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Sovereignty, Territoriality, and the Rule of Law

BY JOAN FITZPATRICK*

Introduction

This exploration of sovereignty, territoriality, and the rule of law takes as its point of departure the November 13, 2001, Military Order issued by President George W. Bush. In the Order, the President claims power as Commander in Chief to detain indefinitely and, if he chooses, to try, by ad hoc military commissions, persons designated by him as international terrorists. Although the Order has no explicit geography, its implementation has taken on significant territorial aspects. As events unfold on Guantánamo, the operative aspects of the Order primarily involve an unprecedented program for indefinite administrative detention without charge or trial. The Order represents a stunning claim to absolutist power, and a rejection of any meaningful legal constraints on the treatment of the captives. The Order repudiates the fundamental principle of judicial control over executive detention, which dates back to the Magna Carta. The Bush Administration policy reflects a realist view of international law, and poses a significant challenge to the international community and its efforts to establish human rights principles governing detentions during states of emergency.

The Order can be approached from a variety of legal and policy perspectives. I have chosen to examine its implications concerning the relationships among sovereignty, territoriality, and the rule of law. Why does the Order pursue a highly problematic armed conflict alternative to the criminal law paradigm, which is readily available to

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combat terrorist acts and threats? Can international law accommodate the notion of an “inter-national” armed conflict between a state and a transnational criminal network that controls no territory and eschews territorial ambitions? Which principles of international humanitarian law apply? If the “War Against Terrorism” is a new type of global and possibly permanent armed conflict, does it have the same impact on the Constitution as conventional armed conflicts? Who are the “alien enemies” in this conflict, and how are their constitutional rights affected? If humanitarian law and the Constitution do not function as constraints on executive power, is international human rights law nevertheless available to protect the Guantánamo captives? Are universal rights adaptable situationally but constant geographically? If the President may act extraterritorially and Congress may criminalize extraterritorial conduct, why should the judiciary be disabled from extending the rule of law to persons subjected to extraterritorial detention and trial?

The Order exploits the confused state of contemporary sovereignty. Indeed, the policy regarding the Guantánamo captives is a case study in the “organized hypocrisy” analyzed by Stephen Krasner. The Order and the “War Against Terrorism” on which it is premised challenge the most commonly accepted principles of post-Westphalian sovereignty: exclusive control over territory, non-interference, and equality among states. The Order expresses an anachronistic claim to sovereignty as absolute rule without accountability. Ironically, the contemporary sovereign finds scope for absolutism more easily outside his territorial realm than within it.

The legal premise for the Military Order is the asserted existence of a “state of armed conflict.” This claim is of pivotal importance, and not a legal technicality. Without a cognizable armed conflict, the President’s attempt to create a parallel and extrac Telegraph constitutional criminal justice system would be rejected out of hand by all but the most extreme authoritarians. The Bush Administration relies by historical analogy upon military commissions that tried alien enemy combatants during declared wars with other states, commissions established by the United States as an occupying power in foreign states, and martial law commissions that tried persons during internal armed conflict in the United States. The United States has not

3. The historical precedents are discussed infra in Section III.A.
previously relied upon *ad hoc* military tribunals to try terrorist suspects, nor has it indefinitely detained terrorist suspects without charge or trial. These measures are highly dubious both under the Constitution and international law.

The international terrorist threat is of long standing. The United Nations has drafted a dozen treaties on the subject of international terrorism, and various acts such as aircraft hijacking and attacks upon diplomats are regarded as international crimes. Al-Qaeda had previously launched significant attacks upon symbols of U.S. sovereignty abroad, notably the 1996 bombings of the U.S. embassies in Kenya and Tanzania that cost hundreds of lives and the 2000 attack upon the USS Cole in Yemeni waters. But not until Al-Qaeda’s murderous September 11 attacks on the World Trade Center and the Pentagon did the U.S. government embrace the concept of a “war” with Al-Qaeda. The September 11 attacks had a profound psychological impact upon the American public, disposing it to accept the rhetoric of armed conflict and the reality of a sizable military response, as well as a significant alteration in security consciousness and governmental operations. The devastation of home ground seemed all the worse for having been inflicted by innocuous and non-military instruments—box-cutters and civilian aircraft—and by persons who did not resemble invaders but ordinary visitors.

The November 13 Order does not characterize the “armed conflict” on which it rests, and specifies neither its parties nor its duration. The confusion and contradictions in the characterization of the claimed armed conflict became especially apparent in the controversy surrounding the Guantánamo captives’ status as prisoners of war. This confusion was not dispelled by the cynical

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6. *Id.* at 242.
It remains unclear whether the asserted war is to be regarded as an international armed conflict against all international terrorists; an international armed conflict against Al Qaeda; an international armed conflict against the former de facto Taliban regime in Afghanistan; or the long-standing internal armed conflict in Afghanistan, which appears to have been resolved with the establishment of an interim government in December 2001.8 These various scenarios implicate dramatically different international legal regimes. Indeed, the idea of an international armed conflict between a state and transnational criminal networks cannot be accommodated by accepted concepts of sovereignty, which adhere only to territorially defined states. The refusal to provide a clear characterization of the “armed conflict” on which the Order is premised appears to be a strategy to escape the application of constraining legal norms and to preserve flexibility to subject persons to the Order without temporal or geographic limits.

This essay will explore what the Order and the Bush Administration’s actions pursuant to it reflect about perceptions of sovereignty, the linkage or disconnection between sovereignty and territoriality, and the consequences for the rule of law. The Bush Administration believes that it has found on Guantánamo a “rights-free zone,” and it will request that U.S. courts ratify this theory.9 Because the treatment of the captives also implicates important international legal norms (specifically, consular access, humanitarian law for those captured during combat, and human rights law), the Bush Administration and the international community are engaged in an active dialogue concerning the Order. While confusion presently reigns, the Guantánamo episode may ultimately produce important clarifications of contemporary doctrines of sovereignty.


I. Territorial Aspects of Sovereignty

The modern system of international law is commonly claimed to rest upon an order traceable to the Peace of Westphalia of 1648. According to Hans Morgenthau, "the Treaty of Westphalia ... made the territorial state the cornerstone of the modern state system." Daniel Philpott defines sovereignty as "supreme legitimate authority within a territory." Mark W. Zacher traces the emergence of territoriality as a defining aspect of political entities:

Political life has not always disclosed a clearly defined system of international boundaries. The medieval world did not have international boundaries, as we understand them today; authority over territorial spaces was overlapping and shifting. The political change from the medieval to the modern world involved the construction of the delimited territorial state with exclusive authority over its domain. Even at that, precisely surveyed national borders only came into clear view in the eighteenth century. In the words of Hedley Bull, the practice of establishing international boundaries emerged in the eighteenth century as 'a basic rule of co-existence.'

John Gerard Ruggie contrasts modern concepts of territoriality with the "nonexclusive territorial rule" characteristic of medieval Europe. He notes:

[T]he spatial extension of the medieval system of rule was structured by a nonexclusive form of territoriality, in which authority was both personalized and parcelized within and across territorial formations and for which inclusive bases of legitimation prevailed. The notion of firm boundary lines between the major

10. Andreas Osiander's interesting revisionist view is that the Peace of Westphalia had the more limited effect of adjusting power relations within the Holy Roman Empire and between it and certain other states, and that the "myth of Westphalia" derives from seventeenth century war propaganda by France and Sweden, appropriated by nineteenth and twentieth century theorists of sovereignty. Andreas Osiander, Sovereignty, International Relations, and the Myth of Westphalia, 55 INT'L ORG. 251 (2001).


territorial formations did not take hold until the thirteenth century; prior to that date, there were only ‘frontiers,’ or large zones of transition. The medieval ruling class was mobile in a manner not dreamed of since, able to assume governance from one end of the continent to the other without hesitation or difficulty because the ‘public territories formed a continuum with private estates.’

Ruggie observes that “the distinctive feature of the modern system of rule” is its conferral of authority on “territorially defined, fixed, and mutually exclusive enclaves of legitimate dominion.” As such, “it appears to be unique in human history.” And, as will be noted below, the modern system poses difficulties “for dealing with the problems of that society that could not be reduced to territorial solution,” of which transnational terrorism is the most acute current example.

