War Making and Peacekeeping

Law in Global Contexts
### Contents

**War Making and Peacekeeping**

<table>
<thead>
<tr>
<th>Page</th>
<th>Title</th>
<th>Author(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>4</td>
<td>September 11: Through an International and U.S. Legal Lens</td>
<td>Patricia Youngblood Reyhan</td>
</tr>
<tr>
<td>7</td>
<td>Fundamental Rights, Political Justice, and the War on Terrorism</td>
<td>Joel B. Grossman and David A. Yalof</td>
</tr>
<tr>
<td>10</td>
<td>The U.S. Model: Intelligence Oversight in a Democracy</td>
<td>Elizabeth Rindskopf Parker</td>
</tr>
<tr>
<td>13</td>
<td>A Matter of Policies … Terrorism Brings Insurance Coverage Under Scrutiny</td>
<td>See what insurance concerns have arisen in the wake of September 11 for both the insurer and the insured.</td>
</tr>
<tr>
<td>14</td>
<td>Debate</td>
<td>Douglas W. Kmiec, Michael F. Noone, and Arthur C. Helton</td>
</tr>
<tr>
<td>16</td>
<td>Students in Action</td>
<td>Margaret Fisher</td>
</tr>
</tbody>
</table>

### SPECIAL COVERAGE

**Get Your Students into Action**

Meet Mary McClymont, president of InterAction, on page 17 to see how your students can assist relief and development organizations’ efforts worldwide to alleviate the devastation in war-torn and disaster-stricken nations.
22 Learning Gateways Stephen A. Rose introduces students to the legal dimension of the U.S. war on terrorism.

24 Supreme Court Roundup Charles F. Williams discusses some of the most controversial, contentious, and significant opinions issued by the Supreme Court during the past term, including the landmark decisions limiting the death penalty and approving school vouchers.

26 News from Capitol Hill Ann Simeo Heinz focuses on the new Department of Homeland Security and the USA PATRIOT Act, plus proposals for restructuring the INS and formulating terrorism-related insurance coverage.

28 Teaching with the News James H. Landman looks at international treaty law and U.S. foreign policy with an eye to accusations that the United States is pursuing a unilateralist course in foreign affairs.

30 Media Specialist’s Corner Michelle Parrini and Jennifer Kittlaus offer students online primary documents related to international law, U.S. law, and the war on terrorism, and they list outstanding books for librarians to enhance collections on the topics.

How Assured Are You … Of Terrorism-Related Coverage?

Find out on page 13 why there’s a devil in the details of all-risk insurance contracts.

Come online to learn how you can make this edition a vital—and now, a light-hearted—part of your classroom instruction. Click “Humor” for some real-life, law-related humor you and your students will enjoy.
The September 11 attacks involved a violation of both U.S. criminal law and international law. Aside from the obvious—that these acts involved intentional murder, hijacking of civilian aircraft, and willful destruction of government property—the attacks violated federal laws declaring international terrorism a crime.

Of course, most of the perpetrators died in the commission of their crime. As to those who planned but did not carry out the attacks, if they are apprehended on U.S. soil, they will be prosecuted. If they are apprehended outside the United States, our government will seek extradition to the United States for trial.

As an international legal matter, nations apprehending accomplices to the September 11 attacks are under a general obligation to try them or to extradite them to the United States for trial. There are limited exceptions to this obligation, including a widespread unwillingness to recognize the obligation where the perpetrator will face the death penalty.

The attacks also violated international law at its most fundamental level. Just over 50 years ago, the UN framers’ primary concern was to prevent armed attacks upon states. They sought to strike a balance between sovereignty of individual states and responsibility to the world community. In pursuit of the goal of preventing war, the framers established as core principles of the United Nations the obligation to resolve international disputes by peaceful means and the prohibition of the use of force. Both are stated in mandatory terms.

As international law developed in the half-century since the United Nations’ founding, it gave recognition to the reality that organizations, legal or otherwise, and individuals also are capable of violent acts directed against nation-states. Sometimes those organizations or individuals act without state sponsorship; at other times they act on behalf of a state. Where they do the latter, international law recognizes that they are, in fact, state actors and that the prohibitions in international law applicable to states are equally applicable to such state actors.

Sometimes states tolerate such individuals or organizations without actually supporting them. This tolerance most often takes the form of permitting the individual or organization to use the state’s territory as a safe haven to plan violent acts against other states or to escape justice once those acts have been committed. Just as clearly as a state is forbidden by international law from engaging in violent acts

“The attacks … violated international law at its most fundamental level.”

Patricia Youngblood Reyhan is the Governor George E. Pataki Professor of International Commercial Law at Albany Law School of Union University in Albany, N.Y.
against another state, it is obliged to ensure that its territory and resources are not used to aid others in the commission of such violent acts. Under such rules, the Taliban, as the then—de facto government of Afghanistan, is legally complicit in the acts of Osama bin Laden and al-Qaida, the terrorist network he heads and the organization responsible for the attacks.

More specifically, international law condemns terrorism. In 1985, the General Assembly “unequivocally condemn[ed], as criminal, all acts, methods and practices of terrorism wherever and by whomever committed.” In 1997, the same body adopted the International Convention for the Suppression of Terrorist Bombings; and, in 1999, it adopted the International Convention for the Suppression of the Financing of Terrorism. Speaking on September 12, 2001, the UN Security Council expressly noted in its resolutions condemning the attacks the applicability of Article 51. For the first time in its history, NATO further invoked Article 5 of its charter, which provides that an attack against one is an attack against all. As a result, all NATO members are obliged to assist the United States. Today, the forces on the ground in Afghanistan are primarily NATO forces.

U.S. Response

President Bush immediately labeled the September 11 attacks not just a criminal act but an act of war. He made it clear that the United States would react with force against al-Qaida and those who supported and sponsored that organization, specifically, the Taliban. One month later, U.S. armed force was brought to bear against al-Qaida and Taliban forces in Afghanistan.

As noted above, the UN Charter makes illegal the use of force save in very limited circumstances. The U.S. military response clearly involved the use of force. Does that use fall within the limited exceptions of the charter? The clearest exception to the charter’s prohibition on the use of force is found in the charter itself at Article 51, which provides, “[N]othing in the present Charter shall impair the inherent right of individual and collective self-defense if an armed attack occurs against a Member of the United Nations.”

The United States has characterized its military response to the attacks of September 11 as, in part, an exercise of its inherent right of self-defense against continuing terrorist threats. Meeting after the attacks, the UN Security Council expressly noted in its resolutions condemning the attacks the applicability of Article 51. For the first time in its history, NATO further invoked Article 5 of its charter, which provides that an attack against one is an attack against all. As a result, all NATO members are obliged to assist the United States. Today, the forces on the ground in Afghanistan are primarily NATO forces.

It thus seems clear that the international community views the U.S. use of armed force in Afghanistan, at least to date, as a lawful use. However, the U.S. response must be evaluated not only in terms of what international law demands but also in terms of what U.S. law demands. What are the implications under U.S. law arising out of the president’s commitment of U.S. military forces to fight the war against terrorism?

In the United States, the war powers are divided between the executive branch and Congress. Yet, whatever the U.S. Constitution’s framers intended in terms of dividing U.S. war powers, the clear course of practice throughout the twentieth century was one of expanding those of the president. The president became increasingly independent of Congress in virtually all matters of foreign policy.

The president’s power to commit U.S. armed forces in huge numbers for conflicts that last for years, without a formal declaration of war by Congress, led many in and outside Congress to question whether an unconstitutional imbalance had followed. The result of such concerns was the War Powers Resolution passed by Congress over a presidential veto in 1973. The resolution allows the president to commit U.S. armed forces without congressional authorization in a national emergency created by an attack on the territory or military forces of the United States. When such an emergency does not exist, the president is required “in every possible instance [to] consult with Congress” before sending U.S. armed forces “into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances,” and the president must continue to consult with Congress regularly after such introduction. In its most controversial section, the resolution then requires the president to terminate the use of U.S. armed forces within 60 days unless Congress declares war or passes authorizing legislation to continue the commitment of forces.
Not surprisingly, Congress acted immediately to endorse the use of U.S. armed force in response to the events of September 11. Yet, as broad as its authorization was, it did not contain a formal declaration of war, and this has consequences for our next issue.

**Detainees’ Legal Status**

As this article is written, the least clear legal issue arising out of September 11 and its aftermath is the question of the rights under international and U.S. law that are to be afforded to the al-Qaida detainees held in Afghanistan and Guantanamo Bay, Cuba. To date, the United States has refused to declare al-Qaida fighters now being detained as “prisoners of war.” Initially, the United States characterized both Taliban members and al-Qaida fighters as “unlawful combatants.” Largely as a result of international and domestic protests against that characterization, President Bush has changed it with respect to Taliban fighters, in essence giving them the status of prisoners of war. So labeling the Taliban fighters has legal consequences under the 1949 Geneva Convention on the Treatment of Prisoners of War, to which the United States is a party.

Because the United States is a party, the convention’s terms form a part of U.S. law as well as international law. As noted above, the United States has not declared war on Afghanistan, the Taliban, or al-Qaida in any formal sense. Significantly, however, in Article 2, the Geneva Convention provides that it applies to “all cases of declared war or any other armed conflict” between two or more states “even if the state of war is not recognized by one of them.” The convention defines who is entitled to prisoner of war status. Prisoners of war are lawful combatants who are part of the organized armed forces of a state and organized resistance movements if they meet defined criteria, including the wearing of a fixed and distinctive sign. Article 5 of the Geneva Convention provides that, in such cases where it is difficult to determine whether individuals are lawful or unlawful combatants, they are to be treated as prisoners of war “until such time as their status has been determined by a competent tribunal.” To date, the United States has not established such a tribunal. In March 2002, the Inter-American Human Rights Commission, a branch of the Organization of American States, requested that the U.S. government do so.

