Laws, Outlaws, and Terrorists

Lessons from the War on Terrorism

Gabriella Blum and Philip B. Heymann

Laws, Outlaws, and Terrorists

Lessons from the War on Terrorism

Gabriella Blum and Philip B. Heymann

Belfer Center Studies in International Security

The MIT Press
Cambridge, Massachusetts
London, England

First MIT Press paperback edition, 2013

For information about special quantity discounts, please email special_sales@mitpress.mit.edu

This book was set in Sabon 10/14 by Toppan Best-set Premedia Limited. Printed and bound in the United States of America.

Library of Congress Cataloging-in-Publication Data
Blum, Gabriella.
Laws, outlaws, and terrorists : lessons from the War on Terrorism / Gabriella Blum and Philip B. Heymann.
p. cm. — (Belfer Center studies in international security)
Includes bibliographical references and index.
ISBN 978-0-262-01475-5 (hardcover : alk. paper)—978-0-262-51860-4 (paperback) 1. War on Terrorism, 2001–2009. 2. Terrorism—United States—Prevention. 3. Terrorism—Government policy—United States. I. Heymann, Philip B. II. Title.
HV6432.B58 2010
363.325'15610973—dc22

2010005427

10 9 8 7 6 5 4 3 2

Laws, Outlaws, and Terrorists

The Belfer Center Studies in International Security book series is edited at the Belfer Center for Science and International Affairs at Harvard University's John F. Kennedy School of Government and published by the MIT Press. The series publishes books on contemporary issues in international security policy, as well as their conceptual and historical foundations. Topics of particular interest to the series include the spread of weapons of mass destruction, internal conflict, the international effects of democracy and democratization, and U.S. defense policy.

A complete list of Belfer Center Studies in International Security appears at the back of this book.

Preface

The motivation to coauthor this book was sparked when we began teaching together first a reading group, then a course, on the Law and Policy of Counterterrorism at Harvard Law School. With different professional and academic backgrounds, we each brought our own training and inclinations to the subject. Gabriella Blum specializes in public international law with a particular focus on the laws of armed conflict; this, and her experience as a lawyer for the Israel Defense Forces, shapes her approach to the challenges of dealing with international terrorism. Philip Heymann has a long career of both practice and teaching in domestic law enforcement and pre-9/11 terrorism, subjects on which he has also written several books. His own experience likewise shapes his approach to addressing the threat of international terrorism.

Given our divergent experiences and perspectives, we expected to find ourselves on opposite sides of the familiar debates. In fact, this was mostly not the case. Even where we disagreed, for instance, over whether terrorism was essentially a crime or an act of war, our disagreement did not have significant consequences. We might also have found ourselves on opposite sides of the Cheney/Obama argument about how beneficial or costly it would be to depart from liberal-democratic values as embodied in domestic and international law. On this count, however, disagreement never materialized. We found that we had very similar views of what history, comparative practice, and common sense instruct about the issues America faces in dealing with terrorism. More important, we discovered a common underlying approach. Blum relied on the protections of the laws of war as limits that should not be breached absent extraordinarily compelling circumstances. Heymann naturally turned to the protections of civil liberties in the United States and its allies; for

him, it was this body of law that staked out the bounds of acceptable action, which were not to be crossed unnecessarily or based only on an assertion—rejected by most of our friends—that we were in some sort of war. Ultimately, these two different paradigms led us to nearly the same place: when debating particular issues, we found that our boundaries were very similar.

From there, we considered how we could employ our legal instincts to approach the all-too-real threat of international terrorism without destroying values that mattered deeply to both of us: respect for human dignity and the rule of law. In order to design a sound counterterrorism strategy for the United States, we started with the axiom that there were certain principles to which a rule-of-law democracy, embedded within a larger community of nations, must adhere. We also both believed that in weighing the burdens and dangers that a government should expect its citizens or others to accept, any departure from international or domestic commitments must be reserved for the most exceptional cases and employed to the most limited extent possible. This proposition held true whether we approached terror attacks as acts of war, warranting a response governed by the laws of war, or as a crime, requiring a law enforcement approach. We discovered that many of the practices of the previous administration, and some of the current one, were not truly faithful to either body of law, and we were unconvinced by the justifications proffered for such departures from legal protections. The key, for us, is that any deviation from legal rules must still respect the underlying values and principles that animate the law to begin with. This standard was frequently met.