The post-Westphalian system is generally believed to have substituted the territorial state for the civitas dei, the unity of Christendom under the authority of the Holy Roman Emperor and the Pope, with ultimate sovereignty in God. Early theorists of sovereignty, including Bodin and Hobbes, postulated absolute authority of the territorial sovereign over his subjects. This atomistic system supposedly displaced complex concepts of layered sovereignty and interpenetration of authority. However, matters were never as simple as the common understanding of Westphalia would suggest, and treaty protections for religious minorities are an early model for contracted and imposed limitations on the sovereign’s treatment of its subjects.

Seyom Brown claims that two “Westphalian principles” in particular “constitute the normative core of international law: (1) the government of each country is unequivocally sovereign within its territorial jurisdiction, and (2) countries shall not interfere in each other's domestic affairs.” Article 2(4) of the United Nations Charter prohibits the use or threat of force in international relations when

15. Id. at 150 (citations omitted).
16. Id. at 151.
17. Id.
18. Id. at 164.
20. KRASNER, supra note 2, at 73-104.
undertaken "against the territorial integrity or political independence of any state." This privileging of territorial integrity in the Charter regime is reflected in the virtual disappearance of successful wars of territorial aggrandizement. The norm's centrality poses a deep dilemma for the United Nations itself in the aftermath of the Kosovo crisis, as the Security Council has authorized United Nations governance of the province while continuing to recognize formal Yugoslav sovereignty.

International law treats states, exercising authority over defined territories, as the constituent units of the international system (for example, in relation to the power to ratify treaties), and postulates a formal equality among states that is belied by actual disparities in power and influence. Only in the latter half of the twentieth century was the legal authority of territorial states extended throughout the globe. The post-Westphalian system coexisted with colonial empires for several centuries, during which the privileges of sovereignty in the international legal system were reserved primarily to European states and to certain others satisfying a test of civilization.

Guantánamo itself occupies an anomalous position stemming from colonialism and reflecting enduring power asymmetries. The lease agreement states:

While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of occupation by the United States of said areas under the terms of

22. U.N. CHARTER art. 2(4).
23. Zacher, supra note 13 (providing striking empirical data and noting the importance of the norm of territorial integrity to weak states emerging from the decolonization process).
27. The United States gained control of Guantánamo as a condition of withdrawing its troops from the occupation of Cuba following the Spanish American War, and the terms of the lease do not permit successor Cuban governments to terminate the U.S. presence without the U.S. consent. KRASNER, supra note 2, at 38; MICHAEL ROSS FOWLER & JULIE MARIE BUNCK, LAW, POWER, AND THE SOVEREIGN STATE: THE EVOLUTION AND APPLICATION OF THE CONCEPT OF SOVEREIGNTY 91-93 (1995).
this agreement the United States shall exercise complete jurisdiction and control over and within said areas.\textsuperscript{28}

The divorce of "ultimate sovereignty" from "complete jurisdiction and control" clearly would contradict the premises of the post-Westphalian state system, but for the recognition that the sovereign's powers include the capacity to alienate portions of territorial control.

Three basic principles can be derived from the U.N. Charter version of post-Westphalian sovereignty: (1) exclusive authority within a defined territory; (2) non-interference by states in the domestic jurisdiction of other states;\textsuperscript{29} and (3) equality among states. The threat or use of force in international relations, the former liberté de guerre, was renounced in Article 2(4) of the U.N. Charter, but subject to the Security Council's collective use of force pursuant to Chapter VII and the reserved right of self-defense in Article 51. The "War Against Terrorism" that underlies the November 13 Order is difficult to reconcile with these precepts of contemporary sovereignty, and this essay explores some of the conceptual challenges that it poses and the consequences to international law.

The events of September 11 vividly illustrate that non-state actors may now shape international relations and affect the conduct of powerful states more profoundly than many formal members of the territorial state club. Indeed, it is difficult to imagine a territorial state bold enough to launch such attacks openly upon the territory of the United States. A state (at least one governed by rational actors) would anticipate self-defense by massive U.S. military retaliation pursuant to Article 51 of the U.N. Charter, resulting in an international armed conflict leading to defeat and occupation. An "armed attack" attributable to another state creates the basis for an exception to the prohibition on the use of force in relations between states, at least during the period immediately following the attack. Some uncertainty exists, however, concerning the rules for attributing responsibility to states for the armed incursions of guerrilla forces they have supplied or supported, into the territory of other states.\textsuperscript{30}

\textsuperscript{28.} Agreement Between the United States of America and the Republic of Cuba for the Lease (Subject to Terms to be Agreed upon by the Two Governments) to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418 [hereinafter Coaling and Naval Stations Lease].

\textsuperscript{29.} U.N. CHARTER art. 2(7).

\textsuperscript{30.} The International Court of Justice rejected claims that the United States could lawfully undertake military action (as a form of collective self-defense with El Salvador) against Nicaragua, in response to alleged Nicaraguan support for the
Officials and publics in the West had little difficulty attributing responsibility for the attacks by Al Qaeda operatives on September 11 to the de facto Taliban regime in Afghanistan. The guilt of the Taliban is derived from its permission to Al Qaeda to conduct planning, training, and financing operations within territory the Taliban controlled. Territorial sovereignty carries with it an obligation to prevent territory from becoming a staging area for armed attacks on other states, at least if the sovereign is directing the attacks or has substantial involvement with the attacking bands. Notably, Germany and Spain have not been the targets of U.S. military retaliation post-September 11, even though evidence suggests that much of the planning and financing for the attacks occurred on their territory. Some unstated element of intentionality appears to separate the complicit Taliban from the blameless allies. Tolerance of terrorist activities that implicate state responsibility is, unfortunately, not clearly delineated in the International Law Commission's recently completed Draft Articles on Responsibility of States for internationally wrongful acts.

No authorization by the U.N. Security Council is necessary to authorize the United States and its coalition partners "to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks," which are international crimes implicating universal jurisdiction. The use of force in law enforcement is one of the exclusive powers of the post-Westphalian state. While the exercise of law enforcement authority outside the territorial limits of the state is


31. The United Nations General Assembly defined as "aggression" the "sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to [acts of aggression committed directly by the State], or of its substantial involvement therein." G.A. Res. 3314, Dec. 14, 1974, 29 U.N. GAOR 6th Comm., 29th Sess., Supp. No. 31, art. 3(g), at 143, U.N. Doc. A/9631 (1975).


ordinarily forbidden, the consent of the territorial sovereign restores legality. The pre-September 11 metaphorical “war against terrorism” involved arrangements for mutual criminal assistance, including extradition and the sharing of information among law enforcement and national security agencies.\textsuperscript{34}

Transnational criminal networks on the model of Al Qaeda dispense with territoriality as a basis for authority. Unlike many groups denominated as international terrorist organizations, such as Basque Fatherland and Liberty (“ETA”), the Kurdistan Workers’ Party (“PKK”), the Liberation Tigers of Tamil Eelam (“LTTE”), the Revolutionary Armed Forces of Columbia (“FARC”), and the Abu Sayyaf Group, Al Qaeda neither aspires to the creation of a separatist state nor seeks to seize political authority throughout the territory of an existing state.\textsuperscript{35} Separatist, irredentist, and insurgent groups essentially buy into the territorial state paradigm. Al Qaeda stands outside it. While it appears that the creation of a territorial Palestinian state is among the objectives of Al Qaeda, its concepts of sovereignty and its mode of operation in many respects reject the post-Westphalian system.

Al Qaeda’s identity and operation as a transnational criminal network would not pose any particular challenge to the international legal regime had the Bush Administration chosen to treat its acts as crimes, either domestic or international. The prior, and indeed in some respects current, policy of the United States was to try Al Qaeda attacks upon U.S. targets as crimes in federal court.\textsuperscript{36}

The international legal bases for the exercise of criminal jurisdiction by the United States over the various crimes attributed to

\textsuperscript{34} In the aftermath of September 11, the European Union responded primarily by enhancing its arrangements for mutual criminal assistance, specifically streamlining extradition. European Union, Conclusions and Plan of Action of the Extraordinary European Council Meeting on 21 September 2001, \textit{reprinted in} 40 I.L.M. 1264 (2001). Certain member states also contributed troops to the armed conflict in Afghanistan.

