Detaining Them Beyond Our Boundaries:
"Enemy Combatants" and the Quest for a Law-Free Zone

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It is a great privilege to be able to address you on Constitution Day and Citizenship Day, to kick off the Citizenship Center's programs for this year on the theme of "The Boundaries of Citizenship," both literal and metaphorical. I want to discuss what I regard as a great peril to American constitutionalism, and to call for a reinvigoration of citizenship to meet that peril. Indeed, I want to say that we are facing nothing less than a systematic assault on our deepest constitutional values, perpetrated in the name of a "Global War on Terrorism."

I do not use words like "great peril" lightly. We have all heard claims that "the sky is falling," and these claims all too often seem to reflect hysteria and partisanship rather than any sober assessment of the day-to-day reality that we experience. But I am here today to say that the sky ***is*** falling. It just happens not to be falling on ***us***. And it is for that very reason that our constitutional consciences need to be awakened. .

There are many reasons to be concerned about the Bush Administration's exorbitant assertions of Executive powers in response to 9/11. Several of these assertions significantly impair our democratic rights and civil liberties as Americans. But the exercises of power with which I am most concerned fall most heavily, not on us, or our friends, or our neighbors, nor even on visitors to the United States. Rather, the most dramatic and gravest manifestation of the Administration's disregard for the rule of law concerns aliens captured abroad and detained outside the borders of the United States. No one would tolerate the exercises of power inflicted on these detainees were they to befall a loved one, a friend, or a neighbor. Unfortunately, however, these measures may appear tolerable if they apply exclusively to a bounded category of person, fundamentally unlike ourselves.

Thus, the category of "unlawful enemy combatants." These are persons whom we have detained beyond our boundaries – beyond the physical boundaries of the United States, beyond the legal boundaries of the Constitution, beyond the moral boundaries of fundamental decency. The Administration has subjected these detainees to effectively limitless exercises of power, on a theory that while America's power can be projected far beyond its shores, its law-abidingness stops at water's edge.

Let us make no mistake about the stakes here. Where I speak to you today of violations of the Constitution and the rule of law, I am not speaking of discriminatory impositions of inconvenience at airports, the loss of the privacy of our conversations, a chilling of free association and free speech, or the erosion of checks and balances, serious issues though these all are. Indeed, I am not talking simply about violations of the Bill of Rights, much though we should cherish that document.

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I am speaking, rather, about disregard for those rudiments of the rule of law, referenced in the original 1787 Constitution, that are so fundamental that until recently, we scarcely felt the need to discuss them:

* the prohibition against *ex post facto* laws (which would criminalize conduct retroactively);

* the prohibition of bills of attainder (which would cast individual persons or classes of persons into outlawry by fiat); and

* the writ of habeas corpus (which guarantees detainees access to an independent court – the only thing, in the final analysis, that distinguishes arrest from kidnapping).

And ultimately, I am speaking about violations of core human rights, rights involving the physical integrity of the person. I am speaking about abduction, disappearance, secret renditions to the security services of foreign dictatorships, prolonged arbitrary detention, torture, and even murder.[1]

The sky is falling, but it is not falling on everyone. I frequently give talks in the community on these issues, and after one such talk, a member of the audience approached me and asked if I believed that America was becoming a fascist state. Part of me wished that I could have said yes, for if we were facing a comprehensive system of state repression, there would at least be no difficulty in summoning a sense of urgency. In fact, I am not concerned that we are all on the verge of losing our liberties, even if our constitutional protections are in danger of some erosion.

And herein lies the problem. John Locke – whose *Second Treatise of Government* laid the foundation on which the framers built our Constitutional order – foresaw resistance to breaches of the rule of law in two circumstances: "if either these illegal acts have extended to the majority of the people; or if the mischief and oppression has lighted only on some few, but in such cases, as the precedent, and consequences seem to threaten all ...."

What is insidious about the peril we face is precisely the fact that for the most part, it will leave ordinary Americans untouched. Of course, the case of Jose Padilla stands as an illustration that there is no secure boundary between Americans at home and the lawlessness that the Administration inflicts in the name of our security. But his case – appalling though it is – remains an exception, and is most important as a window into the prevailing mentality that does its greatest damage to others elsewhere.

