

Also by John Yoo

The Powers of War and Peace

WAR BY OTHER MEANS

AN INSIDER'S ACCOUNT
OF THE WAR ON TERROR

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THE GENEVA
CONVENTIONS

On a cold winter morning in January 2002, three months after the United States invaded Afghanistan, we flew through clear skies over sparkling blue-green waters into Cuba. A gust of warm, humid air, full of the smell of tropical flowers and trees, embraced us as we disembarked at the U.S. Naval Base at Guantanamo Bay, nicknamed Gitmo by the military. I couldn't help thinking that it would all make great beachfront property if Castro ever died.

America had been at war in Afghanistan for three months. One month before, the military, the CIA, and our allies in the Northern Alliance had decisively seized control of Afghanistan, forced al Qaeda from its terrorist bases, and captured hundreds of al Qaeda and Taliban fighters. We were in Cuba to see the detention facility where many of those fighters would spend the rest of the war.

I was the junior person on the flight—not quite the bag carrier, but far down on the agency “org charts”—among the senior lawyers there from the White House and Departments of Defense, State, and Justice. At the time, I was working for the Justice Department's Office of Legal Counsel. Although relatively unknown outside the Beltway, OLC is one of the most powerful legal offices within the federal gov-

ernment. It exists to interpret the Constitution and federal law for the executive branch. In peacetime, OLC usually occupies itself with resolving arcane questions of federal law or resolving interagency disputes. In times of war it advises the President and attorney general on the executive branch's constitutional powers. In the months following 9/11, OLC went into overdrive.

At the beginning of the Bush administration, OLC was an elite office within a government teeming with extraordinarily talented lawyers. Most of OLC's civil service staff were young attorneys just off of or headed to a prestigious clerkship in the federal appellate courts, or even the Supreme Court. Just above them were several experts in foreign affairs, national security, or presidential power with decades of experience. OLC has always been known for attracting deep thinkers on constitutional law, those more interested in figuring out separation-of-powers problems than litigating cases. OLC was often referred to as the attorney general's law firm, or the President's law firm, or the general counsel's general counsel, because when any new or difficult legal question arose, it often found its way there. Its alumni include three Supreme Court justices—Chief Justice William Rehnquist, Justice Antonin Scalia, and now Justice Samuel Alito—several federal appeals judges, attorneys general and solicitors general, and many leading law professors.

As a deputy to the assistant attorney general in charge of the office, I was a Bush administration appointee who shared its general constitutional philosophy. Three of the four other deputies had clerked for Justice Scalia or, like myself, for Justice Clarence Thomas. Other leadership positions within the Justice Department were also held by young conservative lawyers in their early thirties or forties; most had worked for Reagan- or Bush-appointed judges or Republican members of the House and Senate. They were matched by a White House counsel's staff that similarly was composed almost wholly of Supreme Court clerks. Many of us knew each other from going to the same law schools, clerking for the same judges, or working at the same law firms. Heading it all was Jay Bybee, a law professor from the University of Nevada, Las Vegas, who had previously served in the Justice

Department and the White House counsel's office under Presidents Reagan and Bush, and who would soon become a judge on a federal appeals court in Nevada.

Figuring out into which pigeonhole al Qaeda fit under the laws of war fell to the small group of us at OLC who worked on foreign affairs and national security. I had been hired specifically to supervise OLC's work on these issues. Since 1993, I had taught courses in foreign relations and international law at the Boalt Hall School of Law at the University of California at Berkeley. I had taken a sabbatical during that time to serve as a law clerk to Supreme Court Justice Clarence Thomas and as general counsel to the Senate Judiciary Committee under Senator Orrin Hatch, where I gained a first-hand education in the practical workings of the Constitution's separation of powers. Among scholars, I was probably best known for my work on the historical understanding of the Constitution's war power, and I had written a number of articles on the relationship between presidential and legislative powers over foreign affairs. In an administration that arrived in D.C. to focus on domestic issues, like tax cuts, fetal tissue research, and faith-based policies, I was one of the few appointed Justice Department officials whose business was national security and foreign affairs. As the administration moved to adapt the rules of war to this new kind of enemy, OLC's lawyers would play a central role in almost every issue raised by the war on terrorism.

The group of us who landed that day in Cuba surely had no idea then that the "front" in the war on terrorism would soon move from the battlefields of Afghanistan to the cells of Gitmo and the federal courtrooms. Warfare is not limited to military strategies and tactics on a battlefield. In this war, the detection of terrorist networks, detention, interrogation, and covert action are key. The goal is to prevent a terrorist attack—akin to the 9/11 attacks, or the Madrid and London bombings—before it happens. We had to decide what status to accord captured members of al Qaeda and its allies. Ultimately, OLC would advise the White House that the conflict with al Qaeda was not governed by the Geneva Conventions and that its members were not legally entitled to prisoner of war (POW) status. We would also advise

that members of the Taliban could lose their right to POW status by refusing to obey the laws of war. President Bush would accept that advice in a decision in early 2002.

Ever since then, human rights lawyers, liberal interest groups, and political activists have attacked the administration for allegedly violating domestic and international law in the war on terrorism. Their criticism intensified after the release of photos depicting the abuse of Iraqi detainees at the Abu Ghraib prison in the spring of 2004. Charging administration officials with violating international and American law, they claim that Abu Ghraib is only the tip of an iceberg of systematic torture by the Defense Department and the CIA.¹ They rail that White House and Justice Department lawyers are guilty of war crimes for daring to find that al Qaeda terrorists are not legitimate prisoners of war. Amnesty International has called for investigations of "high-level torture architects" like Attorney General Alberto Gonzales; David Addington, the counsel to Vice President Dick Cheney; William "Jim" Haynes, the general counsel of the Defense Department; and several lawyers at the Justice Department, including yours truly.²

However much political activists repeat the claims of human rights groups, they have no merit. The idea that all the lawyers in the Department of Justice, the White House, and the Defense Department are engaged in a conspiracy to twist the law of the land to authorize an illegal war is simply ridiculous. Al Qaeda is an unprecedented enemy—a covert network of cells with no territory to defend, no population to protect, no armed forces to attack. It operates by launching surprise attacks on purely civilian targets. The only way to prevent future September 11s will be by acquiring intelligence. The main way of doing that is by interrogating captured al Qaeda leaders or successfully breaking into their communications. American policy makers have the unenviable and difficult task of preventing future attacks and adapting the rules of war, written for large-scale conflicts between nations, for this new kind of enemy. Human rights groups undermine their own credibility when they constantly criticize the United States for defending itself against

al Qaeda, treating it no differently than they do the real human rights tragedies occurring around the world.

