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THE WAR ON TERROR: WHERE WE HAVE BEEN, ARE, AND SHOULD BE GOING

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It is with pleasure and gratitude that I write this Chapter to honor Professor Ved Nanda and the Denver Journal of International Law and Policy (“Journal”) in commemoration of the Journal's 40th Anniversary. Before getting to know Professor Nanda as a friend and colleague, I long admired his work and insight into the crucial international law issues of the day while using his ideas in my own teaching. I have participated in several Sutton Colloquium programs since first meeting Professor Nanda in Montana, and always welcome these opportunities to come to the University of Denver to share thoughts. I also greatly appreciate the Journal's willingness to publish several of my past writings. I have chosen one of these writings here, co-authored with Matt Cooper who is one of Professor Nanda's very best international law students among the many he has taught and inspired, to assess the war on terror as to where we have been, where we are, and perhaps most importantly, where we should be going.²

In 2009, Matt and I wrote that Europe, and particularly the European Court of Human Rights (“ECHR”), seemed to have a much sounder approach, based on established rule of law and human rights law principles set forth in the European Human Rights Convention (“Convention”), than the U.S. in confronting most legal aspects of the war on terror. We looked at case law developments involving extraordinary renditions, military commissions, and related habeas corpus proceedings to challenge them in connection with suspected terrorist detentions, warrantless electronic surveillance, official complicity in aiding human rights violations - including torture against terrorist suspects by overseas governments and their officials - state secrets as a basis to bar legal claims, and the marked U.S. court tendency to dismiss legal claims against the U.S. and its officials on *91 various technical grounds. These developments were contrasted with the ECHR decisions allowing lawsuits against European states to proceed. We concluded that the U.S. should follow the European approach of allowing lawsuits challenging alleged violations of basic rights of terrorist suspects to be decided on their legal merits. In retrospect and based on a review of U.S. and European case decisions since publication of our article, nothing has altered my position.

Before getting into reasons, however, I think it is appropriate here to cite some of Professor Nanda's own legal views regarding the War on Terror as it has progressed since the September 11, 2001 tragedy because he has, in many respects, been a voice for all of us in identifying legal issues which matter. For example, in 2001 he reminded us that international law is a fundamental weapon in waging the war on terrorism and stated that “the war against terrorism will be won only if concerted national action is taken . . . for that to happen, we need to provide credible leadership that we can be proud of and we need to take the moral high ground that will set an exemplary precedent.”³ That same year, he also noted:

Among policy alternatives to combat terrorism, the use of military force dominates the U.S. agenda today. The implications of this are far-reaching. As historically unprecedented as the challenges are, it would appear that more creative approaches are urgently called for, approaches that do justice to the multi-faceted character of this problem.⁴

Even more to the point, he cautioned:

The use of military force to combat terrorism must be seen as a new powerful tool being wielded by the United States. Having employed it first in Afghanistan and now in Iraq, the US has been emboldened by its reception at home and seemingly undaunted by criticism of it overseas. Its implications are far-reaching, perhaps especially for the integrity of the law itself.⁵

Time and circumstances proved Professor Nanda to be an accurate prophet.

Professor Nanda studied the U.S. approach to waging the war on terror as it continued after 9/11, and in 2006 he addressed the issue of *92 terrorist suspect detentions head-on by urging that the detainees “must be treated humanely” and with “basic fairness.”⁶ He captured the sentiments of many by stating that those directing the U.S. war on terror “must not lose sight of the need to strengthen international human rights law and not even inadvertently dilute it.”⁷

It is with Professor Nanda's foregoing thoughts in mind that we now view where we have been, where we are, and where we ought to be going with the U.S. war on terrorism.