The peril we Americans face is, above all, a moral peril, a peril to the soul of our nation. And it will require nothing less than a mobilization of civic virtue to right our course.

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[1] According to journalist Mark Danner, estimates from 2004 put the number of deaths in detention in Afghanistan and Iraq at between 40 and 50 people. Mark Danner, Interviewed By Dave Gilson, *Mother Jones*, Dec. 7, 2004, available at <http://www.motherjones.com/news/qa/2004/12/12_401.html>.

It also will require engagement with international law. This is not because international law trumps the sovereignty of the United States, or because international law represents a moral sensibility superior to that embedded in American law. Rather, it is because international law represents a solemn commitment on the part of the United States to observe certain minimum standards precisely with respect to those persons who may fall outside the boundaries of domestic legal protection.

International law includes two kinds of protections for foreign nationals. One kind is based on reciprocity, and is predicated on our interest in maintaining the security of our own nationals who come within the power of foreign states. The other kind is non-reciprocal and unconditional, based on the irreducible entitlements of human beings as such. For reasons of both self-interest and national honor, the United States must – whatever its own opinion on the merits – adhere to these norms because they are limitations established by an international legal order in which we participate, most often to our own advantage.

That said, I am not here to give easy answers; quite the contrary. The danger that terrorism poses to public safety is real, and there are valid trade-offs between liberty and security. The solutions to these dilemmas are not obvious. But while all questions in this area are complex, not all questions are close. Contrary to what the President is fond of saying, some responses quite simply need to be "off the table," if we are to maintain our moral identity as a republic that observes the rule of law.

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On September 11, 2001, the United States suffered a devastating attack at the hands of nineteen guys with boxcutters. From that moment to the present, the nation has been at a loss to come to grips with the anomalous nature of the attack. This conceptual crisis does not pertain merely to the informal categories by means of which ordinary people put the attacks and ensuing realities into perspective. It also pertains to the legal framework governing the exercise of power in the wake of the attacks. Whereas previous uses of the term "war" have often been purely rhetorical, as in the "war on drugs" or the "war on poverty," to speak of a "war"on terrorism is to assert specific legal powers, under both domestic and international law.

In the wake of 9/11, even moderate, sensible legal scholars and public officials would have had difficulty finding the appropriate framework to apply. On the one hand, the threat to public safety is immensely greater than that posed by an ordinary civilian criminal conspiracy. Although we can collect evidence and prosecute cases, as we did in response to the first World Trade Center attack in 1993, a purely reactive approach is inadequate. We must try to thwart the next attack before it happens, insofar as that is feasible. On the other hand, unlike in a conventional war, the enemy does not have an overtly identifiable structure. It is not even clear that the enemy is an organization in the ordinary sense; whatever al Qaeda may have been on 9/11, it has since metastasized, so much so that the term now reflects not so much a discrete organization as a common aspiration. We cannot easily ascertain who is and who is not a combatant. Unlike ordinary wars, there is no foreign state that will end up signing a negotiated settlement or an instrument of surrender, so there can be no end date for hostilities.

So, after 9/11, whatever course was going to be taken, some legal creativity was going to be necessary. But there are different kinds of legal creativity. One kind is the creativity that bends legal rules to give effect to their underlying purposes, principles, and policies in new factual circumstances that were not anticipated when the rules were drawn. A second kind of creativity seizes upon new circumstances to call into question the purposes, principles, and policies embodied in existing law.

It was ths second type of creativity that was brought to bear in the Bush II Administration. The architects of the Administration's legal strategy included veteran politicians such as Vice President Dick Cheney, long-time government lawyers such as the Vice President's counsel, David Addington, and legal scholars such as John Yoo, a young law professor on leave from the University of California at Berkeley to serve as the primary authority on foreign relations law and international law in the Justice Department's Office of Legal Counsel. These three, and others with them, brought to this unique situation two significant prejudices, as to which they had long been on record..