The critics argue that the Geneva Conventions set standards that must apply in all conflicts, big or small, whether nations, insurgents, or terrorists are fighting. They claim that the Geneva Conventions are best read as applying to any armed conflicts that take place on the territory of any treaty signatory (which would be any war, since virtually every nation in the world has joined the Conventions), and that even if the treaties do not strictly apply as a matter of treaty law, they have become customary rules universally accepted through consistent practice by states. While appealing in its simplicity and universality, this argument makes the basic mistake of treating al Qaeda as a nation-state which obeys the rules of war. It ignores what makes al Qaeda unique and unprecedented: the fact that it is a stateless terrorist organization that can attack with the power of a nation. To pretend that rules written at the end of World War II, before terrorist organizations and the proliferation of know-how about weapons of mass destruction, are perfectly suitable for this new environment refuses to confront new realities.

Serious legal and policy choices had to be made in this war. The first and most important question presented to us at the Department of Justice was this: Are al Qaeda and other terrorist organizations entitled to be treated illegal or unprivileged nation-states, or should they be treated as enemy combatants not entitled to the protections of the Geneva Conventions?

The question first arose in November 2001, as U.S. forces began to capture al Qaeda and Taliban fighters in Afghanistan. Pentagon officials had to make basic decisions about the conditions of detention for al Qaeda detainees. The Third Geneva Convention requires that the United States cannot hold a prisoner of war in "close confinement" or "in penitentiaries," but instead "under conditions as favourable as those for the forces of the Detaining Power who are billeted in the same area."³ In other words, POWs cannot be detained in individual cells, as in a prison, but only in open barracks. A Geneva Convention POW camp is supposed to look like the World War II camps seen in

movies like *Stalag 17* or *The Great Escape*. But because Gitmo does not look like this, critics automatically declare that detainees' human rights are being violated.

What the critics usually fail to mention is that the Geneva Conventions are treaties that apply only to international armed conflicts between the "high contracting parties" that have signed them. Al Qaeda is not a nation-state. It has never signed the Geneva Conventions. The Geneva Conventions even allow a warring power that is not a party to the Conventions to benefit from their protections by voluntarily accepting their terms in a specific war. Al Qaeda has not done this. Again, these provisions all make plain who is covered by the treaty, and who is not. The Geneva Conventions are not a law of universal application. They are limited to specific types of situations that arise in wars between nations that are parties to them or that accept their provisions.

Al Qaeda violates every rule and norm developed over the history of war. Flagrant breach by one side of a bargain generally releases the other side from the obligation to observe its end of the bargain. Al Qaeda has made no bargain, and observes no rules resembling those contained in the Geneva Conventions. It does not limit fighting to combatants. It does not spare innocent civilian life. It does not take prisoners. Rather, it kidnaps innocent civilians, such as *Wall Street Journal* reporter Daniel Pearl, and hacks off their heads.

The War Crimes Act of 1996 makes it a federal offense to cause a "grave breach" of the Geneva Conventions, to violate what is known as "common article 3" of the Conventions, and to defy the provisions of another core law of war treaty, known as the Hague Regulations.⁴ Because it made elements of the Geneva Conventions part of the federal criminal statute, OLC had to interpret the treaty. No one in the Bush administration, contrary to critics' accusations, wanted to break the law. The very purpose of consulting the Justice Department was to make sure that no one did. Before our military and intelligence agencies could establish policy to address the threats posed by al Qaeda, they needed to know what the law meant first.

When the question on the application of the Geneva Conventions came to OLC, I asked Robert Delahunty to help me with the initial

research and drafting of the opinion. Delahunty was one of the three career lawyers in the office who had risen to the level of the Senior Executive Service, the top crust of the civil service. A man in his early fifties, Delahunty had a large white beard, a mane of white hair, a round jovial face, and a hint of an English accent—he often reminded me of a kindly Saint Nick. He had first gone to England to study Greek and Roman philosophy and history, eventually becoming a tenured faculty member at a British university, left to go to Harvard Law School, and joined the Justice Department in the late 1980s. He had drafted many of OLC's opinions on war powers, foreign policy, and presidential-congressional relations under the first Bush and Clinton administrations. He had an encyclopedic knowledge not just of the law and academic works, but of the real lifeblood of international law—the examples of state practice. To my mind, Delahunty was the very model of the career civil servant who applies his or her long years of experience and knowledge to the benefit of the American people.

In an opinion that eventually issued on January 22, 2002, OLC concluded that al Qaeda could not claim the benefits of the Geneva Conventions. The war with the Taliban was covered by the Geneva Conventions because Afghanistan had signed them. But depending on the circumstances, it was possible that the Taliban had forfeited its rights.⁵ First, we reviewed the actions forbidden by the Geneva Conventions, and by reference the War Crimes Act. Grave breaches of the Geneva Conventions include “willful killing, torture or inhuman treatment,” “willfully causing great suffering or serious injury,” or forcing a POW to fight or depriving him of a fair trial.⁶ Grave breaches of the Conventions, we believed, could occur only in cases of declared war or any other armed conflict between “two or more of the High Contracting Parties” to the Conventions.⁷

The War Crimes Act also criminalizes violations of “common article 3.” Common article 3—“common” because it is repeated in each of the four Geneva Conventions—requires that captured prisoners be treated humanely. It declares that the detaining power—here, the United States—not engage in “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture,” or

“outrages on personal dignity, in particular humiliating and degrading treatment.”⁸ Common article 3 applies in “armed conflict not of an international character” that occurs within the territory of one of the signatories to the treaties. The weight of commentary on the drafting of the Geneva Conventions suggested that common article 3 governed civil wars internal to a country.⁹ It seemed clear that the drafters—who, after all, had worked in the aftermath of World War II—had anticipated only two types of conflicts: wars between nation-states and civil wars. They did not, and perhaps could not, anticipate the revolutionary change in warfare put on display on September 11, 2001: a non-state actor that could wage international conflicts with all the power of a nation.