\textsuperscript{35} For the list of foreign terrorist organizations designated by the U.S. Secretary of State, see U.S. Department of State, Office of the Coordinator for Counterterrorism, 2001 Report on Foreign Terrorist Organizations (Oct. 5, 2001), \textit{available at} http://www.state.gov/s/ct/rls/rpt/fto/2001/5258.htm (last visited Sept. 17, 2002).

\textsuperscript{36} At the time of writing in March 2002, three alleged Al Qaeda operatives (Zacarias Moussaoui, Richard Reid, and John Walker Lindh) awaited trial in federal district court on charges relating to different aspects of Al Qaeda’s activities against the United States. Their alleged acts occurred both inside and outside the territory of the United States.
Al Qaeda reflect a complex attitude toward territoriality in the definitions of jurisdiction to prescribe and jurisdiction to adjudicate.\(^3\) International terrorists follow in the steps of pirates in being perceived as "the enemy of all mankind—hostis humani generis—whom any nation may in the interest of all capture and punish . . . ."\(^3^7\) While universal jurisdiction over piracy was justified by the fact that the "scene of the pirate's operations is the high seas, which it is not the right or duty of any nation to police,"\(^3\) international terrorists threaten the common interests of international society and float within the territory of many states.

The United States has chosen to abandon the law enforcement paradigm for an armed conflict theory with respect to the Guantánamo captives.\(^4\) The November 13 Order posits a state of armed conflict between the United States and some unspecified enemy entity or entities, to which the persons subject to detention and ad hoc military trial are supposedly linked. The September 11 attacks are treated as an act of war, and the Order suggests that the military commissions may attempt to conceptualize the September 11 attacks and other terrorist operations as violations of the laws of war.\(^4\) The procedural rules issued by the Department of Defense in

\(^{37}\) There are five bases for jurisdiction to prescribe that are generally considered to be consistent with international law and the principles of state equality and independence—territorial, nationality, passive personality, effects, and universal. Two are essentially territorial, either direct (territorial) or indirect (effects). Effects jurisdiction is the most controversial, and the United States is widely regarded as legislating expansively on this basis. See Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993); Restatement (Third) Foreign Relations Law of the United States § 415 & reporter's note 3 (1987). Two involve projections of sovereignty based upon links between the prescribing jurisdiction and persons possessing its nationality who become either perpetrators (nationality) or victims (passive personality) of crime outside its territory. The fifth, universal jurisdiction, dispenses with territoriality in the sense that all states may prosecute an offender who has committed a crime giving rise to universal jurisdiction, regardless of the location where the crime was committed and the nationality of the perpetrator and victim. Some states assert the capacity to exercise universal jurisdiction in absentia. However, in many treaties the capacity and obligation to exercise universal jurisdiction are triggered by the physical presence of the alleged perpetrator on the territory of the prosecuting state.

\(^{38}\) S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 70 (Sept. 7) (opinion of Moore, J.).

\(^{39}\) Id.

\(^{40}\) However, it is possible the Bush Administration will ultimately return to the law enforcement model by repatriating captives to their states of origin for prosecution or by transferring some to the ordinary courts in the United States.

\(^{41}\) The Legal Counsel to the President suggested in the press that the Order
March 2002 are as cryptic as the Order with respect to the substantive jurisdiction of the commissions, providing that they may try "violations of the law of war and all other offenses triable by military commission."\footnote{42}

This undertheorized "War Against Terrorism" poses serious conceptual puzzles. For example, the Senate responded to the September 11 attacks by giving its advice and consent to the ratification of the International Convention for the Suppression of Terrorist Bombings.\footnote{43} Article 19(2) of the Convention provides:

> The activities of the armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.\footnote{44}

Thus, the Convention is aimed at bombings perpetrated by non-state actors outside the context of armed conflict—classic acts of terrorism. The Convention follows the model of other United Nations anti-terrorism treaties in providing for mutual criminal assistance and universal jurisdiction with an obligation to prosecute or extradite.

The premise of the November 13 Order is that the September 11 attacks were acts of war and that the perpetrators of those attacks and other similar terrorist acts or plans should be charged with violations of the "laws of war." The Bush Administration proposed an understanding to Article 19(2) of the Convention stating that the treaty terms "armed conflict" and "international humanitarian law" should be interpreted to have the "same substantive meaning as the

\footnote{42. Department of Defense, Military Commission Order No. 1: Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, Mar. 21, 2002, para. 3(B).}


\footnote{44. International Convention for the Suppression of Terrorist Bombings, supra note 43, art. 19(2).}
law of war." Acts governed by the law of war are thus not terrorist acts under the Convention. Yet, the Order appears to be rooted in the idea that acts of international terrorism violate the laws of war.

The contradictions also emerge from the Bush Administration’s strategy for pursuing the “War Against Terrorism” in various countries where terrorist groups are believed to operate. Consider this news item from March 2002:

After deciding to send American soldiers to train antiterrorism forces in the Philippines, Yemen and Georgia, the Bush Administration has decided it would be ‘counterproductive’ to deploy troops in Indonesia, the world’s most populous Muslim nation, because of concerns about an anti-American backlash . . . .

Instead, White House and Pentagon officials have determined that the best way to pursue terrorists operating from Indonesia is to work through law enforcement agencies. To underscore that policy, the director of the Federal Bureau of Investigation, Robert S. Mueller III, quietly visited Indonesia last Friday to develop contacts with his counterparts there.

The decision to rely more on law enforcement efforts and less on military action is significant because American intelligence officials believe Indonesia to be a fertile breeding ground for Al Qaeda. They also believe that the country is the center of operations for a group that has planned attacks on American targets throughout Southeast Asia. Three Indonesians were arrested in the Philippines last week, officials said, and while interrogations are still under way, the men are thought to be linked to suspected terrorists now in detention in Malaysia and Singapore.

Policy toward Indonesia has been closely watched around the world and has been the subject of intense debate within the White House. The country presents a test case of how the administration handles the presence of terrorist cells in a nation opposed to American military intervention.

45. Murphy, supra note 43, at 257 (quoting Prepared Testimony of William H. Taft IV, U.S. Department of State Legal Adviser, Before the Senate Committee on Foreign Relations, Oct. 23, 2001). The understanding would exempt from the exemption certain “isolated acts of violence” committed by insurgent groups, “consistent with the law of armed conflict.” Id. As noted infra note 71, humanitarian law distinguishes internal armed conflict, which it governs, from isolated acts of violence that do not create a situation of armed conflict and are thus to be treated as criminal acts under ordinary law.

46. David E. Sanger & Thom Shanker, U.S. Rules Out Training Indonesia Army,
A test case, indeed. Will those arrested in the Philippines, Yemen, Georgia, and Indonesia be treated alike as battlefield detainees, potentially subject to the November 13 Order, like the six Algerians spirited from Bosnia to Guantánamo in January 2002? And, if this is an international armed conflict and terrorists are violating the laws of war, why is the consent of the territorial state required? But for the November 13 Order, U.S. policy in the “War Against Terrorism” is uncannily reminiscent of traditional antiterrorism efforts, which emphasize mutual criminal assistance. This is perhaps the first “war” in which progress towards victory is measured by the number of arrests, rather than by territorial advances against opposing forces.

While international legal scholars puzzle over the implications of a postulated international armed conflict between the United States and Al Qaeda, the latter heartily embraces the concept. In his book, Knights Under the Prophet’s Banner, Dr. Ayman al-Zawahiri, theorist of Al Qaeda and second in command to Osama Bin Laden, discusses the Jihad of the Muslim “nation” and the reasons why Al Qaeda decided to declare war upon the United States in 1996.

“Afghan Arabs” such as Al-Zawahiri, who participated in the mujahedin struggle against the Soviet-backed Afghan regime and later made common cause with the Taliban, possess the nationalities of many different territorial states, not all of them Arab. Al Qaeda has a physical presence in numerous states, not only in South Asia, the Middle East, and North Africa, but also in Europe, East Asia, and North America. It maintains its structure and operations with the innocuous tools of the globalized world—telephones, e-mail, videotapes sent to international media, international financial transfer institutions, and international air travel.

