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As Allan Ryan tells us on the very first page of his brilliantly argued account of the Guantanamo cases, no one old enough to remember 9/11 will ever forget that day. In the coming years, however, new generations of Americans will come to adulthood unaware of all the military, political, and legal ramifications of that day. The war in Afghanistan was undertaken with the understanding that the attack was a virtual declaration of war by a worldwide conspiracy of terrorists and terrorist-harboring states. The incarceration of hundreds of suspected terrorists and enemy combatants in US military facilities, principally the naval base at Guantanamo, Cuba, followed from a more complex understanding of the attack. To the federal courts then came questions that neither direct military action nor fraught political rhetoric could untangle. What was the basis for the continuing imprisonment of the suspects? Were they prisoners of war? Were they criminals? Did they have the procedural rights that prisoners in American jails exercised? Would they be tried at all, and if so for what offense, in what venue and jurisdiction?

Ryan, whose expertise in military and constitutional law covers all of these bases, follows the story case by case and transforms the complex and confused into the clear and explicable. He brings to life a remarkable cast of characters in the executive branch, the courts, and counsel for the detainees. Most important to readers in the coming generations, he writes with genuine understanding of the pressures on all the policy makers and the lawyers. For these cases were more than the resolution of the fates of individuals—they were a test of a nation’s commitment to a rule of law when faced with enemies whose conduct was the very opposite of the rule of law. Could American justice overcome the panic and fury 9/11 engendered?

As Ryan closed his account, Guantanamo was still open, and though the number of prisoners had drawn down, the lessons of Guantanamo were still there. Even when, as seems likely in the near future, the containment facility will close its doors and the last detainee depart, historians and jurists will debate the legality and the policy of the detention. Ryan’s splendid account will be a central part of this debate. For as he concluded, the use of Gitmo as a containment facility and the determi-
nation to try its prisoners by military commissions “were ill conceived to begin with and they have proven to be failures. Worse, they have been failures that have contorted American ideals, polarized American politics, repelled American allies, and radicalized America’s enemies.”
On September 11, 2001, early on a pleasant late-summer morning, nineteen men from Saudi Arabia and elsewhere in the Middle East, in groups of four or five, acting in concert, routinely passed through airport security in Boston, Newark, and at Dulles airport in northern Virginia. They boarded four United and American Airlines flights bound for the west coast: big planes, loaded with flammable fuel. Soon after takeoffs at about 8:00 a.m., the men overpowered the flight attendants, forced their way into the cockpits, killed the pilots and took control of the aircraft. The two planes from Boston flew into the north and south towers of the World Trade Center in Manhattan. The plane from Dulles flew into the Pentagon, headquarters of the US Department of Defense, across the Potomac River from Washington, D.C. Passengers on the fourth plane, from Newark, fought the hijackers and deterred its course, believed to be to the United States Capitol or the White House; it plummeted into a field in rural Pennsylvania. Everyone aboard all the planes, and many more on the ground—nearly 3,000 people in all—lost their lives on that sunny and tragic day.

It was immediately clear that the attacks were the work of al Qaeda, a radical Islamist organization then based in Afghanistan and led by Osama bin Laden, the forty-four-year-old son of a wealthy Saudi Arabian family. Al Qaeda’s earlier work included a truck bomb in the World Trade Center in 1993; the bombing of the US embassies in Dar es Salaam, Tanzania and Nairobi, Kenya in 1998; and an attack on the US Navy ship Cole in a harbor in Yemen in 2000.

It was the most destructive act on American soil in the country’s history. Beyond that, there was no telling what further violence and carnage might be imminent in the days and weeks and months ahead. American military forces throughout the world were placed on high alert. Civilian flights were grounded in the country for a week; only military planes flew. Americans were gripped by fear and grief, and much of the world—though certainly not all of it—reacted with outrage and sympathy. For anyone in the United States old enough to realize what had happened, September 11, 2001, can never be forgotten. As President
Franklin D. Roosevelt said of the Japanese attack on Pearl Harbor sixty years earlier, it is a date that will live in infamy.