Extraordinary Renditions

Matt and I sharply criticized the seeming U.S. judicial willingness to condone extraordinary renditions by finding no viable cause of action in U.S. courts to challenge them in *Arar v. Ashcroft*. After we published our article, the Second Circuit reheard its prior decision en banc and a sharply divided court reaffirmed its initial decision barring any legal claim against U.S. officials or the government itself.⁸ The U.S. Supreme Court refused to hear the appeal.⁹ Mr. Arar, the plaintiff, was neither a U.S. citizen nor a U.S. permanent resident alien, thus deferring for another day the question of whether U.S. citizens would fare differently in challenging renditions. The Seventh Circuit recently suggested an affirmative answer in a non-rendition overseas torture case, *Vance v. Rumsfeld*,¹⁰ but the Court recently vacated this three-judge decision and granted en banc review in a development which bodes ill for rendition case plaintiffs.¹¹ Meanwhile, U.S. district courts seem to follow *Arar* in rejecting rendition claims by any plaintiffs.¹² In addition, it now seems clear that suits against private, non-governmental defendants participating in rendition are likewise barred whenever plaintiffs require evidence available solely from classified information to sustain them.¹³

Meanwhile, the ECHR goes in a much different direction: “[E]xtraordinary rendition, by its deliberate circumvention of due *93 process, is anathema to the rule of law and the values protected by the Convention.”¹⁴ Although the Court recognized that sending suspected terrorists to other countries is permissible, this can only be done when there are strong, legally binding assurances by the sending and receiving countries that all legal rights protected in the Convention will be respected.¹⁵ As noted in our prior article, the ECHR has little hesitation about granting rule of law primacy over security.

Enemy Combatant Habeas Litigation

As Matt and I pointed out in our prior article, the issues of enemy combatants status and their detention conditions, including indefinite detention status, has been one pitting the U.S. Government against the mainstream of international law jurists' views.¹⁶ We expressed concerns about the limited right of habeas corpus and its viability. Our concerns proved well founded. In case after case since then, detainees in Guantanamo and elsewhere have used habeas to no avail in their efforts to challenge their detentions. The U.S. Court of Appeals for the D.C. Circuit, which now has exclusive jurisdiction over these detainee habeas petitions, has proved a habeas legal graveyard, and its decisions recently prompted a pair of commentators to accuse this Court of “undermining” the right of meaningful habeas review.¹⁷ Another has identified four individual judges on this Court who seem to steer these cases to predetermined outcomes whenever at least two are on the same judicial panel, making it impossible for detainee habeas petitioners to prevail.¹⁸ One specific category of cases involves the evidentiary requirements to prove these petitioners belong in detention as either supporters of, or persons who are part of, terrorist organizations like Al-Qaeda, under a lax preponderance standard the D.C. Circuit has yet to find unmet.¹⁹ This Court most recently reversed a lower court grant of one detainee's habeas petition because federal executive branch actions enjoy a “presumption of regularity” supposedly not considered by the *94 lower court even though the latter appeared to find ample basis to overcome any such presumption.²⁰ These results in and of themselves might not warrant serious criticisms given the small numbers of habeas corpus writs granted by U.S. courts generally, but here the law is still unclear about who may be lawfully detained under what status and evidentiary circumstances. As Professor Chesney notes, “[T]he precise boundaries of the government's detention authority remain unclear despite the passage of more than nine years since the first post-9/11 detainees came into U.S. custody.”²¹ Professor McNeal states it better: “Counterterrorism detention policy in the United States is a mess.”²²

This problem has likely just been exacerbated by President Obama's December 31, 2011 signing of the National Defense Authorization Act of 2012, which now authorizes indefinite military detentions of anyone, including U.S. citizens who are “part of or [have] substantially supported al-Qaeda, the Taliban, or associated forces . . . engaged in hostilities against the United States” or anyone who commits a “belligerent act” against the U.S. or a U.S. ally regardless of whether the detainee committed any such act on a battlefield and even such act is committed in the United States.²³ The ACLU has described President Obama's approval of the legislation as “a blight on his legacy because he will forever be known as the president who signed indefinite detention without charge or trial into law.”²⁴ There is more to say below about the overall Obama approach to the war on terror and military commissions.

