

2011

Preface to the Paperback Edition of United States, International Law, and the Struggle against Terrorism

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Recommended Citation

Thomas Michael McDonnell, Preface to United States, International Law, and the Struggle against Terrorism (paperback ed. 2011), <http://digitalcommons.pace.edu/lawfaculty/839/>.

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Preface to the Paperback Edition

United States, International Law, and the Struggle against Terrorism

It is remarkable that in less than two years so many significant developments have taken place that concern the United States and the struggle against transnational terrorism. Perhaps the three most significant are as follows: (1) the Obama administration's failure to reject wholesale the Bush-Cheney administration's counterterrorism policies and practices; (2) the popular revolts sweeping the Arab world, often referred to as the "Arab spring"; and (3) the US Navy Seals killing Osama bin Laden in Abbottabad, Pakistan.

As noted in the first edition, the Obama administration is to be commended for moving many suspected terrorists for trial in US federal court.¹ Furthermore, after a "year-long review of all detainee files," the Obama administration cleared for release over half of the 242 Guantánamo Bay prisoners still remaining when

¹ Most notably, the Obama Justice Department obtained a guilty plea from the New York Times Square bomber, Faisal Shazad; the federal district court sentenced Shazad to life imprisonment. *Faisal Shazad*, N.Y. TIMES, Oct. 5, 2010, http://topics.nytimes.com/top/reference/timestopics/people/s/faisal_shahzad/index.html. The Administration also obtained a guilty verdict, after a jury trial, against Ahmed Ghailani, who was sentenced to life in prison. Benjamin Weiser, *Heightened Security for Former Detainee*, N.Y. TIMES, June 9, 2011, <http://www.nytimes.com/2011/06/10/nyregion/ghailani-ex-guantanamo-detainee-is-moved-to-supermax.html>. Ghailani had been imprisoned in Guantánamo Bay and was convicted for his involvement in the 1998 bombings of two US embassies in East Africa, resulting in the death of 224 people. *Id.*

Obama took office.² The Obama administration has “repatriated, resettled or transferred” a third of these detainees.³

The Obama administration has apparently carried through on the President’s inauguration day promise to end torture and cruel, degrading and inhuman treatment of detained suspected Islamic terrorists, a crucial step toward restoring the moral authority of the United States.⁴ President Obama has also ordered that the infamous CIA black sites be no longer used, except as short temporary holding facilities.⁵ In other areas of international law, the Obama administration has renewed US efforts to cooperate with the International Criminal Court. The

² *Report Card: Assessing the Obama Administration’s Record of Compliance with the Rule of Law and Human Rights in National Security Policy*, HUMAN RIGHTS FIRST, Jan. 13, 2011, at <http://www.humanrightsfirst.org/2011/01/13/report-card-assessing-the-obama-administrations-record-of-compliance-with-the-rule-of-law-and-human-rights-in-national-security-policy-2/>

³ *Id.* Included in this group are some of the Uighars. (The 22 Uighars, captured by bounty hunters in Afghanistan but who had fled China because of their persecution there, had been detained without trial in Guantánamo Bay since shortly after 9/11. The US had continued to detain them even after they were found not to be enemy combatants). The Obama administration has obtained offers from other countries to accept the Uighars, but has refused to permit them to be released into the United States. The D. C. Circuit has upheld the Obama administration’s position that even if a detainee’s habeas corpus petition has been granted, that does not give the detainee a right to be released in or to reside in the US. *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009). Upon the Obama administration’s showing that all Uighars had received offers of resettlement, the Supreme Court decided to vacate the judgment. *Kiyemba v. Obama*, 130 S.Ct. 1235 (2010).

Many of the Uighars, however, have refused to accept the offers of resettlement. See Nick Baumann, *Supreme Court to Uighars-No US for You*, MOTHER JONES, Apr. 2011, available at <http://motherjones.com/mojo/2011/04/supreme-court-uighurs-no>. See also Richard M. Pious, *Prerogative Power in the Obama Administration: Continuity and Change in the War on Terrorism*, PRESIDENTIAL STUD. Q. 263, June 1, 2011, available at 2011 WLNR 11025271

⁴ In his memoir, President George W. Bush admitted that he expressly approved the waterboarding of Khalid Sheik Mohammed and Abu Zubaydah. GEORGE W. BUSH, DECISIONPOINTS 169, 170-71 (2010). See also HOUSE COMMITTEE ON THE JUDICIARY, MAJORITY STAFF REPORT, REINING IN THE IMPERIAL PRESIDENCY, Jan. 13, 2009, at 114, 123.

