Terror and the Constitution:
Notes From America Since September 11

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About two months after the September 11 attacks, at the height of the U.S.-led war against the Taliban in Afghanistan, the commander of U.S. forces in the region, General Tommy Franks, learned that Mullah Omar, the Taliban's elusive leader, had been located near the southern Afghan city of Kandahar. A roving pilotless drone called the Predator, which was equipped with a pair of air-to-ground Hellfire missiles, had tagged Mullah Omar's four-wheel-drive vehicle and was following it along a dirt road from about five thousand feet in the air. A remarkable feature of the Predator drone is that it can be operated by remote control from just about anywhere in the world, using satellites; this particular Predator was linked into the command center of General Franks far away from Afghanistan. The apparent identification of Mullah Omar was such a big event that General Franks himself was summoned to the command center so that he could operate the Predator himself and decide whether to shoot one of the missiles at Mullah Omar's vehicle.

Franks has described what happened next in a published memoir. He entered the Predator command center and found an air force pilot sitting before a video screen, with a contraption that resembled a video game joystick on the table before him. The screen depicted what could be seen, in real time, from a camera fixed in the nose cone of the Predator – what it showed, in this case, was a convoy of sport utility vehicles churning up dust as they sped along a track in the southern Afghan desert. Franks stood beside the pilot and took command of the drone. He was not alone with his decision-making, however. Shooting a moving target from the air with an armed flying robot was such a novel idea in the American military that it had attracted a great deal of attention from other generals. Each of the four services – the Air Force, the Navy, the Army, and the Marines – sent a senior officer to the Predator command room to monitor what General Franks did. (Franks wrote that he felt this group was there to second-guess him, an instinct that proved sound.) The service representatives sat like a theater audience in front of the general's table. To his right sat one more military officer – a lawyer, who was there to advise him when it would be legally permissible to kill Mullah Omar, and when it would not.

In the American system, during a war such as the one in Afghanistan, the president issues legally binding guidance to the Defense Department outlining how he expects combat to be conducted. This guidance may be very broad – for example, it may instruct the air force to avoid damage to civilian homes while developing target lists. At the Pentagon, lawyers then work with combat commanders to define what this presidential guidance will require in day-to-day practice. This even more specific legal advice may in some cases be issued as binding "rules of engagement" to forces in the field.

As he chased Mullah Omar with his Predator, General Franks considered several times whether or not it was a propitious moment to shoot. Before he made a final decision, he would

turn to the lawyer at his side – who happened to be a woman, in this case – and he would ask, "Any issues, ma'am?"

As Mullah Omar's jeep raced along the road, General Franks withheld fire. Finally, the convoy stopped in front of a mosque, and Mullah Omar and his entourage went inside to pray. For the first time, the group was stationary and gathered in one place. General Franks turned to his lawyer: "Any issues, ma'am?"

"Yes, sir," she answered. "There are issues." President Bush had issued two forms of guidance that this lawyer was worried about. One edict required taking reasonable steps – we don't know the exact language, because it is still classified – to limit damage to civilians during aerial attacks. A second edict prohibited the deliberate, direct targeting of places of worship, except in rare circumstances. The lawyer felt that it would be a violation of presidential guidance to deliberately fire the Predator's missile at the mosque, even though Mullah Omar was inside.

General Franks thought for a minute, and he came up with another idea: What if, he asked, I fire a missile into the dirty thirty yards away from the mosque – then the people inside will hear a loud explosion, and they'll all come running outside, and then we can kill them?

"That would be fine," the lawyer said.

And so General Franks fired the missile in the dirt, away from the mosque, and in fact the worshippers inside did come running out – but they did not pause long enough for the Predator to re-aim; instead they jumped inside their vehicles and went racing back toward Kandahar. Soon they were weaving through an urban area dense with civilians. General Franks never fired another missile.

Mullah Omar, of course, remains at large today, helping to lead a revitalized Taliban insurgency.

After the September 11 attacks, American democracy lost some of its bearings. Those of you who have endured life under

the threat of terror will understand the shocks and pressures that unexpected political violence can create. There had been no attack of this kind on American soil in sixty years, none in the capital city for more than a century. The amplifying power of live and continuous television coverage brought every sentient American into the maw of Ground Zero. It is hardly surprising that a government democratically elected to represent the will of this population went careening forward in a state of blind rage. The consequences of this impaired vision, and the anger and fear that girded it, are now readily apparent – not only to the rest of the world, but even now to many Americans. When a country that is respected at least by some for its democratic, constitutional traditions abandons its principles to wage war – even a just war – it pays a terrible price. There are cases, I am prepared to argue, where this may be necessary, nonetheless. Yet those cases are very, very rare, and the measures adopted in such emergencies require great care and ruthless supervision. We can probably all agree that didn't happen here – to take just one relatively obvious example of what I am trying to argue, we can probably all agree that Guantonomo has done more to strengthen the adversaries of the United States than to weaken or contain them.