One black letter legal rule regarding detention seems to be emerging from these U.S. cases, namely that non-U.S. citizen and nonresident alien detainees held outside U.S. jurisdiction lose their right to sue even in the face of horrible atrocities such as those seen in Abu Ghraib.²⁵ This includes suits against the government, government officials, and contractors, with contractors having especially broad immunity.²⁶

*95 The ECHR takes a tough approach contrary to U.S. detention cases by concluding that permissible grounds for detention pursuant to the Convention do “not include internment or preventive detention where there is no intention to bring criminal charges within a reasonable time.”²⁷ This rule applies regardless of where detainees are located physically as long as they are within the custody of Convention state's military or civilian authorities.²⁸ This straightforward approach makes it difficult to see how any Convention state can lawfully turn over someone it has detained to U.S. military commissions.

Warrantless Surveillance

Another troubling legal aspect of the war on terror cited in our prior article is the use of judicially unsupervised electronic surveillance. We found especially problematic the unavailability of legal redress to challenge the National Security Agency (“NSA”) Terrorist Surveillance Program, in essence giving free reign to U.S. national security agencies to monitor international electronic communications. Since that time, one federal appeals court has continued to block judicial access to litigate whether such surveillance even occurred.²⁹ Another has only recently upheld blanket immunity for U.S. telecommunications companies which aid the government by providing the surveillance means.³⁰ However, on a more positive legal note for plaintiffs in these cases, two separate federal appellate courts have found that certain organizations and individuals now have standing to challenge the electronic surveillance of U.S. citizens outside the U.S. under the current version of the Foreign Intelligence Surveillance Act (“FISA”), adopted in 2008, which requires judicial approval of such surveillance, but does not require any particularized basis for granting such approval.³¹ Whether the award of standing will result in plaintiffs winning these cases on their merits seems far from certain, however, because the government still has a number of defenses (including the “state secrets” argument discussed below) which appear likely to preclude such a result.

In contrast to the surveillance wars in U.S. courts, the ECHR had decided, in its 2008 Liberty decision shortly before we wrote our article, that surveillance without close court supervision is legally impermissible under the Convention.³² Since that decision the ECHR *96 has again reviewed the practice on unchecked national security agency surveillance with little or no court supervision. In a stronger statement, the ECHR determined that even the threat of secret surveillance pursuant to nonexistent or inadequate national laws was enough to trigger ECHR jurisdiction in order to challenge the threat under the Convention.³³ The ECHR also rejected the notion that plaintiff ignorance of the surveillance should bar the action for lack of legal injury by noting finding mere unchecked threat enough to sustain the case.³⁴ The ECHR does not wholly dismiss secret surveillance in the war on terror. In fact, it has upheld it as long as there are clearly written laws which prescribe how and when it will be used, define which categories of persons are susceptible to surveillance, and limit the surveillance time and means to those “strictly necessary for safeguarding democratic institutions.”³⁵ This approach seems far preferable to the guessing game seen in the U.S., although the Amnesty and Jewel cases noted above may well result in similar rulings.

Political Question Bars to Litigation & Liability

Our prior article expressed concerns about U.S. court willingness to apply the political question bar to litigation and liability against the U.S. executive branch, even when basic rights are violated. Since then, our concerns have proved valid as the political question doctrine has shut down judicial review of executive branch decisions to bomb, kill, and falsely accuse innocent people and businesses mistakenly identified as terrorists.³⁶ The D.C. Circuit explains this with crystal clarity: “The political question doctrine bars our review of claims that, regardless of how they are styled, call into question the prudence of the political branches in matters of foreign policy or national security constitutionally committed to their discretion.”³⁷ Taken literally, this means an executive branch official can exercise whatever the official discretionarily determines is appropriate in the war on terror regardless of the consequences, as long as there is a significant foreign relations or national security aspect to the decision. In other words, the lawyers who represent client victims of this war can simply drop their cases and go home because quite probably no war on terror decisions involving other countries are non-discretionary in nature.