Regardless of whether the detainees are prisoners of war, they may be held by the United States until the end of the conflict. Given the potential scope of the “war against terrorism,” that could be a very long time. Once the conflict is over, prisoners of war must be released unless they are charged with specific war crimes. Unlawful combatants, such as the al-Qaida fighters, however, may be tried for crimes committed both before and during the conflict. To date, none of the detainees has been charged with a specific crime.

As time passes, what now seems relatively clear in international law—that the United States had the legal right to bring armed force to bear against al-Qaida and the Taliban—may become murky if the United States extends the use of force temporally or geographically. The fact that the United States can act does not mean that it should, especially where expanded military conflict violates international law and threatens or destroys the current international support for the United States. Over the next months and years, one should not hesitate to keep the legal lens clearly focused on the events that flow from September 11.

**FOR DISCUSSION**

What principles of international law did the terrorist attacks on September 11 violate?

What U.S. laws did the terrorist attacks on September 11 violate?
Rights are always at risk in times of perceived national emergency. The security of the state—what should be the interest of all—may trump the rights and freedoms that individual citizens otherwise expect. How seriously individual rights are disregarded or undermined depends, of course, on what they were to begin with. In constitutional democracies, where belief in the rule of law is at its highest, where the concept of rights is deeply embedded in the national culture, and where the protection of rights is one of the nation’s highest priorities, the dilemma is particularly acute. It may not be true literally that, to quote an old Roman maxim, Inter arma silent leges (“During war, law is silent”). But there can be little doubt that in such times, both rights and the rule of law are in jeopardy.

Investigating, Charging, and Detaining Suspects

The robust protection of the rights of criminal suspects remains a principal feature of the U.S. legal system. Yet the federal government’s war on terrorism puts many of these rights to the test. Can the fundamental rights of criminal suspects survive in a climate in which public officials and citizens alike have become increasingly determined to make terrorists and their supporters pay quickly and dearly for their actions?

The various initiatives taken by the federal government in the months following September 11 provide little encouragement on this score. Certainly, the investigation of suspects in the war on terrorism has sometimes come at the expense of caution, discretion, and other features of “normal” law enforcement.

Consider the manner in which these investigations have been conducted. The federal government has interviewed thousands of individuals who loosely meet the profile of some of the al-Qaida terrorists: men between the ages of 18 and 33, traveling in the United States since January 1, 2000, on student, business, or tourist visas, hailing mostly from certain prespecified (predominantly Islamic) countries. Most of those questioned have been Arab and Middle Eastern visa holders. Constitutional or not, such a blatant profiling of individuals for questioning based on their racial or ethnic characteristics represents a significant step beyond anything federal officials have attempted in modern times—probably not since the internment of the Japanese Americans in World War II.

In the recent past, so-called secret searches of individuals’ homes (conducted without any notice to the owner of the premises) could occur only under the authority of a special warrant that was limited to collecting the information about a foreign

Joel B. Grossman is a professor of political science at Johns Hopkins University in Baltimore, Md. David A. Yalof is an assistant professor of political science at the University of Connecticut in Storrs.
nation’s business or activities in the United States. Since passage of the USA PATRIOT Act by Congress on October 26, 2001, these secret searches have been permitted whenever the major objective of the search is to collect evidence that can be used in a prosecution. The “normal” rules of interrogation and detention have also been bypassed by relying heavily on immigration warrants, which are not “probable cause” warrants and thus are largely free of judicial oversight.

Intense media attention has been paid to two other features of the government’s approach to terrorist investigations: loosening the rules for obtaining wiretap and electronic surveillance warrants and monitoring conversations between individuals held in custody and their lawyers.

The detention itself of large numbers of Arab and Muslim individuals has also raised serious questions about the proper reach of domestic and, in some cases, international law. In the period immediately following September 11, more than 1,200 individuals were detained on criminal charges, immigration violations, and/or material witness warrants. The USA PATRIOT Act allows the federal government to detain for seven days any alien if there are “reasonable grounds” to suspect he may be a terrorist or someone who is aiding terrorism. If the alien is charged with any crime (even one unrelated to terrorism), and the attorney general decides that the release of the alien may threaten the “national security of the United States or the safety of any community or any person,” that same alien may be detained for renewable six-month periods for as long as he remains such a threat.

Some of those aliens detained have been lawful residents with green cards. Although the various circumstances behind these detentions have remained a secret in most of the 1,200 cases, one instance (recently before a federal district judge in New York) concerned a green card holder who was held as a material witness “because an old telephone number of his was found in a car used by one of the September 11 hijackers.” (Lewis) Reports have surfaced that some detainees were not even told why they were being held and were not provided lawyers, in any event. (Murdoch)

Equally disconcerting are reports that large numbers of detainees may have been technically advised of their rights to counsel and advised of the nature of charges against them, yet nevertheless forfeited these and other privileges with a written waiver that they signed while under intimidation or outright threats.

Numerous reports have circulated in the media detailing how such detainees have been treated (or mistreated) by their U.S. captors. A large group of prisoners at the U.S. military base on Guantanamo Bay in Cuba have apparently been kept in small cages where they are fully exposed to the elements. Photographs depict some of these prisoners wearing blacked-out goggles and being forced to kneel with bags over their heads. Others may have been kept naked by their captors for extended periods of time. (Per contra, the government has claimed that these prisoners have been treated according to Geneva Convention standards and have received adequate if not excellent health care and proper nourishment.) Given the possibility that at least some of these prisoners have not even been advised of the nature of their offenses, such treatment may arguably violate Fifth Amendment due-process standards as well as the Eighth Amendment’s prohibition against cruel and unusual punishment.

**Adjudicating the Crimes of “Unlawful Combatants”**

Many issues arising from the above-described treatment of detainees and suspects stem from a larger source of confusion about the status of those individuals. Specifically, noncitizen suspects and material witnesses in the federal government’s “war against terrorism” have been labeled as *unlawful combatants*, a form of legal limbo that denies them (1) the constitutional protection afforded to normal criminal suspects in the United States and (2) the protection under international law traditionally afforded to prisoners of war.

How are such combatants to be tried, if at all? Here lies the single most controversial aspect of the Bush administration’s war on terrorism to date.

On November 13, 2001, President Bush declared that any non–U.S. citizen suspected of terrorism might be tried, at the discretion of his administration, in a military tribunal rather than by an ordinary federal or state criminal court. Although the president held off announcing any final rules that might govern such tribunals, the “draft rules” under consideration by the Department of Defense at that time featured a number of controversial provisions. Responding to criticism, the Bush administration’s final set of rules, announced on March 20, 2002, scaled back a number of the original draft rules’ most
controversial features. For example, the death penalty can be imposed only by a unanimous verdict of seven judges. Yet many of the rules remain. Hearsay evidence will still be allowed, as well as any other evidence that might be convincing to a "reasonable person." (Thus the administration continues to insist on evidentiary standards laxer even than those that are routinely applied at military courts-martial). “Secret evidence” can be used as appropriate, thus denying defendants the right to confront their accusers. Even more troubling, convictions of guilt still require a mere two-thirds vote of a tribunal of as few as three judges. In that sense, military tribunal standards differ significantly from those imposed by civilian federal courts, which require unanimous verdicts to convict. And if the defendant is indigent, he or she can be defended only by military officers. The most glaring aspect—and deliberate omission—of these rules is their continued denial of any substantial role to be played by the federal judiciary, whether as a trier of fact, an interpreter of the law, or a source of appeal. The government seems determined to prevent any of these judgments from being reviewed in the lower federal courts by a writ of habeas corpus or by the Supreme Court by a writ of certiorari. Even military courts-martial in the United States are subject ultimately to review by the U.S. Supreme Court after initial reviews by the military Court of Criminal Appeals and the Court of Appeals for the Armed Forces.

The current tribunals may theoretically try any individual that the president believes is involved in “acts of international terrorism,” a breathtakingly broad sweep that trumps any comparison with the limited use of such tribunals in World War II. Rationalizing justice, punishment, and vengeance is difficult at best. In the final analysis, what the United States has proposed as a way of adjudicating the war crimes of terrorists bears a striking resemblance to what have been called “political trials”—trials in which legal processes are subverted or manipulated to reach a desired if not preordained conclusion. Lawyers for the terrorists, and others, will no doubt make these claims. Likewise, some of the accused terrorists may well contend that they are prisoners of war who must be released and returned home at the conclusion of hostilities and/or political prisoners who, having acted in furtherance of a legitimate political goal, are thus not subject to the law—and certainly not violators of the laws of war. This defense will no doubt be summarily rejected: Neither the U.S. Constitution nor U.S. law recognizes such a defense.

The reality is that by choosing to establish military commissions and providing less than a full array of procedural rights, the government inevitably risks the judgment that these commissions are not legitimate examples of the rule of law—that to achieve specific ends the government has created an ad hoc, semi-autonomous legal procedure that strongly resembles the classical political trial. At a minimum, therefore, government officials would thus be well advised to move cautiously lest they get too far ahead of what the international community or the American people will accept. In this era of international terrorism and globalization, justice is, and must be, everybody’s business.

References

FOR DISCUSSION

How has the government’s investigation of suspected terrorists differed from constitutional criminal investigations and “normal” law enforcement?

How do the proposed provisions for military tribunals differ from those for military courts-martial and civilian trials?
Until 1941, intelligence gathering and analysis in the United States had been decentralized, modest in size, and confined to the military services. From the beginning of World War II, however, the need for intelligence was obvious. A variety of wartime initiatives, including covert activities, code breaking, and other intelligence collection activities, were begun—all of necessity attached to the armed forces.