Bush administration critics make the erroneous claim that U.S. treatment of al Qaeda terrorists violates common article 3.¹⁰ Some international bodies and human rights critics demand that common article 3's requirements—including its vague prohibition on “outrages on personal dignity”—extend to *all* forms of armed conflict.¹¹ That reading ignores the text of the Geneva Conventions itself, which says that these requirements apply only to conflicts “not of an international character.” It also ignores the context in which the Conventions were written. The clear understanding of nations at the time was to prevent cruelty and unnecessary harm in civil wars, which until that time the laws of war had left unregulated. Many of the nations that signed the Geneva Conventions viewed the emergence of non-state organizations in warfare as a lacuna in the laws of war, and so approved two sets of upgrades to the Conventions in 1977 to explicitly protect them. Tellingly, the United States refused to ratify these add-ons, with President Reagan specifically declaring them objectionable because they gave terrorists the protections in warfare due only to honorable warriors.¹²

The structure of the Geneva Conventions, as ratified by the United States, made clear that al Qaeda could not possibly claim their benefits. Al Qaeda simply was not a nation-state, and it had never signed the Geneva Conventions. Their legal benefits could not extend to al Qaeda, which would not obey them anyway. Common article 3 did not

apply to al Qaeda because it is not fighting an internal civil war with the American government. The 9/11 attacks and the struggle with al Qaeda represented an international armed conflict that extended beyond the territory of the United States.

Even if the Geneva Conventions applied, they require that combatants obey four basic principles to receive POW status: They must operate under responsible command, wear uniforms, carry their arms openly, and obey the laws of war. Combatants must clearly distinguish themselves from civilians, and refrain from attacking civilians, so as to reduce the destruction of war on innocent noncombatants. Because of their record of launching deliberate, surprise attacks on civilian targets with no military value and their practice of disguising themselves as civilians, the January 22 opinion concluded, "Al Qaeda members have clearly demonstrated that they will not follow these basic requirements of lawful warfare."

Whether the Taliban deserved the protections of the Geneva Conventions was a much more difficult question, and proved to be the most controversial part of the opinion. Afghanistan had signed the Geneva Conventions, but the question was whether Afghanistan continued as a viable state. The Constitution's recognition of the President as commander in chief and chief executive, long historical practice, and the Supreme Court's view that the President is the "sole organ of the nation in its external relations, and its sole representative with foreign nations,"¹³ established that President Bush could suspend treaties with another nation that had ceased to exist. In fact, the Supreme Court had held in a 1947 case that it would not second-guess a decision by the political branches as to whether Germany had ceased to exist as a nation after World War II.¹⁴

Recent history supplies several cases where a territory lost an effective government and essentially failed. Somalia was the clearest example. Central government authority had collapsed there by 1992, armed gangs fought over control of people and land, and the United States and its allies under the UN's aegis had sent troops. Liberia and Haiti were other examples. OLC's job of defining the law did not extend to uncovering the facts in Afghanistan—that is the job of the

Defense and State Departments and the CIA. The ultimate decision as to whether Afghanistan was a failed state rested with the President. But the U.S. government was already on record. Defense Secretary Donald Rumsfeld had said during the Afghanistan invasion that the "Taliban is not a government. The government of Afghanistan does not exist today. The Taliban never was a government as such."¹⁵ Just before the start of the war, the State Department had said: "There is no functioning central government" in Afghanistan. Rather, it said, "The country is divided among fighting factions" and the Taliban is "a radical Islamic movement" in control of about 90 percent of the territory.¹⁶ A similar judgment about Somalia had allowed the UN Security Council to authorize a military intervention for humanitarian reasons, even though the UN Charter allows the UN to use force only to counter a threat to "international" peace and security, not to mix in internal civil wars.

OLC sought to develop a legal test as to whether a state had "failed." In our view, state failure was marked by "the inability of central authorities to maintain government institutions, ensure law and order, or engage in normal dealings with other governments, and by the prevalence of violence that destabilizes civil society and the economy."¹⁷ Borrowing from the legal test for the birth of a state, OLC recommended that the President consider whether Afghanistan had a defined territory and population, whether it was under the control of a government, whether the government could conduct foreign relations and carry out its international obligations, and whether the government has been recognized by the other nations of the world. If the President found these conditions did not exist, he could suspend our legal obligations with Afghanistan because the Taliban was not a real government running a real country. Government testimony and expert works indicated that "rather than performing normal government functions, the Taliban militia exhibited the characteristics of a criminal gang." According to the UN, it had "extracted massive profits from illegal drug trafficking in Afghanistan and subsidized terrorism from those revenues."¹⁸ Afghanistan itself was subject to the control of warlords and ethnic groups, much of the population had fled

to refugee camps, and all but three countries in the world—Saudi Arabia, Pakistan, and the United Arab Emirates—had refused to recognize the Taliban.

This part of the memo was advancing the law. The idea of failed states had not been fully incorporated into international law. There was a legal test for the emergence of new states (usually from the collapse of an empire), but no settled approach on their collapse. In two previous conflicts, Somalia and the former Yugoslavia, the United States and its allies had justified intervention on the collapse of governmental authority. If those states were thought to continue in existence, then American intervention in both places likely violated international law. If the United States could intervene in Somalia, Haiti, and the former Yugoslavia, surely it could intervene in Afghanistan to stop al Qaeda.

Failed states pose an international threat because their collapse creates ungoverned territory. Terrorists and international criminal organizations can move in and flourish. Warlords and gangs can violate human rights there on a massive scale. Al Qaeda had been able to establish such deep roots in Afghanistan, where it could gather its personnel, organize its assets, and train for its deadly missions in relative freedom, exactly because there was no real government there. While operatives could set up cells in Pakistan or even Germany, they still needed the support of an area where al Qaeda could establish infrastructure, pool its resources and personnel, and take refuge from the police.

Critics have responded that Afghanistan was not a failed state because the Taliban effectively controlled most of its territory. No doubt the Taliban ran a harsh regime, they argue, but it could only have imposed its fundamentalist religious code because it held authority throughout the country, which is the most important test of whether a state exists. On the other hand, much of that effective control seemed to be exercised by warlords, terrorist groups, and tribal militias, while the Taliban did not perform the basic governmental functions of providing minimal services to the Afghani people. Rather, it carried out systematic human rights abuses against the population and

committed severe war crimes against its enemies. Afghanistan's status as a state depended on the facts, and we left that question up to the President and his advisers.

