put some restraints on actions in times of war and to codify these restraints. The Code of Manu (Law of Ancient Hindus), Law 91, provides that a king who fights his foes in battle should not “strike one who has climbed on an eminence, or a eunuch, nor one who joins the palms of his hands [in supplication], nor one who [flees] with flying hair, nor one who sits down, nor one who says “I am thine...” In 634 A.D., Calif Abu Bakr charged the Muslim Arab Army invading Christian Syria: “Do not commit treachery, nor depart from the right path. You must not mutilate, neither kill a child or aged man or woman...”<sup>22</sup> These are just to title a few of the various theories of *Jus in Bello* throughout history.

By giving the impression that the United States may not take *Jus in Bello* as seriously as possible, the United States may lose credibility in much of the world. The

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<sup>22</sup>Covey T. Oliver, Edwin B. Firmage, Christopher L. Blakesley, Richard F. Scott, and Sharon A. Williams, *Cases and Materials on The International Legal System*, 4th ed., (Westbury, NY: The Foundation Press, 1995), pp. 1257–1258.

United States has historically been seen as a leader in international law and human rights. If it wants to be able to intervene in states with brutal dictators, then it must be as impeccable as possible in its own record of human rights. Otherwise everything the United States says regarding human rights may be seen as mere rhetoric and political correctness. Words like “liberty” and “human rights” should fill people with feelings of respect, hope, and passion. They should not be viewed as empty words devoid of meaning, and only used as a political tool. Many are already cynical. It would be tragic for the United States to squander its reputation as a humanitarian state for the sake of such ineffective policies.

As for the military tribunals, there are reports of inept translations, and there is a lack of independent review outside the chain of command. The international community is rightly concerned about whether the accused can get a fair trial. Unless the United States government presides over fair trials, their outcome will enjoy little respect in much of the international community.

As already noted, the perception that the United States disregards some of the international rules of war can put American troops in danger. If an enemy were only *prima facie* inclined to follow the rules of war, it could become disinclined rather quickly if it appeared that the United States is not following the rules of war.

Again, often all that is gained by aggressive interrogative techniques are false confessions. For example, Asif Iqbal gave interrogators a false confession. After extensive interrogation, he finally admitted that he was, indeed, in the videotape with Osama Bin Laden that the interrogators were trying to tie him to. Later, the British

intelligence found proof that Asif Iqbal could not have been in that video. He had been in England at the time the video was made.<sup>23</sup>

It is known that excessive interrogation techniques often lead to false confessions. Thus any information gathered is of little use to military intelligence. United States officers have been trained to strictly follow the dictates of American and international law. Deviation from such training could endanger United States troops. If the United States soldiers do not honor the Geneva Conventions and the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment, then even if two wrongs do not make a right, they may in fact be less likely to be treated with the protection of POW status. The United States was founded on a respect for human dignity and human rights. This foundation is cherished by many Americans, and respected by much of the rest of the world. It is a foundation that should not be chipped away at. Finally, the robustness of a country's Constitution is not enhanced by *inter arma silent leges*. Indeed, a country grows stronger by showing a strong commitment to the Constitution *during* times of war. The United States Constitution was written to provide checks and balances during times of war and peace. Security will not be obtained through false confessions, increasing worldwide animosity toward the United States, holding detainees incommunicado indefinitely, and so forth. Instead, it is by staying within the parameters of international law and the United States Constitution, that America can best find an appropriate balance between both security, rights, and civil liberties.

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<sup>23</sup> Associated Press, "Britons Once Held by U.S. Claim Brutality," *MSNBC*, August 4, 2004, <http://www.msnbc.msn.com/id/5602003/>