Modern U.S. Intelligence Structures

At the war’s end, the lessons of the war years—and particularly the Pearl Harbor attack—had a lasting impact. A decision was made to continue intelligence collection in peacetime and to create a central structure to handle the responsibility. Congress enacted two laws: the National Security Act of 1947 and the CIA Act of 1949. These laws established an entirely new national security framework independent of all existing departments and military services; most significantly, they created the Central Intelligence Agency as an independent entity reporting directly to the president through National Security Council staff. Several points about the two laws and the national security framework’s structure are important.

Public Laws First, even though the laws created agencies and activities that would operate in secret, the laws were public. The idea of a public law authorizing a secret intelligence activity was unprecedented and must have seemed highly improbable to the rest of the world.

Congressional Oversight From their beginnings, the agencies and activities authorized by the new laws were subject to annual congressional oversight for a reason fundamental to the U.S. constitutional structure: Only the U.S. Congress can authorize funding for government agencies. This requirement brings with it an oversight process for all federal agencies as they seek funding for their next year’s operations. In this regard, the new intelligence agencies were no different; they too had to request funding and in so doing subject themselves to congressional review. There was, however, one distinction to the budgetary oversight imposed: All details of the congressional budget process occurred in secret and only before the concerned congressional committees. This oversight arrangement is unique to the U.S. democratic structure of governance.

Inherent Oversight Mechanisms The “checks and balances” principle on which the U.S. Constitution is based (of which the allocation of budget authority is one

Elizabeth Rindskopf Parker is dean of the University of the Pacific’s McGeorge School of Law in Sacramento, Calif.
example) creates other, inherent oversight mechanisms that have strengthened intelligence oversight. For example, the president acts as commander in chief, as the nation’s primary representative in foreign affairs, and as the executor of the law in the domestic arena. It is the president who gathers and uses intelligence. Congress passes all laws and appropriates all funds to support government activities; it reviews the results of intelligence efforts annually to ensure that the activities are lawfully funded and appropriately conducted. The judiciary reviews and interprets the constitutionality of all laws; its role in reviewing intelligence activities is modest, yet from time to time can be significant. Indeed, the very fact that intelligence activities could be subject to independent court review creates a type of “anticipatory oversight.” Finally, the independence from one another of the three branches of government dramatically strengthens the functioning of their various oversight roles.

Executive Branch Intelligence Community Within the executive branch of government, the creation of “an intelligence community”—organizationally separate from all other departments (such as the Department of Defense, the Department of State, and the Department of Justice), yet capable of independent and direct reporting to the president (through the National Security Council, a staff element in the White House)—is important because it ensures the most reliable advice and analysis, free of the institutional bias of sister departments and organizations. At the same time, because the statutory responsibility for conducting various aspects of intelligence is separated among several agencies and departments, the tendency for abuse when all responsibility is placed within one monolithic governmental bureaucracy is significantly reduced.

Dedicated Intelligence Agencies The process of intelligence gathering is confined to dedicated intelligence agencies (or departmental components). By design, these intelligence agencies have no role either in policy formulation or in implementing policy choices. (The CIA’s authority to propose, design, and, after policy level approval, implement covert action programs is an exception to this general rule that intelligence agencies do not become involved in the execution of policy.) Further, as noted above, the various components of intelligence collection are distributed among several different agencies. This arrangement ensures the independence of the intelligence community’s views and advice in deciding upon any course of action.

CIA Limitation Finally, the legislation that created the CIA provided an exceptionally broad grant of authority, with one important limitation: It insisted that the CIA not become involved in law enforcement activities. This distinction continues to the present (although a recent modification now permits the intelligence community to respond to law enforcement requests for information, if the information to be collected is overseas and does not involve U.S. citizens). The distinction provides two important benefits: Citizens’ rights are protected, but intelligence collection is freed from the rigorous collection standards constitutionally required in U.S. criminal proceedings.

Intelligence Community Entities From its origins with the creation of the CIA and the National Security Council, the U.S. intelligence community has gradually expanded with the addition of various agencies, each dedicated to serving different intelligence collection and analysis functions. On occasion, the creation of a new agency may have been kept secret for a period of time to protect its mission. (For example, the National Reconnaissance Organization, which operates the U.S. overhead satellite reconnaissance program, was not revealed until the early 1990s.) Yet, in all cases, Congress has been directly involved in creating and annually funding each of these agencies. Eventually, every agency in the U.S. intelligence community, as well as most of the basic intelligence responsibilities, has been explicitly defined in laws written and passed by the Congress. Considered together, these laws describe the U.S. intelligence community in detail.

Director of Central Intelligence For intelligence policy purposes, the community is led by the Director of Central Intelligence (DCI), who also serves as the Director of the Central

A crime scene investigator with the FBI carries in evidence-gathering equipment at a Delray Beach, Fla., condominium where terrorist suspects in the World Trade Center and the Pentagon attacks lived.
Intelligence Agency (CIA). The CIA is an independent “cabinet level” agency composed of several directorates. Two of these are directly involved in intelligence gathering. The Directorate of Operations (DDO) collects intelligence from human sources, called HUMINT; as required by the statute, if authorized in writing by the president and notified to the Congress, the DDO is also responsible for conducting covert action activities. The Directorate of Intelligence (DDI) prepares intelligence reports analyzing all sources of information for the executive branch and, on occasion, Congress. This participation is for advisory, not national-policy-setting, purposes. Although, as head of an independent agency, the DCI responds directly to the president and often participates in the president’s cabinet.

Justice, Defense, State, and Treasury Departments

Other members of the intelligence community include portions of the Departments of Justice (the FBI’s counterintelligence activities), Defense (the Defense Intelligence Agency and intelligence collection parts of the military services), State (the Bureau of Intelligence and Review), and the Treasury. Several intelligence agencies located within the Department of Defense are dedicated exclusively to intelligence collection.

For example, the National Security Agency (NSA) is responsible for electronic intelligence collection (SIGINT) and security, as well as code making and breaking; the National Reconnaissance Office (NRO) is in charge of imagery collection (IMINT); and the recently created National Imagery Management Agency (NIMA) is responsible for imagery analysis. The Department of Defense supervises the operation of each of these agencies to ensure that they act consistently with their own internal operating rules, regulations, and applicable governing law. The DCI, in contrast, has the overall authority to decide how the various components of the intelligence community will focus their resources. Here again, division of responsibility for the operation of various members of the intelligence community has created a natural oversight process by putting different authorities in charge of different aspects of the same agency’s operation.

Additional Oversight and Review

As one part of their official function, several offices within each of these intelligence agencies have provided additional oversight and review of the agencies’ operations to ensure consistency with policy, law, and regulation. On an ongoing, day-to-day basis, lawyers assigned to each agency’s general counsel’s office advise on legal and policy questions as these arise. Further, should litigation arise involving the agency, the Department of Justice or the courts may review difficult questions.

Each agency also has an office of inspector general created by statute and dedicated exclusively to performing an oversight function. In the case of the CIA, this statutorily created office must periodically report to Congress as part of the oversight process, and the appointment of the inspector general is also subject to Senate approval.

Oversight bodies exist in the Department of Defense as well as in the White House. If criminal prosecution appears warranted, information that results may be referred for further investigation to the attorney general and the House and Senate oversight committees. Finally, since the late 1920s, the Department of Justice’s Office of Intelligence Policy and Review has served in an oversight and monitoring role for the intelligence community’s activities.

In actual operation, intelligence activity oversight in the U.S. arrangement is continuous. Within Congress, two committees established in the late 1970s are exclusively dedicated to the funding and review of intelligence activities and programs: the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence. These committees are bipartisan, with permanent staff members. Hearings in closed session (to protect classified information) are held almost daily. The standard for review requires the intelligence community to keep the legislature “fully and currently informed” about matters of concern.

Numerous other committees may also seek to review aspects of the intelligence program as it may affect their areas of primary responsibility. Finally, the Congressional Budget Office may seek to review various accounts maintained for its benefit.

Visit insightsmagazine.org for the online text of this article, including Professor Rindskopf Parker’s views on improving the FBI’s analytic capability to fight terrorism.

FOR DISCUSSION

In what ways is oversight of U.S. intelligence agencies provided for?

Why is the separation of intelligence gathering among different agencies significant?
The events of September 11, 2001, brought the insurance industry under intense scrutiny. How would it respond to the claims of individuals and businesses that were victims of the attacks? Were there enough reserves in the insurers’ coffers to pay all the claims? Today, many claims have yet to be filed, and the full extent of the insureds’ losses is not yet determinable. Published reports range from $50 billion to as high as $100 billion.

“All risk” policies generally cover damage resulting from all perils other than those that the policy specifically says it does not cover. Acts of war might be excluded from coverage, for example. Policyholders might want to include coverage for war perils through a policy endorsement, or those interested might obtain separate coverage through a war risks insurer.

Insurance companies are said to invoke exclusions when loss results from a type of damage not covered in a policy. Notably, the immediate reaction of many leading insurance companies holding all risk policies for September 11 victims was not to invoke the war risk exclusion, but rather to cover damages resulting from the terrorist attacks. Likewise, war risk insurers issued assuring statements that there were sufficient resources to cover their policyholders’ losses.

Yet the question of whether the attacks’ catastrophic fallout will ultimately be covered has not yet been answered. As the losses mount and property and casualty insurers calculate the claims’ magnitude, they may reconsider their initial positions. The toll on the immediate impact area, on building owners, on business owners, and on those businesses in turn dependent upon those on the front line has the potential to tax the insurance industry to an unprecedented level, even assuming that there are no more such attacks. If there are, the importance of these coverage issues will be magnified and broadened, conceivably into the smallest U.S. communities.