First, they regarded international law as an inappropriate encumbrance on U.S. power. Second, they regarded the post-Vietnam and post-Watergate assertions of Congressional authority as an unjustifiable encroachment on – indeed, an enfeebling of – the Executive. Cheney and Addington had both contributed to the Minority Report of the Congressional Committee that investigated the Iran-Contra scandal in the late 1980s, and they argued that Reagan Administration operatives such as Oliver North had been justified in evading Congressional efforts to restrict support for Nicaraguan insurgents. John Yoo was a theorist of Executive Power, and supporter of what is known in the academy as the Unitary Executive Theory, a highly controversial understanding of Presidential authority that asserts, among other things, that Article II vests in the President powers drawn directly from the sovereignty of the United States rather than from the constitutional text.[2]

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[2] The following language of a controversial memo signed by Yoo's superior, Jay Bybee, but known to have been principally authored by Yoo, sets forth the point:

> The Framers understood the Clause as investing the President with the fullest range of power understood at the time of the ratification of the Constitution as belonging to the military commander. In addition, the structure of the Constitution demonstrates that any power traditionally understood as pertaining to the executive — which includes the conduct of warfare and the defense of the nation — unless expressly assigned in the Constitution to Congress, is vested in the President. Article II, Section 1 makes this clear by stating that the "executive Power shall be vested in a President of the United States of America." That sweeping grant vests in the President an unenumerated "executive power" and contrasts with the specific enumeration of the powers – those "herein"– granted to Congress in Article I. The implications of constitutional text and structure are confirmed by the practical consideration that national security decisions require the unity in purpose and energy in action that characterize the Presidency rather than Congress.

The architects of the Global War on Terrorism were not reluctant warriors. They were bearers of radical views, waiting for their chance. They immediately set out to do two things: first, to cherry-pick standards from different frameworks so as to give maximal discretion to the Executive, without accepting the constraints of any framework; and second, to upset settled understandings of the existing frameworks.

Both of these strategies would have enormous consequences for the treatment of detainees. They would, in effect, carve out law-free zones in which War on Terrorism detainees could be subjected to unlimited Executive discretion. By unilaterally designating War on Terrorism detainees as "unlawful enemy combatants," and by placing them in detention centers outside official U.S. sovereign territory, the Administration has sought to place them – both literally and figuratively – beyond the reach of legal protection.

The first piece of legal creativity concerned the Geneva Conventions. If the struggle against al Qaeda is a matter of armed conflict rather than civilian law enforcement, the Administration does not need to observe ordinary standards of due process in taking action against persons associated with al Qaeda. But the law of armed conflict establishes constraints of its own. One, very elaborate set of constraints, applies to international armed conflict. Another, very modest set of constraints, applies to non-international armed conflict. The latter is contained in what is known as Common Article 3 of the four Geneva Conventions of 1949.

Although states parties to the Geneva Conventions were willing to make elaborate reciprocal concessions to other states for the event of interstate war, they were reluctant to surrender their sovereign prerogatives with respect to other conflicts – above all, conflicts within their own territories against domestic insurgents. Still, they did agree in Common Article 3 as follows:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, ... [in regard to p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms ... the following acts are and shall remain prohibited at any time and in any place whatsoever:
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> (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; ...
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> (c) Outrages upon personal dignity, in particular humiliating and degrading treatment;
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> (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial

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Jay S. Bybee, Assistant Attorney General, "Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards for the Conduct of Interrogation under 18 U.S.C. §§ 2340-2340A," August 1, 2002, p. 37.

guarantees which are recognized as indispensable by civilized peoples.

Not only has the United States ratified the Geneva Conventions, but Congress has implemented aspects of the Conventions through domestic legislation, including the War Crimes Act.[3] Until 2006, the War Crimes Act provided that all violations of Common Article 3, whether by or against Americans, were war crimes, punishable in U.S. courts.

Faced with this standard, the Administration took the position that the war against al Qaeda, while an armed conflict not subject to the ordinary standards of peacetime justice, was neither an international nor a non-international armed conflict for the purposes of wartime norms. As a result, the Administration sought to disregard what is understood by international lawyers around the world to be a universal minimum standard, applicable whenever and wherever no more exacting standard is applicable.