⁵ Barack Obama, Exec. Order No. 13,491, § 4(a), 74 Fed. Reg. 4893 (Jan. 22, 2009).

administration also obtained a binding chapter VII Security Council resolution approving the use of force against Libya to protect the civilian population and has insisted on allies playing key leadership and combat roles, all a departure from the generally unilateral approach that had been the previous administration's hallmark, at least in its first term.

The Obama administration has also supported a significant change in policy in Afghanistan to reduce civilian casualties and damage to civilian objects. Issued in 2009 by then commander General Stanley A. McChrystal and reissued with some modifications by his successor, General David H. Petraeus, the Tactical Directive requires American and other NATO forces to go beyond the protections of international humanitarian law to avoid civilian casualties and damage to civilian property.⁶ The purpose of the Directive is, if not to win the hearts and minds of the Afghan people, at least not to push them into the arms of the Taliban. As a result, far fewer civilians have been killed and many fewer Afghan homes have been destroyed at the hands of American and other NATO forces.⁷

⁶ See *Senator Carl Levin Holds a Hearing on Operation Moshtarak in Helmand Province Afghanistan*, CQ CAPITAL TRANSCRIPTS, Feb. 22, 2010 (Department of Defense Undersecretary Michelle Fluornoy testified that President Obama's ordered an "immediate strategy review" and as part of that strategy he appointed General Stanley A. McChrystal as commander who "prioritized protecting the Afghan people over killing the enemy"), available at 2010 WLNR 3804516. See also Richard A. Oppel & Rod Norland, *New Rules Stress G.I. Limits in Fighting*, N.Y. TIMES, Aug. 3, 2010, (noting that General McChrystal's Tactical Directive was greeted warmly by President Hamid Karzai and by human rights groups, but disliked by American troops on the ground), available at <http://www.nytimes.com/2010/08/04/world/asia/04petraeus.html>

⁷ See, e.g., Hashim Shukoor, *U.N. Taliban Attacks Driving Up Afghan Civilian Casualties*, MCCLATCHY NEWSPAPERS (noting that '[c]ivilian casualties caused by coalition and Afghan security

As of this writing, the outcome of the war in Afghanistan is in doubt. Even the initial invasion raised some questions under international law because al Qaeda, not the Taliban had not attacked the US. Granted al Qaeda had received safe haven in Taliban Afghanistan, but the publicly available evidence fails to indicate that the Taliban had “effectively controlled” al Qaeda or had participated in the 9/11 attacks.⁸ There are some who question the Tactical Directive and the concern about protecting Afghani civilians as an approach that prevents the US from winning the war.⁹ Given Afghanistan’s colonization by Britain, the Russian invasion in 1979, and the subsequent civil strife, resulting in the Taliban’s creating a totalitarian religious state, an approach highly respecting the human rights of Afghanistan civilians is likely to be a more effective counterterrorism policy and practice.¹⁰

On the other hand, the Obama administration has failed to fulfill its promise to close the Guantánamo Bay detention facility.¹¹ Not only has the administration failed to do so, but has announced that it intends to detain indefinitely without trial

forces fell by 30 percent during the first half of this year, to 223 deaths and 160 wounded”), Aug. 10, 2010, *available at* 2010 WLNR 15933571

⁸ See chapter 12, starting on page 259, for a much fuller discussion of this issue.

⁹ See, e.g., Tod Robberson, *BLOG: Opinion: Point Person: Michael Scheuer, former CIA bin Laden tracker*, THE DAILY MORNING NEWS, May 6, 2011, *available at* 2011 WLNR 8914735.

¹⁰ Obviously, such an approach does not guaranty victory. By the way “counterterrorism” may be the wrong term here, because the Taliban had been in power before US invasion on October 7, 2011. The administration uses the term counter-insurgency. This again illustrates the slipperiness and vagueness of the term “terrorism” and its counterpart “war on terrorism.”

¹¹ The statement on page 38 that President Obama “declaring that the Guantanamo Bay detention center would be closed within a year” has thus failed to come to pass.