The ECHR seemingly takes a different approach regarding discretionary decisions in the war on terror:

*97 [I]t would be contrary to the rule of law for the legal discretion granted to the executive . . . to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference. . . .³⁸

The ECHR has indicated quite strongly that only the judicial branch of government has the power to determine when executive discretion has overreached at the expense of rights protected by the Convention.³⁹ It is unlikely that the ECHR would ever accept a political question bar to judicial review.

State Secrets and Undisclosed Evidence

Matt and I took issue with U.S. judicial inability or unwillingness to allow litigation by victims legally injured in the war on terror when evidence in the case flowed from state secrets, even when these cases have merit. We also expressed concern about how easily state secrets could be claimed by the U.S. executive branch, which even cites the doctrine to shield publicly available information, as seen in the 2007 El-Masri decision.⁴⁰ Since that time, two other federal appellate courts in different circuits have applied the state secrets doctrine to preclude plaintiffs from pursuing their cases.⁴¹ In addition to these state secrets cases, other federal courts have refused to require disclosure of witness identities and other material evidence used to support anti-terrorism criminal convictions.⁴² This means that even when terrorism cases wind up in federal criminal court rather than military commissions, the constitutional rights generally available in other criminal cases do not necessarily apply in these.

The ECHR applies a different standard to evidence denial on national security grounds. Although the ECHR recognizes the need, at times, not to make all evidence used in terrorism cases available to defendants, this need can be met only with great difficulties; independent courts must be able to assess all evidence used in particular cases, in consultation with legal counsel for defendants, *98 before cases involving secret evidence can proceed.⁴³ Unlike U.S. courts, the

ECHR will readily reject convictions based on lack of access to evidence rather than find reasons to sustain them.⁴⁴

Military Commissions: Are They Legitimate?

Our prior article joined the large chorus of voices questioning the legitimacy of military commissions in adjudicating many of the detainees caught up in the war on terror. We praised the 2006 U.S. Supreme Court Hamdan decision finding military commissions created under a then-applicable federal statute invalid based on U.S. constitutional and international law principles.⁴⁵ We also suggested that the Court's subsequent Boumediene decision recognizing Guantanamo detainee habeas rights had left another legal question mark hanging over legislatively created military commissions.⁴⁶ Congress nonetheless responded first to Hamdan by reconstituting the commissions in 2006 to create their statutory basis; and again in 2009, partly in response to Boumediene to set evidentiary parameters for both civil court habeas proceedings and commission cases.⁴⁷ Congress again acted last December to refine somewhat how commissions are to function from this point forward.⁴⁸ Based on this pattern of congressional enactments, it seems clear the U.S. legislative branch, with executive branch support, will insist on using military commissions in the war on terror as long as the judicial branch allows it.

Whether commissions are constitutionally viable will require yet another U.S. Supreme Court decision, or two, to decide. Meanwhile, opinions about whether they meet fundamental legal safeguards are decidedly mixed as they now hear cases. Two recent commentators with first-hand familiarity of commissions cases generally give the commissions positive assessments, and one, Joshua Dratel, has written a piece well worth reading because he raises points seldom discussed by critics about how experienced civilian criminal defense counsel can practice effectively once the cases get underway.⁴⁹ Other commentators deplore these commissions, citing serious ethical, evidentiary and substantive rights issues, suggesting something akin to Star Chamber justice.⁵⁰ One military lawyer with actual case experience provides a balanced perspective about the pros and cons of the commissions, before ultimately concluding they should be abolished in favor of using U.S. civilian courts.⁵¹ The negative critics conclude without exception that these commissions lack validity under U.S. constitutional and international law. Perhaps the harshest criticism of all to date comes from a U.S. military lawyer who represents Guantanamo detainees, when he cites "the legal theory underpinning Guantanamo and the military commissions" as "an assault upon the structure of our form of constitutional government" flowing directly from the architect of Nazi Germany's legal system used to support the Holocaust.⁵²