Why take such pains to evade so meager a standard? It is one thing to deny al Qaeda detainees POW status – a status that the Administration also sweepingly denied, much more dubiously, to Taliban fighters. But why try to reserve the prerogative to violate basic standards of humane treatment, the general applicability of which the U.S. has never previously questioned?

The reason becomes clearer when the focus shifts to the Torture Convention. The Torture Convention establishes torture as a universal-jurisdiction crime, subject to prosecution in the court of any treaty party, however unconnected to the incident, and without regard to the nationality of the perpetrator or of the victim. Torture is defined as the intentional infliction, other than "incidental to lawful sanctions," of "severe pain or suffering, whether physical or mental, ... by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[4] Once again, not only is the United States a party to the Convention, but Congress has passed a criminal statute implementing it, 18 U.S.C. §§ 2340-2340A.

On August 1, 2002, the Justice Department's Office of Legal Counsel issued one of the most extraordinary legal documents of our time, the so-called Bybee Memo, signed by Assistant Attorney General Jay Bybee, but known to have been written by Prof. Yoo. The Memo is most notorious for the following legal conclusion: In order to amount to torture, physical pain "must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."[5] Extraordinary though that statement is, it is far from the most

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[3] 18 U.S.C. § 2441.

[4] Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment ('Torture Convention'), 10 December 1984, 1465 UNTS 85, 23 ILM 1027 (1984), art. 1.

[5] Jay S. Bybee, Assistant Attorney General, 'Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A,' 1 August 2002 (hereafter 'Bybee Memo'), at 1. The Department of Justice subsequently withdrew the Bybee Memo and rejected specific aspects of its legal analysis, though it declined to repudiate any of the 'conclusions' of contemporaneous Justice Department detainee treatment opinions. Daniel Levin,

troubling aspect of the Memo.

The Memo's title reads, "Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A." That may sound unremarkable, but it is actually shocking. 18 U.S.C. §§ 2340-2340A has absolutely nothing to do with "Standards of Conduct for Interrogation." The statute codifies an international crime, a crime so serious that its perpetrators are regarded as "enemies of humanity," subject to prosecution in any court in the world. The statute does not address any further matters, and does not implement other aspects of the Torture Convention, which include a more general international obligation to prevent cruel, inhuman, and degrading treatment.

The Memo's title suggests – without any conceivable justification – that lawful interrogation is defined by the absence of the codified elements of the international crime. If we need any further proof that this is the intended message, Prof. Yoo's cover letter of the same date purported to address more generally "the legality, under international law, of interrogation methods to be used during the current war on terrorism." It opines that "interrogation methods that comply with § 2340 would not violate our international obligations under the Torture Convention."[6] The Memo thus licenses interrogation tactics falling just short of torture, despite the obvious fact that such tactics would necessarily fall within the Convention's prohibition of "cruel, inhuman, and degrading treatment."

How could Prof. Yoo ignore the prohibition on "cruel, inhuman, and degrading treatment"? Well, see if you can follow this. Back when the Senate consented to the Torture Convention, it attached a reservation to the United States instrument of ratification. The reservation binds the United States to the obligation to prevent "cruel, inhuman or degrading treatment or punishment," only insofar as that term means the treatment or punishment prohibited by the Constitution of the United States."[7] The purpose of the reservation, by all accounts, was to avoid buying into standards of cruel, inhuman, and degrading treatment established in the jurisprudence of the European Court of Human Rights, which is a much more liberal court than the United States Supreme Court. The reservation contains no limitation, express or implied, regarding the geographic scope of our obligation to refrain from cruel, inhuman, and degrading treatment. If you don't believe me, ask the person who originally wrote the language, the Reagan Administration's Legal Advisor, Abraham Sofaer. He says this, as well.

But as it happens, there are Supreme Court precedents that the Administration reads as implying that aliens detained abroad cannot avail themselves of any constitutional rights in U.S.

Acting Assistant Attorney General, 'Memorandum for James B. Comey, Deputy Attorney General, Re: Legal Standards Applicable under 18 U.S.C. §§ 2340-2340A,' 30 December 2004, at 2 n.8.

