

# A President Beyond the Law

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The question tears at all of us, regardless of party or ideology: How could American men and women treat Iraqi prisoners with such cruelty — and laugh at their humiliation? We are told that there was a failure of military leadership. Officers in the field were lax. Pentagon officials didn't care. So the worst in human nature was allowed to flourish.

But something much more profound underlies this terrible episode. It is a culture of low regard for the law, of respecting the law only when it is convenient. Again and again, over these last years, President Bush has made clear his view that law must bend to what he regards as necessity. National security as he defines it trumps our commitments to international law. The Constitution must yield to novel infringements on American freedom.

One clear example is the treatment of the prisoners at Guantánamo Bay, Cuba. The Third Geneva Convention requires that any dispute about a prisoner's status be decided by a "competent tribunal." American forces provided many such tribunals for prisoners taken in the Persian Gulf war in 1991. But Mr. Bush has refused to comply with the Geneva Convention. He decided that all the Guantánamo prisoners were "unlawful combatants" — that is, not regular soldiers but spies, terrorists or the like.

The Supreme Court is now considering whether the prisoners can use American courts to challenge their designation as unlawful. The administration's brief could not be blunter in its argument that the president is the law on this issue: "The president, in his capacity as commander in chief, has conclusively determined that the Guantánamo detainees . . . are not entitled to prisoner-of-war status under the Geneva Convention."

The violation of the Geneva Convention and that refusal to let the courts consider the issue have cost the United States dearly in the world legal community — the judges and lawyers in societies that, historically, have looked to the United States as the exemplar of a country committed to law. Lord Steyn, a judge on Britain's highest court, condemned the administration's position on Guantánamo in an address last fall — pointing out that American courts would refuse even to hear claims of torture from prisoners. At the time, the idea of torture at Guantánamo seemed far-fetched to me. After the disclosures of the last 10 days, can we be sure?

Instead of a country committed to law, the United States is now seen as a country that proclaims high legal ideals and then says that they should apply to all others but not to itself. That view has been worsened by the Bush

administration's determination that Americans not be subject to the new International Criminal Court, which is supposed to punish genocide and war crimes.

Fear of terrorism — a quite understandable fear after 9/11 — has led to harsh departures from normal legal practice at home. Aliens swept off the streets by the Justice Department as possible terrorists after 9/11 were subjected to physical abuse and humiliation by prison guards, the department's inspector general found. Attorney General John Ashcroft did not apologize — a posture that sent a message.

Inside the United States, the most radical departure from law as we have known it is President Bush's claim that he can designate any American citizen an "enemy combatant" — and thereupon detain that person in solitary confinement indefinitely, without charges, without a trial, without a right to counsel. Again, the president's lawyers have argued determinedly that he must have the last word, with little or no scrutiny from lawyers and judges.

There was a stunning moment in President Bush's 2003 State of the Union address when he said that more than 3,000 suspected terrorists "have been arrested in many countries. And many others have met a different fate. Let's put it this way: They are no longer a problem for the United States."

In all these matters, there is a pervasive attitude: that to follow the law is to be weak in the face of terrorism. But commitment to law is not a weakness. It has been the great strength of the United States from the beginning. Our leaders depart from that commitment at their peril, and ours, for a reason that Justice Louis D. Brandeis memorably expressed 75 years ago.

"Our government is the potent, the omnipresent teacher," he wrote. "For good or ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself."

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