The ECHR would likely agree with the harshest commissions' critics, given the continuous ECHR line of cases concluding that military courts can never try civilian terrorist defendants fairly, or in a manner consistent with Convention safeguards, because they fall too far outside civilian judicial control. We cited the Kenar case in our article to illustrate this legal point.⁵³ Since that case, the ECHR has had no military court decision, but a series of recent cases involving British military activities in Iraq make clear that the Convention applies to all aspects of these activities where civilian rights are concerned. The British Government has yet to prevail in any of these cases, arguing special military exigencies as a basis for ignoring Convention rights.⁵⁴ Perhaps more to the point, the ECHR has strongly suggested that countries bound by the

Convention would violate it by extraditing suspected terrorists in European detention to the U.S., absent assurances that they would not be tried by U.S. military commissions.⁵⁵

*100 The Bush and Obama Administrations: Is There a Material Difference?

Professor Nanda minced no words in describing “there is broad consensus that the Bush Administration's war on terror led to violations of international human rights law as well as international humanitarian law . . . both domestically and internationally.”⁵⁶ Few scholars would dispute this view, which does beg the question of whether the Obama administration has done any better. The answer is a qualified maybe. President Obama has apparently halted renditions, torture, and secret detention facility use.⁵⁷

However, despite Obama campaign promises to close Guantanamo, the detainees are still there and their trials by military commissions of dubious validity continue. To date no high or mid-level U.S. civilian or military official has been convicted in civilian or military courts for violating U.S. detainee rights, including officials tied to the infamous Abu Ghraib prison. Contractors have also evaded legal accountability in most cases because “no coherent recourse currently exists, either domestically or internationally, that can hold PCMFs [Private Military Contractor Firms] accountable for mistreatment.”⁵⁸ Although post-Abu Ghraib legal review occurred during the Bush administration, there is no reason to believe results would differ in the current one. These results are stark regarding the military:

After exhaustive investigations, public fallout, and internal recriminations, eleven enlistees were court-martialed, convicted, and sentenced for their conduct at Abu Ghraib. Their sentences ranged from a reduction in rank and the loss of one-half of one month's pay to ten years in prison. As for the officers who ran the Abu Ghraib prison, only one, the lieutenant colonel who directed the interrogation center, was charged with crimes relating to the abuse and subsequent cover-up; he was cleared of all charges but for one count of willfully disobeying an order not to discuss the investigation. A few officers were reprimanded and administratively punished for their failures of leadership, including then-Brig. Gen. Janis Karpinski, who lost her star, and Col. Thomas Pappas, who was relieved of command, reprimanded, and fined. Not a *101 single officer, however, was court-martialed for failing to stop the abuse of prisoners. In fact, Maj. Gen. Antonio M. Taguba, the Army investigating officer whose report revealed the extent of military crimes at Abu Ghraib, damaged his own military career by completing such a candid, hard-hitting report.⁵⁹

One former military prosecutor who also tried ICTY cases suggests that the notion of command responsibility, used to try numerous high level military officers for legal rights abuses, seems lacking. She persuasively argues that