An underlying problem is how to formulate an appropriate definition for terrorism and terrorists relative to war. When is terrorism the equivalent of war? And when are terrorists subnationals, as opposed to being representatives of a sovereign nation to the extent that they can perpetrate an act of war on its behalf?

It may prove highly relevant that the Bush administration’s position from the outset has been that the nation is at war, even lacking a formal declaration. Does that mean that September 11 victims have no coverage unless they have a war perils policy endorsement or separate war risks policy? Can their insurers change their position and successfully invoke the war risk exclusion, winning in court if sued for such a denied claim? At this point in the process of settling the claims involving terrorism, it’s not at all clear how such a case would be decided.

If the sides line up, each will have a powerful argument. Policyholders seeking to collect on their claims will argue that the terrorists’ identities and the al-Qaeda network’s nature are murky and subnational enough so that this is not a war and therefore coverage may not be denied. Insurers seeking to successfully deny claims will focus on U.S. actions that suggest September 11 was part of a war—the freezing of terrorist assets, troop deployment to Afghanistan, and the bombing of that nation.

For the online text of this article, visit insightsmagazine.org

For information on pending congressional legislation involving insurance coverage for terrorist-related losses, see pages 26–27.

How these issues play out in the months ahead will likely guide policy makers for decades and hopefully provide clarity to coverage disputes. Meanwhile, the insurance market is likely to respond with definitive policy language that will call terrorism by name instead of attempting to label it by concept. What is clear now is that classic policy language and case precedents are unlikely to apply to a post-September 11 world.

There are powerful reasons that courts-martial, which have been part of U.S. legal tradition since the Revolutionary War, should be preferred over military commissions to try the Guantanamo Bay detainees.

First, commissions have always been constitutionally suspect. The Supreme Court has reviewed convictions by military commissions with great suspicion because they are contrary to our system. For example, in *Ex parte Milligan* (1866) and in *Duncan v. Korematsu* (1946), the Court ruled that there was no reason to take the exceptional step of using commissions when regular courts (and courts-martial) were available. Recently, members of both congressional parties have introduced legislation (S. 1937 and S. 1941) requiring that traditional court-martial procedures be followed in the trials of the detainees. This approach has been supported by the American Bar Association.

Military commissions received extensive use in the Civil War and were affirmed by the Supreme Court in the famous World War II decisions—*Ex parte Quirin* sentencing Nazi saboteurs for attempting a foiled plot not unlike that alleged against Jose Padilla and his “dirty bomb,” and *Ex parte Yamashita* hanging a Japanese commander for the brutal atrocities he ordered against civilians in the Philippines. The Civil War precedent *Ex parte Milligan*, which nominally questions the availability of military tribunals where civilian courts remain open, was later confined to its unique domestic insurgency facts and specifically the fact that Milligan was not—in international parlance—an unlawful belligerent. Terrorists clearly are.

The standard applied in military tribunals is simple and pragmatic. If those perpetrating war crimes are not disposed of upon the field of battle, military tribunals may be empowered to ascertain with evidence that is “probative to a reasonable man”—that is, more probable than not—that a given person or organization has committed what Sir Edward Coke called centuries ago a crime committed by the enemies of mankind.

Practically, this will mean neither the hearsay rule (which has bedeviled prior terrorist trials in federal court because of the disappearance or unreachability of direct witnesses) nor ill-fitting exclusionary rules that have no deterrence-based relevance to this setting would derail the admission of evidence obtained under the noncoercive interrogation authorized by the president’s order.

The use of military tribunals is commonplace in our military history, and those appearing before them have been both exonerated and executed. The promise of a fair trial is not a sham and, as mandated by the Bush order, is more likely to become reality simply because of the

continued on page 31
Attorney General John Ashcroft expressed concern about trying terrorists in the United States when he said, “Are we supposed to read [alleged terrorists] their Miranda rights, hire a flamboyant defense lawyer, bring them back to the U.S. to create a new cable network of Osama TV or what have you?” But our federal courts are well suited to prosecute terrorists, at least non–U.S. citizens apprehended and incarcerated here.

Indeed, terrorists have been prosecuted in the federal courts on many occasions. For example, the individuals involved in the 1993 World Trade Center bombing were tried in federal court. Their jury trial lasted six months, with 204 witnesses and more than 1,000 pieces of evidence presented. The trial resulted in the conviction of four defendants, who were each sentenced to 240 years in prison and fined $250,000. In 1995, Pakistani authorities arrested the prime fugitive wanted in connection with the 1993 bombing, Ramzi Ahmed Yousef, and delivered him to U.S. authorities. He was prosecuted and sentenced to 240 years in prison as well. More recently, in October 2001, four associates of Osama bin Laden were sentenced to two life terms of imprisonment for the bombing in September 1998 of U.S. embassies in Nairobi, Kenya, and Dar-es-Salaam, Tanzania. These individuals were also ordered to pay a total of $33 million to individual victims and to our government.

Procedural rules in the federal courts are designed to guarantee minimum standards of fairness to criminal defendants who must face the awesome resources of a government prosecution and also risk the loss of their liberty and lives. Federal trials are open to the public, and defendants have a right under the Constitution to confront and challenge their accusers and the evidence against them. The prospect of disclosing classified evidence can produce dilemmas. But special national security mechanisms exist in the Classified Information Procedures Act that are designed to avoid forcing the government to disclose sensitive intelligence information during

Arthur C. Helton is director of Peace and Conflict Studies and senior fellow for Refugee Studies and Preventive Action at the Council on Foreign Relations in New York City.
Translating a Dream into Reality—Making the World a Better Place

by Margaret Fisher

In this edition, Students in Action spotlights paths that young people can take to help alleviate the terrible destruction, poverty, and injustice occasioned by war and other disasters. Damage to children from war comes not only from bombs and guns, but also from the loss of the care, protection, and support needed for healthy child development.

In wartime, children get separated from their families, they are forcibly recruited into the army, and they suffer other abuse and neglect. According to Save the Children, in recent conflicts, women and children made up 90 percent of the people killed. In fact, during the 1990s, war caused the deaths of more than 2 million children. Today, 42 million women and children are uprooted because of war. In today’s armies, approximately 300,000 soldiers under the age of 18 serve as fighters, cooks, spies, minesweepers, and soldiers’ “wives.”

These statistics tell an appalling story, but the good news is that there are many individuals and organizations helping to ease suffering and establish long-term solutions to poverty, injustice, and persecution. Mary McClymont, whose interview appears on the next three pages, has spent her entire career doing just that. Today, she is president of InterAction, the largest U. S. coalition of U. S.-based, nongovernmental organizations (NGOs) that work in the areas of relief and development in every developing country. Many of InterAction’s member organizations serve on the ground, providing immediate relief to children and individuals in war-torn areas.

Following the interview, you’ll find out about five organizations that assist youths and adults around the world: CARE, the International Rescue Committee, the International Youth Committee, Mercy Corps, and Save the Children. You will learn how you can become acquainted with, participate in, influence, and strengthen their many programs dedicated to relieving the human suffering that results from war, political unrest, and disaster.

Margaret Fisher is an adjunct professor at the Seattle University School of Law. An attorney/educator with many years’ experience in teaching law to the public, Fisher assists the state courts of Washington with educational programs.
Fisher: It seems that almost everyone dreams of making the world a better place. You seem to have achieved that in your career. When did you develop your commitment and involvement in making the world a better place?

McClymont: It began as a young person. I’m a person who came out of the 1960s, when there was a lot of interest in broader social issues, such as protest against the Vietnam War and interest in the world at large. Then, when I was young, I traveled to the developing world, so I saw for the first time extraordinary inequality and poverty.

Fisher: What would you say are the three most pressing needs in the world?

McClymont: I think that first and foremost is the extreme poverty and enormous disparity in people’s wealth. Tied to that and really a part of that is social exclusion and inequality.

Fisher: So, say a little more about social exclusion.

McClymont: It means that people don’t have basic access to the fundamental things of life like clean water, basic health, basic education, a way to improve their children’s lives, and the means to give their kids an education or food. These are fundamentals. If you live in extreme poverty, you don’t have access to them. Social exclusion also happens when, because of the color of one’s skin or one’s gender, a person is excluded from basic opportunities to participate fully in the world and society.

Fisher: How have the September 11, 2001, events affected the efforts of InterAction, the coalition that you lead, to address world problems?

McClymont: Well, what we believe is that the American public is looking with fresh eyes on what happens overseas now. They understand better than ever a connection between helping Afghanistan parents get their kids food and clothing and their own personal safety. They see a connection. Certainly policy makers understand the national security implications of making sure that people’s basic needs are met in other countries. And we know that Americans are more interested in paying attention and helping people build self-sufficiency around the world. They do see a connection between September 11 and development assistance.

Fisher: When you meet with high-ranking U.S. government leaders, how do you get them to listen to your point of view?

McClymont: We are very privileged to be able to meet with individuals very high up in the U.S. government, for example, Condoleezza Rice, assistant to the president for National Security Affairs, and Secretary of State Colin Powell. They’re good governmental officials; they are open to listening to the nongovernmental perspective. They recognize that our member NGOs are often partners with the U.S. government in delivering aid and promoting development. We have a point of view about certain issues that are a part of delivering that aid, and they need to listen to us because we bring real experience from on the ground. Our members are in every developing country; we know what is going on, on the ground. That is critical to a policy maker, or it should be.

And it is, to knowledgeable people like the two I’ve just described. So they want to know our perspective, and they know how important the NGOs are to the larger world and, frankly, to Americans. InterAction members, in the aggregate, get $3 billion in donations from the American public. They are a very important player and they are respected by Americans to a large degree. So our policy leaders recognize that it is good politics to listen to NGOs—that they have real knowledge to bring to the table.