In any event, the President did not need to rest his decision only on Afghanistan's status as a failed state. Even if Afghanistan were a functioning state, and the Geneva Conventions applied, the laws of war still required that the Taliban militia meet the basic rules for fighting forces. The Geneva Convention governing POWs extends protection to "members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power."¹⁹ From everything we knew about the Taliban, it did not operate as a regular armed force. It acted more like a mob, without any clear command structure, and its fighters were more likely to be attached to different tribes or warlords than to Afghanistan.

This does not settle the matter though, because Geneva also protects "members of other militias and members of other voluntary corps, including those of organized resistance movements."²⁰ To receive POW status, such militia members must observe the four basic principles mentioned earlier: "that of being commanded by a person responsible for his subordinates," "that of having a fixed distinctive sign recognizable at a distance," bearing arms openly, and "that of conducting their operations in accordance with the laws and customs of war." If there is "any doubt" as to a detainee's status as a POW, the Geneva Conventions call for a tribunal, which in American practice had been satisfied by convening three officers together in the field. This decision would depend on the facts in Afghanistan, which we could not determine thousands of miles away in Washington. POW status was either up to the military on the field, or, as we saw it, the President could examine the operation of the Taliban as a whole and reach a determination.

Lastly, OLC wanted to make clear that we were discussing only issues of law, not policy. Even if al Qaeda or Taliban fighters did not deserve the legal protections of the Geneva Conventions, the President could still extend those rights as a matter of policy and goodwill. OLC provided historical examples where the United States had

provided POW status when not legally required. At the outset of the Korean War, neither the United States nor North Korea had yet ratified the 1949 Geneva Conventions, but General Douglas MacArthur ordered the troops under his command to follow the “humanitarian principles” of common article 3 and the more detailed requirements of the POW convention. During Vietnam, the United States provided POW status to members of the Vietcong, even though they refused to operate in accordance with the principles of lawful combat. In Panama, the United States chose to treat the followers of General Manuel Noriega according to the Geneva Conventions, without conceding that the law required it. In Somalia, Haiti, and Bosnia, American forces agreed with their allies to apply the “principles and spirit” of the Conventions, even though it was unclear whether the wars were civil or international, and many combatants did not obey the rules of warfare. Our point was that the United States could find it advantageous to follow the Geneva Conventions, even if not legally bound to, but that then again it might not. That would be a question for the policy makers—Powell, Rumsfeld, Ashcroft, Tenet, and Rice—to decide, not OLC.

As the White House held its procession of Christmas parties and receptions in December 2001, senior lawyers from the attorney general’s office, the White House counsel’s office, the Departments of State and Defense, and the NSC met a few floors away to discuss the work on our opinion. We sat at a large round table in a room in the ornate, Empire-style Old Executive Office Building where secretaries of state once conducted business. Just a few days before, American and British special forces and their Afghan allies had killed many al Qaeda fighters in the mountainous caves of Tora Bora, but had just missed Osama bin Laden and his top lieutenants.

This group of lawyers would meet repeatedly over the next months to develop policy on the war on terrorism. We certainly did not all agree, nor did we always get along, but we all believed that we were doing what was best for the nation and its citizens. Meetings were usually chaired by Alberto Gonzales, now attorney general, then the counsel to the President. A short man with perfectly

combed jet black hair, Gonzales was a real-life Horatio Alger story. He had grown up in modest circumstances in Texas and enlisted in the Air Force, which encouraged him to go to college. He went to Rice and Harvard Law School, and then returned to Texas, where as a corporate lawyer he came to the attention of Governor George W. Bush. He served as counsel to the governor, was elected Texas secretary of state, joined the Texas Supreme Court, and then came to the White House as the President’s counsel. Gonzales’s usual modus operandi was to keep his talking to a minimum, to seek a full discussion of the contending views, and to keep his own views private. He hated conflict and would have preferred that every meeting ended in a consensus, yet I found that when he had to, he could make the toughest decisions a lawyer would face. In private, he loved a good joke and had an easygoing, agreeable manner, which concealed a fierce competitive streak. At the same time, he could never understand why opponents (both inside and outside the administration) would resort to bureaucratic maneuvers, personal attacks, leaks, or exaggerations and distortions to prevail. Gonzales came to Washington with no agenda but that of providing his client, George W. Bush, with the best legal advice possible.

At meetings, his deputy, Timothy Flanigan, usually played the role of inquisitor, pressing different agencies to explain their legal reasoning or to justify their policy recommendations. I had known Flanigan ever since he had interviewed me for a job when I was fresh out of law school. He was sometimes overweight, sometimes not, with a glint in his eye and always ready with a funny remark, which must be a job requirement for someone with fourteen children. He had gone to the University of Virginia Law School, clerked for Chief Justice Warren Burger, and then worked in OLC before becoming its head at the end of the last Bush administration. Flanigan had worked at a variety of law firms before leaving private practice for a few years to work on a biography of Burger. He had been a critical member of the Bush campaign’s legal team during the Florida recount. Flanigan did not shy away from conflict, as Gonzales did, and knew the ways of Washington, whereas Gonzales had no Beltway experience. Flanigan brought

the ties to the broader Washington political and legal community, while Gonzales provided the personal relationship with Bush.

The State Department was usually represented by one of the most experienced officials to have served as its legal adviser, William Howard Taft IV. Taft was a thin man who bore little resemblance to his prodigious presidential progenitor. He had already enjoyed a long career as deputy secretary of defense and DOD's general counsel during the Reagan administration. Another regular participant at meetings on terrorism policy was John Bellinger, the legal adviser to the NSC, who would succeed Taft when Rice became secretary of state. An official in the Clinton Justice Department, Bellinger often shared Taft's accommodating attitude toward international law.

William "Jim" Haynes represented the Defense Department as its general counsel. Haynes was a charming, athletic man; D.C.'s legal newspaper, the *Legal Times*, had done an early profile comparing him to James Bond, which prompted no end of teasing from his colleagues. Haynes was a natural leader who inspired trust from those he worked with. He never sought the spotlight, never sought to dominate a meeting, but instead wanted to hear the positions of the different agencies. He saw his mission as preserving the Defense Department's legal and policy options and the prerogatives of his boss, Secretary Donald Rumsfeld. He attended Harvard Law School, served in the Army, and later became general counsel of the Army under Bush 41. After working for defense contractors and law firms during the Clinton years, Haynes was chosen by Rumsfeld to help transform the military, which made him a target of military lawyers, just as Rumsfeld had encountered resistance from the military brass. Haynes would later be nominated for a federal judgeship in Virginia, but his nomination would be held up by senators critical of the Bush administration's terrorism policies.