47 suspected Islamic terrorists.¹² The first edition criticized the Obama administration for appealing the 2009 US federal district court decision in *Maqaleh v. Gates*,¹³ which had extended the right of habeas corpus to detainees who had been brought from other countries to Bagram Airbase in Afghanistan. As I feared, the Court of Appeals for the District of Columbia reversed that decision, enabling the creation of yet another legal black hole to take the place of Guantánamo Bay. Given the current make-up of the Supreme Court and Elena Kagan's promise to recuse herself in all cases in which she was involved as the Solicitor General, the Court of Appeals ruling will almost certainly stand for years to come.¹⁴

Congress has also contributed to the violation of international law by prohibiting the use of funds from the Defense Authorization Act to transport GITMO detainees to the United States for trial and prosecution.¹⁵ This legislation,

¹² Executive Order, Barack Obama, *Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force*, March 7, 2011, at http://www.whitehouse.gov/sites/default/files/Executive_Order_on_Periodic_Review.pdf

¹³ *Maqaleh v. Gates*, 604 F. Supp. 2d 205 (D.D.C. 2009), *rev'd*, 605 F.3d 84 (D.C. Cir. 2010).

¹⁴ Justice Kagan had argued to reverse *Maqaleh* when she was serving as Solicitor General, so even had she not made the pledge to recuse herself from all cases she had participated in as SG, there is little likelihood that the Supreme Court would reverse the Court of Appeals ruling. (On the other hand one never knows for certain how a justice might vote.) Recall that Justice Kagan took the place of Justice John Paul Stevens who formed part of the majority in the 5 to 4 opinion in *Boumediene v. Bush*, 553 U.S. 723 (2008), granting Guantánamo Bay detainees the right of habeas corpus in US federal courts. Since *Maqaleh* was arguing for an extension of *Boumediene* to Bagram, Airbase in Afghanistan, it is unlikely that he would garner more than four votes. The outcome for him would probably at best be a tie: 4 to 4, meaning that the D.C. Circuit Court's decision would be affirmed.

¹⁵ Ike Skelton National Defense Authorization Act for Fiscal Year 2011, [Pub. L. No. 111-383, 124 Stat. 4137 \(2010\)](#). See Kristine A. Huskey, *Guantánamo and Beyond: Reflections on the Past, A Present and Future of Preventive Detention*, 9 U. N.H. L. REV. 183 (2011).

if not found unconstitutional, in effect prohibits trying any GITMO detainee in US federal courts.¹⁶ The legislation contributes to GITMO detainees being tried by military commissions, special courts which do not comport with the Geneva Conventions. The legislation also prohibits the use of federal funds to transfer any detainee to any foreign country unless certain onerous criteria are met.¹⁷ In cases in which the Administration wishes to release a detainee, the only option is to find a country that is willing to accept that person. Congress's rigid rules will make that process—already a difficult one—increasingly hard to accomplish. Consequently, the Congressional legislation will abet prolonged, if not indefinite detention of individuals whom the Executive has concluded are entitled to freedom.

Unfortunately, the Obama administration has acquiesced in Congress's prohibiting funding to transport Guantánamo Bay detainees in the United States. President Obama signed the bill, albeit with a signing statement asserting that the bill constituted "a dangerous and unprecedented challenge to critical executive branch authority . . . and that it could, regarding transferring detainees to other countries, "hinder the conduct of delicate negotiations with foreign countries and therefore the effort to conclude detainee transfers in accord with our national

¹⁶ Ashley Pope, *Note, After Guantánamo: Legal Rights of Foreign Detainees Held in the United States*, 34 *FORDHAM INT'L L.J.* 504, 504-505 (2011). The legislation also prohibits the use of Department of Defense funds to build or modify prisons in the US for Guantánamo Bay detainees. *Id.*

¹⁷ *See* Huskey, *supra* note 15, at 191. The legislation does not apply to individuals who have been ordered released by a court, for example, by a federal court granting a habeas corpus petition.

security.”¹⁸

The administration has not subjected the defunding statute to judicial challenge. Bowing to Congress and to public opinion, Attorney General Eric H. Holder has gone back on his decision to have Khalid Sheikh Mohammed, alleged mastermind of the 9/11 attacks, tried in federal court in New York City. “KSM” will now be tried by military commission in Guantánamo Bay. As horrific as the crimes he is accused of are, the decision is disquieting because the military commissions lack judicial independence, permit the admission of coerced statements, and have not, unlike federal courts, been fully tested. Moving his case to a military commission virtually guarantees a death sentence, which is probably exactly what Khalid Sheikh Mohammed wants.