We did sometimes disagree on particular measures or on particular instances of accommodating law and necessity. These occasional debates usually arose because the laws of war, as a general matter, permit a country to use more aggressive means against external threats than the laws of peace do. Legitimate disagreements can arise over measures that a law enforcement model (which has been favored by many of our allies) would preclude, but that a war model would permit. Pushing the boundaries of the law enforcement model was sometimes necessary and allowed those entrusted with our security some bounded leeway to exceed the limits of criminal law when confronted with the unique dangers of transnational terrorism. From both a moral and strategic perspective, however,

it remains much harder to justify those measures that go even beyond the principles that animate the war model.

It is for the most part a fallacy—although an oft-repeated one—that adherence to the rule of law and individual rights necessarily comes at the expense of security needs. A commitment to certain liberal-democratic traditions *is* part of our security. Moreover, experience time and again has shown that the most aggressive and hotly contested means (such as torture, detention without protections, or overwhelming firepower), some of which required a departure from preexisting legal understandings, may backfire and actually undermine our security.

The threat of transnational terrorism is here to stay for the foreseeable future. The most recent events in Fort Hood and on the Northwest airliner bound for Detroit prove that the threat remains, and that it doesn't take one particular form or emanate from one identifiable enemy. Going forward, we would be wise to legislate the precincts of permissible action when the United States faces violent attacks by terrorists abroad; we need also to find agreement with our closest allies on this issue. Only the dangers posed by the largest and most lethal of drug cartels come close to the threats of terrorism, and neither menace is easily accommodated by domestic law. Neither, however, yields readily to the definition of conventional war; the heterogeneity of actors, the clandestine nature of operations, and the lack of a coherent geographic "battlefield" can deify a straightforvard application of either paradigm. Modern terrorism presents a different problem from those that were in mind when the laws of war or peacetime were created.

Perhaps a third legal regime, one that would accommodate the necessities of counterterrorism as well as the need to protect individual rights, is warranted, but reaching a consensus over such an intermediate regime will be a lengthy process. Today's governments must decide how to act in between the existing paradigms and without the clear guidance of a third. To make the law that is required now, they must consider the application of statutory and constitutional powers, the relevance of international commitments, the role of the legislature and domestic courts, and the way domestic and international audiences will perceive any chosen strategy.

In facing these challenges, a government must begin by asking what, if any, departures from the normal rules of national behavior are actually

necessary or truly important for security purposes. We can find no evidence for the intuition of some in the Bush administration that more coercion is necessarily safer. Having identified what departure from the law of peacetime or the law of war a sensible and effective strategy may require, the decision maker must examine whether the proposed strategy is still compatible with our common values and the principles animating the law. If a departure from law is inevitable, the chosen course must still respect the values the law embodies. Not all answers may be found within the limits of existing legal rules, nor are they found in the boldest defiance of our laws and values. In this book, we strive to offer some insights as to how law, strategy, and morality should shape the hardest questions about counterterrorism.

Our thinking about these issues was greatly advanced by discussing them with our students, American and foreign, who have shared with us their own perspectives, insights, and experiences, for all of which we are deeply thankful. We have also benefited from a wonderful group of research assistants, including Taylor Lane, Sarah Miller, Rachel Murphy, Neha Sheth, and Anne Siders, and particularly Natalie Lockwood and Whitney May.

Several commentators who are renowned experts in their field have shared with us their insightful comments and suggestions on the manuscript as it developed: John Bellinger, Robert Fein, Jack Goldsmith, and Robert Mnookin. All remaining errors are ours.

We are grateful for the support we have received from Harvard Law School, under the leadership of, first, Dean Elena Kagan, and then Dean Martha Minow, in the process of writing this book

Finally, we are indebted to Sean Lynn-Jones for the invitation to publish the book with the MIT Press, to Clay Morgan for dealing with us on behalf of the MIT Press, and to the editors, Kathleen Caruso and Julia Collins, who have worked hard to make our work more coherent and readable.