Some in the media have become obsessed with another lawyer, David Addington, then counsel to Vice President Cheney, now his chief of staff.²¹ No doubt the fascination with Addington is part of a broader effort to claim that Cheney is really in charge of the White

House rather than merely fulfilling the vice president's traditional role as the defender of the President and his party. The punditry's fixation on Addington is, I believe, in large part a response to his colorful personality. In the usual sea of colorless, blue-suited, white-shirted, stripe-tied bureaucrats, men and women whose main goal is to create no waves and make no enemies, Addington stands out. A tall, white-bearded man with a booming voice and a confident, combative manner, Addington always does his homework—he reads voraciously, not just cases, laws, and treaties, but the daily flow of memoranda that course through the White House. He never declines the opportunity to press agency general counsels on whether they are interpreting the law or making policy.

He was the equal of any other lawyer in experience, having served as DOD general counsel under Cheney, special assistant to President Reagan, and lawyer for the House Intelligence Committee. Yet, Addington was always conscious of his position. He enjoyed saying that the vice president "was not in charge of anything" so all he could do "was ask lots of questions"—which often flowed in a torrent, replete with references to CIA practice, military jargon, Marshall Court opinions, and sometimes sarcastic comments. Various media reports claim that his influence was so outsized he even had a hand in drafting Justice Department legal opinions in the war on terrorism. As the drafter of many of those opinions, I find this claim so erroneous as to be laughable, but it does show how wrong the press can get basic facts.

The State Department and OLC often disagreed about international law. State believed that international law had a binding effect on the President, indeed on the United States, both internationally and domestically. Following its traditional view since at least Bush 41, OLC usually argued that international law that did not take the form of a treaty was not federal law because it was not given such authority by the Constitution's Supremacy Clause. In our arguments, State would authoritatively pronounce what the international law was. OLC usually responded "Why?"—as in why do you believe that, why should we follow Europe's view of international law, why should we not fall back on our traditions and historical state practices?

OLC's conclusion that the Geneva Conventions did not apply to al Qaeda did not ruffle any feathers. But it is no secret that the State Department disagreed with our view that the Taliban were not owed POW status. It argued that a territory could not lose its status as a nation-state, even though this had justified American intervention in places like Somalia and Haiti. Taft predicted that a presidential decision that Afghanistan was a failed state would cause the heavens of international law to fall. If the Geneva Conventions did not apply to a failed state, no treaties at all would apply to a failed state. Afghanistan's inability to be a party to any treaties "would have far-reaching implications for the conduct of U.S. foreign policy toward other States with questionable governing regimes."²² If Afghanistan was a failed state, it would no longer be a member of the United Nations, International Monetary Fund, or World Bank, or a party to the nuclear nonproliferation treaty. The ownership of assets, liability for claims and debts, and "diplomatic relations and the status of our embassy" would be in question. Taft argued that maintaining Afghanistan's status as a state would keep these treaties in place, "to ensure the protection of the population." We thought these arguments were fundamentally ones of policy—they sketched the implications of a finding of a failed state—but did not actually come to grips with the question: Does a state really exist when its territory is gripped by civil war and subject to the control of warlords? Does a state exist when basic services are denied the population, and terrorists can freely roam throughout the land? In this respect, we thought Taft's memo represented the typically conservative thinking of foreign ministries, which places a priority on stabilizing relations with other states—even if it means creating or maintaining fictions—rather than adapting to new circumstances. It reminded me of the decision of the first Bush and Clinton administrations to claim that the ABM Treaty of 1972 still existed even after the collapse of the Soviet Union.

Military lawyers from the Pentagon had a policy concern. Known as "JAGs," short for judge advocates general, they worried that if the United States did not follow the Geneva Conventions, our enemies might take it as a justification to abuse American POWs in the future.

They believed that the Geneva Conventions were now "customary international law"—applicable not by treaty, but by custom developed through the practice of states over time. Most rules of civilized warfare, such as the ban on targeting civilians, had been accepted through custom long before taking the form of a treaty. It did not matter whether al Qaeda had signed the Geneva Conventions or not, the JAGs argued; the principles applied to any war and to anyone that the United States fought. Some, such as Senator Lindsey Graham (himself a JAG), have suggested that the JAGs were shut out of the decision process. From what I saw, the military had a fair opportunity to make its views known. Representatives from the Joint Chiefs of Staff, including uniformed lawyers, were present at important meetings on the Geneva question and fully aired their arguments.

The Justice Department disagreed. Whether to treat captured al Qaeda or Taliban fighters as we would soldiers captured fighting for France or Germany is a matter of policy. The law does not require us to provide them all with similar treatment, because the law cannot predict everything that may occur in life or war. It did not anticipate a war fought with a non-state terrorist organization with the destructive power of a nation. That does not mean that we recommended the administration do everything the law allowed. Setting policy within the limits of the law would depend on the circumstances.

It was far from obvious that following the Geneva Conventions in the war against al Qaeda would be wise. Our policy makers had to ask whether it would yield any benefits or act as a hindrance. Although the United States had obeyed the Geneva Conventions scrupulously in previous wars, our enemies in Korea, Vietnam, and the first Persian Gulf War abused American soldiers anyway. Mistreatment of prisoners is another form of "asymmetric warfare" that weaker opponents use against their stronger enemies. There is no reason to think that al Qaeda or the Taliban would act any differently than had communist China, North Vietnam, or Saddam Hussein. If anything, al Qaeda shows no desire to take prisoners at all, or provide them with humane conditions—but rather instantly executes them (a Geneva Convention violation). Nations at war with the United States will treat

American POWs humanely or abuse them based on the imperatives of war, not on what we do against al Qaeda.

OLC concluded that the Geneva Conventions had not assumed the status of customary international law that bound the United States, nor, for that matter, all nations in the world. Even if the Geneva Conventions could be seen as universal, and not just applicable to signatories, they only governed either conventional wars among nation-states using regular armed forces or rebel groups in a civil war. There was no customary international law on terrorist organizations like al Qaeda that could launch a devastating international attack. No clear customary international law on megaterrorism like 9/11 existed.