The first edition praised the Obama administration for avoiding the vague, overbroad phrase “war on terrorism” or “global war on terrorism,” coined by the Bush-Cheney administration.¹⁹ Yet the Obama administration has crafted a virtually equally troubling phrase: United States being “in armed conflict with al Qaeda, the Taliban and associated forces,”²⁰ That formulation is a bit more definite,

¹⁸ Angie Drobnic Holan, *Obama and Congress Remain at Odds on Closing Guantánamo*, ST. PETERSBURG TIMES, Jan. 12, 2011 (quoting Barack Obama’s signing statement), available at 2011 WLNR 74251.7

Apparently as part of the huge defense appropriation bill funding the wars in Afghanistan and Iraq, the President believed that he could not veto the legislation. See Huskey, *supra* note 15, at 193-94.

¹⁹ See pages 36 to 41 in chapter 2.

²⁰ Harold H. Koh, *Keynote Address to the American Society of International Law*, US DEP’T OF STATE, March 25, 2010, Washington, D. C., at <http://www.state.gov/s/l/releases/remarks/139119.htm>. The statement on page 41 of chapter concerning the Obama administration’s refraining from use of the term “war on terrorism” is technically correct, but does not capture the Obama administration’s subsequent characterization and policy.

by mentioning al Qaeda and Taliban by name, but contains the vague words, “associated forces,” whoever they may be. More ominously, this formulation permits the Administration to carry out a military attack anywhere in the world—broadly employing the law of war rather than law enforcement under a human rights regime. Harold Koh, the Legal Adviser to the State Department, suggests attacks would be permissible in states that are either unwilling or unable to arrest or capture members of al Qaeda or “associated forces.” Such an expansive standard for the use of military force, without more, raises serious questions under international law.

Most alarming in this regard, the Obama administration has vastly increased the deployment of weaponized drones for targeted killing of alleged Islamic terrorists, authorizing the Central Intelligence Agency to carry out such attacks in Yemen and the tribal areas of Pakistan, and the US Air Force to conduct these attacks in Iraq and Afghanistan. The number of attacks the administration has authorized in Pakistan represents nearly a four-fold increase over the Bush-Cheney administration. Although targeted killing may sometimes comport with international humanitarian and human rights law, it is literally an explosive counterterrorism tactic, which at best presses the bounds of international law. Routinely resorting to such methods and means of warfare against religiously and nationalistically motivated terrorists leaders and groups may have the effect of making the targets of such attacks martyrs and inflame rather than dampen

Islamic terrorism. Such attacks may further undermine the moral authority of the United States in the eyes of Arab/Muslim peoples. (Despite the legal label, “targeted killing,” a great number of people in the affected countries view such attacks as assassinations.)

Many Americans have enthusiastically greeted the killing of Osama bin Laden, responsible for horrendous crimes against thousands of innocent civilians in the US and elsewhere. The available evidence suggests that the Navy Seals essentially carried out a targeted killing operation. Reportedly, unless bin Laden clearly surrendered, the Seals were ordered to kill him. Although, as of this writing, the facts of the raid have not been clarified, many commentators, with some exceptions, have concluded that the targeted killing operation comported with international law.²¹

The significance of bin Laden’s killing will probably not be able to be definitively determined for years. Yet some research suggests that killing a religious terrorist leader is likely to strengthen rather than weaken the terrorist organization in question.²² Such an outcome would be particularly unfortunate

²¹ See, e.g., Harold Koh, the Legal Adviser to the Secretary of State, *The Lawfulness of the Operation against Osama bin Laden*, OPINIO JURIS BLOG, May 19, 2011 (arguing, among other things, that bin Laden was a combatant who could be killed anywhere, that he constituted an imminent threat, and that he failed to surrender), at <http://opiniojuris.org/tag/bin-laden-killing/> But see Thomas Darnstadt, *Justice American Style[:] Was Bin Laden’s Killing Legal*, DER SPIEGEL, May 3, 2011 (suggesting that the operation was illegal, because it occurred in a peaceful part of Pakistan territory, away from an area of armed conflict, and that human rights law demanded that a law enforcement approach be used), available at <http://www.spiegel.de/international/world/0,1518,760358,00.html>.

given that al Qaeda and its allied terrorist organizations have generally been in decline. That decline is likely due to two factors: first, al Qaeda's decision to attack other Muslims rather than directing its fire solely on the West; and, second, the Arab spring, which al Qaeda and its allies have had little to do with. The promise of obtaining genuine democracy threatens to take the air out of the extremists' balloon. So many Arab and Muslim countries have had dictatorial rulers for decades, effectively cutting off avenues of peaceful protest and preventing Islamic peoples from democratically changing their government. Since democratic channels had been eliminated, individuals with legitimate grievances could only go underground, thereby encouraging the young to join terrorist organizations. If the Arab spring bears fruit and if genuine democratic institutions can be established, there will be a decreased need to pursue illegal avenues to effect change.