President George W. Bush, in office eight months, summoned the country to respond with force and determination. It was an act of war, he said, and no effort would be spared to find and defeat the enemy, to kill them or to bring them to justice. In his call lay a clue to much of what was to come: 9/11 was inarguably a crime—indeed, a cascade of crimes—that was also taken by the president, and most Americans, as an act of war.

What followed over the next dozen years was one of the most tense, turbulent, and controversial periods in American legal and political history. It brought two presidents, the Congress, and the Supreme Court into repeated confrontations that called into question the very meaning of the Constitution of the United States: the separation of powers, the authority of the president in war, the due process of law, the role of the Supreme Court and the nation’s federal courts, and the balance of military and civilian control in a government ordained under the rule of law. Not since Roosevelt’s New Deal of the 1930s had such fundamental principles come into such sharp conflict, not since the Civil War had they done so in a time of war. The four cases decided by the Supreme Court from 2004 to 2008, and the response of the president and Congress, are the focus of this book.

Much of that turbulence and controversy has centered on a backwater US naval base on Guantanamo Bay, Cuba, which the Bush administration turned into a detention camp for nearly 700 aliens captured by, or handed over to, American military forces that invaded Afghanistan weeks after September 11. President Bush also ordered that those who were behind the attacks be brought to trial, not in federal courts but before military commissions—ad hoc tribunals of military officers, operating under rules specially written for them. The rules departed, markedly and quite intentionally, from the legal and constitutional provisions that govern both civilian and military courts. In addition, the Congress enacted laws to prohibit Guantanamo detainees from going to any federal court to seek a judicial ruling on the legality of their imprisonment.

These actions inevitably created sharp and prolonged disagreement on what it means to be a nation under the rule of law. The President of
the United States, Commander in Chief of its armed forces and chief executive officer of the nation, implemented policies that the Supreme Court of the United States, the nation’s highest judicial authority, repeatedly rejected. The Congress of the United States, the embodiment of democracy, enacted laws that sought to overturn the decisions of the Supreme Court and circumscribe the jurisdiction of all federal courts. After a new president was inaugurated in 2009, it sought also to restrict his authority to deal with the complex issues that emerged so viciously from that September morning.

As this is written in the first weeks of 2015, the turmoil of United States law in what can aptly be called the post-9/11 era is not over. That conflict has abated in some respects, but it has not been resolved, and may not be for years to come.

The Supreme Court, its nine justices divided on fundamental questions of the constitutional balance of powers in the American system, decided four crucially important cases from 2004 to 2008 but has been silent on the conflict for seven years since then. A president twice elected to bring about change has continued the policies of his predecessor in some respects, altered and ended others, and faces an obdurate Congress that has frustrated his attempts at further change. And Congress, riven by partisan division, has shown itself unable to accomplish little of importance that requires cooperation or compromise.

Still, it is not too soon to chart the course of American law during this momentous period, to illuminate how it has both preserved and reshaped fundamental concepts of the due process of law, the separation of powers, and presidential authority. That is the purpose of this book. My focus is primarily on the cases decided by the Supreme Court in 2004, 2006, and 2008, arising out of lawsuits filed by lawyers representing the Guantanamo detainees as they sought judicial review of their captivity, and relief from the procedures of trials by military commissions that controlled life and death for some of them. But these cases did not arise in a calm political environment, nor did the confrontation among the three branches of our government by any means subside after 2008. The decisions of the Supreme Court resolved some issues, in some respects, but in almost equal measure they left others undecided, returning them to the Congress, to the president, and to lower federal courts. That process continues.
Any examination of the Supreme Court’s terror cases, therefore, important as those cases are, must also take account of the response of the president and the Congress both to the decisions of the Court and to the issues that the Court left undecided. The best lens for this examination is the foundation of the US Constitution: the separation of powers. That principle can be simply described, as it has been throughout our history in countless classrooms. The Constitution creates a national government of limited powers, some of them quite specific and others indistinct and ambiguous, reserving all else to “the States respectively, or to the people” in the words of the Tenth Amendment in the Bill of Rights.

