

# Ten Years After 9.11

The YLR recently asked members of the Law School faculty for their thoughts about how the world and the rule of law have changed in the ten years since the events of September 11, 2001.



Stephen L. Carter

## Just and Unjust Wars

IN THE YEARS SINCE the 9-11 attacks, the most important change in the way we view the theory of just and unjust wars is that we think about the theory at all. Prior to that horrific day, Americans tended to divide loosely into two camps: those who thought the nation always right in its military actions abroad, and those who viewed every use of force by the United States with skepticism. Since 9-11, the nation has toppled the regimes of Afghanistan and Iraq, and still has troops in both places. We are prosecuting an ever-widening War on Terror. And, at this writing, we are participating in the bombing of Libyan government forces and installations, with an eye toward protecting innocent civilians.

And although the military, with reason, remains by far the most respected institution in our national life, this is a lot to take on, and America has grown weary of war. Yet our conversations—on university campuses, yes, but also around dinner tables and on talk

shows—have become dominated by the fine points of the ethics of war. When can we attack those we believe are planning to attack us? Suppose we use stand-off missiles: how many civilian casualties are acceptable before we ourselves are acting immorally? When can we target individuals, not as part of a battle but in order to take out the leadership of the other side? How far are we willing to gather the information that is vital to defend the nation against terror attacks?

All of these questions are difficult ones, carrying profound moral implications. That we are debating them at all must be counted a good thing. The United States spends 41 cents of every dollar spent on defense in the entire world. Part of the work of citizenship is to think seriously about what we want that money to buy.

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*Stephen L. Carter '79 is the William Nelson Cromwell Professor of Law*



Owen Fiss

## A Predicament of His Own Making

GIVEN HIS SUPPORT for military commissions and indefinite detention without trial, President Obama's determination to close Guantánamo has become a gesture of doubtful significance. In December 2009 he followed up on his initial order promising to close Guantánamo in one year's time and announced a plan to transfer many of the Guantánamo prisoners to a prison in Thomson, Illinois. In a similar vein, he objected to the December 2010 legislation effectively prohibiting such a transfer, and he vowed to fight for the repeal of that measure. However, once he made the decision, announced in his May 2009 National Archives speech, to use military commissions to try some of the Guantánamo prisoners and to detain others for indefinite, prolonged periods of time without affording them a trial of any type, the Guantánamo closure ceased to be of much importance. Guantánamo became an object of public controversy and was denounced during the 2008 presidential campaign not only because it was viewed as a site where prisoners had been tortured, but also because President Bush had planned to try some of the prisoners being held there before military commissions and to continue to detain others being held there without trial—precisely what Obama intends to continue doing. The objection to Guantánamo was largely an objection to these policies.

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*Opposite: A model of the new World Trade Center currently under construction in Lower Manhattan. Photograph by Joe Woolhead with thanks to Silverstein Properties.*

**Fiss** *continued from previous page*

The notoriety of Guantánamo also arose because Bush had insisted that the prison lay beyond the reach of habeas corpus—by which a prisoner can challenge the legality of his detention—and successfully pressed Congress to amend the habeas statute to deny the availability of the writ to anyone determined to be an unlawful enemy combatant. The June 2008 Supreme Court decision in *Boumediene v. Bush* relieved Obama from having to take any position on the availability of habeas corpus for Guantánamo prisoners, for in that case the Court upheld the constitutional right of Guantánamo detainees to the writ. Obama complied with the Court's ruling, as Bush did, but then sought—and continues to seek—to limit its scope. In response to habeas petitions from prisoners held at Bagram Air Force Base in Afghanistan, Obama's lawyers have argued in *Al Maqaleh v. Gates* that the *Boumediene* decision should be confined to Guantánamo and Guantánamo alone, and that the prison at Bagram—a facility maintained by the United States and one to which terrorism suspects from the four corners of the earth have been brought—lies beyond the reach of the Constitution. In taking this position,

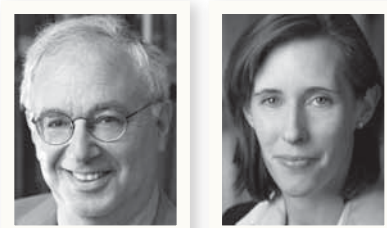
Obama has further deprived the act of closing Guantánamo of meaning.