[6] John C. Yoo, Deputy Assistant Attorney General, letter to Alberto Gonzales, 1 August 2002, available at <http://news.findlaw.com/hdocs/docs/doj/bybee80102ltr.html>.

[7] US Reservations, Understandings, and Declarations (RUDs) upon Ratification of the Torture Convention, available at <http://www.unhchr.ch/html/menu2/6/cat/treaties/convention-reserv.htm>.

courts, including rights against cruel treatment (though that particular issue has not yet come before the Court). So Prof. Yoo and the Bush Administration have drawn the following conclusions: that aliens abroad have no substantive constitutional rights against cruel, inhuman, and degrading treatment, that the U.S. has limited its obligation in this area to compliance with its own Constitution, and that therefore the U.S. has no obligation under the Torture Convention to refrain from cruel, inhuman, and degrading treatment of aliens abroad.

Again, why this torrent of pseudo-legal nonsense? Because creating a law-free zone for the ruthless interrogation of detainees is absolutely central to the Administration's vision for the War on Terrorism. Whereas the laws of war have always distinguished violence on the battlefield from treatment of captured fighters in custody, the Administration understands the interrogation room as an extension of the battlefield, and indeed, as the main battlefield. This is why John Yoo went so far in the Bybee Memo as to say that any Congressional effort to prevent the President from using torture would be unconstitutional:

> Congress can no more interfere with the President's conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield. Just as statutes that order the President to conduct warfare in a certain manner or for specific goals would be unconstitutional, so too are laws that seek to prevent the President from gaining the intelligence he believes necessary to prevent attacks upon the United States.

It is not clear that the Bush Administration currently asserts so bold a theory of Executive power – it continues to send mixed signals – but it is clear that this statement captures the President's vision of the conflict. When the Supreme Court's July 2006 *Hamdan* holding repudiated the Administration's position on the non-applicability of Common Article 3, and thus raised the specter that interrogation methods may have run afoul of the War Crimes Act, the President urgently pressed Congress to amend the War Crimes Act. In one of the more bizarre moments of this or any Administration, the President begin his pitch with the words: "The United States does not torture. It's against our laws, and it's against our values. I have not authorized it – and I will not authorize it."[8] He thereupon called for legislation to ensure the perpetuation of "enhanced" interrogation methods designed by the CIA to break down the resistance of "high-value terrorism suspects."

These methods, which the President declined to describe (for fear of helping "the terrorists learn how to resist questioning"), have been reported to include the following:

> Long Time Standing: ... Prisoners are forced to stand, handcuffed and with their feet shackled to an eye bolt in the floor for more than 40 hours. ...
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> The Cold Cell: The prisoner is left to stand naked in a cell kept near 50 degrees.

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[8] George W. Bush, Press Conference, "President Discusses Creation of Military Commissions to Try Suspected Terrorists," September 6, 2006.

Throughout the time in the cell the prisoner is doused with cold water.

Water Boarding: The prisoner is bound to an inclined board, feet raised and head slightly below the feet. Cellophane is wrapped over the prisoner's face and water is poured over him. Unavoidably, the gag reflex kicks in and a terrifying fear of drowning leads to almost instant pleas to bring the treatment to a halt.[9]

Though the Administration stubbornly refuses to confirm or deny this, the President seemed to be referring to just these when he spoke of the "tough, ... safe, ... lawful, and necessary" methods that now needed to be immunized by new legislation.

Congress responded by giving him what he asked for. Amazingly, it drew its definition of actionable cruel treatment directly from John Yoo's preposterous "organ failure" standard.[10] Since infliction of such bodily injury would probably leave the detainee too debilitated to respond to questioning, the new provision (part of the Military Commissions Act) serves (and indeed, aims) to immunize any method reasonably calculated to extract useful information. Moreover, beyond shielding guards and interrogators from criminal liability, Congress affirmatively and deliberately facilitated the perpetuation of "enhanced" interrogation methods by cutting off detainees from access to the regular courts that might monitor their treatment and by precluding detainees from seeking civil redress for the abuses they suffer.