To both create and limit the government, the Constitution vests the national government’s powers in three branches, each with its own authority and the ability, through a system of checks and balances, to restrict the other two branches from exceeding the powers given to each of them. To those who wrote the Constitution, no principle of governance was more important than this. “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointive, or elective,” James Madison wrote in Federalist No. 47, “may justly be pronounced the very definition of tyranny.” Thus, “the preservation of liberty requires that the three great departments of power should be separate and distinct.” The framers had no use for the parliamentary democracy of Great Britain, in which the prime minister and others in the executive were drawn from the elected members of the legislature, and the highest judicial authority was that body’s House of Lords. Invoking “the celebrated Montesquieu,” the French lawyer and philosopher, Madison was emphatic: “Where the WHOLE power of one department is exercised by the same hands which possess the WHOLE power of another department, the fundamental principles of a free constitution are subverted” (Madison’s emphasis).

Ordaining a separation of those powers in the Constitution was thus necessary, but not enough. A “mere demarcation on parchment of the constitutional limits of the several departments,” Madison wrote in Federalist No. 48, “is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.” For the separation to be effective, it would need teeth, and so each branch of the government was allocated cer-
tain limited but effective controls over the other two, so as to “divide and arrange the several offices in such a manner as that each may be a check on the other.” Madison quoted Thomas Jefferson, in his Notes on the State of Virginia: “An ELECTIVE DESPOTISM was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others.”

These checks and balances could be realized, Madison (or perhaps it was Alexander Hamilton) wrote in Federalist No. 51, only by “so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.” He went on to explain, “It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”

The primary separation of powers is simple: Congress enacts laws; the president implements them; the courts interpret them by resolving disputes that arise over their meaning and application. Each branch operates independently but they must also act interdependently. The president nominates judges to the Supreme Court and lower federal courts; the Senate confirms them, or not; the judges, once confirmed, have lifetime tenure by which they decide disputes free of political control or any direct accountability, yet their decisions can define and restrict the powers of the other two branches.

But this simple summary only opens the door. “Checks and balances” is a nice way to say “tension and conflict,” and the Constitution is notably sparse in its details of how tension and conflict are to be resolved. The Constitution is clear enough that Congress “constitutes tribunals” (that is, it creates the lower federal courts and defines their scope and authority); that the president commands the armed forces; and that
the Supreme Court decides cases and controversies arising under the Constitution, the nation’s treaties, and the laws enacted by Congress. Yet the Supreme Court’s most profound authority, to invalidate congressional or presidential actions that exceed constitutional powers, is found nowhere in the Constitution itself. It was declared to exist by Chief Justice John Marshall in 1803, as a necessary aspect of the Constitution’s limits on government authority. In the terror cases, and in the response of the president and Congress to those cases, each branch of this government, relying on its constitutional powers, was thrust into confrontation with each of the other two. How those confrontations arose, how they were addressed, and how they have been resolved—to the extent they have been resolved—is the subject of this book.

One may reasonably ask why another book on the consequences of 9/11 and the “war on terrorism” is needed, especially from one whose military and government service concluded well before the events. There have been dozens of books written about this period, some of them quite good and most of them by those who bring their personal perspectives formed as military, political, and intelligence officials; academics; journalists; and lawyers. Many of these works are decidedly partisan, seeking to justify the author’s actions or perspectives and to persuade the reader of the rightness of that course or those insights. Such works are essential to the public dialogue and to the often messy compilation of history by contemporary generations and succeeding ones.

But the dialogue, and the compilation of history, also require contributions of those who have no particular turf to defend and seek instead to examine the facts as objectively as they can. No account, however brief or lengthy, can be perfectly objective; what one chooses to address or to leave out is the first step off the path of complete objectivity, if such a path exists at all. And how one recounts what is addressed is a further step off that uncertain path. Still, as someone who has taught constitutional law and the law of war to law students and to undergraduates during this post-9/11 era, who has followed those events closely and incorporated them into my teaching, and who has been pressed by students and colleagues to explain and defend my views, I believe there is a place for a concise, readable, and relatively objective account for readers who are not necessarily lawyers or law students but who want to understand, in some depth, how American law was tested and how it re-
sponded during this tumultuous period, so as to draw their own conclusions. In the account that follows, I do not shy from presenting my own opinions, or from criticizing the actions of individuals and political institutions—two presidents and their administrations, the Congress, and the federal courts—and the reasons for those actions. But I have tried to make my own analysis evident, and not to tailor my account except to show the reader what I believe is important to an understanding of what has happened, and how it has affected the fundamental principles of our Constitution and our democracy.