Fisher: Let’s talk about the Millennium Challenge Account, which was announced by President Bush earlier this year. How is this different from international aid that our government has given out before?

McClymont: Many people are skeptical about international development. We have myriad examples of how basic assistance has improved people’s lives: smallpox was eradicated in
1977; over the last 30 years, illiteracy has been reduced by 20 percent; life expectancy has increased by 20 years; river blindness, which kills hundreds of thousands of people throughout Africa, has been virtually eliminated. These kinds of things are going on all over the world because of development assistance.

However, many Americans are worried because they think that aid may go to corrupt governments who will waste it. What we need to do is show that aid really does work if done in the right way. So in light of that, the president said, he will give more money, but he wants to make sure that the money is targeted better. He developed a set of criteria that would be used before a country would receive these additional dollars in aid.

Basically what happened is that he said by 2006 the U.S. government would annually give an additional $5 billion to our aid budget for international development assistance, and that is quite a substantial increase. The president promised that the money would be used to fight poverty and to help people find hope and opportunity. What we plan to do is work hard to make sure the $5 billion materializes and that it is used for poverty-focused development, which will make people’s lives better, give them a basic education, give them basic health care, help mothers and children stay alive, get clean water, and so on. That’s what we want the money to be used for, and we’re going to work hard to ensure that through this Millennium Challenge Account it is used that way. The Millennium Challenge Account will be directed at certain core countries. But we also want to make sure that the regular traditional assistance does not diminish but is increased as well. There are billions of poor people all over the world who will not benefit from the MCA because they don’t necessarily fall within its criteria.

**Fisher:** What types of criteria are used to select the core countries?

**McClymont:** They must show progress toward ruling justly; they must have basic governance and provide human rights; they must show they are investing in their people, in their education and health care; and they must have good economic policies. A lot of the research shows that for large-scale aid to be effective, it needs to go to countries among the truly poorest that have good, reasonable economic policies and good governance. That’s where research tells us large-scale aid works best.

**Fisher:** In terms of the selection of the countries that meet the MCA criteria, would you say that there is a correlation between the poorest countries and countries that have good, reasonable economic and governance policies, or are the poorest countries going to be those in the most chaos and therefore not eligible for the MCA aid?

**McClymont:** We absolutely won’t get to some of the poorest countries through the MCA. That is why we say that there is another pot of money: the traditional development accounts. InterAction is just saying that that money has got to continue and be increased and be used for those poor people who aren’t otherwise going to get it through the MCA.

**Fisher:** Let’s look at the young people of the United States and what role they might play in these issues. Of course, young people can donate to a specific organization or do fund-raising to benefit an organization. How else might they get involved?

**McClymont:** I think they can contribute to one of our members, an organization that they respect. I also think they can do advocacy work; they can urge and also get their parents to urge Congress to provide increased international development and humanitarian aid. They can speak to their friends and tell them about how important this work is. Not only will this make them safer, it is the right thing to do. They can learn more about their neighbors around the world. I am sure that almost every young person in the United States goes to school with someone who comes from a developing country. Have them learn about the experiences of their fellow
students. The conditions of the countries from which these people have come can only broaden students’ personal understanding.

Of course, if students are lucky enough to have the opportunity, they can travel. They can join volunteer programs. Many of our member organizations operate volunteer programs in which people can go help out in another country. They can join the Peace Corps when they are a little older. They can participate in fellowship and exchange programs around the world. There is nothing better, as I experienced in my own life, than firsthand exposure, seeing for yourself what it’s like to live in another place where people are truly poor.

Fisher: What about a career in humanitarian aid and development? What should a young person plan on?

McClymont: I get calls from literally hundreds of people asking about such employment. I can tell you that the best preparation is to have good knowledge about international issues and a very specific skill, such as public health. This combination is what organizations are looking for when hiring people for international development.

Fisher: Are there any of your 160 organizations that specifically include young people in the work of the organizations?

McClymont: What young people can do is go to our Web site and be linked to the members. Many of our members have Web sites, but I couldn’t begin to cite them individually. I just learned about this the other day: President Bush is creating a U.S. Freedom Corps. Its Web site will link to volunteer opportunities across the board.

Fisher: When I browse your Web site, I read about so many organizations doing so many wonderful things around the world. Do you have any advice about how a young person should go about selecting an organization or a particular issue to support?

McClymont: I just think it’s in the eye of the beholder. It’s a personal thing; it’s what moves you most, from your own personal experience. Naturally enough, I would urge people to get involved in helping people overseas to live better lives. The readers need to know that 1.2 billion people live on less than $1 per day. That is an astonishing amount of extreme poverty. About 3 billion, which is half the world’s population, live on less than $2 per day. That’s why I believe global poverty is the most crucial thing that people can turn their attention to. As I said, there are many other issues—the rights of people, justice, and social exclusion—but they are all wrapped up with poverty. I think poverty is not only about income levels but also about being excluded from the most basic opportunities.

Fisher: What other advice might you have for interested young people?

McClymont: Reading about a cause, learning about it, and becoming expert on it are really important. Young people can talk to their friends and family and influence others to work on helping other people. That is the key: to figure out issues that are actually going to contribute to other people’s lives.
CARE
www.careusa.org

CARE was begun in 1945 in response to World War II survivors’ needs. Today, this agency not only provides immediate relief but also looks to poverty’s underlying causes and attempts to implement long-range solutions.

CARE focuses its humanitarian efforts on four major priorities, including short- and longer-term emergency relief to survivors of conflicts and natural disasters. Its Web site describes its individual projects, including a major effort to provide emergency aid to Afghans. The agency has more than 450 staff in Afghanistan and neighboring Pakistan, working with communities and local partners to develop sources of clean drinking water, educate tens of thousands of children, and distribute food and other emergency supplies to the community’s most vulnerable members.

Involvement opportunities are described on the Web site. Youth Corps provides volunteer experiences for high-school students to participate in international development. A virtual tour, including diary entries and photos of a recent effort in Guatemala, features eight high-school students from Atlanta and Chicago working with local families to overcome poverty. The site also provides opportunities to chat with the students online and, afterward, to download a souvenir screensaver.

The Web site makes it easy to become part of CARE’s advocacy efforts on the local, national, and international levels. Individuals can sign up for the agency newsletter and e-mail updates of developing issues. They can participate in CARE by hosting local fund-raising events and outreach projects that raise awareness and provide support for its work and by reviewing legislation and contacting government officials to influence policy decisions.

International Rescue Committee
www.theirc.org

The mission of the International Rescue Committee (IRC) is to help people who are persecuted because of race, religion, or ethnicity, as well as those uprooted by war and violence. Working in more than 30 countries, the IRC provides both immediate relief and longer-term strategies to resettle refugees and help them become self-sufficient.

When a crisis first occurs, the agency provides safety, food, shelter, and medical care. As it stabilizes, the IRC operates programs to help refugees cope with life away from home, including training, education, and job skills. The agency also has a strong voice on policy issues, calling attention to refugee issues around the world.

The IRC reports that, at the start of the year 2002, there were an estimated 14.5 million refugees and over 20 million displaced persons (uprooted from their homes but still in their countries). From Afghanistan alone, over 2.5 million refugees have sought safety in neighboring countries.

The Web site describes concrete ways to help refugees. For example, the IRC furnishes those attempting to resettle within the United States with food, clothing, and shelter. People can select from many ways to welcome these refugees as new and valuable members of U.S. society. They can volunteer at a local resettlement agency (the Web site directs people to the nearest office); become an English tutor, a tour guide, or a family mentor; donate money, furniture, and household items; teach others about refugees; and employ or encourage local businesses to employ refugees.

The Web site describes limited internships and volunteer postings available, as well as desired job applicant qualities. Anyone considering a international development career will find the advice there useful.

International Youth Foundation
www.iyfnet.org

Over the last decade, the International Youth Foundation (IYF) and its partners have worked to improve young people’s conditions and futures, helping over 23 million youths in over 60 countries to acquire the life skills, education, job training, and opportunities critical to their success.

The IYF identifies effective programs already in place and strengthens and expands them so that more youths...
may benefit. At the same time, it gets the message out about issues affecting young people throughout the world, works to strengthen youth program leaders’ skills, and encourages the use of best practices.

For example, YouthNet International identifies over 175 youth development programs around the world that embody best practices, such as the Boys and Girls Society of Sierra Leone, Africa, which helps the growing number of young people ages 8 to 18 who live on the streets of Freetown, the capital. YouthNet International helps with basic education, vocational and agricultural training, community-service activities, schoolwork and fees, and temporary shelter. It is also strongly committed to youth participation in the planning, implementation, and governance of youth-serving organizations, seeking donations to support the foundation.

**Mercy Corps**

www.mercycorps.org

Since 1981, Mercy Corps has provided more than a half-billion dollars in aid to people in 73 countries, based on need without regard to religion or politics, using social entrepreneurship to alleviate poverty and build just communities in some of the world’s more challenging regions. The agency provides humanitarian aid to individuals living in countries in conflict or disaster, whether the problem arises from civil, religious, or ethnic causes. At the same time, it builds strategies to identify and reduce these causes.

The Mercy Corps Web site highlights its projects, which today reach over 5 million persons in over 30 countries. One is in Indonesia’s Maluku Province. The world’s most populous country, Indonesia has been in tremendous turmoil for four years. Mercy Corps has promoted economic recovery, providing direct relief to individuals, helping to improve displaced persons’ self-sufficiency, and working to increase chances for peaceful interactions among the bitterly divided religious and ethnic groups.