The nation of which Al-Zawahiri writes is not a territorial state, but a political force connected by faith and commitment to “striving”

47. See infra note 55.
48. Dexter Filkins, U.S. Might Pursue Qaeda and Taliban to Pakistan Lairs, N.Y. TIMES, Mar. 21, 2002, at A1 (indicating that consent of the government of Pakistan would be sought prior to pursuit of Al Qaeda and Taliban fugitives in Pakistani territory).
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Al Qaeda's nation appears to be a contemporary reconceptualization of the Islamic umma, a sovereignty under God with layers of authority, symbolically centered on the caliphate abolished by secular Turkey in 1924.50 While the analogy risks being overdrawn, the umma of Islam bears some resemblance to the civitas dei of Christendom that the Westphalian system displaced.

II. Territorial Aspects of Armed Conflict

A. International Armed Conflict

The legal definitions of international armed conflict are constructed against the background of the post-Westphalian state system. Thus, Common Article 2 of the Geneva Conventions of 1949 envisions international armed conflict between High Contracting Parties.51 Only territorial states are capable of ratifying the Geneva Conventions. The complex rules that govern international armed conflict—rules that inter alia set out principles of distinction among targets of warfare and specify treatment of certain classes of persons affected by conflict, including prisoners of war and civilians—thus control behavior among states. The Geneva Conventions operate on the principle of reciprocity, and immunize combatants from both sides from punishment for lawful acts of war.

Al Qaeda and other transnational terrorist networks are not capable of becoming High Contracting Parties to the Geneva Conventions. This is the premise upon which President Bush based his decision that captives suspected of ties to Al Qaeda, held at Guantánamo, would not be treated as prisoners of war ("POW").52 The POW policy begs the question whether, for the very reason that Al Qaeda is not a state, international armed conflict against it is simply a legal impossibility. The Bush Administration, by denying the applicability of the Geneva Conventions to its War Against Terrorism, appears to claim the existence of a new form of

52. The press statement, supra note 7, indicates: “Al-Qaida is not a state party to the Geneva Convention; it is a foreign terrorist group. As such, its members are not entitled to POW status.”
international armed conflict that is subject to no identifiable norms of international humanitarian law. For example, persons associated with the Bush Administration have publicly denied that the principle of distinction applies to acts of "war" committed by Al Qaeda, so that even attacks against military targets using conventional methods of warfare would be subject to criminal punishment. The Administration's views appear to envision an international armed conflict in which all of the "combatants" as defined by the Third Geneva Convention are on one side—that of the United States and its allies. Obviously, this departs from the principle of reciprocity, while creating other legal anomalies.

The United States had, prior to November 13, 2001, been consistent in its rejection of the concept of an international armed conflict between state and non-state entities. Thus, the United States has refused to ratify Protocol I of 1977, in part because the Protocol includes within the definition of international armed conflict wars of liberation against colonial domination and racist regimes. Those wars cling closely to the territorial paradigm, since insurgent groups aspire to governance and statehood on the post-Westphalian model. The advantage of Protocol I to insurgents in wars of national liberation is that much more elaborate and protective rules govern treatment of combatants in international armed conflict. Insurgents in internal armed conflict are generally subject to prosecution under ordinary criminal laws for acts of violence they commit during their rebellion. An international armed conflict with a transnational criminal network such as Al Qaeda, with no territorial aspirations, is not envisioned in Protocol I.

The President's conception of the "War Against Terrorism" is startlingly broad. A very extensive range of persons suspected of ill intent against the interests of the United States could potentially find themselves at the mercy of the ad hoc system of executive justice established under the November 13 Order. The possible consequences for fundamental principles of territorial sovereignty are equally profound. For example, passages in the State of the Union Address in January 2002 suggest an international armed conflict with


a wide range of terrorist groups operating in the territories of many different states, and an intention on the part of the United States to exercise law enforcement authority where the territorial sovereign fails to satisfy U.S. requisites:

What we have found in Afghanistan confirms that, far from ending there, our war against terror is only beginning.

Thanks to the work of our law enforcement officials and coalition partners, hundreds of terrorists have been arrested. These enemies view the entire world as a battlefield, and we must pursue them wherever they are.

While the most visible military action is in Afghanistan, America is acting elsewhere. We now have troops in the Philippines. Our soldiers, working with the Bosnian government, seized terrorists who were plotting to bomb our embassy. Our Navy is patrolling the coast of Africa to block the shipment of weapons and the establishment of terrorist camps in Somalia.

My hope is that all nations will heed our call, and eliminate the terrorist parasites who threaten their countries and our own.

But some governments will be timid in the face of terror. And make no mistake about it: If they do not act, America will.\(^{55}\)

The November 13 Order is premised upon a claim of international armed conflict of a legal, and not simply metaphorical, nature. But this is not an international armed conflict cognizable under existing international law. The burden remains on the Bush Administration to enunciate this claim more clearly, and to specify whether it disclaims the application of customary humanitarian law along with the Geneva Conventions with respect to its captives. While the U.S. public appears incurious about the extraordinary assertion of an international armed conflict between the United States and terrorist groups, international interlocutors, including the International Committee of the Red Cross ("ICRC") and the Inter-American Commission on Human Rights, take a more skeptical and probing position.\(^{56}\)


\(^{56}\) The ICRC argues that the prisoners at Guantánamo, having been captured
Indeed, the position of the ICRC suggests a different theory concerning the armed conflict that serves as the basis for the November 13 Order. The POW policy asserts the existence of an international armed conflict between the United States and the Taliban, the de facto government of Afghanistan at the time the United States launched its military campaign on Afghan territory in October 2001. As Afghanistan is a state party to the Geneva Conventions, Taliban combatants are “covered by the Convention.”\textsuperscript{57} Common Article 2 envisions that some international armed conflicts will not be declared, and may occur between states that do not recognize each other’s governments. The rules on recognition, which permit one state to deny the attributes of sovereignty to the effective government of another state, are in tension with the post-Westphalian principles of sovereign equality and non-interference.\textsuperscript{58} The Geneva Conventions essentially follow the declaratory rather than constitutive view of recognition,\textsuperscript{59} and accommodate the present reality that formal declarations of war have become virtually obsolete.

President Bush has nevertheless claimed that all Taliban captives are ineligible for POW status, without having conducted the individual hearings mandated by Article 5 of the Third Geneva Convention for cases where the POW status of a captured combatant is in question.\textsuperscript{60} This decision is designed to leave the U.S. military discretion to detain and try all Guantánamo captives without regard for the specific legal obligations of the Geneva Conventions, while

\textsuperscript{57} Fact Sheet, supra note 7.

\textsuperscript{58} See generally HERSCHEL LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW (1947). The “declaratory” view ties legal existence to existence in fact, reducing recognition to a political act leading to the establishment of diplomatic relations between the recognized state and the state granting recognition. Id. at 41-42. The “constitutive” view, on the other hand, ties the legal existence of new states to the conferral of recognition by existing states. Id. at 38.

\textsuperscript{59} Id.

\textsuperscript{60} Fact Sheet, supra note 7.
extending to them “many POW privileges as a matter of policy.”

The most pertinent aspects of POW treatment are exemption from punishment for lawful acts of war; humane treatment; limits on interrogation; trial rights equivalent to those afforded soldiers of the detaining power; housing equivalent to soldiers of the detaining power; and repatriation at the conclusion of active hostilities, unless the POW has been charged with or convicted of crimes under criminal processes consistent with the Convention. These are significant international legal constraints, designed to operate extraterritorially.

The duration of the asserted international armed conflict with the Taliban is uncertain. In announcing the procedures for the military commissions in March 2002, the counsel for the Department of Defense stated that “the conflict is still going and we don’t see an end in sight right now.” However, it was unclear whether he was referring to the conflict in Afghanistan or the global “War Against Terrorism.” The consequences for the Afghan conflict of U.S. recognition of the interim government headed by Hamid Karzai in December 2001, following the defeat of the Taliban as a governing entity, are also difficult to ascertain. While the POW policy suggests that the United States has engaged in an international armed conflict with the defeated Taliban regime, the United States is not at war with the state of Afghanistan, whose recognized head of government sat as honored guest at the President’s January 2002 State of the Union Address.