The United States has never in its history consented to the idea that the laws of war protect terrorists. In the wake of the wars of decolonization and independence in the third world, several nations sought to extend the protections of the Geneva Conventions to those who did not fight on behalf of states—freedom fighters, rebels, liberation movements, or even terrorists (as the saying goes, “One man’s terrorist is another man’s freedom fighter”). In 1977, Additional Protocols to the conventions extended POW protections to the fighters of non-state actors, and were signed by President Jimmy Carter. President Reagan decided in 1987 against seeking Senate approval. Reagan criticized the first protocol because it “would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. They would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves.”²³ He concluded that “we must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law.” In a sign of how much the world has changed, the editorial page of the *New York Times* praised Reagan’s decision.²⁴

What clearer evidence could there be that the United States has *not* agreed to give terrorists the protections due to honorable warriors? That it has *not* agreed to an international practice of considering war with terrorists to be covered by the Geneva Conventions. *This* is the law of the land.

Customary rules of international law can develop even without a written treaty, but only through the long practice and agreement of states. There is no world government that legislates and enforces rules on nations. At this moment in world history the United States’ conduct should bear the most weight in defining the customs of war. Our defense budget is greater than the defense spending of the next fifteen nations combined.²⁵ We are the only nation that consistently fights wars around the world to protect its interests, to maintain peace in unstable regions, and to prevent human rights catastrophes. American troops helped keep the peace in Europe after World War II, maintained a delicate balance of power in Asia, and prevented any foreign intervention in the Americas. We have sought with less success to bring a better world to parts of Africa and the Middle East. Our NATO allies could not even stop the fighting along their border, in the former Yugoslavia, without American participation. Even while fighting two wars simultaneously in Afghanistan and Iraq, our military strength remains unrivaled.

Whether nations should adapt the Geneva Conventions to international terrorist organizations like al Qaeda under international law, which arises largely by the practice, agreement, and custom of states, is decided by the nations that actually fight wars. That critical question should not be decided by taking an international opinion poll, where many of the votes are cast by nations that are not democracies, or don’t have to face the tough choices demanded by war. The United States has used its dominant military position to create and maintain a liberal international order based on democracy and free trade. U.S. practice in its wars—to maintain global peace and stability—have primary authority in setting international law on the rules of warfare.

Nevertheless, other nations and human rights groups fiercely attacked the United States for its Geneva Convention decision. Normally stalwart European allies, like the Germans, have called for Gitmo to be closed down. None of these nations have the responsibility of holding large numbers of dangerous al Qaeda operatives. They are happy to criticize the United States, but privately they don’t want the United States to release their own al Qaeda citizens, who could return

home to wreak havoc. Some commentators, like Robert Kagan, have suggested that the differences over the war on terrorism stem from wholly different political cultures. "Europe is turning away from power, or to put it a little differently, it is moving beyond power into a self-contained world of laws and rules and transnational negotiation and cooperation."²⁶ The United States, on the other hand, has chosen to rely more on power than international law, on military force as much as on persuasion, and sees a world of threats, not peaceful cooperation. "Americans are from Mars, and Europeans are from Venus," Kagan says. Jeremy Rabkin believes that Europeans are engaged in a misguided and dangerous project to degrade national sovereignty and replace it with global governance by international institutions.²⁷

Looking back, I would put Europe's criticism of the United States' position on the Geneva Conventions down to old-fashioned rational, but short-term, self-interest. It is no secret that some European countries, particularly France, wish to restore the balance-of-power system that prevailed before World War II. Criticizing the United States for its terrorism policies inflicts political costs on us, seeks to unify world opinion under European leadership, and attempts to turn other nations against American policy. Meanwhile, these nations benefit from our fight against al Qaeda, just as they did during our struggle against the Soviet Union. Some European allies make significant contributions to the war on terrorism, but the U.S. carries by far the greatest burden. France, Germany, and other European nations have large immigrant Muslim populations which have not assimilated—witness the 2005 riots in France and the location of the operational leaders of the 9/11 attacks in Hamburg, Germany. They do not want to provoke their Muslim communities by pursuing an openly tough terrorism policy.

Our January 2002 memo represented an effort at consensus. On our flight to Gitmo, I sat next to Taft and sought to make clear that the President could choose to leave aside the failed state theory. He could decide instead that the Geneva Conventions would apply to Afghanistan, but that members of the Taliban could lose their POW status if they failed to obey Geneva's requirements for an armed force. State wanted to hold thousands of informal hearings in the field for captured

Taliban fighters. OLC maintained that the President could decide whether the Taliban militia as a group met Geneva requirements based on his constitutional authority to interpret treaties. The President could decide, if he chose, that Geneva's rules would apply as a matter of policy, including common article 3's guarantee of basic humane treatment of detainees.

A few weeks after the Gitmo trip, the lawyers met again in the White House situation room, a surprisingly small but ultrasecure room in the basement of the West Wing (one can even see photos of it on the White House Web site), to finally resolve the issues for presidential decision. If Geneva Convention rules were applied, some believed they would interfere with our ability to apprehend or interrogate al Qaeda leaders. We would be able to ask Osama bin Laden loud questions, and nothing more. Geneva bars "any form of coercion" and POWs "may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind." This is more restrictive than domestic criminal procedures used in American police stations, where every day police officers get into suspects' faces and try to cut plea bargains in exchange for cooperation. Geneva's rules were designed for mass armies, not conspirators, terrorists, or spies.

Consensus eluded the group. Gonzales had the unenviable task of summarizing the different positions for President Bush and attempting to forge a consensus. On January 18, 2002, the President decided that neither al Qaeda nor Taliban fighters would receive POW status under the Geneva Conventions. According to a leaked State Department memo, Secretary of State Colin Powell asked President Bush to reconsider this decision. Powell wanted not just the Taliban covered, but al Qaeda too.