There are many ways to donate to Mercy Corps, including purchasing Mercy Kits that provide health care, education, or other basics to people in troubled parts of the world. Web site visitors can shop online, with sales benefiting Mercy Corps work; and they can apply to volunteer or serve as interns at the agency’s Portland, Ore., offices.

**Save the Children**

www.savethechildren.org

Save the Children operates in 45 countries. Consistently, its approach is to work with families to define and solve the problems their children and communities face, using strategies to ensure self-sufficiency. In the United States and in 40 other countries, the agency works with women and children in four major program areas including “Emergencies and Conflict”; it strongly focuses on helping children in war-torn areas.

Every May, Save the Children issues its “State of the World’s Mothers Report,” which ranks, from best to worst, the status of mothers and children in regions of war and conflict. In 2002, Afghanistan ranked last out of 165 countries on the condition of women and children. Save the Children is working there in response to horrific conditions such as these: 165 children out of every 1,000 die before reaching age 5; 1 in 7 mothers dies in childbirth; 71 percent of children are not enrolled in school; 88 percent of the population lacks safe water; and 25 percent of children suffer severe or moderate malnutrition.

Through its Web site, Save the Children makes getting involved very easy. Choices include sponsoring a child ($24 per month), making a donation, and taking action. The funds collected are used with other donations to support community-based programs that provide services to families and children in the sponsored child’s community. Taking action can be as simple as signing a sample letter to a U.S. government official thanking him or her for a specific action.
Learning Gateways

by Stephen A. Rose

See Strategies Here

This teaching strategy introduces students to the legal dimensions of the U.S. war on terrorism. Students will learn about the core principles of international and U.S. law as related to the post–September 11 war in Afghanistan and captured Taliban and al-Qaida fighters. To extend the lesson and deepen students’ understanding of the complexity of this topic, follow up with additional activities and strategies at www.insightsmagazine.org

Lesson Overview

Objectives

As a result of this lesson, students will
• Identify and explain core principles of international and U.S. law that relate to the U.S. war on terrorism.
• Examine how core principles of international law helped shape the U.S. response to the post–September 11 events in Afghanistan.
• Use the core principles of international and U.S. law to help determine what type of tribunal and associated rights might be applied to the detained fighters in Afghanistan and Cuba.

Target Group: Secondary students

Time Needed: 2–4 hours

Materials Needed: Copies of “September 11: Through an International and U.S. Legal Lens” (pp. 4–6) and the Student Handout on page 23

Procedures

1. Introduce the lesson by asking what the legal justifications are for U.S. military actions in Afghanistan. Ask students to consider the question from the perspectives of both U.S. and international law. Then ask what should be done with the detained fighters in Afghanistan and Guantanamo Bay, Cuba. Discuss and list student responses.

2. Assign students to home groups—each composed of three students and as heterogeneous as possible in terms of gender, race, and political perspectives. Assign one of the following topics to each home group member. Explain that later in the lesson, members will teach one another about the topics.
   a. International law and U.S. response to the September 11 attacks
   b. U.S. law and response to the September 11 attacks
   c. Detainees’ legal status in Afghanistan and Guantanamo Bay, Cuba

3. Distribute copies of “September 11” and the Student Handout.

4. Have home group students break out into new groups of three to four students assigned to the same topic. (Most likely, more than one group will address the same topic.) Members of each group should use the handout questions under their category to develop expertise on their topic.

5. While groups are working, circulate to facilitate discussion and clear up any misunderstandings. Be sure students are correctly informed about their topic.

6. Have students return to their home groups and teach one another about their topics, again using the handout questions to guide their teaching, discussion, and note taking.

7. When all groups are finished, conduct a discussion using these questions.
   a. In what ways did the September 11 attacks violate international law? How is the United States justifying its use of force against the Taliban and al-Qaida?
   b. According to international law, what should the Taliban government of Afghanistan have been doing to the al-Qaida terrorist organization? What did the Taliban do?
   c. After the Afghanistan conflict ends, should the detained Taliban soldiers judged to be “lawful combatants” be released? Should detained al-Qaida fighters be treated the same?
   d. Given that both fundamental U.S. legal principles and international law suggest that detainees should not be held indefinitely without being charged with a crime by a competent tribunal, what type of tribunal should be established to afford detainees their legal rights?
   e. What rights should be afforded under international law and U.S. law to the al-Qaida detainees held in Afghanistan and Guantanamo Bay?
   f. What is the dilemma the United States faces with regard to releasing captured al-Qaida fighters in Afghanistan and Guantanamo Bay?

Stephen A. Rose is a professor of education in the College of Education and Human Services, University of Wisconsin in Oshkosh.
Expert Questions on September 11

A. International Law and the U.S. Response to the Attacks on September 11

1. How does international law, as conceived by the United Nations Charter, strike a balance between the sovereignty of individual states and their responsibility to the world community?
2. What are the core principles that the framers of the United Nations established for settling international disputes?
3. According to international law, what are the obligations of states that have individuals or organizations within their borders directing violence toward other states?
4. According to international law, what are the justifications the United States offered for its use of force against the Taliban government of Afghanistan and the al-Qaeda terrorist organization?

B. U.S. Law and Its Response to the Attacks on September 11

1. Why did Congress establish the War Powers Resolution in 1973, and what are the responsibilities and limitations of the president and Congress?
2. How has the War Powers Resolution affected U.S. involvement in Afghanistan?
3. Why did NATO become involved in the use of force in Afghanistan?
4. What U.S. laws did the September 11 attacks violate?

C. Legal Status of the Detainees in Afghanistan and Guantanamo Bay, Cuba

1. Under the Geneva Convention, what is the status of the captured al-Qaeda fighters, and what are their rights?
2. According to the Geneva Convention Article 2, what are the criteria for prisoner of war status? Do Taliban fighters meet the criteria? Do al-Qaeda fighters meet the criteria?
3. According to the Geneva Convention Article 2, what should be done to determine the status of detainees who are not “lawful combatants” under Article 2 of the Geneva Convention?
4. Legally, what can the United States do to al-Qaeda fighters who are judged to be unlawful combatants?

Teaching Standards for This Issue

Teachers of civics, government, history, and law all over the country are working toward attaining the educational standards set forth by their local communities. To assist in this effort, each edition of Insights on Law & Society is designed to support national standards of major educational organizations such as the National Council for the Social Studies, the Center for Civic Education, the National Center for History in the Schools, and the American Library Association. To see the national standards supported by this edition of Insights, visit insightsmagazine.org (click “Learning Gateways”).

Illustration by Rick Ingrasci
Education

School Vouchers The court voted 5-4 in Zelman v. Simmons-Harris, No. 00-1751, to uphold an Ohio program that provides tuition aid for low-income Cleveland students to attend the participating public or private schools of their parents’ choosing. Because 96 percent of Cleveland voucher recipients have elected to enroll in private religious schools, opponents argued that the program causes taxpayer dollars to be spent in support of religion in violation of the First Amendment’s establishment clause. The majority opinion written by Chief Justice Rehnquist disagreed, however, saying that “the constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are religious, or most recipients choose to use the aid at a religious school.”

Drug Testing Another education case of import this term was Board of Education of Independent School Dist. No. 92 v. Earels, No. 01-332, in which the court voted 5-4 to uphold a school-district policy requiring all middle- and high-school students to consent to urinalysis drug testing in order to participate in any extracurricular activity. The opinion expands schools’ drug-testing authority well beyond that announced in the court’s 1995 decision in Vernonia School District v. Acton, 515 U.S. 646, which had upheld a random drug-testing policy that was limited to student athletes.

FERPA The Family Educational Rights and Privacy Act (FERPA) was the subject of two cases this term. In Gonzaga University et al. v. Doe, No. 01-679, the court ruled 7-2 that a student cannot enforce FERPA by suing a private university for damages under Section 1983 of the Civil Rights Act. The majority opinion written by Chief Justice Rehnquist disagreed, however, saying that “the constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are religious, or most recipients choose to use the aid at a religious school.”

Capital Punishment

Mentally Retarded Criminals In a decision that bucked a decidedly conservative trend this term, the court voted 6-3 in Atkins v. Virginia, No. 00-8452, that the execution of mentally retarded criminals is a form of “cruel and unusual punishment” prohibited by the Eighth Amendment. The case involved an emotional issue, and emotions ran suitably high. While Justice Stevens wrote for the majority that the punishment violates the “evolving standards of decency that mark the progress of a maturing society,” Justice Scalia’s caustic dissent contended that “seldom has an opinion of this court rested so obviously upon nothing but the personal views of its members.” Chief Justice Rehnquist vigorously denounced the majority’s decision to place weight (albeit in a footnote) on “foreign laws, the views of professional and religious organizations, and opinion polls.”

Jury Sentencing In another case, Ring v. Arizona, No. 01-488, however, even Justice Scalia joined Justice Ginsburg’s 7-2 ruling that a jury—and not a judge—must determine the presence or absence of any “aggravating factors” required for imposition of the death penalty. Only Chief Justice Rehnquist joined Justice O’Connor’s dissenting opinion in that case.

Free Speech

Candidates’ Speech In Republican Party of Minnesota v. White, No. 01-521, the court ruled 5-4 that a state’s canon of judicial conduct cannot constitutionally prohibit judicial candidates from “announcing” their views on disputed legal or political issues. Minnesota had argued that this restriction on candidates’ speech was justified by the state’s
compelling interest in preserving the judiciary’s impartiality and appearance of impartiality. But after noting the “obvious tension” between the Minnesota Constitution, which provides that Minnesota judges shall be elected, and the state supreme court’s “announce clause, which places most subjects of interest to the voters off limits” to the candidates, the Supreme Court’s conservative bloc (Rehnquist, Scalia, O’Connor, Kennedy, and Thomas) concluded that the speech restriction violated the First Amendment.