The United States eschews the role of occupying power in Afghanistan. Occupying powers temporarily displace the government of a defeated state and assume the role of the post-Westphalian sovereign within that territory. Their capacities include the establishment of an ad hoc judiciary and the exercise of law enforcement authority. While the United States maintains control over some prisoners in Afghanistan, it seems not to envision the establishment of military commissions there.

While the Guantánamo base reportedly remains the most likely trial site, the Bush Administration apparently seeks the locale most secure from oversight by the independent U.S. judiciary, which might

61. Id.
question the jurisdiction of the commissions and provide protection for the captives' legal rights. These officials apparently do not blanch at the image of the United States—the constitutional democracy that pioneered the separation of powers—searching the world for a trial site that law and independent judges cannot reach.

As the United States continues to engage in military actions intended to kill or arrest Taliban and Al Qaeda suspects in Afghan territory, it does so with the formal consent of the interim Afghan government. The recognition of the Karzai government, under the U.N. Charter system, implicates the fundamental norm of exclusive territorial control over law enforcement that is an aspect of both the non-interference principle of Article 2(7) and the prohibition on the use of force expressed in Article 2(4). The legitimacy of U.S. military and law enforcement operations in Afghanistan following recognition of the Karzai government rests upon the accepted theory that a post-Westphalian sovereign may, despite the principle of exclusive territorial control, cede portions of authority to external entities, including other states. U.S. forces have committed grievous errors affecting Karzai loyalists and civilians. A significant asymmetry of power exists between the United States and the insecure new government in Afghanistan, leaving U.S. forces free to operate despite these tragic mistakes. A similar asymmetry of power between the United States and Cuba explains the ability of the United States to engage in a semblance of penal authority in Guantánamo.

Because the Taliban leadership was closely linked to Al Qaeda, the capture of members of the latter could be seen as an aspect of the defeat of the Taliban. Indeed, Al Qaeda fighters might be regarded

64. See Katherine Q. Seelye, Government Sets Rules for Military on War Tribunals, N.Y. TIMES, Mar. 21, 2002, at A1:

Some administration officials said a likely setting for the trials would be the United States Naval Station at Guantánamo Bay, Cuba, because they would be shielded from the jurisdiction of United States courts.

But that view is not a legal certainty, and the administration is wrestling with finding a locale that would afford the military the most control and prevent the federal courts from intervening in death penalty cases.

Id.

65. See KRASNER, supra note 2, at 73.

as "[m]embers of . . . militias and . . . other volunteer corps, including those of organized resistance movements," eligible for POW treatment under the Third Geneva Convention because of their capture while engaged in hostilities. 67

However, the Military Order is not limited or even primarily directed at the armed conflict in Afghanistan. The Bush Administration has begun to transfer prisoners to Guantánamo who were not captured in Afghanistan and who had no involvement in the conflict there. The President referred proudly in his State of the Union Address to the six Algerians seized in Bosnia and transferred, in disregard of extradition rules, in January 2002. 68 The November 13 Order appears designed to permit the President to bypass the ordinary criminal processes with respect to a wide range of persons suspected of terrorist acts or plots unrelated to the events of September 11 and the ensuing military action in Afghanistan. The "War Against Terrorism" is both global and indefinite. The criteria for declaring "victory" over international terrorism are unimaginable and unrelated to ordinary standards for determining the termination of hostilities in international armed conflict.

Given the territorial nature of the post-Westphalian state system and Al Qaeda's non-territorial identity, retaliation against Al Qaeda by the United States necessarily takes place in the territory of some state. In the case of Afghanistan, the de facto Taliban government essentially got swept into a conflict whose primary target was the Al Qaeda network.

How far the United States intends to pursue this armed conflict into the territory of non-consenting states and against additional terrorist groups is a question of grave moment. As the "War Against Terrorism" extends its reach, and suspected terrorists seized outside Afghanistan are transported to Guantánamo for indefinite detention or military trial, the international community's tolerance of the Administration's expansive war rhetoric will be tested. Terrorist suspects seized outside the context of the conflict in Afghanistan will likely present less plausible claims for treatment consistent with the Geneva Conventions. The Bush Administration has already begun to disseminate the view that the "War Against Terrorism" is an emergency justifying indefinite executive detention without judicial

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68. Union Address, supra note 55.
oversight. 69

B. Internal Armed Conflict

The distinction between international armed conflict and internal armed conflict is significant, as each type of conflict brings into application a different set of conventional and customary legal norms. Perhaps of greatest significance for persons captured during armed conflict are the lack of immunity for lawful acts of war for insurgents in internal armed conflict, and the denial of POW status. While conduct during the conflict is governed by the norms of humanitarian law that pertain to internal armed conflict, insurgents may be subjected to the ordinary criminal laws for their acts of rebellion. However, Common Article 3 of the Geneva Conventions of 1949 requires that any trials must be by “a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” 70

The definition of internal armed conflict is territorial, in the sense that internal conflict is contained within a single state and involves the government of that state and insurgents aspiring to sovereignty over all or a portion of its territory. Internal armed conflict must also be distinguished from isolated acts of violence and internal disorders, and Protocol II draws this distinction primarily on a territorial basis, recognizing armed conflict only where the non-state forces have effective control of a portion of the national territory. 71


U.S. officials will rely in part on decisions by European human rights courts that allowed British authorities to detain Irish Catholic and Protestant militants for long periods of time if they were deemed dangerous but not necessarily guilty of a crime, sources said. Those courts allowed the detentions as long as British officials periodically reviewed the cases.

International law allows for such indefinite detention only in cases of national emergency, and administration attorneys view the current situation—with a danger of clandestine terrorists possibly wielding weapons of mass destruction—as exactly that, legal sources said.

“...”

“...In a state of real emergency, various liberties can be suspended,” said one attorney who advised the administration on the rules.

Id.

70. Third Geneva Convention, supra note 51, art. 3.
71. Protocol Additional to the Geneva Conventions of 12 August 1949, and
Internal armed conflict may not appear to have much bearing on the November 13 Order. While the United States employed military commissions as martial law courts during its Civil War, it does not claim that the September 11 attacks launched an internal armed conflict in the United States of a magnitude that has disabled the ordinary criminal courts from functioning. Despite the massiveness of the September 11 attacks, Al Qaeda's presence in the United States is insufficient to satisfy the criteria for an internal armed conflict as defined in international law.

However, the U.S. military involvement in Afghanistan can be viewed as occurring in the context of that state's quarter-century old internal armed conflict. The U.S. military battled the Taliban not alone but with the assistance of the Northern Alliance, the armed wing of the de jure government, as well as other anti-Taliban Afghan forces. Once the Taliban was defeated, the United States continued to conduct military operations with the formal consent of the interim government, to which power was peacefully transferred in December 2001 by the former de jure government. The United States promptly extended formal recognition and full diplomatic relations to the Karzai government.

Thus, U.S. military action in Afghanistan is different in degree rather than in kind from U.S. military assistance to other governments engaged in internal armed conflict with terrorist groups, such as the Philippines and Colombia. Because the United States is not an occupying power in any of the states to whom it has extended anti-terrorist military assistance, including Afghanistan, it may not establish autonomous military commissions in the territories of these states to try persons suspected of war crimes, acts of terrorism, or common crimes. Those states may permit the United States to engage in law enforcement authority within their territory, may transfer terrorist suspects to the United States, and may even choose to accept U.S. assistance in the establishment of criminal tribunals.

The notion that the United States is engaged in an international armed conflict in the Philippines, for example, seems implausible. President Bush's State of the Union Address, however, includes such

relating to the Protection of Victims of Non-International Armed Conflict (Protocol II), June 8, 1977, art. 1(1), 1125 U.N.T.S. 609.

72. Ex parte Milligan, 71 U.S. 1 (1866), establishes the principle that military commissions may not try civilians during civil war where the regular federal criminal courts are capable of functioning.
law enforcement and military cooperation in the description of the continuing "War Against Terrorism." It remains to be seen if the Bush Administration will follow the logic of its rhetoric and transfer to Guantánamo captives seized in other internal armed conflicts.