Given this new reality, United States and its allies should even more strictly comply with international humanitarian law and human rights law, and, to the extent possible, afford greater protections to civilians than traditional humanitarian law requires. Overacting could have the effect of reinvigorating jihadist movements and gaining them more recruits, more sympathizers, and more supporters in the Islamic world just when these extremists have grown increasingly unpopular and disrespected. Explaining the Tactical Directive, General David Petraeus told his troops in Afghanistan to fight aggressively, but he also stated: "We can't win

²² Jenna Jordan, *When Heads Roll*, 18 SECURITY STUDIES 719, 746 (2009), DOI: 10.1080/09636410903369068, available at <http://cpost.uchicago.edu/pdf/Jordan.pdf>.

without fighting, but we also cannot *kill* or capture *our way to victory*. Moreover, *if we kill civilians or damage their property in the course of our operations, we will create more enemies than our operations eliminate.*²³ His Directive appears in direct conflict with the targeted killing weaponized drone program carried out by the CIA and by the Air Force. General Petraeus is essentially calling for virtually no civilian casualties, fairly close to what the law enforcement regime requires and in contradistinction to what drone Hellfire missiles, capable of destroying a house, typically accomplish.

In summary, the Obama administration has definitely moved towards stricter compliance with international law in the struggle against terrorism, but at the same time it has clung to many of the previous administration's counter-terrorism policies, including indefinite detention, the preference for military commissions rather than civilian courts to try alleged terrorists,²⁴ and the use of military rather than law enforcement as the major counter-terrorism practice. The Obama administration has even increased the use of weaponized drones for "targeted killing" far beyond the level of the Bush-Cheney years. Furthermore, Congress has been an obstacle to fashioning enlightened counterterrorism policies.

²³ General David H. Petraeus, Commander NATO/ISAF, COMISAF Guidance, August 1, 2010 (emphasis added).

²⁴ To be fair, the Obama administration did wish to try Khalid Sheikh Mohammed in federal court and bring other GITMO detainees to the United States for trial, but the administration did not push hard against Congress and public opinion to make that happen.

United States has thus yet to learn from the experiences of its close ally, the United Kingdom, that the surer way towards eliminating terrorist organizations is to respect international law and to reverse the American government's priorities, namely, making law enforcement the primary counter-terrorism practice and the military approach the exception. This edition continues to examine the legal and public world order challenges that the struggle against terrorism poses for the international community, for the West, and particularly for the United States.

Thomas Michael McDonnell
White Plains, New York
June 2011

Additional Developments Since the First Edition

On page 69, the chapter notes President Obama's opposition to investigations and prosecutions of Bush administration officials for alleged illegal acts in that administration's counterterrorism practices and policies and notes that "there is increasing pressure, as of this writing, for at the very least a bipartisan investigation similar to the 9/11 Commission."

Despite President Obama's opposition, Attorney General Holder did appoint a special prosecutor in 2009 to investigate the CIA interrogators' practices.²⁵ As of this writing, however, no indictments or reports have been forthcoming. The Special Prosecutor refused to indict any member of the CIA for intentionally destroying 92 video recordings of waterboarding, despite their being a court order against the CIA not to destroy any evidence.²⁶ The failure to prosecute or at a minimum to issue a critical report is disappointing and a troubling precedent, suggesting that CIA officials have the green light to destroy damaging evidence in the future. Given the clandestine nature of their activities and the special powers the country invests in

²⁵ Mark Mazzetti & Scott Shane, *CIA Abuse Scandal Detailed in Report on Detainees*, N.Y. TIMES, Aug. 24, 2009, available at <http://www.nytimes.com/2009/08/25/us/politics/25detain.html>

²⁶ Ken Dilanian, *CIA avoids charges Officers won't be prosecuted over the destruction of interrogation tapes*, L.A. TIMES, Nov. 10, 2010, at 14, available at 2010 WLNR 22436102. See also Editorial, *Waffling on Waterboarding*, L.A. TIMES, Nov. 16, 2010, at 24, available at 2010 WLNR 22838475.

the CIA, one would have expected a much sharper response from the Special Prosecutor.

Furthermore, pressure for a bipartisan investigation or truth commission (as indicated on page 69) has now substantially subsided.