[a] command climate of zero tolerance for law of war violations, where commanders have strong and targeted incentives to prevent, detect, and punish abuses, would do more than achieve the laudable goal of meeting our obligations under international law. It would also strengthen our military organization and better enable the military to accomplish its missions.⁶⁰ Obama administration Justice Department attorneys argue as zealously as their Bush administration predecessors against allowing war on terrorism victims legal redress in U.S. courts which, as seen above, routinely accept the arguments. If anything, the Obama lawyers have deepened the habeas legal quagmire since he took office.⁶¹ Most scholars assessing the Obama administration

approach to the war on terror have harshly criticized it.⁶² Despite the positive changes President Obama has apparently brought about as noted above, detainees can still be held incommunicado, military commissions continue to try civilians under procedurally defective and ethically problematic rules, detainees are still returned to countries where they can be tortured, and in addition, investigations of past alleged torture in the prior administration have apparently withered on the vine in breach of U.S. Torture Convention obligations.⁶³ Although perhaps some partisanship is expected from a senior Republican Senate staff expert involved with war on terror legislation, one has difficulty arguing with his conclusion that:

*102 [o]ther than a relatively minor revamping of the military commissions system, President Obama's pre-election criticism of Bush administration policies and post-election discussion of charting a new course in detention policy has dissolved into paralysis and procrastination. Political demagoguery and legitimate policy differences among senators and congressmen create an environment inhospitable to the development of consensus detention legislation, but those obstacles could be overcome with leadership from the President. Without that leadership, though, detention policy has merely become a tool used by those on both the political left and right for their own electoral reasons.⁶⁴

Many would agree with Professor Welsh that indefinite Guantanamo detentions lack legitimacy, yet nothing has been done to stop them and the 2012 Defense Reauthorization Act ensures their continuation.⁶⁵ As Professor Miller notes in comparing Guantanamo detentions to the World War II Korematsu case, President Obama's claims of authority to maintain indefinite detentions "for many of the remaining Guantanamo detainees, underscore . . . the likelihood that the power he claims will, in Justice Jackson's dissenting words in the most infamous detention case in our history, lie 'about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.'"⁶⁶ Professor Yin recently wrote; "[I]t is now readily apparent that the Obama Administration is pursuing a counterterrorism strategy . . . broadly consistent with that of the Bush Administration."⁶⁷

As discussed above, the ECHR applies law rather than political expediency in war on terror cases. The ECHR recognizes command responsibility as customary international law to allow convictions of those who fail to prevent subordinates' war crimes.⁶⁸ Our prior article illustrated that the ECHR has long applied strict accountability on Convention states to conduct thorough investigations of human rights *103 abuses and provide legal redress for violations. These legal obligations continue.⁶⁹ The ECHR has also emphasized that any alleged special war on terror considerations cannot override Convention rights and protections, in rejecting practices such as extraordinary rendition as "anathema to rule of law and the values protected by the Convention."⁷⁰ The Obama Administration would do well to study ECHR case decisions protecting basic legal rights and refusing to apply technicalities to undermine them.

Where We Should Go From Here in the War on Terror

The ECHR approach to most aspects of the war on terror discussed above should probably be adopted. Here is what the future likely portends if this happened.

First, the U.S. would not engage in extraordinary renditions or similar activities without serious legal consequences. At a minimum, victims of such renditions would have an automatic right to

legal redress and compensation in U.S. courts, or alternatively, some form of U.S. administrative tribunal empowered by a future U.S. law could set reasonable compensation amounts. In addition, those engaged in rendition acts would be subject to criminal liability. If a particular rendition were deemed essential under exigent national security circumstances, a U.S. presidential pardon avoids the criminal exposure problem. Once rendition victims have access to appropriate compensation, suing private individuals and companies, such as Jeppesen, might not be needed and complicated state secrets problems are avoided.

Second, the U.S. should clarify the habeas corpus for Guantanamo detainees in a manner consistent with U.S. constitutional and international law. The ECHR approach requiring all detainees to be scheduled promptly for criminal prosecutions and trials subject to the full panoply of defendant constitutional rights meets these concerns. In the process of cleaning up the detainee habeas legal mess, we should also define detainee status much more precisely so detainees can know with certainty why they are detained. Moreover, because Congress contributed to this mess legislatively, Congress might consider using new legislation to define some specific criteria for detainee habeas corpus writs.