III. Territorial Aspects of the Rule of Law

The November 13 Order and the detention policy implemented at Guantánamo raise a compelling question—is there a physical space in the world today where the treatment of prisoners by the United States is ungoverned by any legal rules? The text of the November 13 Order suggests that geography is irrelevant, as the detentions and military commissions are purportedly authorized both inside and outside U.S. territory. However, the selection of Guantánamo as a detention/interrogation site and a possible venue for the military commissions is far from accidental. The dominant concern of U.S. authorities appears to be escape from constitutional constraints on the treatment of terrorist suspects. That escape is better guaranteed in a location beyond the habeas corpus jurisdiction of the politically independent federal judiciary.

There are three bodies of law whose application U.S. authorities must avoid if indefinite detention and trial by military commission are to succeed pursuant to the November 13 Order. First, the provisions of the United States Constitution relating to the establishment of lower federal courts, indefinite preventive detention, and the rights of criminal suspects must be interpreted as being inapplicable, or constitutional scrutiny must simply be avoided altogether. The applicability of constitutional norms is addressed below in Section III.A. Second, humanitarian law limits on detention and trial of captured combatants must be avoided. The applicability of the Geneva Conventions has been addressed above in Section II, and humanitarian law will not be examined further in this essay. Third, human rights prohibitions on arbitrary detention and guarantees of fair trial rights must be found inapplicable, either through a derogation claim, a narrow jurisdictional theory relating to extraterritoriality, or simply by ignoring international obligations. Human rights norms and the potential availability of a forum to test the Bush Administration's policy against human rights treaty and customary norms are addressed in Section III.B.

73. Union Address, supra note 55.
the Philippines, at the time an unincorporated territory of the United States, and the defendant was a high-ranking Japanese general accused of command responsibility for serious violations of the laws of war. *Johnson v. Eisentrager* is especially interesting because the military commission operated in China, with the consent of the Chinese government, and because the Supreme Court refused to exercise habeas corpus jurisdiction to examine the legal basis for the commission trials, as it had in the two previous cases.

This trio of cases exempted military commissions from the provisions of the Bill of Rights on the theory that alien enemy combatants charged with violations of the law of war during international armed conflict are subject to a special legal regime. This regime was derived from the law of nations as it then existed. Indeed, the three opinions are noteworthy for their extensive discussions of customary international law, Congress's constitutional role in implementing the laws of war pursuant to the "define and punish" clause, and the Court's own responsibility to implement the law of nations as part of the law of the United States.

The November 13 Order poses separation of powers issues not raised by the commissions established during the Second World War—in particular, the Executive's usurpation of Congress's power to establish the lower federal courts. The claim that the President's authority as Commander in Chief justifies the creation of a parallel criminal justice system and a scheme of indefinite detention is dubious at best, and unsustainable especially in the absence of a legally cognizable international armed conflict.

Whatever the nature of the current "war," one thing is clear—there are no "alien enemies." Since 1798 Congress has defined "alien enemies" as "natives, citizens, denizens, or subjects of [a] hostile nation or government" with which the United States is engaged in a "declared war." Even if the armed conflict underlying the November 13 Order is narrowly conceived as an international armed conflict with the Taliban, the absence of a declaration of war means that no Afghan citizens or other subjects of the Taliban may be

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78. U.S. Const. art. I, § 8, cl. 10.
79. U.S. Const. art. I, § 8, cl. 9 (conferring power on Congress to "constitute Tribunals inferior to the supreme Court"); U.S. Const. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").
A. The Constitution

This essay will not examine the entire range of constitutional issues implicated by the November 13 Order. Rather, the key precedents concerning the constitutionality of trial by military commission will be analyzed for their relevance to the November 13 Order, with an eye especially to territorial elements. It should be emphasized that, should the November 13 Order produce primarily a program of indefinite detention without charge or trial, the existing precedents will have little bearing on its constitutionality. Remarkably, the Bush Administration announced in March 2002 its intent to detain indefinitely even captives who have been acquitted by military commissions, if the Pentagon regards those persons as dangerous.74 Officials also indicated that only a handful of the hundreds of captives are likely to be tried.75 The prospect of indefinite detention during the “War Against Terrorism” implicates the highly controversial precedents relating to wartime internment of persons of Japanese nationality or descent, including thousands of U.S. citizens as well as South Americans deported to the United States for detention.76

The Bush Administration relies on three cases in which the Supreme Court refused to invalidate convictions by military commission: Ex parte Quirin, In re Yamashita, and Johnson v. Eisentrager.77 In all three cases, defendants were enemy combatants captured in the course of declared international wars, and were accused and convicted of violations of the laws of war.

The geography of this trio of cases is notably diverse, suggesting that status (enemy alien combatant) was the driving factor in the constitutional exceptionality of these cases, rather than the territory in which the commissions operated. The commission in Quirin operated in the territory of the United States, one defendant claimed to be a dual U.S.-German national, and all were German combatants who had discarded their uniforms in order to commit acts of sabotage within the United States. The commission in Yamashita operated in

74. Seelye, supra note 63 (quoting Pentagon officials William J. Haynes II & Douglas Feith).
75. Id.
treated as alien enemies. Al Qaeda, of course, has no "citizens."

The selective disfavored treatment of alien enemies in international and U.S. law rests upon concepts rooted in the territorial aspects of post-Westphalian sovereignty. The presence of alien enemies, even civilians who are lawful permanent residents, in the national territory during armed conflict poses a danger to be managed by special measures of expulsion and internment. Alien enemies are identifiable by their citizenship, not by personal conduct or their attitudes toward their host state.\(^\text{81}\) They are subject to summary expulsion and internment, which derogate from normal constitutional protections for aliens present in the United States.

Trials by military commission and detentions under the November 13 Order are limited to non-citizens, but, unlike policies of expulsion and internment of alien enemies, these policies are not directed at persons of a particular foreign nationality. In general, non-citizens subjected to federal criminal justice are entitled to the same constitutional rights as citizens, especially with respect to the important structural protections that interpose juries and independent judges between the suspect and the accusing executive:

\[\text{[In relation to] the Fifth and Sixth Amendments, it must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by those amendments, and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty or property without due process of law.}\(^\text{82}\)

\textit{Wong Wing v. United States} leaves open the question whether the Executive may deny grand jury indictment, jury trial, and trial before politically independent Article III judges to non-citizens tried in offshore detention camps, and whether the Due Process Clause protects the Guantánamo captives against indefinite detention without trial or after acquittal.

The special constitutional treatment of alien enemies applies only during declared international armed conflicts. As Justice Black stressed:

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\text{[T]he Alien Enemy Act of 1798 was intended to grant its extraordinary powers only to prevent alien enemies residing in the}\]


\(^82\) Wong Wing v. United States, 163 U.S. 228, 238 (1896).
United States from extending aid and comfort to an enemy country while dangers from actual fighting hostilities were imminently threatened. . . .

The 1798 Act did not grant its extraordinary and dangerous powers to be used during the period of fictional wars. 83

Terrorist suspects, who may be of any nationality and who lack a legal tie of citizenship to their alleged organization, are not easily analogized to alien enemies. They may be guilty of crimes against the United States, indeed of crimes severe enough to imperil national security. But they are not alien enemies accused of violations of the laws of war in a declared international armed conflict, as were the defendants in the three cases from the Second World War that validated the use of military commissions.

It is far from clear that war crimes, understood in an international legal sense, will be the focus of any prosecutions mounted pursuant to the November 13 Order. Terrorist offenses, past and planned, are the chief preoccupation of the Bush Administration's defensive strategy. The two important Supreme Court precedents that invalidated convictions by military commissions involved noncombatants who were neither enemy aliens nor accused of violations of the laws of war. 84

Johnson v. Eisentrager deserves special attention because it is sometimes cited for the proposition that the Constitution has no extraterritorial application. The location of the detention and interrogation facility at Guantánamo and the decision to forego

84. Ex parte Milligan, 71 U.S. 1 (1866), involved the prosecution of a U.S. citizen for anti-Union speech in Indiana during the Civil War. The Court invalidated Milligan's conviction on the ground that the Constitution does not authorize emergency powers that dispense with Article III and the Bill of Rights where the war has not disabled the federal courts from functioning. Thus, Milligan might accept the operation of military commissions where they fill a legal vacuum created by armed conflict. No such vacuum exists in relation to crimes that might be prosecuted by military commissions established under the November 13 Order.