Congress did manage to declare in the 2005 Detainee Treatment Act that the cruel, inhuman, and degrading treatment standard applies to persons detained abroad, even though that legislation, too, simultaneously stripped the federal courts of jurisdiction to hear detainees' claims of abuse, and immunized perpetrators of cruel methods who had followed bad legal advice in good faith. (I call this the John Yoo defense.) But the President, in signing the Act, issued a "signing statement" indicating that he would ignore the standard to whatever extent he might regard it as inconsistent with "the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief." What this means, no one is permitted to know, let alone challenge in a court of law.

Although the Administration's effort to establish a law-free zone has met with some resistance from the Supreme Court,[11] and increasingly from lower courts and even from military

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[9] Marty Lederman, "CIA 'Enhanced Interrogation Techniques' Revealed," November 21, 2005, available at <http://balkin.blogspot.com/2005/11/cia-enhanced-interrogation-techniques.html>.

[10] The Military Commissions Act specifies the "serious physical pain or suffering" component of the 'cruel or inhuman treatment' punishable as a war crime. That standard is met only by "bodily injury that involves: (i) a substantial risk of death; (ii) extreme physical pain; (iii) a burn or physical disfigurement of a serious nature (other than cuts, abrasions, or bruises); or (iv) significant loss or impairment of the function of a bodily member, organ, or mental faculty." 18 U.S.C. § 2441(d)(2)(D).

[11] The Supreme Court held in *Rasul* in 2004 that Guantanamo Bay is not beyond the habeas jurisdiction of the federal courts, and in *Hamdi* that at least a U.S. citizen held as an enemy combatants

commissions, the fundamentals of the Administration's approach remain in place. Even where the last Congress postured in favor of legal standards, it consistently enabled the disregard of those standards.

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It is bad enough that anyone at all should be subjected to this vision of a new kind of war. But who are the supposed "unlawful enemy combatants" – authoritatively designated by the President and the Secretary of Defense as "the worst of the worst," without even the most cursory individual hearings?

The Administration and its apologists consistently refer to the detainees as having been "captured on the battlefield." The term "battlefield" conjures up images of Gettysburg or Manassas – a discrete place where one would expect to find only those participating in combat. The implication is that the detainees have, by their own actions, forfeited due process.

But it turns out that the Administration uses the term "battlefield" largely as a metaphor. Once again, while the Administration insists on classifying our confrontation with al Qaeda and its associates as a war, it typically in the very next breath insists that this is a war unlike all other wars, and that we must transcend our constrained understandings of what warfare looks like.

According to one study that was based on the Pentagon's own data, only 5% of the Guantanamo Bay detainees were captured by U.S. forces in Afghanistan, with most of the rest having been turned over by Pakistani or the Northern Alliance forces at a time when the U.S. offered large bounties for suspected enemies.[12] The only thing that distinguishes most of the detainees from civilians is someone's claim that they are connected to a terrorist organization – a claim that may be based on hearsay many times removed. Some of the detainees were never anywhere near a site of combat, but were simply abducted, without any legal process or any notice, from countries such as Bosnia, and sent to Guantanamo, or in some cases, to so-called "black sites" in undisclosed third-country locations.

Detainees can now challenge their status before Combatant Status Review Tribunals, created after the Supreme Court's 2004 indications in *Rasul* and *Hamdi* that the "unlawful enemy combatant" designations would not escape review altogether and forever. But the CSRT processes

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"must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker. ... These essential constitutional promises may not be eroded." And even more importantly, it held in *Hamdan* in 2006 that Common Article 3 of the Geneva Conventions does apply to War on Terrorism detainees, and that the President could not unilaterally create a system of tribunals at odds with the minimum standards of Common Article 3, as incorporated into U.S. law by the Uniform Code of Military Justice.

[12] Mark Denbeaux & Joshua Denbeaux, "Report on the Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data," pp. 2-3, available at <http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf>.

are scarcely legal processes at all. There is no defense attorney, no opportunity to call defense witnesses, no opportunity even to know what evidence implicates the defendant, let alone to cross-examine an accuser. And where tribunals have actually ordered the release of detainees, new tribunals have been convened to reverse those rulings. Congress codified the CSRT process in the 2005 Detainee Treatment Act, providing for a limited right of federal court review. The major battle right now, in the *Boumediene* case coming before the Supreme Court, is how limited that federal court review can be. Meanwhile, the detainees have languished in Guantanamo for almost six years without any meaningful test of the evidence for their status as "unlawful enemy combatants."

