

Law and War

Gabriel Schoenfeld

Ever since the september 11th attacks plunged America into a global conflict against radical Islamist terror groups — not to mention ground wars in Iraq and Afghanistan — we have learned a great deal about how our country organizes for and wages war. Among the most striking lessons we have learned is that lawyers and judges now play starring roles both in making national-security policy and in

Gabriel Schoenfeld is a senior fellow at the Hudson Institute and a resident scholar at the Witherspoon Institute.

During the First World War, the administration of President Woodrow Wilson imposed repressive measures to stifle dissent—including restrictions on speech by anti-war activists, censorship of mail, and mass arrests of immigrants suspected of disloyalty or anarchy.

effort to cut off shipments of arms to North Vietnam and to pressure the Hanoi regime. In June 1973, the Congress voted to cut off funding to operations involving Cambodian territory beginning in August of that year. But in July, before the funding ban took effect, New York congresswoman Elizabeth Holtzman (represented by ACLU attorneys) filed suit in federal court arguing that continued bombing was not authorized by Congress and was therefore unconstitutional. A federal judge agreed with Holtzman and ordered a halt to the bombing, but the administration quickly appealed the decision to the U.S. Court of Appeals for the Second Circuit, which stayed the lower court's injunction. Holtzman appealed to the Supreme Court, which was out of session; Justice Thurgood Marshall denied her appeal. But Holtzman then made use of a provision that allowed her to turn to another justice for redress. The ACLU accordingly sent one of its lawyers across the country to the remote holiday redoubt of Justice William Douglas in Goose Prairie, Washington, and Douglas vacated the stay.

Here was a watershed moment. In effect, the judicial branch of government was now directing the application of American air power in real time. The Nixon administration immediately asked Chief Justice Warren

notion that the individual and his rights, rather than the state, are the locus of international jurisprudence.

The formation of the United Nations in 1945, moreover, committed the United States to a set of international norms that intruded upon the internal affairs of nations. And through the International Court of Justice, the U.N. charter created an institution that could, theoretically at least, enforce them. Any gap was soon filled by the rise of the doctrine of “universal jurisdiction,” under which some nations asserted the right to prosecute individuals for alleged crimes committed outside of their own borders. The spread of this doctrine has led to the proliferation of extradition requests against foreign officials for crimes, real and alleged, in foreign civil conflicts. To cite one prominent example, in 1997, Spanish judge Baltasar Garzón used universal jurisdiction to pursue former Chilean dictator Augusto Pinochet. Some American officials—most notably former secretary of state Henry Kissinger—are among those who have subsequently been targeted under the same legal regime. More recently, Israeli officials have faced similar attempts at prosecution for war crimes allegedly committed in the 2006 war in the Gaza Strip.

Over time, multilateral agreements have also given rise to a body of customary international law that has assumed an increasingly prominent

our own officials balk at defending America in critical moments, sometimes with disastrous consequences. In 1998, the Clinton administration contemplated a plan to capture Osama bin Laden in his encampment in Kandahar, Afghanistan, and transport him to the United States for trial. According to the 9/11 Commission report, Samuel Berger, President Clinton's national security advisor, saw legal problems looming large. He "worried that the hard evidence against bin Laden was skimpy and that there was a danger of snatching him and bringing him to the United States only to see him acquitted," the report noted. At the same time, a high-ranking CIA official expressed fears about violating an executive order against foreign assassinations: According to the commission, the official was worried that "the operation had at least a slight flavor of a plan for an assassination" and "people might get killed." The operation was called *Operation Enduring Freedom*, and people were indeed killed, though not in Kandahar but in New York, Washington, and Pennsylvania.

fighting to win

Chief Justice Charles Evans Hughes once famously argued that "the war power of the Federal Government . . . is a power to wage war successfully." But given the new constraints on our troops and civilian officials, can America now wage war successfully? Do our legal mechanisms, extraordinarily attuned to defending the rights of our enemies, correspond to the very serious challenges we face in defending our own people?

The judiciary is the branch of our government least well equipped to

of the Obama administration are products of the same legal culture that stood in bitter opposition to the Bush-era counterterrorism framework. Former members of the Guantánamo bar now hold senior positions in the Department of Justice. The Obama administration came into office pressing for civilian trials in which terrorists captured abroad would enjoy the full set of rights granted American citizens, promising to close the Guantánamo Bay facility, seeking to re-open investigations of CIA interrogations.

elites, the judiciary is inserting itself into those policy decisions as never before — taking our defense apparatus, and our ability to wage war, into uncharted territory.

This plunge into the unknown comes at a dangerous time. An unspoken assumption of the legalist regime is that we are not presented with an existential danger; whatever threats face us in the struggle against Islamist radicals, this view implies, our national survival is not at risk as it was when we faced the Axis powers in World War II or the Soviet Union in the Cold War. And yet as the thousands of Americans who have lost their lives in this conflict demonstrate — and as al-Qaeda's ongoing quest to acquire weapons of mass destruction also demonstrates — that is by no means our enemies' view of this war.

Napoleon once remarked that God favors the side with the heaviest artillery. It is less than clear that He will favor the side with the most lawyers.