Introduction: The War on Terrorism—Lessons from the Past Nine Years

In *A Man for All Seasons*, playwright Robert Bolt depicts an imaginary, yet entirely plausible dialogue between Sir Thomas More, the Renaissance humanist who refused to succumb to a direct order from King Henry VIII, and More's son-in-law, William Roper, who warns More against Richard Rich. Rich was the solicitor general who would later give false testimony against More, leading to the latter's conviction and execution. "Arrest him," pleads Roper. "For what?" asks More, forever a lawyer. "That man's bad," a courtier intervenes. "There is no law against that," says More. A frustrated Roper then protests that if the laws could be imagined to be trees in a forest, and the devil were hiding behind one of them, "I'd cut down every law in England" to get him. To that, More queries: "Oh? And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat?" He then concludes by stating, "Yes, I give the Devil benefit of law, for my own safety's sake!"[1]

The past nine years' "war on terrorism" has been a formative time in U.S. history and, indeed, global history, no less than the 9/11 attacks themselves. It has influenced and reshaped relationships between East and West, North and South, the Christian and Muslim worlds, democratic and nondemocratic regimes. Wave after wave of historically rooted fears as well as new fears, real and exaggerated, have generated demands for government action that would thwart this new threat; three broad sets of interest were to be maintained in unison while taking into account three broad sets of interests: the safety of the United States and that of its allies; adherence to American traditional liberal democratic values; and the global status of the United States.

It is common to hold, as the Bush administration did, that these interests are necessarily in tension, if not in direct conflict, with one another,

especially when it comes to reconciling security needs with liberal democratic values. And further, that in the name of national security, traditional American values as embodied in domestic and international law and institutional arrangements must be set aside, far aside. As we will argue in this book, more often than not this tension is contrived or misconceived.

We often think about law as a tool for accommodating various sets of interests and for striking the balance between and among interests that are in conflict. This is true for peacetime law as it is for wartime law, although each system of law operates on the basis of different assumptions and is guided by different principles of accommodation. Peacetime laws apply to the quotidian life with a modicum of peril and assign the meeting of threats to law enforcement operations with the judiciary playing a central role. Although constrained to some degree by international law, each country chooses its domestic law enforcement regime. Wartime laws, which are largely international in origin, define a model in which danger is heightened—no longer an everyday sort of danger, but one that appears in the shape of war and that assigns the meeting of threats to military and intelligence agencies. Judicial involvement is minimal. These two sets of laws in combination constitute our existing legal paradigms for dealing with danger.

The September 11 attacks threw a wrench into the works—rattling, then redefining, not only our critical distinctions of law between peace and war but also our very conception of the role of law when we are in danger at home. Citizens and government alike stood aghast at the enormity and novelty of the events. As President Bush described the attacks a few days later, "Americans have known wars, but for the past 136 years they have been wars on foreign soil, except for one Sunday in 1941. Americans have known the casualties of war, but not at the center of a great city on a peaceful morning. Americans have known surprise attacks, but never before on thousands of civilians. All of this was brought upon us in a single day, and night fell on a different world, a world where freedom itself is under attack." The new type of attacks did not resemble any threat that law enforcement was intended to handle, nor did it resemble any of those wars that the laws of war were designed to address. The challenge, then, was for law to serve its purpose of accommodating the interests of national security, traditional American values—especially

a commitment to human dignity and the rights of the individual—and the global status of the United States when confronted by this new, unnamed danger.

Neither of the main paradigms—peace or war—seemed to apply. Indeed, the Bush administration determined that law, essentially, had failed to address the new threat. In coining and declaring a new *global war on terror*, the administration found peacetime domestic law to be irrelevant. This was "war" but a new kind of war with a new kind of enemy, to whom traditional wartime international law was also largely inapplicable. With domestic law irrelevant and international law inapplicable, the war on terrorism was thus to be conducted within what we have termed here a No-Law Zone.

We do not doubt that the threat of modern international terrorism poses new challenges for governments of liberal democracies, challenges that our existing legal paradigms might not suffice to meet. But we believe that conducting a war on terrorism within a No-Law Zone was neither warranted nor useful. In fact, we believe it ultimately frustrated all three sets of U.S. interests: security, liberty, and international leadership.

The Choice of the War Paradigm

So why was this approach chosen? The war paradigm promoted three major goals: First, it allowed the employment of warlike measures—military strikes, invasion, battlefield detention, to name some—alongside the traditional law enforcement measures of arrest, extradition, trials, and imprisonment. Second, the executive branch could concentrate and exercise wide-ranging powers under the commander-in-chief constitutional authority. Indeed, the debates over the scope of executive power and the autonomous power of the president to act without congressional approval or oversight reached new levels of intensity during this period. And third, once a "war" was declared, the government could demand—and get—an almost unlimited pool of resources, supported by both Congress and the American people; after all, who wants to stand in the way of America's winning the war?