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Now, one possible response to my expression of alarm and outrage about all of this is simply: "Grow Up." The world is filled with harsh realities not covered in high school civics classes. And indeed, in one sense, there is nothing really so new about any of this. Throughout the Cold War, successive U.S. administrations indirectly perpetrated, or at the very least knowingly facilitated, far worse ruthlessness abroad. Murder and torture were most often carried out a step removed from official U.S. government participation, by foreign state security apparatuses and by foreign insurgent – not to say terrorist – forces that received *materiel* and logistical support from the United States. The Reagan Administration, so widely credited with the promotion of freedom, collaborated with vicious killers in El Salvador, Nicaragua, Guatemala, and Honduras, but also in Angola, in Cambodia (where, almost unbelievably, it supplied anti-Vietnamese insurgents aligned with the genocidal Khmer Rouge), and of course in Afghanistan, where it supplied hard-line Islamist forces, some of whom have now turned on us.

Thus, from the standpoint of some on the Left, outrage over current practices may be taken as a sign of naïveté. If America's hands had seemed cleaner up until now, this is only evidence of American self-deception and hypocrisy.

Be this as it may, it is a favorite expression of human rights advocates that "hypocrisy is the tribute that vice pays to virtue."[13] Hypocrisy does not itself make an action or an actor any better, but as compared with shamelessness, it indicates a more hopeful state of affairs. The need to deny and distance oneself from bad acts manifests the existence of baselines. Perpetrators engage in hypocrisy because they cannot afford to say, "I did it because I could." They fear a real, even if not necessarily decisive, cost if their ruthlessness is exposed for all to see.

Part of what is so distinctive about the Bush II Administration is its shamelessness. It claims legal license to do what past administrations have denied, and it participates directly in activities from which past administrations have sought to sponsor from some remove. This is not an improvement.

Of course, from a different standpoint, on the political Right, outrage about current practices

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[13] Attributed to Duke François de La Rochefoucauld, 1613-1680.

are naive for a different reason: Ruthlessness outside our borders is a requisite for the observance of constitutional values inside. We sleep safely in our beds only because a select few have the moral courage to contemplate the abyss. Faced with a new kind of enemy that knows no limits, we must, in the memorable words of the Vice President, go to "the dark side." As he put it in an interview five days after 9/11:

> It is a mean, nasty, dangerous dirty business out there, and we have to operate in that arena. I'm convinced we can do it; we can do it successfully. But we need to make certain that we have not tied the hands, if you will, of our intelligence communities in terms of accomplishing their mission.[14]

Now, most human rights advocates categorically dismiss the Vice President, on the ground that the end can never justify the means. I must confess that I do not. Public servants have a duty not just to ***respect*** the physical integrity of the person, but to ***protect*** the physical integrity of the person, including against terrorist attacks. In a morally ordered universe, there would be no clashes between duties toward ***those upon whom one acts*** and duties toward ***those on whose behalf one acts***. Each violation of the dignity of the human person would necessarily imply a wrongful act, and certain classes of acts could be categorically rejected, "come hell or high water."

I do not believe that such moral order is present in our world.. The ultimate maxim of deontological ethics – "Evil shall come into the world, but not through me"[15] – makes sense to me as a maxim only with the aid of theology. If God were taking care of it, however mysteriously, my role would be to observe the categorical imperative, and to let God sort it out.

Because I do not share the faith in a God who intervenes in the world, I regard it as an abdication of responsibility to take that attitude. Mitigating harms is a moral imperative for those who undertake responsibility for a political community.

So, I, like the Vice President, am willing to contemplate the abyss. If, indeed, there were sound reason to believe that limitless exercises of power against a few human beings – including that most quintessential exercise of domination, torture – would assure the conditions of a dignified human existence for a great multitude, I would not be able to rule out even the most ruthless measures. I would also unequivocally reject the effort to have it both ways by saying that the ruthless measure would be "morally wrong but practically necessary," or some such pseudo-sophisticated nuance. In my view, the act is either morally justified, or it isn't.