Obama, rather than dismantling Bush's counterterrorism apparatus, has in crucial respects perpetuated it. He has sought to deny habeas corpus to Bagram prisoners, endorsed the policy of imprisonment without trial, and, as vividly indicated by the April 4, 2011, turn-around with Khalid Sheikh Mohammed, continued the use of military commissions. Obama sometimes endorsed these policies with reluctance, which was never Bush's style, but ultimately overcame this reluctance and chose to sacrifice principle. With Obama's endorsement, Bush's counterterrorism policies have become durable features of our legal order. They have shaped our understanding of what is acceptable, and may well serve as precedents for a less reluctant president.

*Owen Fiss is Sterling Professor of Law*

*The above op-ed is excerpted from a longer opinion piece published by the Boston Review on May 3, 2011. For more by Professor Fiss on this topic, please see his December 4, 2009, op-ed on Slate. That article, titled "Obama's Betrayal," discusses imprisonment without trial on its own terms.*

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**Bruce Ackerman and  
Oona Hathaway**

## The World...

THE BASIS OF OUR WAR in Afghanistan and elsewhere has been Congress's decision, seven days after September 11, 2001, to authorize force against those who "planned, authorized, committed, or aided the terrorist attacks" and those who harbored them. This was intended to destroy al-Qaeda and deprive it of sanctuaries in Afghanistan.

Osama bin Laden's death puts paid to the war authorized by this resolution. Even before his death, the original rationale provided only tenuous support for military operations in Afghanistan. Indeed, CIA director Leon Panetta publicly said months ago that there were only fifty to one hundred members of al Qaeda in the entire country. Would the resolution continue to apply even if only one al-Qaeda fighter remained?

The resolution also includes those who harbored the attackers. In 2001, this surely included Afghanistan's Taliban government. But Afghanistan has a different government and constitution now. We are helping President Hamid Karzai fight a variety of insurgents, but it's a big stretch to say they are all part of the entity that "planned, authorized, committed, or aided" the September 11 attacks or harbored those who did. Is this really the basis of our continuing war in the region?

## ...after bin Laden

If the answer is yes, it raises a deeper question: whether we still have a constitutional system of checks and balances on big decisions over war and peace. To his credit, President Obama has not claimed, as Bush administration officials did, that the Constitution gives the president exclusive power over warmaking. He has relied on increasingly strained readings of the 2001 resolution. But with bin Laden's death, this strategy has degenerated into sheer legal fiction. If Obama's continuation of the war under radically changed circumstances goes unchallenged, it will transform a limited congressional mandate into a magic wand authorizing a never-ending and worldwide conflict in response to a constantly changing threat.

Now is the time for President Obama to declare victory over those responsible for the September 11 attacks and return to Congress for a new resolution defining the extent and limits of our military operations as we enter a second decade in the struggle against terrorism.

*The above op-ed was originally published in The Washington Post on May 3, 2011.*

*Bruce Ackerman '67 is Sterling Professor of Law and Political Science  
Oona Hathaway '97 is Gerard C. and Bernice Latrobe Smith Professor of International Law*



**Jonathan Macey**

## "Nous sommes tous Américains" ... But Has the World Forgotten This Lesson?

THE TERRORIST ATTACKS at the World Trade Center towers and at the Pentagon on September 11, 2001, affected the United States in a variety of ways, some subtle, many not. On the surface, the economic effects of the attacks are easy to measure. But the psychological effects internally within the U.S. and the effects of America's perceptions of itself in the world likely are even more serious and long-lasting.

As far as the direct cost of the attacks, the Comptroller of the City of New York has estimated a \$21.8 billion loss. The OECD (Organization for Economic Cooperation and Development) similarly has estimated that the attack cost the private sector \$14 billion and the federal government \$0.7 billion, while cleanup was estimated at \$11 billion. This translates into direct out-of-pocket costs of about 1/4 of 1 percent of the U.S. GDP.

In addition, there were significant costs associated with the closing of New York's financial markets, which did not open on September 11 itself and remained closed until September 17. Similar but less severe disruptions affected the U.S. commercial aviation industry.

But the available empirical evidence indicates that the direct economic costs were not serious. The economy grew in the fourth quarter of 2001, and the decline in the third quarter of 2001 was predicted by economists to occur well before the attacks. And the decline we

experienced was in line with these predictions, so it is implausible to blame that decline on the attacks.