The cartoon imagery of the United States abroad since September 11 – an imagery partly created by pre-existing adversaries of America, and partly by America's own errors – relies upon examples such as Guantonomo and Abu Ghraib to show that the instruments of American power, particularly its military forces and its intelligence services, operate without reference to the rule of law. And in fact, for example, until earlier this month, when it was rebuked by the United States Supreme Court, it was the official policy of the Bush Administration that the protections afforded by the Geneva Conventions did not apply to Al Qaeda and Taliban prisoners in its custody, in part because neither al Qaeda nor the Taliban were parties to the Geneva accords. So the cartoon narrative of America's unilateral abrogation of international and even, as it happens, domestic

law, is certainly grounded in uncomfortable truth. And yet, at the same time, this cartoon imagery can obscure a more complicated, more important debate about law and terrorism that is actually taking place inside the American government – a debate exemplified by Tommy Franks' chase after Mullah Omar – a debate that is largely carried out by lawyers.

The most effective resistance to the Bush Administration's emergency abrogation of treaties and laws since September 11 has not come from the Congress or the press. It has come from lawyers inside the national security bureaucracy, and particularly, the uniformed military officers who serve as lawyers within the armed forces. Even amid the heat and rage and uncertainty of late 2001 and early 2002, these military attorneys insisted on the rule of law – sometimes because they were just unimaginative, stubborn people who loved rules of all kinds, and sometimes because they were wise professionals who were able to take a long view of history, and of history's various emergencies, when many around them could not. We should admire their courage, but even more, we should take note of the system that put them in the room at crucial moments, and empowered them to speak up, and protected their pensions and their careers when they said or wrote what was unpopular, even while sitting next to a powerful general like Tommy Franks, even while making a legal decision that they might later come to regret. "Any issues, ma'am?" Can you imagine being in her shoes? And how can you fail to be inspired by the fact that she looked up at him at that moment, and said, "Yes, there are issues."

Without these lawyers and the values and principles they were trained to defend, we now know, it would have all been much, much worse. And I would argue that this is true notwithstanding the fact that Mullah Omar remains at large.

Professional militaries and professional spy services are susceptible to the same diseases and the same flaws as other bureaucracies – the hubris of leadership, the expediency of

unscrupulous operators, collective laziness, and so on. Within a healthy constitutional democracy, however, armies and spy services can sometimes, surprisingly, be adamant and effective defenders of the rule of law. This is not necessarily because they are populated by greater numbers of idealists than is, say, the department of motor vehicles. Rather, their loyalty to law and treaties is often an expression of bureaucratic self-interest. Soldiers treat prisoners of war humanely so they will in turn be treated humanely when they become prisoners of war. Intelligence officers do not assassinate rival station chiefs because they wish in turn not to be assassinated. More broadly, in a noisy and dynamic electoral democracy such as the one in the United States, an institution such as the Central Intelligence Agency, which by its nature works on the edges of the law, has come to recognize that its long-term institutional health depends on a sustainable consensus of support from Congress and the public, and that this, in turn, requires that it protect itself, from time to time, from the passing zeal of presidents bent on changing the world in an extra-legal flash. From the outside, the C.I.A. can appear ungoverned, unregulated. Those who work there know that it can be a remarkably cautious and self-protecting institution. Its in-house legal department is large and intimidating.

It is obviously not enough to observe or applaud the presence of law or lawyers within the national security bureaucracy, however. If we go back to General Tommy Franks and his video game command center, we immediately find ourselves engaged in an argument. To put it crudely, the question is this: Why should a lawyer be permitted to stop this general from killing Mullah Omar?

At least in the United States, liberal intellectuals often manage to avoid answering questions of this kind. They are not in the arena, they are not in the fight, they are standing outside, and so they do not have to sully themselves with problems that can seem extraordinarily complex and frustrating to frontline practitioners, whether those practitioners are in uniform or not.

But if liberalism is to survive the emergencies of our age – and by liberalism, I mean a political philosophy that embraces constitutional democracy, freedom of speech and association, tolerance, pluralism – then it must face these arguments, and ultimately, it must win them.

If liberalism is to survive the emergencies of our age, it must acknowledge that the enemies of liberalism include some terrorists who are possessed of millenarian visions, and whose strategies and tactics lie outside the boundaries of most of the wars waged by governments since the age of Napoleon. It must acknowledge this, and then explain why the instruments of liberalism are adequate in response, nonetheless.

One contribution the Bush Administration has made to this argument since September 11 has been to demonstrate, through its errors, the limits of blind force and illiberal attitudes, particularly in this era of global media and digital transparency, even in the face of suicide bombers and millenarian terror.