A glossary (p. 193) and a chronology (p. 197) follow the text.
I want to thank, once again, my longtime friend and colleague, former Marine Corps military judge Richard D. Sullivan, who read each chapter as it was written with an acute and knowledgeable eye and made valuable contributions to its accuracy and clarity. William Banks of the Syracuse University School of Law read the manuscript and provided helpful comments. I am grateful also to Boston College Law School, which offered me the opportunity in 1989 to teach what was reportedly the first course on the law of war in a civilian law school, where I have taught it every year since, and to the Harvard University Summer School, where I have taught a similar course to undergraduate and graduate students since 1997. Michael Briggs at the University Press of Kansas encouraged me to write this book. Above all, my wife, Nancy, supported me unfailingly in this endeavor, as in all others, with limitless patience, understanding, and good humor.
The 9/11 Terror Cases
In early October 2001, on orders of President George W. Bush, American military forces invaded Afghanistan, augmented by a robust number of civilian operatives of the Central Intelligence Agency, and soon joined by some military units of the United Kingdom and other “coalition partners.” The immediate objective was to depose the Taliban, the country’s fundamentalist Islamist government and a protective host of the al Qaeda network as it planned and carried out the attacks of September 11. Al Qaeda was led by Osama bin Laden, whose stated objective was to rid the Arab world of Western influence. His followers were Muslims from many nations, some of whom had initially come together to repel, with American arms and aid, the Soviet Union’s invasion of Afghanistan in the 1980s and had maintained their cohesion despite the Soviet Union’s dissolution in 1991. Many of them were skilled in the construction and use of missiles, bombs, and other weapons, but they were not conventional military forces. Their strategy was terrorism—attacking targets, some of them military but many not, without warning. If this was war, the al Qaeda network acted with no regard at all for the international laws of war, formalized in the Geneva Conventions, that prohibit attacks on civilians and other noncombatants.

Al Qaeda operatives had detonated a truck bomb in the garage of New York’s World Trade Center in 1993, killing six and injuring more than a thousand, a crime for which several of them had been convicted in federal court in 1995 and sentenced to life imprisonment. That carnage, and their subsequent attacks on the US embassies in Tanzania and Kenya in 1998 and the Navy’s guided-missile destroyer USS Cole in Aden harbor in Yemen in 2000, had made al Qaeda well known to the US government, enough so that the Central Intelligence Agency had an office whose sole job was to find and kill bin Laden. Whether the adminis-
tration of George Bush, inaugurated in January 2001, should have been more alert to signs that bin Laden was planning a major attack on the United States led to recriminations, some of it along partisan lines, in the wake of 9/11, but there was near-universal popular support for the invasion of Afghanistan and the destruction of al Qaeda.

Working cooperatively with anti-Taliban Afghan elements of the Northern Alliance and with its coalition partners, US forces succeeded in overthrowing the Taliban within a few months of the invasion and taking some of its fighters into custody, but getting at al Qaeda proved difficult. Bin Laden and his councilors were thought to be hiding in the almost impenetrable terrain along the Afghan-Pakistan border, undisturbed by Pakistan’s military, which supported the Taliban. Unwilling to confront that sometimes helpful but always uncertain ally, the US military offered lavish cash rewards to anyone in Afghanistan who turned over a member of the Taliban or al Qaeda. The locals produced captives with enthusiasm, but whether they were actually hostile combatants proved to be another question.

From a standing start, the United States in little more than four months had carried out a difficult military invasion of a mountainous and landlocked country halfway around the world and had held its position, however tenuously. The swiftness of the action and the elusiveness of al Qaeda created any number of challenges, but two were especially pressing. The military forces in Afghanistan had few places to hold those who had been captured on the battlefield or turned over for bounties. And, back home, US political and intelligence officials were desperately trying to figure out what al Qaeda was planning next. Both needs were to be answered in one of the most unlikely places imaginable: the US Naval Base at Guantanamo Bay, in Cuba.