Third, warrantless surveillance of U.S. citizens and permanent resident aliens in their person and in their communications needs tight legal rein by U.S. federal courts. The way to accomplish this is through specified probable cause for surveillance approved by courts. Even if *104 U.S. citizens and resident aliens are taken care of, however, this does not solve the more complicated issue of protecting basic privacy rights of others as a human right. The ECHR does not distinguish between citizens or resident aliens on the one hand, and nonresident aliens on the other, in limiting such surveillance under the Convention.⁷¹ The U.S. should assess how to protect all privacy rights without compromising national security.

Fourth, the U.S. political question bar to litigation and liability should be disallowed in cases involving basic legal rights violations. This is not to say that litigants deserve automatic standing to sue because they must still demonstrate tangible legal injury, but when they do so their lawsuits should proceed.

Fifth, the use of state secrets and undisclosed evidence in all war on terror criminal cases should either cease altogether or face substantial curtailment. The U.S. Government seems able to get quite a few convictions in terrorism-related cases without any apparent need to resort to these flawed legal tools. Facing one's accusers and witnesses who support them reflects a bedrock principle of U.S. constitutional law, as the U.S. Supreme Court has repeatedly stressed.⁷² This has already become such a serious problem that rather than face the prospect of numerous detainee acquittals, the government has found it necessary or desirable to release hundreds of Guantanamo detainees without charging them.⁷³ Although these releases might well suggest the problem is now self-correcting, nothing precludes widespread detentions from recurring in the future and the detainees still at Guantanamo have yet to see much of the evidence needed to defend themselves. On a related note, either Congress or the U.S. Supreme Court should overturn the D.C. Circuit Court decision barring Confrontation Clause application in detention habeas proceedings because otherwise, detainees may have no way to bring a meaningful habeas writ for lack of available evidence to support it.⁷⁴

Sixth, military commissions should be eliminated except in cases involving non-US military personnel as defendants. In this regard the ECHR view that military courts can never ensure fair trials for civilians has no persuasive counter-argument. The fact that a growing number of current and former military lawyers with direct Guantanamo case experience now view commissions' elimination as contrary to core U.S. *105 constitutional and international law principles makes the elimination case a legal cinch.

Seventh, President Obama should keep all his campaign promises. The U.S. is the star actor on the world stage as a nation which once led the world in rule of law adherence. The Bush administration opted to sacrifice this role after 9/11 and it should not be forgotten that President Obama won his election in no small part because of his campaign promises to regain it. As seen above, the differences between the Bush and Obama administrations are not legally sufficient, and the recent 2012 Defense Authorization Act reestablishing indefinite detentions takes the U.S. in the wrong direction.

Finally, there should be legal accountability once and for all for U.S. military and civilian personnel, as well as private party accomplices, who choose not to play by the rules of respecting basic individual legal rights in the future. What is done may now already be done, but the ECHR requirement of competent and thorough investigations of all significant legal rights abuses, accompanied by meaningful legal remedies when these abuses are found, is one the U.S. is long overdue to adopt. The imposition of command responsibility on U.S. political and military leadership could fix most of these problems, and if the day ever comes when the U.S. loses a military conflict we may well find it imposed by others.

Concluding Comment

The U.S. war on terror has created many casualties. Perhaps the greatest casualty of all is a loss of the core rule of law focus which differentiated the U.S. from so many other countries on the global stage decades before this war began. In order to win it, the U.S. must regain its leadership in not only advocating, but practicing rule of law principles predicated on respect for, and protecting, basic individual rights. As Professor Nanda accurately wrote, the war on terror must “be fought in the realm of ideas.”⁷⁵ In doing so, the United States “must scrupulously follow principles of international law.”⁷⁶ Following Professor Nanda's sage counsel here will bring permanent victory to the endeavor.