It is beyond my ability to construct a complete and fully rounded argument of for liberalism as a strategy of self-defense against terrorist groups, but I would like to try to start a discussion about such an argument's shape – to map, provisionally, some of its provinces and borders.

The argument is easiest – and in many ways, least satisfactory – when it is conducted as a general defense of a democratic constitutional order. We would probably all agree that such an order is preferable to the alternatives. We could observe that history is littered with cases where enemies of liberalism have seized on a climate of emergency to attack democratic constitutions they opposed or ignored even when there was no emergency. Yet this sort of argument becomes a kind of unconvincing tautology: The constitution is sacrosanct, and so it must be defended, and so anyone who questions the application of its principles in a genuine emergency is an enemy of the constitution. Such a blind defense of a liberal order in the face of

illiberal enemies is not only likely to fail in the clinch – when the Predator is in the air and the enemy's jeeps are racing along a desert track – it is also lazy and fatally self-satisfied.

A much more interesting and durable argument might begin if we try to adapt the enduring strength of liberal principles to the difficult, complicated, uncertain work of defeating or containing liberalism's enemies.

The defense of free speech and the protection of dissent in an open society, for example, might be regarded, in this argument, not only as a value to be defended – but also as a strategic advantage to be embraced against adversaries whose thinking and actions are repeatedly constrained by rigidity, conformity, and fear. One of the saddest discoveries the United States made after its tragically mistaken invasion of Iraq was that the American system for assessing Iraq's weapons of mass destruction failed not so much because the information available was poor (although it was), but because dissent and free debate among non-partisan American intelligence analysts had been quashed through political intimidation. In the end, the American intelligence community had a debate about Iraq's weapons of mass destruction that was almost as constrained by conformity and fear as was the debate about the coming war within Baathist Iraq's own military circles. Many of the most spectacular failures in American intelligence and foreign policy since the Second World War – the failure to understand the accumulating weaknesses in the Soviet system, for example – can be traced to a failure within the national security bureaucracy to embrace dissent, free speech and debate as a strategic asset, even inside a system where much of the information being debated must be kept secret. Ultimately, we know, the American and European constitutional systems outlasted the Soviet Union because they were able to air out, debate and begin negotiations to resolve many of their important problems and errors as they went along – race relations, economic insecurity, and so on – while the Soviet system of conformity and political intimidation allowed corrosion and cracks to build

up like geological fault lines, until the ground finally crumbled. Citizens of a liberal constitutional order should demand that their bureaucracies abide, in their day-to-day pragmatic work against enemies of the state, including during war and emergency, by the same principles of free speech and protected dissent these national security bureaucrats are pledged to defend on behalf of the public – not just because it is right, but also because it is practical.

As I said earlier, I am prepared to argue that constitutional democracies will occasionally confront emergencies so grave that they will require the temporary suspension of some constitutional protections. It would be silly and ahistorical to try to imagine a world in which no such emergencies will ever occur. The important questions, however, all involve thresholds – how grave is the emergency, what protections must be suspended and why, and what is the evidence that such suspensions are in fact necessary and effective? One problem with these questions is they are not empirical. There are no objective, observable answers. And even if the answers can be approximated by guesswork or gut instinct, the answers are not static – the circumstances of any true emergency are continuously changing. So there are really only two ways to approach the correct answers under wartime pressure – either you have consistently flawless leaders who make the ideal decisions on their own, or you have a noisy, inclusive, open debate in a democratic society about what constitutes a true emergency and what measures may be necessary to address that emergency.

In the United States, try as we may, we seem to have trouble electing consistently flawless leaders. I have the impression that Sri Lanka has struggled with a similar problem. And so we are left with the noisy, at times uncomfortable alternative – free speech, and protected dissent.

The examples I have just listed are in some sense tactical – they are attempts to convert a few abstract liberal principles into

a living law of self-defense, a practical system. But this is not the only level on which an argument for liberalism in an age of terror can be constructed. Liberalism is not just a tool box for more intelligent, more sustainable methodology against enemies of the state; it is also a practical and successful political strategy for coopting and reducing the number and virulence of enemies over time.

Al Qaeda, with its extra-territorial vision of the ummah and its migration into the vitual spaces of the Internet, may prove to be a partial exception, but most millenarian or terrorist organizations are susceptible, over the long run, to the cooptation and distractions of territorial politics and citizenship. Insurgent movements are usually defeated or pacified, every educated citizen in South Asia knows, at least in part through conversion into democratic politics. We have seen this again and again – here, in the Punjab, in Northern Ireland, and perhaps now even with the Maoists in Nepal. This is currently the strategy of the United States in the Sunni areas of Iraq, of course.

It hardly seems plausible to adopt, over the course of years or decades, a political approach to counterinsurgency based in part on the absorptive appeal of constitutional democracy without having the confidence and conviction, at the same time, to defend and even actively promote the rights and civil protections that democracy is based upon.