But the declaration of war was also fraught with obvious problems. First, there was a definitional problem in declaring war against a nonstate

actor, which was difficult to identify and was not confined to any particular territory. While the Taliban regime still ruled Afghanistan, supporters of Al-Qaeda could appear anywhere, and they have. Moreover, the goals of the war, as defined by the 2001 Authorization for Use of Military Force (granted by Congress and signed by President Bush), were "to prevent any future acts of international terrorism against the United States [by those responsible for the 9/11 attacks]." However, prevention of a measure available to millions is an ill-defined purpose. How do we know when that goal has been attained and the war can be declared over, victory won, and the danger done with? What should we learn, if anything, from the fact that some of our allies have been successfully attacked over the last nine years, but we have not? In all probability, the threat is still there. And if we cannot tell when the threat is eliminated, how—or when—can the war ever be over?

Another problem with the war paradigm is that *war* is a highly charged term, on the most basic human psychological level, as well as politically, morally, and legally. A declaration of war against a human enemy, unlike the more metaphorical wars declared on disease, poverty, drugs, and global warming, naturally exacerbates the sense of suspicion, hostility, and defensive-offensive posturing on all sides to the conflict. Every move is a threat, every response—a counterattack. To the extent the enemy is motivated by a belief that he or she is defending the land and culture, declaring war only heightens that fear.

Crucially, too, for our considerations here, *war* is also a legal concept, especially but not only in international law. Not all is fair in love, and not all is fair in war. The international community has long come to realize that if humanity is to have any chance at survival, it must assume some limitations on how it fights. This is the impetus behind the body of international humanitarian law, also known as the Laws of War, developed through centuries of bloodshed and cruelty that were nonetheless oftentimes tempered by unwritten laws limiting warfare. But the established limitations were not designed for the new battlefield, one that had no identifiable borders, armies, or even enemy. This state of affairs allowed the Bush administration to take a more aggressive approach, and left it free, in its own mind, to jettison all limitations and commit, instead, to a much narrower, self-chosen set of restrictions. These legal

acrobatics further weakened domestic and international support and in fact strengthened opposition to the United States worldwide.

Finally, a truism that applies to all wars is that there are no clean wars. All wars inflict unintended harms on the innocent as well as the guilty. Long-term effects, both domestic and international, are impossible to assess accurately in advance. Decision makers, so psychological studies tell us, tend to be overoptimistic and overconfident about their ability to affect and control the course of events once the match has been lit. The wars in Afghanistan and Iraq are not over. We did not capture Bin Laden. Alongside harming Al-Qaeda and its support network, we have harmed a great many innocent civilians; alongside building infrastructure and introducing democracy and human rights, we have, directly or indirectly, ruined entire neighborhoods and ripped apart social groups and communities. These often unavoidable effects of war create new recruits to terrorism.

At this point in time, any cost-benefit analysis of the Bush administration's war strategy is contestable. In particular, it is impossible to offer any definitive causal explanation for the absence of another successful terrorist attack on U.S. soil since 9/11, as it is always hard to explain why an event has not occurred. The fewness of attacks may be due to the administration's aggressive posture. The greater ease of attacking in Europe, as our enemies have been doing, may also be a contributing factor. Alternately, relative safety at home may stem from the more benign defensive measures taken, such as watch lists, airport and border security, more effective cooperation among the intelligence communities, and general safety and protective means. It may even mean that the level of threat was never as high as we thought.

A Third Paradigm: Neither War nor Peace

The struggle against international terrorism has not been won. Allegiance to the goals and means of Al-Qaeda has not been ended. To the contrary, we believe that the phenomenon of terrorism, in one form or another, is here to stay, in America and worldwide. Since 9/11, terrorists have struck repeatedly in the Middle East, as well as in London, Madrid, Bali, Colombia, Russia, and elsewhere (albeit in different forms and driven by

different motivations). What we have learned from both the successes and the failures of U.S. strategy over the past nine years should provide an invaluable guide—domestically and internationally—on how to devise an effective, legal, legitimate, and politically viable counterterrorism strategy for years to come.

While post-factum assessments of successes and failures involve counterfactual calculations, and although it is always near impossible to determine with certainty why something—in this context, another major terrorist attack on U.S. soil—has not happened, we believe this much can be asserted with a high degree of confidence: the conduct of a "war on terror" outside clear legal boundaries was unnecessary if not downright harmful to U.S. goals. The costs this war has inflicted on the rule of law, traditional American values, and America's position as world leader are evident; the benefits to national security are doubtful, especially since much if not all that was achieved might well have been achieved by taking a different path.