Child Pornography Congressional efforts to curb online pornography also drew the court’s attention in two separate cases. In Ashcroft v. Free Speech Coalition, No. 00-795, the court voted 6-3 to strike down two sections of the Child Pornography Prevention Act of 1996 as unconstitutional. One section would have banned so-called virtual child pornography: pornography that appears to depict actual minors but which is actually produced with young-looking adults or computer-imaging technology. The other section was aimed at preventing the production or distribution of pornographic material that is “pandered as” child pornography.

Writing for the court, Justice Kennedy dismissed as “somewhat implausible” the government’s argument that its objective of banning pornography produced using real children necessitated a prohibition on virtual images as well. Virtual images, the government contended, are indistinguishable from real ones and promote the trafficking in works produced through the exploitation of real children. “The hypothesis is somewhat implausible,” Justice Kennedy wrote. “If virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes. Few pornographers would risk prosecu-

tion by abusing real children if fictional, computerized images would suffice.”

Door-to-Door Advocacy and “Community Standards” Less controversially, the court in Watchtower Bible & Tract Society v. Village of Stratton, No. 00-1737, ruled 8-1 that a village ordinance making it a misdemeanor to engage in door-to-door advocacy without first registering with the mayor and receiving a permit violates the First Amendment as it applies to religious proselytizing, anonymous political speech, and the distribution of handbills. On the other hand, in Ashcroft v. American Civil Liberties Union, No. 00-1293, the court could not muster a single majority opinion in the course of concluding that reliance on “community standards” to identify what material “is harmful to minors” on the World Wide Web does not by itself render the Child Online Protection Act substantially overbroad for First Amendment purposes.

Criminal Procedure Bus Searches In addition to expanding schools’ authority to search students for drugs in Board of Education of Independent School Dist. No. 92 v. Earls (discussed above), the court also ruled 6-3 in United States v. Drayton, No. 01-631, that the Fourth Amendment likewise does not require police officers to advise bus passengers of their right to refuse consent to random drug and weapon searches. The Eleventh Circuit had thought such advice necessary to prevent passengers from concluding that they had no choice but to agree to an officer’s request to search their persons and luggage. But writing for the court, Justice Kennedy concluded that the bus passengers in this case had not been “seized” within the meaning of the Fourth Amendment’s search and seizure clause and that their consent to the police search had been voluntary.

Privilege Against Self-Incrimination Finally, in McKune et al. v. Life, No. 00-1187, the court voted 5-4 to uphold a prison sexual abuse treatment program in which, in order to avoid losing prison privileges, inmates must sign an “Admission of Responsibility” form accepting responsibility for the crimes for which they have been sentenced. The respondent (who has consistently protested his innocence despite his conviction) objected that this incentive system violated his Fifth Amendment privilege against self-incrimination. He argued that he was being pressured to confess to a crime that he did not commit, and that any admission of responsibility he made could incriminate him in a future prosecution for perjury or any other offense to which he confessed. The court concluded, however, that the rehabilitation program serves a vital penological purpose and simply offers inmates “minimal incentives” to participate that do not amount to the compelled self-incrimination prohibited by the Fifth Amendment. Justices Souter, Ginsburg, and Breyer joined Justice Stevens’s dissent from Justice Kennedy’s majority opinion.

Research Tool

For updates, more information, and additional resources about these and other Supreme Court cases, visit insightsmagazine.org (click “Supreme Court Roundup”).
Enacted Legislation

USA PATRIOT Act One of the more controversial pieces of legislation enacted after September 11 was the USA PATRIOT Act. Opponents argue that the act compromises individual civil liberties by allowing the indefinite detention of noncitizens for minor visa violations, expanding the government’s ability to conduct secret searches, and granting the FBI broad access to individuals’ sensitive business records without having to show evidence of a crime. Supporters, however, maintain that the act is necessary to boost the government’s law enforcement powers while increasing the safety of U.S. citizens.

Airline Aid and Airport Security On September 20, 2001, President Bush signed into law an airline aid package, the Air Transportation and System Stabilization Act, granting $15 billion to the airline industry. Essentially, U.S. air transportation companies will receive a total of $15 billion in direct payments and $10 billion in federal loan guarantees. The United States will also reimburse domestic airlines for increases in premiums paid on their flight insurance for a specified period. House and Senate negotiators also passed the Aviation Security Act, providing for the takeover of airport security by the federal government, once necessary screeners are hired and trained.

Aid to Victims In addition, the September 11th Victim Compensation Fund of 2001 was established. Victims of the attacks, including passengers and crew members on the hijacked planes and those injured or killed on the ground, can either file a claim for economic and noneconomic damages or sue the appropriate air carrier(s) directly in court. Claimants must disclose any additional monies received or promised from collateral sources, such as workers’ compensation benefits or life insurance policies. Claimants compensated by the fund are also prohibited from seeking punitive damages. The bill limits the liability of the two airlines involved for all claims arising from September 11, 2001, to a total amount no greater than the limits of liability coverage maintained by the carriers.

Border Security On May 14, the president signed H.R. 3525, the Enhanced Border Security and Visa Entry Reform Act of 2002, which authorizes funding for hiring and training government personnel, improved visa technology and infrastructure, and coordination of information among law enforcement agencies.

Proposed Legislation

INS Restructuring The September 11 attacks highlighted the need to overhaul the U.S. immigration and border security system. On April 25, the House passed, 405-9, H.R. 3231, which would split the Immigration and Naturalization Service (INS) into two new Justice Department bureaus. One agency would enforce immigration laws and keep unqualified people from entering the United States, while the other would provide immigration and naturalization services to legal aliens. The Senate also passed an INS restructuring bill (S. 2444). At this point, however, the future of the INS is unclear: President Bush’s call for a Homeland Security Department (see below), which would put the INS under its control, conflicts with his own previous plan to reorganize the INS. Bush’s plan also runs counter to bills passed by

Ann Simeo Heinz is an attorney, editor, and writer working in Chicago.
Congress that the administration has also endorsed.

**Insurance Coverage Debate** One of the industries hit the hardest from the September 11 attacks was the insurance industry. To prevent future losses from terrorism, the House passed H.R. 3210, the ‘Terrorism Risk Protection Act, which authorizes a federal terrorism insurance loan program that would kick in when losses exceed $1 billion and a single property and casualty insurer’s losses exceed 10 percent of its capital surplus or net premiums. The Senate version, S. 2600, provides for insurance companies to pay $10 billion of insurance costs for terrorism attacks for two years. After that point, the government would cover 90 percent with the insurance industry paying the remaining 10 percent. However, partisan disagreement has blocked this legislation from passing in the Senate so far.

**Suppression of Terrorism** On June 18, the House passed a Senate amendment to H.R. 3275, to implement the International Convention for the Suppression of Terrorist Bombings, to strengthen criminal laws relating to attacks on public places and the International Convention for the Suppression of the Financing of Terrorism, to combat terrorism and defend the nation against terrorist acts. The bill had been approved by the Senate, 83-1, on June 14.

**Rescuing Americans** On May 11, the Senate Appropriations Committee approved a measure authorizing the president to use force to rescue any American held by the new International Criminal Court and to bar arms aid to nations that ratify the court treaty. A similar version passed in the House last December but died in conference.

**Child Trafficking** On May 9, the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security approved H.R. 4623, to prevent trafficking in child pornography and sexual obscenity, to proscribe pandering and solicitation related to visual depictions of minors engaging in sexually explicit conduct, and to prevent child pornography and obscenity from facilitating crimes against children. A similar bill, S. 2511, was introduced in the Senate on May 14.

**HIV/AIDS** On June 13, the Senate Committee on Foreign Relations approved S. 2525, to amend the Foreign Assistance Act of 1961 to increase aid to foreign countries seriously affected by HIV/AIDS, tuberculosis, and malaria.

**Women’s Rights** At a June 13 hearing, the Senate Foreign Relations Committee considered, for the first time since 1994, U.S. ratification of the Treaty for the Rights of Women, or CEDAW (Convention on the Elimination of All Forms of Discrimination Against Women). Aimed at providing a universal standard for the rights of women, the treaty promotes their fair treatment in areas such as education, employment, health care, marriage, politics, and law.

CEDAW was adopted by the UN General Assembly in 1979 and signed by President Jimmy Carter in 1980. Although it has been ratified by 169 countries to date, the U.S. Senate has yet to approve CEDAW.

Advocates are urging the United States, as a leader in promoting international rights, to ratify the treaty as a reaffirmation of the nation’s commitment to the international community to protect human rights and advance the international rule of law. The State Department recommended ratification of the treaty last February, stating that it is “generally desirable” and “should be approved.”
United States and Unilateralism

Even as the United States has worked to forge an international alliance in the “war on terror,” the Bush administration’s decisions not to participate in a number of high-profile international treaties have led to accusations that the United States is increasingly pursuing a unilateralist course in foreign affairs. Since the beginning of 2001, the United States has

- Withdrew from the Kyoto Protocol for the UN Framework Convention on Climate Change, an international agreement for reducing emissions of the greenhouse gases that are believed to be a key component in global warming.
- Withdrew from the Anti-Ballistic Missile (ABM) Treaty that the United States signed with the Soviet Union in 1972. The ABM Treaty controlled, among other things, the development of missile defense systems.
- Formally notified the United Nations that the United States does not intend to become a party to the Rome Statute, adopted in 1998 to create an International Criminal Court. The United States signed the Rome Statute on December 31, 2000.