More significant and lasting consequences are not hard to identify. Expenditures on defense increased by a massive amount in the aftermath of the September 11 attacks. Glen Hodgson, the Deputy Chief Economist for the EDC (Export Development Canada), said that "The U.S. alone now spends about U.S. \$500 billion annually—20 percent of the U.S. federal budget—on departments directly engaged in combating or preventing terrorism, most notably Defense and Homeland Security. The Defense budget increased by one-third, or over \$100 billion, from 2001 to 2003 in response to the heightened sense of the threat of terrorism—an increase equivalent to 0.7 percent of U.S. GDP."

People on the Left such as Paul Krugman have suggested that much of this increase in expenditures for security and defense are best understood as unnecessary political programs enabled by the terrorism, rather than a rational and necessary response to terrorism. As others have observed, for example, the Iraq war, which is proving to be extremely expensive and shows no signs of coming to an end, likely never would have begun in the first place if the 9/11 attacks had not occurred.

And this is where the 9/11 story gets very interesting. The direct effects of

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**Macey** continued from previous page 9/11 were manageable. The most profound damages that 9/11 has had have been the residual wounds on America's self-respect and image in the world.

In the post World War II period, particularly in Europe as a result of the Marshall Plan, the U.S. was viewed as an enlightened, powerful liberator. America's enviable position as a paragon of both moral virtue and economic superiority was reinforced by the Cold War and by the role of the U.S. in NATO.

But the U.S. since its founding has had acute difficulty in making itself understood by the people of the poorer countries of the world. This problem was exacerbated by U.S. foreign policy toward Latin America, the Bay of Pigs fiasco, the country's inability to win the Vietnam War, and the country's own history of troubled race relations.

The U.S. has never been appropriately credited for its unprecedented achievements in constructing the world's most tolerant and vibrant society. The country's commitment to social equality, religious freedom, and economic opportunity is poorly understood and vastly unappreciated. The miracle of the U.S. is that it inspires allegiance and loyalty on the part of its citizens on the basis of its commitment to the Rule of Law, and not on the religious or economic ties among its citizens. The tragedy is how poorly this fact is understood outside of the borders of the country, particularly among developing countries.

For a brief period after the attacks America was embraced, particularly in Europe, as never before. Britain pledged to "stand full-square alongside the U.S. in the battle against terrorism." German Chancellor Gerhard Schröder called the attacks "a declaration of war against the civilized world," and in Berlin 200,000 people marched in a show of solidarity with America. Perhaps most movingly, the headline of *Le Monde*, the largest French newspaper, famously proclaimed "Nous sommes tous Américains." Even enemies of the U.S. such as Cuba, Iran, Libya, and North Korea roundly con-

demned the attacks, along with countries such as China, India, and Russia, with whom the U.S. has very complex and often antagonistic relationships. Significantly, secular and religious leaders in Egypt, Jordan, Libya, Syria, Iran (where large crowds participated in candlelit vigils and more than 60,000 spectators observed a minute of silence at Tehran's largest soccer stadium), and Pakistan also condemned the attacks. The United Nations, often a hostile forum for the U.S. and a center for the expression of anti-American interests, enacted Security Council Resolution 1368 which supported America's right to defend itself. Thus, support for the U.S. extended far beyond our usual allies.

Inside the U.S., diverse Muslim groups including the American Muslim Alliance, the American Muslim Council, the Association of Muslim Scientists and Engineers, the Association of Muslim Social Scientists, the Council on American-Islamic Relations, the Islamic Medical Association of North America, and the Muslim Public Affairs Council described the 9/11 attacks as "vicious and cowardly acts of terrorism against innocent civilians" and categorically condemned them.

The global pro-U.S. solidarity was a remarkable and encouraging part of the 9/11 debacle. Unfortunately, we are back where we started. Over the past decade clumsy U.S. foreign policy has managed to dissipate much of this good will. Just as the world was embracing traditional American values of tolerance and respect for rights, America was seen to be rejecting them as it attacked Iraq on a false pretext and created a detention camp inside the U.S. Naval Base in Guantánamo Bay, Cuba, that has been deemed by the Justice Department to be outside the legal jurisdiction of the U.S. This lost opportunity is, in my view, the biggest—and most unquantifiable—loss suffered by our country in the decade since 9/11.

*Jonathan Macey '82 is Sam Harris Professor of Corporate Law, Corporate Finance, and Securities Law*



**Robert C. Ellickson**

## Building Mosques...

IN MID-2010, the prospect of a mosque and Islamic cultural center near the site of the former World Trade Center sparked a national furor. The three other most-publicized recent uproars of a similar stripe have arisen in highly diverse settings—Temecula, California, Murfreesboro, Tennessee, and Sheboygan County, Wisconsin. Did the trauma of 9/11 raise the legal bar for mosque construction in the United States? It seems not. In all four of these conspicuous controversies, local zoning officials ultimately allowed construction to proceed, typically by unanimous vote.