With al Qaeda we face a dangerous network of conspirators who can inflict mass casualties. Preemptive attacks or arrests based on intelligence are our most important tool. This became the central issue as the President reconsidered. According to a leaked draft of a memo to the President dated January 25, 2002, Gonzales took the position that the nature of the al Qaeda threat rendered "obsolete Geneva's strict limitations on [the] questioning of enemy prisoners, in addition to its

requirements that captured fighters receive commissary privileges, pay, athletic uniforms, and scientific instruments.”²⁸ Why? According to the leaked draft the United States must be able “to quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities against American civilians.” Applying different standards to al Qaeda does not abandon Geneva, but only recognizes that Geneva does not reach an armed conflict against a stateless enemy able to fight an international conflict.

Gonzales’s leaked draft summarized the policy considerations raised by different agencies. In our conflict with al Qaeda, information was our primary weapon against future attack: it made no sense to follow Geneva when the need for intelligence is so great. Finding Geneva did not apply would also effectively eliminate any threat of domestic prosecution under the War Crimes Act, which might impose an unwise and unnecessary straitjacket on U.S. troops in a war whose “circumstances and needs” were unpredictable. The memorandum emphasized that “the war against terrorism is a new kind of war,” not “the traditional clash between nations adhering to the laws of war.”

Gonzales has been caricatured as calling the Geneva Conventions “obsolete” or “quaint.” This plucks words out of context and misrepresents the leaked draft. Its argument was that Geneva did not apply as a matter of law, and that it was far more important as a matter of policy not to fatally hamstring intelligence-gathering by imposing a legal process never meant for the case, even if diplomacy would seem to counsel otherwise. Appearances and the massaging of international sensibilities could wait.

Gonzales’s draft presented Colin Powell’s objections. The United States had consistently applied the Conventions in previous conflicts, even when the law did not require it. Refusing to apply Geneva would weaken the United States’ future ability to demand POW treatment for captured Americans. Our allies and some domestic groups would condemn the decision. Failing to apply Geneva “could undermine U.S. military culture which emphasizes maintaining the highest standards of conduct in combat, and could introduce an element of uncertainty in the status of adversaries.” It was a good argument, and from pre-

cisely the person—the secretary of state—who must be concerned with world opinion.

Gonzales’s draft memo recommended that the President find that neither al Qaeda nor the Taliban were covered by Geneva. It observed that in past conflicts, the United States had found the Conventions did not apply legally. This would be particularly appropriate in regard to “terrorists, or with irregular forces, like the Taliban, who are armed militants that oppressed and terrorized the people of Afghanistan.” It also argued that as a matter of policy the United States should still provide captured enemy combatants with humane treatment, which would provide a minimum standard for interrogation or any other detention conditions. Military regulations governing detainees would still apply, but the draft memo pointed out “our adversaries in several recent conflicts have not been deterred by [the Geneva Convention on prisoners of war] in their mistreatment of captured U.S. personnel, and terrorists will not follow [Geneva Convention] rules in any event.” Any concerns about a decline in military discipline were cured by President Bush’s order that the detainees be treated humanely. Gonzales’s memo conceded that other nations would criticize our decision, and might even withhold cooperation, but said it was important to apply international law only where it was actually binding.

Gonzales’s description of the policy pros and cons neatly summed up the choice before the President. It answered the primary objection of those who argued that the military ought to continue to follow the Geneva Conventions because otherwise other nations would abuse our captured soldiers. Would U.S. refusal to provide POW status to al Qaeda and the Taliban influence the conduct of a future opponent? Who knew? In a future conflict, say over Taiwan, China might violate the Geneva Conventions, citing America’s previous refusal to apply them to al Qaeda. Such prediction is inherently uncertain, however, and if one were going to decide based on the past, China has not been a stickler for Geneva Convention rules anyway. It seems safer to predict that in deciding POW policy, China’s primary interest would be in the treatment of Chinese prisoners, not the treatment of al Qaeda prisoners from a previous war that never involved China. Suffice it to

say that citing precedents about the enemy's treatment of other nations' prisoners in other wars wouldn't drive America's POW policies, much less China's or any other hypothetical adversary's.

According to yet another leaked memo, Powell responded the next day. Powell's leaked memo conceded that al Qaeda were not POWs, and that the Taliban individually or as a group might also lose their entitlement to that status.²⁹ To Powell, the important question was that the United States publicly declare that the Geneva Conventions applied to the war in Afghanistan. His memo argued that following Geneva would permit the same "practical flexibility in how we treat detainees including with respect to interrogation and length of the detention," while the cost of the opposite policy would generate "negative international reaction," "undermine public support among critical allies," and lead to legal challenges in U.S., foreign, and international courts. Following the Conventions, Powell's memo maintained, "presents a positive international posture, preserves U.S. credibility and moral authority by taking the high ground, and puts us in a better position to demand and receive international support." Publicly declaring support for the Conventions "maintains POW status for U.S. forces," and "generally supports the U.S. objective of ensuring its forces are accorded protection under the Conventions." According to this leaked memo, State had decided to cut its losses, but still hoped to maintain the application of the Geneva Conventions, in theory, to Afghanistan.

In a letter to the President on February 1, 2002, John Ashcroft weighed in. While Ashcroft usually worked from documents prepared by staff, as every cabinet member must do in the interests of efficiency, he wrote this one personally. If the President determines that Afghanistan is a failed state, Ashcroft observed, "various legal risks of liability, litigation, and criminal prosecution are minimized."³⁰ This finding would provide "the highest assurance" under domestic law that no American military, intelligence, or law enforcement officer would later be prosecuted for violating Geneva rules because the President's decision that the treaty was not in force would be conclusive. Ashcroft also thought it unlikely that the failed state option would

come back to haunt the United States in a future war because "it would be far more difficult for a nation to argue falsely that America was a 'failed state' than to argue falsely that American forces had, in some way, forfeited their right to protections by becoming unlawful combatants." He pointed to the North Vietnamese abuse of American pilots as an example of the latter.

On February 7, 2002, President Bush decided to follow OLC's legal advice, but to go with Powell's policy. In a memo to Cheney, Powell, Rumsfeld, Ashcroft, Andrew Card, George Tenet, Condoleezza Rice, and General Richard Myers, President Bush said that the Geneva Conventions only applied to conflicts involving states fighting with regular armed forces. "However," he wrote, "the war on terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific crimes against innocent civilians, sometimes with the direct support of states."³¹ Bush had accepted OLC's legal conclusion that the Geneva Conventions did not apply to al Qaeda, which was neither a state nor a party to the treaties. He also accepted that he could suspend the Conventions with regard to Afghanistan, but decided not to. Instead, he found that the Taliban were "unlawful combatants" who had lost their POW status. President Bush also found that common article 3 applied only to an "armed conflict not of an international character," and hence neither to the war with al Qaeda nor to the Taliban.