Duncan v. Kohanamoku, 327 U.S. 304 (1946), decided at roughly the same time as Yamashita, invalidated convictions by military commissions operating in Hawaii during Second World War. Hawaii was an incorporated territory of the United States, but located within the "theater of war" in the Pacific. The decision by the military commander to subject civilians accused of ordinary crimes to trial by military commission was invalidated on a theory similar to that of Milligan: the continued availability of the federal courts to try the same crimes. The citizenship status of the defendants is not mentioned in the Court's opinion.
establishment of military commissions inside the United States may have been motivated by an understanding that the Bill of Rights would provide no extraterritorial protection to persons subjected to the November 13 Order. But the reasoning of *Johnson v. Eisentrager* turns as greatly on the defendants’ status as alien enemies accused of war crimes as it does on the fact that their trial occurred in China and their sentences were being served in Germany.

Gerald Neuman has elucidated two centuries of confused doctrine relating to the territorial dimension of constitutional protection, especially for persons suspected of crimes. Neuman explains the difficulty the Framers’ generation had with the applicability of the Constitution to court proceedings conducted outside the territory of the original thirteen states. As the United States became an imperial power, with sovereignty over non-white subjects outside the territory of admitted states, theories suggested that law enforcement and judicial power could be exercised by U.S. officials in disregard of the Bill of Rights. Even citizens tried abroad, for example by consular courts, might not enjoy the protection of the Bill of Rights. As Neuman observes, Justice Field’s opinion in the leading case of *In re Ross* emphasizes his view of the territorial limits of the Constitution. Field held that a U.S. consular court sitting in Japan must, consistently with principles of comity, operate “on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other.”

The Insular cases, which date from the era of Guantánamo’s acquisition, divided the Supreme Court between Chief Justice White, who “maintained the Constitution as the measure of federal power over territories supposedly designated by Congress as welcome to full status, but limited protection in other territories to a minimal set of background rights described as fundamental,” and the first Justice

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86. See id. at 943-56.
87. Id. at 956-64.
88. Neuman observes:
The language of the argument came from the conflict of laws and emphasized the primacy of territorial sovereignty as the basis of legal obligation. Japan as a sovereign nation had the ultimate right to forbid the consul to conduct a jury trial within its territory; therefore the Constitution was not legally binding on the consul.
Id. at 957.
Harlan, who “continued the traditional insistence that wherever Congress acquired sovereignty, the rights of the written Constitution followed as part of the fundamental law.” In Neuman’s terms, “municipal law” theorists such as Justice Harlan asserted that the Constitution followed the flag. The projection of sovereignty over territories carried with it the constraints of the Constitution. Harlan, however, suggested that temporary military occupation of foreign territory with no objective of acquiring sovereignty would not extend the protection of the Constitution.91

Reid v. Covert,92 decided after Johnson v. Eisentrager, extends full constitutional protection to the extraterritorial military trial of a civilian not charged with war crimes. In that case, however, the defendant possessed U.S. citizenship. There is little case law following Reid that casts light on the constitutional theories examined by Neuman and their potential applicability to the military commissions proposed in the November 13 Order.93 As Neuman summarizes:

As the Bill of Rights expanded under the Warren Court and the early Burger Court, lower courts read Reid v. Covert broadly as confirming citizens’ rights against federal action on the high seas and in foreign countries. A substantial body of criminal procedure cases resulted, as well as occasional noncriminal cases. Some courts were hesitant to deny similar protection to aliens abroad, and two well-known holdings boldly provided such protection.94

The Supreme Court in 1990, however, suggested that certain provisions of the Bill of Rights, such as the warrant clause of the Fourth Amendment, have no extraterritorial application to non-citizens, even those later subjected to regular federal criminal trials.95

In its character as a program of indefinite preventive detention, the November 13 Order is highly questionable under the Due Process Clause. The analogy to wartime internment of prisoners of war and

90. Neuman, supra note 85, at 958.
91. Id. at 963 (discussing Neely v. Henkel, 180 U.S. 109 (1901), which involved extradition of a U.S. citizen to Cuba to stand trial before a military tribunal established by occupying General Leonard Wood).
94. Neuman, supra note 85, at 970 (citations omitted).
civilians seems strained, in light of the global scope of the "War Against Terrorism" and the impossibility of determining the warring parties and the duration of "hostilities." The Order purports to authorize the indefinite preventive detention of terrorist suspects arrested anywhere in the world, for an unspecified period of time, and without judicial supervision.

The Supreme Court in the recent Zadvydas v. Davis decision applied full due process protection to deportable but non-removable aliens held in indefinite preventive detention, and confirmed the appropriateness of habeas corpus relief to supervise executive detention policies. The Court stressed the physical presence of the detainees in the territory of the United States, however:

It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders [citing United States v. Verdugo-Urquidez and Johnson v. Eisentrager]. But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.

In dismissing a habeas corpus petition filed on behalf of unnamed Guantánamo captives, a federal district court in Los Angeles relied on precedent suggesting that Haitian and Cuban asylum-seekers previously detained on Guantánamo were not subject to the "sovereignty" of the United States and thus could not protect their right to liberty by invoking the habeas corpus jurisdiction of the federal courts. The District Court cautioned that "nothing in this ruling suggests that the captives are entitled to no legal protection whatsoever." Yet, without a forum in which to adjudicate their legal rights, the Guantánamo captives are left to the mercy of unfettered executive discretion.

Litigation brought on behalf of British and Australian captives may clarify whether the most fundamental aspect of Due Process, derived from the Magna Carta—right to judicial determination of the

97. Id. at 693.
98. Coalition of Clergy v. Bush, 189 F. Supp. 2d 1036, 1049 (2002) (citing Cuban Am. Bar Assoc. v. Christopher, 43 F.3d 1412, 1425 (11th Cir. 1995)). The asylum-seekers, unlike the current captives, however, had the "key to the jailhouse door" in that they could escape confinement by accepting repatriation.
99. Id.
lawfulness of executive detention—protects persons subjected to the power of American law enforcement in anomalous offshore prison facilities. Venue is claimed in the District of Columbia, on the basis that President Bush and Secretary of Defense Rumsfeld, who oversee the military commanders of Camp Delta on Guantánamo, are located and are making relevant policies there.

B. Human Rights Law

The suggestion that any human being is without legal rights, when detained and threatened with criminal prosecution and punishment, poses a stark challenge to universal human rights principles. The concept of universal human rights is antithetical to the status and geographic distinctions that cause the protection of humanitarian law and the Constitution to be variable and unpredictable.

The November 13 Order primarily implicates three sets of human rights: the prohibition on arbitrary detention; the right to fair trial; and the prohibition of torture and cruel, inhuman, and degrading treatment or punishment. The United States is a party to two relevant treaties, is subject to the supervision of a regional human rights body in the Americas (the Inter-American Commission on Human Rights), and is also bound by customary international human rights norms relating to these rights. I will not explicate these rights at length in this essay. While the issue of arbitrary detention is fairly well framed on the basis of information available as of March 2002, additional facts are necessary in order to assess whether torture or cruel, inhuman, or degrading treatment is being inflicted on the captives. The question of fair trial rights requires an analysis of whether the derogation from ordinary procedures in the federal criminal courts made by the Department of Defense regulations, most significantly in relation to the denial of appeal to an independent judicial body and the admission of hearsay evidence, is taking place in the context of an emergency that threatens the life of the nation and whether the derogation measures are strictly required by the


exigencies of the circumstances.

The three bodies of law (Constitution, humanitarian law, and human rights law) vary in interesting ways in relation to geography and the ability of military captives to claim rights. The theory of the November 13 Order appears to be that the existence of an armed conflict confers authority on the President to establish by fiat a specialized criminal justice system, not subject to constitutional constraint or judicial scrutiny. The President may designate certain persons to be detained and/or tried in this system of his creation, and they may not claim any protection under the Constitution. Operating this system outside the territory of the United States, but in a location where full sovereign power can be exercised over the captives, further insulates the President's actions from constitutional limits because of the uncertain geographic scope of habeas corpus relief. Thus, the claimed armed conflict and the extraterritorial location of the captives combine to make the Constitution essentially disappear as a source of legal rights.