The United States knew Guantanamo well. In 1903, when Cuba had gained its independence from Spain after the Spanish-American war, it gave the United States a perpetual lease of a naval fueling station on its southeast coast. The United States had been there ever since, notwithstanding Fidel Castro’s overthrow of the government in 1959 and his subsequent alliance with the Soviet Union. The base was an isolated American enclave run by the US Navy and stoutly fenced off from the rest of this Communist country. There were no diplomatic relations, no trade, no direct communications between the two governments and

{ Chapter One }
so no US worries about bothersome interference. Where Guantanamo was concerned, the American policy was simple: Castro didn’t like it, and America couldn’t care less. Apart from the Cuban Missile Crisis of 1962, when civilian dependents were evacuated from the base, nothing of great consequence happened there anyway. Most Americans knew Guantanamo, if they had heard of it at all, from the 1992 movie *A Few Good Men*, a court-martial drama starring Jack Nicholson.

How Gitmo, as it was commonly known in the military, became the centerpiece of the Bush administration’s war on terror is central to understanding the events of the post-9/11 years, for there three imperatives coalesced. First, Guantanamo could provide detention for the captives who were accumulating in Afghanistan, though its isolation and rudimentary facilities on an unfriendly island made it inferior to other military installations that were available, or could quickly be made so. But those other installations were within the United States or on the territory of governments that would assuredly take a distinct interest in any US plan to bring al Qaeda terrorists to their soil. Working out arrangements would take forever, if it could be done at all.

Guantanamo’s second advantage was that, situated in Cuba, it was beyond the jurisdiction of any American court. This was a critical concern to those in the president’s inner circle, because they had no intention of creating a conventional prisoner-of-war camp, operated in accordance with international law under the constraints of humane treatment imposed by the Geneva Conventions and monitored by the International Committee of the Red Cross. Gitmo would be a place where terrorists were to be interrogated, and rigorously. No federal judge would hear claims from the lawyers who would surely emerge to argue that detainees were being held unlawfully, or mistreated in violation of Geneva. In that respect, it could not have been better placed had it been on Saturn.

And third, Gitmo could become the tangible demonstration that the United States was winning the war on terrorism. Because it was closed, the Department of Defense could control all access and could determine what the world saw, or did not see. And what DoD wanted the world to see—though not too closely—was an American naval base full of captured terrorists.

These aspects of Guantanamo were crucial to the Bush administration in 2001 because it had no intention of following any rules, and
it made no secret of that. Vice President Richard Cheney, to whom President Bush had delegated virtually complete authority to direct the government’s war on terror, told a Sunday morning TV audience five days after 9/11, “We have to work the dark side, if you will. Spend time in the shadows of the intelligence world. A lot of what needs to be done here will have to be done quietly, without any discussion.” Cofer Black, chief of the CIA’s counterterrorism office, told a congressional hearing, “This [anti-terrorism policy] is a very highly classified area. All you need to know is that there was a before 9/11 and there was an after 9/11. After 9/11, the gloves come off.”

In the weeks after 9/11, an interagency task force was formed to determine how the United States should treat captured al Qaeda and Taliban operatives. Under the direction of Pierre-Richard Prosper, a State Department lawyer serving as Ambassador at Large for War Crimes Issues, lawyers and policymakers from Cabinet departments and executive agencies met repeatedly for serious discussions on developing rules by which the government could hold and interrogate prisoners. It was focused, it was knowledgeable, it was mindful both of its responsibilities and the limitations imposed by law.

And for that reason it was out of the loop. Its role was usurped by a small and far less visible knot of administration officials that came to be known informally as the “war council.” Cheney was its patron, and at its center was his counsel David Addington, little known outside the inner workings of the administration but widely respected and not a little feared within it. Addington was recognized as Cheney’s alter ego; when he spoke, he spoke for Cheney. The war council included John Yoo, the thirty-three-year-old deputy assistant attorney general in the Justice Department’s Office of Legal Counsel, a former law clerk to Justice Clarence Thomas, on leave from the law faculty at the University of California at Berkeley. Yoo was an influential figure in the Federalist Society, the brain trust of the conservative legal movement, and an avid exponent of robust and untrammeled powers of the president, particularly in time of war.