Some constitutional scholars might interpret these outcomes as evidence of the sway of Supreme Court decisions interpreting the Free Exercise Clause of the First Amendment. But this perspective would overplay the role of the federal constitution in the structure of social life. Most American immigrants, realizing that they were highly diverse, gradually and painfully came to embrace norms supporting freedom of religious exercise. While the text and evolving case law of the First Amendment have undoubtedly reinforced this deep cultural commitment, it may be more instructive to view First Amendment

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## ...after 9/11

jurisprudence as a manifestation of, and not the cause of, American norms of religious tolerance.

An attorney inclined to view the Ground Zero controversy solely through a First Amendment lens would miss the influence of a wider set of legal and social norms. If New York City were to have refused to approve the proposed mosque, the developer's attorney most promising legal grounds for a challenge would not have been the Free Exercise Clause, but rather narrower New York State zoning doctrines and a pertinent federal statute (the Religious Land Use and Institutionalized Persons Act of 2000).

Moreover, informal norms, which influence and are influenced by law, also shape outcomes in land use controversies. Officials in New York City, Temecula, Murfreesboro, and Sheboygan may have voted as they did not because they thought they were constitutionally constrained, but because they thought—and they intuited that most voters thought—that it was the right thing to do. On the zoning front at least, the shock of 9/11 seems not to have caused Americans to jettison their commitments to the free exercise of religion.

*Robert C. Ellickson '66 is the Walter E. Meyer Professor of Property and Urban Law*



**Peter H. Schuck**

## Citizenship Law in the Wake of 9/11

DID 9/11 AFFECT our citizenship law? The answer, so far, is not at all. American citizenship has probably never been easier to obtain—through birth in the U.S., descent from American citizens, and naturalization—and almost impossible to lose (under a 1967 Supreme Court decision, *Afroyim v. Rusk*). Indeed, it is increasingly common for a U.S. citizen to hold dual and even triple citizenships as a result of some combination of birth, descent, marriage, and naturalization.

The traditional notion of citizenship emphasizes that the U.S., as a sovereign state exercising plenary power over its territory, has the power and duty—constrained only by the Constitution and statutes—to define for itself who are insiders, outsiders, and in-betweens; to determine the rights of these individuals and their obligations to the state; and to decide which, if any, international law limits (in addition to peremptory *jus cogens* norms) on American sovereignty it will accept. But important changes in the world—global migration, international human rights law, and dramatic changes in technology, trade, telecommunications, industrial practices, transportation, and cultural diffusion—have radically increased states' interdependence and limited American sovereignty in fact, if not in law.

One might have thought that the post-9/11 terrorist plots involving U.S. citizens—Jose Padilla, the Times Square bomber, Anwar al-Alwaki operating from Yemen, Major Hasan at Fort Hood, for example—would have strengthened the appeal of the traditional model by making it harder for foreigners to obtain

U.S. citizenship and easier for the government to expatriate disloyal Americans. After all, citizenship greases the wheels of terror. Plotters can travel easily to and from terrorist training camps on American passports. Citizens cannot be monitored as easily as immigrants can, they cannot be deported, and they have certain legal rights that foreigners lack (citizens can't be tried by military commissions, for example).

Yet, perhaps surprisingly, 9/11 has not changed our citizenship law. True, if a terrorist is a naturalized citizen, the government might revoke it if he misrepresented material facts in his naturalization petition. Legislation introduced in May 2010 would strip an American of his citizenship if he has certain links to terrorist activities, but the bill has gained little traction and might raise due process and other constitutional problems.

9/11 did not change the principle that the Constitution protects the citizenship of law-abiding and criminal citizens alike against a government that might seek to exile them. Although loyalty is basic to citizenship, we don't make native-born citizens affirm it. Except in the naturalization oath context, requiring a loyalty oath may infringe First Amendment rights to dissent or to remain silent. A terrorist would ignore it anyway. After-the-fact treason prosecutions or expatriation, even if allowed by *Afroyim*, are irrelevant. Citizenship law is a weak lever for preventing future 9/11s. **Y**

*Peter H. Schuck is the Simeon E. Baldwin Professor Emeritus of Law and Professor (Adjunct) of Law*