
Book Reviews

Jordan J. Paust. ***Beyond the Law: The Bush Administration's Unlawful Responses in the 'War' on Terror.***

New York: Cambridge University Press, 2007. Pp. 311. \$29.99 (pbk). ISBN: 9780521711203.

On 5 December 2007, the United States Supreme Court heard oral argument in *Boumediene* and *Al Odah*, the third major Guantánamo detainee case to come before it.¹ In this latest iteration of the juridification of Guantánamo, detainees – none of whom are US citizens – challenge the constitutionality of the *habeas corpus* stripping provision of the Military Commissions Act (MCA).² Detainees argue they have no opportunity to meaningfully challenge their continued detention before a neutral decision-maker. Approximately 300 detainees remain at Guantánamo. Although it is too early to predict what the Supreme Court will do in *Boumediene* and *Al Odah*, one thing is clear: in seeking to drain law from the 'war on terror', the Bush Administration has actually increased law's importance by sparking extensive litigation. Detainees have attracted representation by sharp legal minds, prompting judicial inter-

ventions on the limits of executive power and on the applicability of Common Article 3 of the Geneva Conventions.

The situation at Guantánamo is one of several past and ongoing examples of what Jordan Paust calls 'dirty war tactics' deployed by the United States in response to the 9/11 attacks (at ix). In *Beyond the Law: The Bush Administration's Unlawful Responses in the 'War' on Terror*, Professor Paust describes these 'dirty war tactics' and claims that, in undertaking them, the Bush Administration balefully has corroded the rule of law itself.

Paust does not mince words. In Chapter 1 he argues that a 'common plan to violate customary and treaty-based international law concerning the treatment and interrogation of ... detainees ... emerged within the Bush administration in 2002' (at 1). He adds that this common plan has 'criminal implications' (at 1). In a piercing *cri-de-coeur*, Paust laments: 'I know of no other instance in the long history of the United States of a plan approved by lawyers at the highest levels of our government systematically to deny human beings protections under the laws of war' (at 24). In Chapter 2 he marshals additional evidence to support his claims in Chapter 1, and adds a section on forced rendition and forced disappearance (at 34–41). Chapter 3 advances arguments that the United States 'cannot be at "war" with Al Qaeda or "terrorism"' (at 48). Chapter 4 assesses what international humanitarian law and international human rights law has to say about the status of detainees and the need for judicial review. Chapter 5 addresses the interplay of US constitutionalism and the prosecution of the 'war on terror'. Paust dismisses the executive's claims to 'unchecked power'. He contrasts the Bush Administration's 'unconstitutional and autocratic commander-above-the-law theory' (at xii) with the actual state of the law. Finally,

¹ The fourth major case litigated in the war on terror, *Hamdi v. Rumsfeld*, involved a US citizen determined to be an unlawful enemy combatant.

² The MCA was adopted by Congress with strong Presidential encouragement in 2006 following the Supreme Court's striking down of the pre-existing military commissions in *Hamdan v. Rumsfeld*. Sec. 7(a) of the MCA, 120 Stat. at 2635-36, states: 'No court, justice or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or who is awaiting such determination.'

Chapter 6 returns to a more detailed assessment of the military commissions. Although crafted to prosecute a small number of detainees currently at Guantánamo, they have not yet actually tried anyone (Australian David Hicks pled guilty).

The book delivers a conservative argument – conservative in the true sense of the term, namely that what is settled suffices to deal with the new threat. For Paust, Geneva law works and needs to be respected. On the other hand, activist expansion of the concept of war is ‘extremely dangerous’ (at 49); ‘[c]hanging the status of combatants and prisoners of war could have serious consequences ...’ (at 63). Paust’s voice of caution and restraint has been influential.

Paust’s influence and prominence make *Beyond the Law* a must read. That said, the book has some limitations. Readers already versed with Paust’s work will find little that is new here. The chapters each are summaries of previously published pieces. The interstices are open; the connections are thin; there is no introduction or conclusion. This renders the text disjointed, brusque, and at times repetitive. More of *Beyond the Law* is given to endnotes than actual text.

Beyond the Law tends to essentialize the Bush Administration. There is need to tread somewhat carefully here insofar as the executive is not monolithic. Now that the Bush Administration nears the end of its time in office, more reports emerge of internal dissent.³ Paust recognizes, but seems to downplay, the fact that US policies in the ‘war on terror’ are the product not only of the executive, but – as is the case with the 2006 MCA – also of the legislative branch. These policies additionally attract support among elements of the US media and civil society. Moreover, the US is far from the only government that has responded to the reality of transnational terrorism by consolidating executive power. Nor is it the only government that has had to deal with curial push-back.

Furthermore, the debate is not a binary one: adhere to the law as is or follow the Bush Administration. There is much that lies in between. Non-state actor terrorist attacks undeniably differ from war as classically understood. Attacks in New York, Bali, Madrid, and London each are criminal attacks, to be sure, but they also are part of a war-like campaign conducted by irregular combatants; the drafters of the Geneva Conventions did not explicitly have this kind of violence in mind; and technological advances alarmingly make a small band of extremists capable of inflicting great harm on civilian populations. Just because the Bush Administration got things wrong does not necessarily mean that the body of law it sought to dismantle gets everything right.

Paust goes some way to forge extrinsic justifications for the normativity he ascribes to international humanitarian law as is. But, for the most part, he assumes that we will be well-served by adhering to the law as is. In *Beyond the Law* he might have explained more robustly why we should stick to the pre-existing script. Certainly, there are many justifications for sticking to the script. These include promotion of expressive goals⁴ and of social constructivism; preservation of reputation; safeguarding self-esteem and dignity, which the torturer loses with each painful indignity visited upon the victim; tactically, it may be a show of strength not to permit terrorists to set the agenda of law reform through their reprehensible attacks; effectively, the violation of human rights in the prosecution of the ‘war on terror’ may attract even more recruits to destructive causes.

What *Beyond the Law* compellingly delivers is an anatomy of how members of the Bush Administration ran afoul of international human rights law and how some senior lawyers shattered norms of legal ethics and

³ J. Goldsmith, *The Terror Presidency: Law and Judgment inside the Bush Administration* (2007).

⁴ See generally, M. A. Drumbl, ‘The Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, The Geneva Conventions, and International Criminal Law’, 75 *George Washington Law Review* (2007) 1165.

professional responsibility.⁵ Paust provides an argument as to how international criminal law might retrospectively frame those events. Regardless of how we debate where the law might go in terms of adapting to perilous new security threats, Paust's work encourages anti-terrorism initiatives to be implemented in the name of law and not against law. His work also ensures that those engaged in the struggle against terrorist atrocity sacrifice neither their dignity nor humanity.

Mark A. Drumbl

*Class of 1975 Alumni Professor and
Director, Transnational Law Institute
Washington & Lee University,
School of Law
Email: drumblm@wlu.edu*

doi: 10.1093/ejil/chn023

⁵ See also Alvarez, 'Torturing the Law', 37 *Case Western Reserve Journal of International Law* (2006) 175; Bassiouni, 'The Institutionalization of Torture under the Bush Administration and the Responsibility of Public Officials', in M. Cherif Bassiouni (ed.) *International Criminal Law* (3rd ed., 2008) Ch. 5.4; Luban, 'Liberalism, Torture, and the Ticking Bomb', 91 *Virginia Law Review* (2005) 1425.