

## WHAT RULES DO WE PLAY BY?

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NOT SINCE the beginning of World War II, when America was shaken out of its international isolation, have so many of our friends and allies so seriously questioned our international policies. Their concerns and criticisms, widely reported, focus on a central point: our refusal to apply to ourselves the rules we push on others.

Who would have confidence, they seem to ask, in a sheriff who appears to believe that because he does, after all, wear a white hat, the laws of the town don't apply to him? Why, in such circumstances, should they believe that he is acting on their behalf, and in the interest of the town's laws? No wonder the American sheriff has recently had such trouble raising posSES to confront our real and growing international threats.

It is not only on issues like the environment, the rights of children, and the scourge of land mines that the United States stands virtually alone in opposing international agreements. We are breaking away not only from our allies but from our own heritage on the most basic issues of human liberty and the rule of law. In doing so, we risk more than diplomatic isolation and important foreign policy interests. We are acting in contradiction to our most basic national ideals.

The serious security crisis precipitated by the Sept. 11 outrage requires us to balance new security measures with the legal safeguards that are at the heart of both domestic and international law. That balance needs to be struck as the result of a serious national debate. At present, we have neither that debate nor a balanced approach. Consider two examples.

The first concerns the basic rights of prisoners we have captured (including American citizens). The United States is holding over 500 people, allegedly members of the Taliban or of Al Qaeda, at a camp at Guantanamo Bay. President Bush has said that they are not to be treated as prisoners of war under the Geneva Conventions.

It is very hard to read the Geneva Conventions that way. Moreover, the Geneva Conventions specifically preclude the United States, as the captor, from making that decision. A "competent tribunal" is supposed to be formed to make judgments on a case by case basis as to whether each detainee qualifies as a prisoner of war or not.

Our government offers this explanation, in effect, of why it refuses to form such a tribunal: Since it knows that all the detainees are guilty, it does not need to determine their guilt through any legal process. Such sophistry hardly squares with our belief in the rule of law and its due processes.

Certainly, many held at Guantanamo are guilty of vicious acts against us. It might even be that some of them were co-conspirators in the events of Sept. 11. But US officials have acknowledged that some may be innocent. Which ones are terrorists, which ones were only soldiers doing their losing duty, and which are neither cannot be known without trials on specific

charges and specific evidence. Currently, they are being held without charge, without access to counsel, without contact with their families, without any tribunal to apply any rules.

One ambassador of a friendly (and truly moderate) Arab government bitterly complained to us that he was rebuffed when he asked at the State Department even to know the names and whereabouts of his citizens, with whose protection and welfare he is charged. Back home, he said, the critics of America and his own friendly government are using the issue to hammer at his nation's cooperation with us in the war on terrorism.

The plea of the Organization of American States, through the Inter-American Commission on Human Rights, was rejected when it asked the United States to "adopt precautionary measures" under the Geneva Convention or "customary international law," to which we have subscribed. The OAS was told that it had no jurisdiction. The detainees were "unlawful combatants" (whatever that means) and therefore not under anybody's jurisdiction. And in a suit filed in Washington, D.C., the parents of some of the captives have asked the court to give their sons basic due process rights.

The position of the United States is that American courts do not have jurisdiction over noncitizens captured overseas and held outside the United States, even at Guantanamo where the United States has exercised control for almost 100 years.

In sum, we have created a legal limbo for these detainees, seemingly without a plan for any kind of resolution. That seems like justice in a gulag, not by the United States.

More alarming still is the use of the same kind of argument applied to an American, no matter how sordid his past. Abdullah al Muhajir (born Jose Padilla), an American citizen, has been arrested and held without charge, simply on the assertion of the attorney general that he is guilty of some kind of criminal or terrorist intent. This brings to America the kind of unchecked governmental power that we rightly denounce when it is exercised anywhere else in the world.

It is not only the laws and norms of international behavior that call for our resolving the status of all these prisoners. It is in our national interest. Our behavior puts our own citizens abroad at risk of similar treatment. It undercuts our arguments against the abuses of the Cubas and Iraqs of the world and in favor of the rule of law and democracy. And, when the time comes to convict and punish those detainees who are guilty of the most heinous crimes against us, as some or many undoubtedly are, our credibility in making the case for their guilt will have seriously been undercut.

The second instance of our defaulting on our basic beliefs is even more damaging to our leadership of the civilized world. We have declared war on the newly created International Criminal Court.

The United States, under President Clinton, had signed the treaty which established the new court. In May of this year, Washington formally gave notice that it would not abide by the treaty. President Clinton had privately acknowledged the difficulty of getting the Senate to ratify the new court. But now we are going beyond wait-and-see nonparticipation to an active battle to try to keep the court from functioning at all.

What makes our position so galling to some of our strongest allies is that the United States has been in the forefront of pushing criminal sanctions against persons charged with crimes against humanity. We were prime movers of the Nuremberg trials of the Nazis. We have pushed for prosecution of Slobodan Milosevic and other Serbians charged with war crimes.

The International Criminal Court is the world's effort to treat the questions of war crimes and genocide on some regular and legitimate basis, with important safeguards against its abuse. (It could not prosecute any American for such a crime, for example, if an American court were taking up the case - as in the case of My Lai.)

Now we not only oppose our allies on whether to join the court but have started to wage war against it. We vetoed a resolution at the United Nations to extend the peacekeeping mandate in Bosnia and announced that unless American soldiers got a permanent exemption from the jurisdiction of the court, we wouldn't let any peacekeeping missions be authorized.

That policy cut to the very heart of our role in world affairs. In the face of unyielding opposition from our allies on the Security Council, we then retreated to proposing a temporary compromise. This embarrassing fiasco exactly makes the point about how out of step, and out of character, we have become.

We well know, from our own government service, how important it is for the president, the commander-in-chief, to have full support in any military endeavor that engages our country. But this must not mean that we let debate over such fundamental policies be dampened by fear: fear that a position might seem soft on terrorism or seem to put American soldiers at risk to foreign, drumhead justice.

There has already been some labeling of criticism as unpatriotic. In an election year particularly, such criticism can be feared as politically dangerous. But the greatest thing we have to fear is the fear of losing our passion for justice and our belief in the rules that ultimately guarantee our safety.

It is past time for Congress to begin a debate on these issues, whether or not it is good politics - a serious debate, not one of partisan jabs and screamed sound bites on television talk shows. The war on terrorism will last a long time, and the precedents we set now can affect our freedoms and standing in the world for decades or more.

More than the fate of several hundred people at Guantanamo and more than the participation of Americans in future peacekeeping operations force are at stake. The leadership of the world is on the line. We cannot lead, in splendid isolation, without followers.

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