Too often in the United States, and particularly these days, the opportunity to embrace liberal principles as a global strategy is defeated by the very partisan competition between free political parties that the constitution enfranchises. In the current environment, the defense of civil liberties has become part of a deeply polarized and seemingly irreconcilable culture of election cycles. This is not exactly new for us – Michael Dukakis lost to the current president's father in 1988 for many reasons, but surely his confession on national television, in language that echoed the McCarthy period, that he was a "card-carrying member of the American Civil Liberties Union" did not help. Yet in my own

adult lifetime I certainly cannot remember a period of more poisonous, vitriolic and argumentative partisan politics than what we are enduring in Washington today.

It wasn't always this way. As lively and contentious as partisan politics were during the Reagan years, for example, there was still a comparatively greater degree of consensus about Cold War foreign policy, and the role of liberal constitutional values in anti-Soviet strategy. It was a time when Republicans both mocked Democrats for their human rights ideals and then appropriated and advanced those ideals against the Soviet Union. In fact, it was the activist, ideological right of the Republican Party, not the establishment wing led by President George Bush 41, as we call the father, that discovered the language of international human rights could be a far more effective means than proxy wars or military intimidation to embarrass and contain the Soviet Union's dictatorship. Sakharaov and Havel found many of their most effective allies in the Republican Party during the 1980s. There is a direct line between that human rights wing of the Republicans, now seemingly abandoned, and the democracy promotion efforts of the current administration. It's just that as this strain of Republican foreign policy was refracted through the trauma of September 11, it ceased to be a strand of a multilateral global movement, and instead became an instrument of unilateral, hubristic foreign policies.

Slowly, tenuously, this imbalance in the American constitutional experience since September is righting itself. Despite threats and intimidation, the press has brought to the attention of Congress and the public several secret programs that were operating outside of the law, in particular an eavesdropping program that had been constructed by the Bush Administration in self-conscious defiance of an existing statute for regulating such secret work.

I should say something about the relationship between the press and the government in America since September 11,

particularly on the recently contentious subject of publishing accounts about secret counterterrorist operations. The media is enormously unpopular in America today and has been for some time, so beating up on newspaper editors is not much riskier in political terms than denouncing al Qaeda terrorists – and indeed, some portion of the American public seems to think there is little distinction between them. I had the privilege to work as managing editor of the Washington Post before and for several years after September 11. In more than six years, there were less than a dozen occasions when a story we intended to publish produced a request for discussion from the government – and this request was something we solicited, voluntarily, whenever we had reporting that we thought might reveal sensitive operational details to enemy groups or otherwise endanger lives. None of the more difficult calls occurred on my watch, however – I found these cases, because of their specifics, fairly easy to dispose of. There is no easy formula or pat set of principles that can be applied to these decisions, however. Although I'm not an attorney, I come from a family of lawyers, and I thought of the decisions I made as arising from what in the Anglo-American tradition you might call a "case law" standard – that is, the facts of each case must be examined very very closely and then evaluated against a backdrop of bedrock principles. To oversimplify a little, as an editor, you consider the extent of the public interest in a particular secret, and you also consider, on the other hand, the extent of potential harm that could be created by the publication of that secret. In evaluating the public interest side of that equation, you would certainly consider the extent to which the secret activity under discussion appears to skirt or evade the law. Most but not all of the recent controversial decisions by American editors to publish secret information have involved cases where the secret activity clearly skirted or evaded the law. The one exception, in my judgement, was the most recent disclosure by the New York Times and several other newspapers of international financial surveillance programs – these appear to have been legal and

fully briefed to Congress, and so the public interest argument supporting their disclosure struck me as more tenuous than in the previous cases of extra-legal eavesdropping and secret offshore intelligence prisons.

In addition to the press, after a period of quiet acceptance of the Bush Administration's extraordinary assertions of executive power, has slowly started to recover its voice, and has provided a more thorough review of national security laws enacted immediately after the September 11 attacks.

Most important of all, the United States Supreme Court last month rejected the Bush Administration's approach to the detention of terrorist suspects at Guantonomo, forcing the administration into a new round of negotiations with Congress at a time of rising public and press scrutiny. Although it is happening much more slowly than it should, the fundamental mistakes made at Guantonomo seem likely now to be corrected. To quote just one pointed sentence from the Supreme Court's recent opinion, which refers to the Guantonomo detainee in whose name the challenge was brought before the court, "Even assuming that Hamden is a dangerous individual who would cause great harm or death to innocent civilians given the opportunity, the Executive nevertheless must comply with the prevailing rule of law in undertaking to try him and subject him to criminal punishment."

We have waited too long in the United States for this reassertion of common sense and self-interest.

We should all be worried, however, about what may happen if this renaissance is tested by another terrorist attack on American soil.

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