On page 81, the chapter mentions that CIA officers were being tried *in absentia* for the kidnapping from Italy of an alleged Islamic terrorist whom the CIA had extraordinarily rendered to Egypt. The trial has since been concluded and the court found 23 American CIA officers guilty of abduction.²⁷

Note 65 on page 90 cites to sources suggesting that the Obama administration, to the disappointment of many, has failed to unequivocally reject extraordinary rendition of suspected Islamic terrorists to countries with poor human rights records. In a similar vein, the Obama administration has used the same arguments as the Bush-Cheney administration—preserving state secrets—in vigorously defending the Boeing subsidiary that allegedly transported detainees to CIA black sites as part of the Bush administration’s extraordinary rendition program.²⁸

On page 109, the chapter mentions that US federal courts were just beginning to take up the habeas corpus petitions of the Guantánamo Bay Detainees. The federal courts have granted the habeas corpus petitions of many Guantánamo

²⁷ Rachel Donaldo, *Italy Convict 23 Americans for CIA Renditions*, N.Y. TIMES, Nov. 4, 2009, at A1, available at <http://www.nytimes.com/2009/11/05/world/europe/05italy.html>

²⁸ Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010), *cert. denied*, 2011 WL 1832889, 79 USLW 3370 (2011).

Bay detainees, but that does not mean that they are automatically freed.²⁹ The D.C. Circuit has ruled that they are not entitled to be released into the United States.³⁰ Consequently, the Executive has to find a country will accept them.

On page 119, the chapter indicates that the Ninth Circuit declared unconstitutional part of the Material Support Statute, the main legal weapon used in prosecuting alleged terrorists. That opinion was vacated by the Ninth Circuit sitting *en banc* and remanded to the district court. On appeal after remand, a panel of the Ninth Circuit concluded that the statute was unconstitutionally vague as applied to petitioners, who wished to provide legal training and political advocacy for Kurdistan Workers Party and the Tamil Tigers, two foreign terrorist organizations listed by the Secretary of State.³¹ Reversing, the United States Supreme Court in *Holder v. Humanitarian Law Project*,³² ruled that the statute was not vague as applied to petitioners and did not violate their rights under the First Amendment freedom of speech or freedom of association clauses.³³ Regardless of the merits of the case, the Supreme Court reaffirms the breadth of the material

²⁹ William Glaberson & Charlie Savage, *Secret Case Against Detainee Crumbles*, N.Y. TIMES, Apr. 26, 2011, at A12, available at http://www.nytimes.com/2011/04/27/world/secret-case-against-detainee-crumbles.html?_r=1&ref=habeascorpus

³⁰ See *supra* note 3, for a discussion of *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009), and its subsequent case history.

³¹ They also wished make a monetary contribution for the humanitarian activities of the organizations. *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705 (2010).

³² *Id.*

³³ *Id.* at 2714.

support statute, strengthening the argument to try terror offense cases in federal courts rather than in military commissions.

On page 123, the chapter states that “with the lead of the Obama administration, a counter-trend appears to be emerging [that recognizes more strictly human rights and humanitarian law principles]. Unfortunately given the Obama administration’s position on so many counter-terrorism issues that resemble its predecessor’s this statement concerning the Obama administration can no longer be made.³⁴

On page 161, the chapter expresses concern for entrusting the CIA with the authority to carry out drone attacks (the CIA apparently is the only US agency carrying out such attacks in Pakistan and Yemen). The reasons given for this concern are the Agency’s role in the detainee abuse scandal and its inaccurate intelligence reporting in the run-up to the war in Iraq. Additional reasons that question assigning the CIA this responsibility include its unfortunate history in conducting assassinations in the 1960s and 70s, its inherent lack of transparency as

³⁴ See Pious, *supra* note 3 (quoting General Michael Hayden, CIA Director under President George W. Bush) (“Bush’s CIA director General Michael Hayden praised Obama’s ‘continuity’ of policy, observing ‘to President Obama’s credit, he has used many of the tools that we used to continue to take the fight to the enemy.’ He mentioned renditions to other nations for interrogation, indefinite detention of detainees, limited definition of habeas corpus rights, use of military commissions, reliance on state secrets defenses in court proceedings.) (citation omitted).

a secret service,³⁵ and the non-uniformed status of its officers, which render them unprivileged combatants.

³⁵ Charlie Savage, *UN Report Highly Critical of US Drone Attacks*, N.Y. TIMES, June 3, 2010, available at <http://www.nytimes.com/2010/06/03/world/03drones.html>.