But at the very least, given the fallibility of our projection of consequences, there should be a strong presumption against acts that inflict definite and extreme human costs for speculative benefit.

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[14] "The Vice President Appears on Meet the Press with Tim Russert," Sept. 16, 2001, available at <http://www.whitehouse.gov/vicepresident/news-speeches/speeches/vp20010916.html>.

[15] Jeremy Waldron ascribes this line to Bernard Williams, though I have never been able to find the citation. Alexander Solzhenitsyn authored a similar-sounding line, but not for the same point.

The Administration has come nowhere close to demonstrating that it can prevent mass murder and mayhem by unleashing the worst in human nature against those whom it has sequestered in dark places. The advocates of these measures are not professional interrogators – who have expressed overwhelming opposition to torture – but arm-chair ideologues, for whom a willingness to endorse ruthlessness counts a kind of test of war-time leadership qualities, of "having what it takes." That kind of thinking is beneath refutation.

Moreover, the highly particularized "ticking time bomb" scenario, with which we are now all too familiar, is a product of the seminar room and the Hollywood set. It is not the issue we actually face. The question is whether we should legislate a license for officials to engage in on-the-spot judgments about whether to inflict cruel, inhuman, and degrading treatment, or whether we should "risk" an absolute, perfectly effective bar on torture, knowing that this would preclude the use of torture even should a genuine ticking time bomb case happen to arise. (I take it that it would be unethical to legislate an ***absolute*** penal prohibition in the ***hope*** that it would be disobeyed in the foreseen circumstances.)

I, for one, am willing to take that "risk" of too little torture. The ticking-bomb scenario is simply too unlikely to justify opening Pandora's Box. We need to be far more concerned about too much torture than too little.

In the hypothetical world of the seminar room, all human dynamics can be stopped in mid-action, finely analyzed, partly accepted and partly rejected; a flexible norm can be proposed in the expectation that its application will be marked by the same detached, all-things-considered judgment brought to bear on its articulation. Not so in the midst of struggle against a hated foe, and in the press of insistent demands for the extraction of actionable intelligence.

When Maj. Gen. Geoffrey Miller was dispatched to Abu Ghraib to introduce pre-interrogation softening-up techniques of systematic harassment and intimidation originally devised for Guantanamo, he instructed Abu Ghraib's supervisor, Brig. Gen. Janis Karpinski, as follows: "You have to treat the prisoners like dogs. If you treat them, or if they believe that they're any different than dogs, you have effectively lost control of your interrogation from the very start."[16] (PBS, 2005) We should not kid ourselves: if we license torture in any form, this is the mentality that we are licensing. The only practical barrier to moral collapse is a deeply ingrained sense that cruel, degrading and humiliating tactics are "off the table."

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The following words of the theologian Martin Niemoeller about Nazi Germany are now so familiar as to have passed into cliché: "First they came for the Communists, but I was not a Communist so I did not speak out. Then they came for the Socialists and the Trade Unionists, but I was neither, so I did not speak out. Then they came for the Jews, but I was not a Jew so I did not

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[16] PBS Frontline, "The Torture Question: Interview: Janis Karpinski" (2005), available at <http://www.pbs.org/wgbh/pages/frontline/torture/interviews/karpinski.html>.

speak out. And when they came for me, there was no one left to speak out for me."

Those are stirring words, but they are sometimes misconstrued. Niemoeller's essential point does not rest on a "canary-in-the-mineshaft" logic. Niemoeller was not simply castigating himself for having been imprudent, for having failed to forge strategic alliances. He was castigating himself for having failed to see the common humanity in those who were singled out as "other."

It may very well be that no one is ever coming for us, our loved ones, our friends, or our neighbors. And yet we should draw no comfort from those who assure us that the extraordinary measures being undertaken will be confined to some "them," walled off behind boundaries – literal or figurative, geographic or legal – from the all-important "us." Whether or not anyone is ever coming for us, we have a moral responsibility to stand up for others, or else we would not be worthy of having anyone stand up for us.