Reluctance to commit the United States to international agreements is not a phenomenon unique to the current administration, nor to the executive branch. Treaties signed by the president often meet considerable resistance in the Senate, whose consent is necessary to ratify a treaty under the U.S. Constitution. Recent examples include the UN Convention on the Rights of the Child, negotiated and signed during the Clinton administration and since ratified by every country except the United States and Somalia, and the UN Treaty on the Rights of Women, signed by President Carter in 1980 and ratified by 169 countries to date.

Unilateralism in international matters refers simply to a nation’s willingness to go it alone, making decisions on the best course of action independent of the opinions or actions of other countries. Treaties often constrain unilateralism by binding the countries that ratify the treaty to terms reflecting the consensus—and often the compromises—of the member states. Traditionally, treaties have been bilateral, involving only two nations (the ABM Treaty is an example), or multilateral, involving numerous member states (such as the UN Convention on the Rights of the Child). As international organizations have assumed a more prominent role in international affairs, the notion of supranational treaties has emerged. The treaty establishing the International Criminal Court, for example, asks member states to submit to the jurisdiction of an international authority that has no national affiliation.

The enforcement of both bilateral and multilateral treaties depends upon the willingness and the ability of the member states to impose sanctions on another member state that violates the treaty’s terms. Indeed, one concern cited in opposition to supranational treaties is that the judgment of individual member states would be subordinated to an external decision-making authority that answers to no specific national constituency.

Pros and Cons

To critics of the current administration’s actions on treaties, unilateralism represents American arrogance and
lack of concern for what the rest of the world thinks. These critics argue that such arrogance is particularly dangerous in today’s increasingly interconnected world, where major issues involving the environment, the proliferation of weapons of mass destruction, and the stability of world financial markets transcend any one nation’s borders. Moreover, by refusing to participate in international agreements, the United States might compromise its moral authority in the world community—its “soft power” to lead by example—as well as its ability to enlist the cooperation of other nations on issues of concern to the United States. Given the United States’ post–Cold War status as the sole world superpower (what some have called a hyperpower), the need for the United States to consider its leadership role in the global community is particularly acute.

Those who support more limited U.S. participation in treaties reject a negative interpretation of unilateralism. They argue that nations have always negotiated and entered into treaties on the basis of their perceived self-interests, and there is no reason that the United States should bind itself to terms that do not further its interests. Similarly, there is a distinction between the problem a treaty purports to address and the terms it proposes to address it. The U.S. withdrawal from the Kyoto Protocol, for example, does not mean that the United States supports an increase in global warming. But it may very well disagree with the protocol’s underlying assumptions about the problem or the viability of the terms that the protocol imposes on the member states. No treaty is better than a bad treaty, so the argument goes, especially if viable alternative solutions to the problem exist. And if the circumstances that motivated the United States to ratify a treaty in the first place undergo a material change, as has been argued with respect to the Cold War–era ABM Treaty, why should the United States remain bound to treaty terms that are no longer relevant?

The United States still remains bound to, and actively participates in, a host of treaties. Indeed, the United States and Russia recently signed a new arms reduction treaty on nuclear warheads, potentially mitigating any adverse effects of the U.S. withdrawal from the ABM Treaty. It seems likely that in a world of increasing globalization—with greater flows of people, trade, capital, technology, weapons, and information across borders—efforts to forge new international agreements will continue. So too will debates over the interest of the United States in participating in these new treaties, ensuring that issues of unilateralism, international cooperation, and treaty law will remain in the news for years to come.

**Teaching Resources**

**United Nations**
The United Nations is perhaps the best source for information on major multilateral treaties and treaty law in general. A particularly useful general resource for classrooms is the UN Treaty Reference Guide, intended to explain key terms used in connection with treaties and to facilitate general understanding of the scope and function of various international agreements. The guide can be downloaded in either PDF or text versions from the United Nations’ Web site at untreaty.un.org/English/guide.asp.

The United Nations and related entities also maintain Web pages explaining the intent, terms, and status of major international agreements that are currently in the news, including:
- The Kyoto Protocol to the UN Framework Convention on Climate Change (unfccc.int/resource/convkp.html)

**Department of State**
The Department of State is a valuable resource for information on current U.S. policy toward a range of international issues and agreements. A good place for classroom research to start is “International Topics and Issues” (www.state.gov/interntl/), offering an alphabetized list of links to information on topics ranging from arms control to women’s issues, many of which are the subject of treaties.
Media Specialist’s Corner

Compiled by Michelle Parrini and Jennifer Kittlaus

Here’s a Useful Tool …

We hope you will find this department useful, whether you are a student researching the issue’s theme, a teacher preparing a lesson, or a library media specialist assisting students or teachers in tracking down additional resources for their course work. Library media specialists might also find the column helpful as a selection tool for collection development purposes. Each print edition offers, among other resources, annotated Web sites with primary documents that students may need to locate and annotated booklists that relate to the issue’s topic. The Web site features full bibliographic information and selected reviews for booklist entries as well as Web links to additional research and instructional support. Your feedback is always appreciated.

Primary Documents for Students


Full text of President George W. Bush’s November 13, 2001, executive order regarding the “detention, treatment, and trial of certain non-citizens in the war against terrorism.”

Federal Indictment of Zacarias Moussaoui, www.usdoj.gov/ag/moussaouiindictment.htm:

Full text of Moussaoui’s December 2001 indictment on six counts of criminal conspiracy, including conspiracy to commit acts of terrorism transcending national boundaries.

Statement of U.S. Sen. Russ Feingold (D-Wisconsin) Opposing 2001 USA PATRIOT Act, feingold.senate.gov/releases/01/10/102501at.htm:

October 2001 criticism of the PATRIOT Act, arguing that in protecting Americans from terrorism, Congress must not lose sight of the freedoms granted by the Constitution and Bill of Rights.

UN Human Rights Treaties, www.unhchr.ch/html/intlinst.htm:

From the Office of the High Commissioner for Human Rights, full texts of international human rights instruments.


Describes the rules governing military commissions that will be used for prosecuting certain noncitizens in the war against terrorism.


Guide to the military commission rules.

USA PATRIOT Act of 2001 (Uniting and Strengthening America by Providing Appropriate Tools to Intercept and Obstruct Terrorism Act of 2001), thomas.loc.gov/cgi-bin/query/z?c107:H.R.3162.ENR:

Signed into law in October 2001, act designed to aid in the deterrence and punishment of terrorist acts, extending the powers of domestic and international intelligence agencies.

Universal Declaration of Human Rights, www.yale.edu/lawweb/avalon/un/unrights.htm:

Adopted by the United Nations in 1948, declaration setting forth inalienable rights and fundamental freedoms as a standard of achievement for all peoples and nations.

Books


Reviews the politics of prosecuting war crimes by tribunal and the tribunal trials that the author believes had negative repercussions; from Waterloo (1815) to the tribunal instituted at the Hague (1993).


Comprehensive guide to human rights law with background and perspectives.


First chapter provides a comprehensive historical and political examination of terrorism by the director of the terrorism research unit of the RAND Corporation.


Former deputy chief of the Counterterrorist Center of the CIA outlines components of terrorism, counterterrorism efforts, U.S. counterterrorism policy, and effectiveness of U.S. policy overseas.

Come online to link to professional book reviews and excellent online resources for librarians, students, and teachers looking for additional support on the topics of international law, U.S. law, and the war on terrorism.

Michelle Parrini and Jennifer Kittlaus are editors and program managers for school programs at the ABA Division for Public Education in Chicago.
discipline of legally trained military personnel sitting in judgment. Finding a jury in a regular civilian court capable of being dispassionate about the use of their neighbors as human weapons of mass destruction against the World Trade Center towers and the Pentagon is problematic, illustrated perhaps by early pretrial motions filed in the case of the so-called American Taliban, John Walker Lindh. And insofar as swift and deliberate justice is a consideration, a military commission, reviewed by a panel appointed by the secretary of defense or the president, is certainly far more expeditious than anything comparable in civilian judicial practice.

Military tribunals also have the virtue of allowing evidence to be considered without necessitating the disclosure of classified information in open court or the identification of intelligence personnel and sources. And here the point of military tribunals—and their appropriateness—becomes plain. These bodies are extensions of the military campaign and the efforts of the president to protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks.

mentarity is based on the assumption the national courts will be regularly constituted and consistent with national legal traditions. Isn’t it hypocritical for the United States to criticize other nations for trying enemies of the state before special military courts when we propose to do so? And if it is hypocrisy, how can the United States claim to be a moral leader?

At a March 21 news conference, the secretary of defense’s senior civilian lawyer described our court-martial system as “the best in the world.” Because it is the best, we should rely on it to try our enemies and show the rest of the world that we’re not afraid to use a court system that reflects our standards of fairness.

pretrial discovery or to forego a prosecution of a terrorist. Under these procedures, summaries or portions of documentary evidence can be made available to defendants.

In sum, the Constitution provides ample flexibility to prosecute in our federal courts noncitizen terrorists apprehended and incarcerated here, consistent with the procedural rights of criminal defendants. These terrorists should be tried in our civilian courts.
Here’s Important News for You …

Host a “Dialogue on Freedom”
Conceived by U.S. Supreme Court Justice Anthony Kennedy, Dialogue on Freedom brings lawyers and judges into high schools to discuss American society and democratic values in the wake of September 11. Constitution Day, September 17, is a perfect time to host a Dialogue on Freedom in your community. For information, visit www.dialogueonfreedom.org

Have Young Lawyer, Will Teach Tolerance
The ABA Young Lawyers Division’s Tolerance Through Education program brings lawyers into schools to work directly with students. Designed for grades 3–12, lessons are built around concepts of tolerance, diversity, and understanding. For more information, visit www.abanet.org/yld/home/toolkit/main.html; to order, contact (312) 988-5522 or abasvcctr@abanet.org