Humanitarian law, in contrast, springs into application when an armed conflict comes into existence. The November 13 Order appears to have been crafted primarily to escape from the Constitution, with little thought given to the consequence that armed conflict would subject the President's treatment of the captives to the external constraints of the Geneva Conventions. The confusion and disagreement within the Bush Administration over the POW status of the captives perhaps results from this inattention. The POW controversy has helped illuminate the ambiguous character of the “War Against Terrorism” and has exposed the United States to international criticism for its disregard of important international legal protections for persons detained in the course of combat. The President has denied the captives the most important protections of the Geneva Conventions—trial rights and housing equivalent to that afforded soldiers of the detaining power and repatriation at the conclusion of hostilities. Their standards of treatment are determined by “policy” rather than law, and subject to unfettered executive discretion.

Human rights law neither disappears nor springs into application with armed conflict. The danger that human rights protections might be suspended by warring states was contemplated by the drafters of human rights treaties, including the International Covenant on Civil and Political Rights (“ICCPR”). The derogation clause in Article 4 of the ICCPR governs the circumstances under which human rights
protections may be suspended or varied to accommodate emergencies that threaten the life of the nation, whether caused by war, terrorism, or other extraordinary situations. Certain rights, such as protection against torture and cruel or degrading treatment, are non-derogable. The derogation jurisprudence of human rights treaty bodies has yielded a principle that the right to seek a judicial determination of the lawfulness of detention also cannot be suspended. Emergency rules implicating arbitrary detention and fair trial rights are subject to searching evaluation to assess whether the suspension of rights is proportional to the exigencies of the emergency situation. All persons subject to detention are protected by these norms, without the status limitations that affect the applicability of the Constitution or humanitarian law.

Derogating states do not typically establish offshore detention and trial facilities for terrorist suspects. Thus, the November 13 Order poses a distinct set of issues that have not been thoroughly examined by human rights treaty bodies, even though lengthy detention without charge and military trials of terrorist suspects are a well-known phenomenon in derogation jurisprudence. Is there a variable geography to fundamental human rights?

The United States obtained a ruling from the Supreme Court that the 1951 Convention relating to the Status of Refugees placed no constraint upon the Executive's treatment of refugees outside the territory of the United States, leaving the Executive free to interdict asylum-seekers on the high seas and return them directly to the state

102. For a more detailed explanation of Article 4 as it applies to the establishment of military commissions pursuant to the November 13 Order, see Fitzpatrick, supra note 8.

in which they feared persecution. Can a similar theory of geographic inapplicability be argued in relation to the ICCPR and the Convention Against Torture ("CAT")?

The language of the treaties is likely to be seized upon by the Administration to argue that these instruments do not govern its treatment of the Guantánamo captives. Article 2(1) of the ICCPR requires a state party to protect the defined rights of "all individuals within its territory and subject to its jurisdiction." Article 2(1) of the CAT requires a state party to prohibit "acts of torture in any territory under its jurisdiction." The decision by the European Court of Human Rights that persons affected by NATO bombing in Belgrade in 1999 could not file an application under the European Convention for the Protection of Human Rights and Fundamental Freedoms suggests that human rights treaties may have a confined jurisdiction "ratione loci." However, the human rights treaty bodies, including the European Court of Human Rights in the Bankovic v. Belgium case, recognize that where a state party projects its sovereignty outside its own territory to detain persons, its actions are subject to human rights treaty provisions. The United States, by the terms of its lease with Cuba, exercises "complete jurisdiction and control" of the Guantánamo base. The captives are held in close and harsh confinement, every detail of their existence supervised by U.S.

105. International Covenant on Civil and Political Rights, supra note 101, art. 2(1).
106. Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, supra note 101, art. 2(1).
108. Id. at paras. 23, 26, 67-73. The respondent states argued that:
   "The exercise of 'jurisdiction' therefore involves the assertion or exercise of legal authority, actual or purported, over persons owing some form of allegiance to that State or who have been brought within that State's control. . . ."

   [T]he Court . . . has applied this notion of jurisdiction to confirm that certain individuals affected by acts of a respondent State outside of its territory can be considered to fall within its jurisdiction because there was an exercise of some form of legal authority by the relevant State over them. The arrest and detention of the applicants outside the territory of the respondent State . . . constituted, according to the Governments, a classic exercise of such legal authority or jurisdiction over those persons by military forces on foreign soil.

   Id. at paras. 36-37.
officials.

Where a state is operating extraterritorially, and is subjecting individuals to its law enforcement authority, the state must adhere to its human rights treaty obligations, including the prohibitions on torture and arbitrary detention. During the "dirty wars" in South America, for example, foreign security forces were sometimes permitted to detain, torture, and disappear "terrorist" suspects in the territory of allied dictatorships. This exercise of extraterritorial law enforcement brought the victims within the jurisdiction of the state committing the human rights violations. As the Human Rights Committee stated in such a case, the reference to territory and jurisdiction in Article 2(1) of the ICCPR:

does not imply that the State Party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it.... [I]t would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.110

This leaves the question of a forum for assessing the consistency of U.S. policy regarding the Guantánamo captives with the nation's human rights obligations. The United States does not accept the right of individual communication under the ICCPR, although it has accepted the optional interstate complaint mechanism under Article 41. No state has ever brought a complaint against another state before the Human Rights Committee. The Human Rights Committee may also review state reports, including special reports that have sometimes been requested from states facing emergencies, pursuant to Article 40. The United States has generally ignored the rulings of the Inter-American Commission on Human Rights ("IACHR"), which has authority to consider individual communications regarding states that are members of the Organization of American States but which have not ratified the American Convention on Human Rights. The IACHR has already received a communication concerning the treatment of the

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If a U.S. court exercises habeas corpus jurisdiction over the captives, their rights under treaties and customary international law could be determined, as elements of the "laws or treaties" of the United States.\(^{112}\)

IV. Conclusion

This essay has explored the intersection of sovereignty, territoriality, and the rule of law, in relation to the unprecedented policy of detention and potential military trial of suspected terrorists subjected to the November 13 Military Order. First, the territorial elements of post-Westphalian sovereignty have been sketched. Specifically, this essay has examined the challenge posed to the state system by non-territorial transnational criminal networks such as Al Qaeda. The Bush Administration appears to regard the United States as being engaged in an international armed conflict with Al Qaeda and other global terrorist networks, although its pronouncements regarding the "War Against Terrorism" remain confused and contradictory. What is clear is that the Administration believes that victory in this war requires the exercise of absolute sovereignty without legal constraint over captured enemies. Ironically, this rights-free zone of operation is more practically available outside the sovereign’s territory than within it.

Second, this essay examined the territorial assumptions of the law of armed conflict. In particular, it emerges that international law cannot accommodate the concept of an international armed conflict between a state and a transnational terrorist network with no territorial aspirations. Al Qaeda is unable, even if willing, to become a party to the Geneva Conventions, not being a member of the club of post-Westphalian states. Thus, the November 13 Order will operate without legal constraints from international humanitarian law, even though it is premised on the existence of armed conflict. While the United States acknowledges the formal applicability of the Geneva Conventions to its conflict with the Taliban, President Bush has rejected the trial and detention rules set out in the Third Geneva Convention for all of the Guantánamo captives.

\(^{111}\) Request by the Center for Constitutional Rights, the Human Rights Clinic at Columbia Law School and the Center for Justice and International Law for Precautionary Measures under Article 25 of the Commission’s Regulations, Feb. 25, 2002 (on file with author).

Third, this essay explored the territorial aspects of the Constitution, as it relates to the implementation of the November 13 Order. Whether the Constitution follows the flag to Guantánamo, and whether judicial scrutiny of the detentions and potential military trials will be available to the captives, are complex and unclear questions.

Finally, the international human rights obligations of the United States are substantively difficult to escape by the creation of offshore detention facilities. These are universal norms, not variable based on the status of the person detained. The Bush Administration is likely to argue that the “War Against Terrorism” has created a state of emergency that justifies derogation from detention and fair trial provisions. It is also possible that the Administration will suggest territorial limits on those universal obligations. Whether the mechanisms designed for the implementation of human rights treaties have sufficient authority to adjudicate authoritatively the lawfulness of U.S. policy is a troubling and significant question for rights defenders.