Footnotes

[1](#)

The University of Montana. The Author has been the General Counsel and an adjunct law faculty member at The University of Montana since 1994. His academic specialty areas include international law, which he has been teaching at The University of Montana Law School for the past 18 years. The views expressed herein are solely the author's personal ones and not attributable to The University of Montana.

David Aronofsky & Matthew Cooper, [The War on Terror and International Human Rights: Does Europe Get It Right?](#), 37 *Denv. J. Int'l L. & Pol'y* 567 (2009).

[3](#)

Ved Nanda, *The Role of International Law in Combating Terrorism*, 10 *Mich. State Univ. - Detroit Coll. L. J. Int'l L.* 603, 608 (2001).

[4](#)

Ved P. Nanda, *Foreword: Combating International Terrorism*, 31 *Denv. J. Int'l L. & Pol'y* vi, x (2002).

[5](#)

Id. at ix.

[6](#)

Ved P. Nanda, [Terrorism as an “Internal Conflict” Under the 1977 Geneva Protocol: Defining “Enemy Combatant” and the International/Domestic Consequences](#), 14 *Mich. St. J. Int'l L.* 27, 34 (2006).

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Ved P. Nanda, [Introductory Essay: International Law Implications of the United States' “War on Terror,”](#) 37 *Denv. J. Int'l L. & Pol'y* 513, 537 (2009).

[8](#)

[Arar v. Ashcroft](#), 585 F.3d 559, 582 (2d. Cir. 2009) (en banc), cert. denied, [130 S. Ct. 3409 \(2010\)](#).

[9](#)

Id.

[10](#)

[653 F.3d 591, 594 \(7th Cir. 2011\)](#).

[11](#)

[Vance v. Rumsfeld](#), No. 10-1687, 2011 U.S. App. LEXIS 22083, at *1 (7th Cir. Oct. 28, 2011).

[12](#)

See [Lebron v. Rumsfeld](#), 764 F. Supp. 2d 787, 800 (D.S.C. 2011); [Al-Zahrani v. Rumsfeld](#), 684 F. Supp. 2d 103, 112 (D.D.C. 2010).

[13](#)

[Mohamed v. Jeppesen Dataplan, Inc.](#), 614 F.3d 1070, 1083 (9th Cir. 2010) (en banc), cert. denied, [131 S. Ct. 2442 \(2011\)](#).

[14](#)

[Ahmad v. United Kingdom](#), 51 *Eur. Ct. H.R.* SE6, P 114 (2010).

[15](#)

Id. PP 104-09.

[16](#)

The Military Commissions Act of 2009, enacted October 28, 2009, now refers to such combatants as “alien unprivileged enemy belligerents” and “alien privileged enemy belligerents” but this is a semantic change without any substantive difference - the former face military commission trials and enjoy limited legal rights, while the latter get prisoner of war status even though few detainees in U.S. military custody fall into this category. Military Commissions Act of 2009, Pub. L. No. 111-84, §§ 1802(6)-(7)(C), 123 Stat. 2190, 2574 (codified as 10 U.S.C.A. § 948(a) (West 2012)).

[17](#)

Jon Connolly & Marc D. Falkoff, [Habeas, Informational Asymmetries, and the War on Terror](#), 41 *Seton Hall L. Rev.* 1361, 1393 (2011).

[18](#)

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[19](#)

See, e.g., [Khan v. Obama](#), 655 F.3d 20, 26 (D.C. Cir. 2011); [Almerfed v. Obama](#), 654 F.3d 1, 5 (D.C. Cir. 2011); [Barhoumi v. Obama](#), 609 F.3d 416, 424 (D.C. Cir. 2010).

[20](#)

[Latif v. Obama](#), No. 10-5319, 2011 WL 5431524, at *7-8 (D.C. Cir. Oct. 14, 2011).

[21](#)

Robert M. Chesney, [Who May Be Held? Military Detention Through the Habeas Lens](#), 52 *B.C. L. Rev.* 769, 864 (2011).

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