A legal finding that the Geneva Conventions did not apply to al Qaeda, and that the Taliban had lost their POW status, did not answer the question of policy—what standards of treatment to provide. On the one hand, treating the detainees as unlawful combatants would increase flexibility in detention and interrogation, potentially yielding actionable intelligence that could prevent future terrorist attacks and locate al Qaeda personnel and assets. On the other hand, appearing to depart from the Geneva Convention standards could cause negative responses from our allies, international criticism, and a decline in military discipline. President Bush ordered that "as a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military

necessity, in a manner consistent with the principles of Geneva.” He wrote: “Our values as a Nation, values that we share with many nations of the world, call for us to treat detainees humanely,” and this principle applied whether legally required or not. President Bush also said that the United States “has been and will be a strong supporter of Geneva and its principles.”

President Bush chose the right policy, one that provided the United States with flexibility to develop the rules that should apply to the new enemy of global terrorism, but which, in treating the enemy humanely, maintained American values. The White House released a list of the conditions provided to the detainees, including adequate food, clothing, housing, shelter, medical care, and the right to practice their religion. I witnessed these humane standards myself at Gitmo. Detainees received clothing, regular meals, the means to practice their religion, housing, and exercise. Some detainees received the first modern medical and dental care of their lives. To be sure, conditions were not those of a hotel—detainees were kept in cells, initially constructed of chain fence until more permanent facilities could be built, and they were guarded 24/7 by marines on patrol and from watchtowers. U.S. armed forces were ordered to treat the al Qaeda and Taliban humanely, and they did so admirably.

Human rights advocates and commentators have criticized Bush’s policy decision. Some make an absolutist argument, raising the Geneva Conventions to a high principle.³² The Geneva Conventions, however, are treaties, and very detailed ones at that. They are not a moral code. Bush’s order to treat the detainees humanely, regardless of what they had done to us, regardless of the civilians they had killed and the rules of warfare they had broken, arose from morality. What standards to use toward al Qaeda and Taliban detainees is a question of policy. It demands that we measure the costs and benefits of the policy against other alternatives.

President Bush made his decision only five months after the September 11 attacks. All the available intelligence suggested that al Qaeda planned more strikes against the United States. One could argue that the costs to America’s international reputation were greater

than the immediate intelligence benefits. I do not think so; as various government leaders have acknowledged publicly, the intelligence gathered from captured al Qaeda and Taliban fighters allowed our intelligence, military, and law enforcement to frustrate plots that could have killed thousands of Americans.³³ Al Qaeda clearly sought weapons of mass destruction capable of increasing the devastation it could inflict by an order of magnitude. What President would put America’s image in the United Nations above the protection of thousands of innocent civilian lives?

Far from radical, President Bush’s decision drew on traditional rules of war. The customary laws of war have always recognized stateless fighters as illegal, unprivileged enemy combatants. This is a category that has existed for centuries. Pirates were the scourge of the oceans, and any nation could capture them; they were never owed the status reserved for legal combatants who obeyed the rules of civilized warfare. Justice Department opinions dating from the Civil War had distinguished between lawful combatants who wear a uniform, fight for a nation, and obey the rules of war, and “secret, but active participants, as spies, brigands, bushwhackers, jayhawkers, war rebels, and assassins.”³⁴ The latter were “banditti” who were “thoroughly desperate and perfectly lawless.” “These banditti that spring up in time of war are respecters of no law, human or divine, of peace or of war; are *hostes humani generis*, and may be hunted down like wolves.” This understanding continued to prevail during World War II, when the Supreme Court recognized in a saboteur case that unlawful combatants who had forsworn the laws of war did not enjoy those laws’ protections.³⁵ The Geneva Conventions mention neither illegal combatants nor any attempt to eliminate the concept. No one today is talking about hunting al Qaeda down like wolves, but a hardened operative who targets thousands of innocent civilians for death and disguises himself as a civilian is an unlawful combatant not due the protections given to honorable warriors.

Perhaps the greatest achievement of the laws of war over the centuries has been to make clear that noncombatants are off-limits. Innocent civilians cannot be deliberately targeted. Armed forces cannot use

civilians as shields, they cannot deliberately conceal themselves in certain buildings, such as religious or medical facilities, and they must wear uniforms to clearly distinguish their status as combatants. Al Qaeda fights in covert, unconventional ways that play to its strengths and our weaknesses—which are also our strengths: our standards of honor and the protections of our legal system.

When our group of lawyers visited Gitmo, the Marine general in charge told us that several of the detainees had arrived screaming that they wanted to kill guards or any other Americans. Many at Gitmo are not in a state of calm surrender. Open barracks for most are utterly impossible; some al Qaeda detainees want to kill not only guards, but their peers who might be cooperating with the United States. As recently as May 2006, prisoners with makeshift weapons attacked guards who had rushed to save a detainee who had faked a suicide.³⁶ The provision of ordinary POW rights to these detainees, such as allowing them to cook their own food or conduct research, or to keep their own command structure, is infeasible.

The Geneva Conventions make perfect sense when war involves states. They make a laudable distinction between civilians and uniformed combatants to protect civilians, permit detention of combatants to prevent them from returning to combat, and ensure a minimum level of humane treatment for ordinary foot soldiers, most of whom can be presumed, in a twentieth-century battlefield, to have little valuable information. Today the main threat to peace does not arise from the threat of conflict between large national armies, but from terrorist organizations and rogue nations that don't give Geneva or any other rules the time of day.

Human rights advocates and liberal critics of the Bush administration's terrorism policies pretend that the rules of civilized warfare, including the Geneva Conventions, can safely address terrorism. September 11 proved them wrong. Before, the laws of war classified wars into those between states and internal civil wars. In the 1990s, the threat to global peace and security seemed to come from the latter more than the former. But the 9/11 attacks revealed a new kind of

threat: a nonstate terrorist organization that wields the destructive power of a nation while ignoring the rules that guide nations. The candid approach would be to admit that our old laws and policies did not address this new enemy, and that we need to start developing a new set of rules to confront it, and soon.