How, then, should an administration react to this new type of threat? To begin, we must, like our most successful allies, learn to manage the fears that terrorism is designed to create. The real danger from terrorist attacks is hard to predict; the level of fear has long seemed detached from reality. Even before 9/11, when the scale of terrorism involved for the United States was generally less than ten victims in any single event and less than a score in a year, a terrorist attack (especially in a Western country) was capable of capturing the attention and fear of an entire nation—indeed of anyone with access to media. Hijacking, hostage taking, explosions, and suicide bombings all breed vicarious fear and a sense of universal danger, often out of proportion to the actual threat they pose. Judging by the sheer allocation of resources before September 11, we already cared more about a phenomenon whose very worst and rarest case, prior to that point, was a bombing of an Air India plane in 1985 that killed 329 people, than we did about cancer or car accidents. Post 9/11, our fears have multiplied tenfold. They now involve dirty bombs, chemical and biological warfare, and nuclear devices.

If internal law as it stands will not conform, then we must develop a new paradigm, for international terrorism will not fit comfortably into either the paradigm of war or that of law enforcement in peacetime. We had thought the two existing paradigms fit nearly seamlessly together,

but they do not when terrorism becomes a major international threat falling in the gap between the two familiar bodies of law. In the long run, we will need a new body of domestic and international law providing a set of powers and protections falling somewhere between those now available in traditional war and those available in domestic law enforcement. But what about the decades before we have such new, internationally sanctioned laws?

The interim, third paradigm we propose in this book recognizes that values and principles lie, relatively obviously, beneath the explicit rules protecting individuals in the two traditional paradigms. It is as if one were confronted with defining the rules for a new sale/loan arrangement for automobiles when only the rules for sales and those for loans had been established. The new rules will obviously fit between the two established sets of rules. Indeed, here, the two sets of values and principles are, although different, often closely related as they deal with such matters as interrogation, detention, collective sanctions, and permissible killing.

The Bush alternative was to note the gap between the coverage of the two systems of rules and to deny any binding effect to the values and principles they shared and that motivated both paradigms. Seeing the costs of such a policy, we urge and demonstrate the benefits of a strong presumption that whatever is done to and about international terrorists should be consistent with either the principles behind the law of war or the principles reflected in domestic law. Policy may strongly suggest imitating law enforcement or armed conflict, but a state of near-law should require a clear, principled justification for any departure from the established rules.

The U.S. Supreme Court has come to insist that the threat of modern terrorism cannot be dealt with outside the law. The novelty of the threat may require a degree of adaptation of existing laws, but not the jettisoning of all legal arrangements. Our argument is that, in devising an effective counterterrorism strategy, one should begin with either of the two paradigms: law enforcement or war (imperfectly corresponding to the paradigms of peacetime law and wartime law). The choice of which of the two paradigms to begin with would depend on the nature and scale of the threat, who it emanates from, whether it has a distinct territorial space, and more. More important, however, is that both paradigms have their own internal logic of how to accommodate the interests of national

security and human dignity. While a departure from familiar, traditional law might borrow from either paradigm, what is borrowed must preserve that accommodation. Only the minimal necessary departures should be contemplated. And when departures or adaptations are deemed unavoidable, they must still remain loyal to the underlying logic of each paradigm and to the set of values it protects.

The point is simple. Nations that are protective of liberties conscientiously limit and balance those powers that could readily be abused. That is of course what drove the demand for our Bill of Rights. In international warfare, government powers seem dangerously absolute, yet they are restrained by protective international agreements like the Hague and Geneva Conventions.

The granting of dangerous powers is rendered safer when we give them with strong protective limitations. That terrorism, which demands new powers, falls somewhere between the law of war and the law of peace does not mean that the protections found in traditional legal constraints in each of these areas suddenly disappear into a gaping black hole somewhere between law's two separate realms.

The constraints on powers are often very similar in war and in peace. There may be room for debate about which set of powers—military or law enforcement, each with its accompanying protections—should be applied; but we should never be left in a dark new realm of no law, where the powers of killing, interrogating, detaining without trial, or departing from due process procedures are exercised without protections. The same rationale that ensures checks on the use of power, both in peacetime and in war, must restrain governments' powers in dealing with new threats, until new statutes, treaties, or judicial decisions fill remaining gaps.

The Structure of Our Argument

We divided this book into three parts. The first, "On Law and Terrorism," concerns the relationship between law and counterterrorism strategies and, more generally, the function of law in times of dire emergency—a subject that occupied Thomas Jefferson and Alexander Hamilton two centuries ago as it does us today. The second, "On Coercion," explores the promise and limitation of various coercive strategies