Also on the war council was the man with direct access to the president, Alberto Gonzales, counsel to the president, a trusted advisor to George W. Bush from Bush’s days as governor of Texas. Next to Gonzales was his deputy, Timothy Flanigan, who had from 1990 to 1992
headed the Office of Legal Counsel in the administration of the president’s father, George H. W. Bush, and later a key player in *Bush v. Gore*, the Supreme Court case that settled the 2000 presidential election in favor of the younger Bush. John Rizzo, the CIA’s general counsel, and William (Jim) Haynes, general counsel at the Department of Defense and Addington’s successor and protégé in that role, worked closely in this inner circle with its direct access to the Oval Office. For others with obvious responsibilities but more moderate views—Secretary of State Colin Powell and National Security Adviser Condoleezza Rice chief among them—the self-appointed war council had a simple solution. It ignored them.

This group, with Vice President Cheney, determined the administration’s response to 9/11 on matters of presidential authority and the gathering of intelligence. Memos to the president were signed by Gonzales, but they had been drafted by Addington and Yoo, who faced no resistance from the inexperienced and compliant Gonzales. Their animating principle was that the president had complete authority to do what he thought necessary—*whatever* he thought necessary—to protect the country from terrorism. It was an authority that nothing in the Constitution could restrict, an authority that needed no assent, much less could brook any interference, from the Congress or the judiciary.

In this regard, the war council had the benefit of a significant congressional action. A few days after 9/11, anxious to go on record in response to the attacks, Congress had approved, nearly unanimously, a resolution known as the Authorization for the Use of Military Force. The AUMF declared that the president “is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”

The AUMF was clearly intended to authorize the invasion of Afghanistan in pursuit of Osama bin Laden, his al Qaeda network, the Taliban that had protected it, and anyone else behind the 9/11 attacks or the continued protection of them. But the war council and Cheney did not understand “military” to be a qualification on the president’s authority. The president was the commander in chief. Anything he did in the
interests of protecting the nation was “military.” Nor did it read “the attacks of September 11, 2001” as a qualification. The AUMF was intended to “prevent any future acts” of terrorism against the United States and so anything aimed at countering terrorism was within its scope. Reading the AUMF in this way was not difficult: Addington and Yoo had drafted it. No act of Congress was necessary for presidential action, nor could any act of Congress constrain it, for the war council’s unshakeable belief was that presidential authority in war was by definition whatever the president wanted to do, regardless of congressional validation and despite any congressional objection. The AUMF, ostensibly a demonstration of congressional assent, instead underscored the sweeping breadth of the president’s authority.

On the other hand, the Geneva Conventions could be a problem. Ratified by the United States and virtually every other country in the world, those four treaties, last revised and updated in 1949, laid out some of the most important international rules of warfare, protecting the sick and wounded on land and sea, prisoners of war, and civilians. The members of the war council, like many of the conservative theoreticians from whom they drew agreement and support, had little patience for international law and in fact openly disdained it. It was, to their way of thinking, a suspicious and threatening imposition of alien notions of what “law” should be that, if taken seriously, would restrict the authority of the United States to act according to its own Constitution.

Particularly problematic was the Third Geneva Convention, which requires that enemy combatants captured during international armed conflict be characterized as prisoners of war and, as such, treated humanely, with adequate food, shelter, clothing, and medical attention, even recreation. POWs can be interrogated, but they are under no obligation to give more than their name, rank, and serial number. If they refuse to give more, the treaty is explicit: “No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.”

That obviously would not do. If the gloves were to come off, no member of al Qaeda, no Taliban operative, no detainee of any stripe could be heard to insist that he was protected from “unpleasant or dis-
advantageous treatment.” For the United States to renounce Geneva, to declare that it was no longer bound by such a universally accepted agreement, would be politically reckless, but the war council devised a way around this problem. Those captured in Afghanistan would simply be deemed to lie outside the protections of Geneva. From the time of the first Geneva Convention in 1864 through the latest revisions in 1949 and some additional protocols in the 1970s, their concern has always been armed conflict between military forces, and in particular the treatment accorded to combatants on the battlefield, combatants taken prisoner, and the civilians impacted by such conflict. The Conventions are not concerned with common criminals, with war’s looters and thieves, with freelance marauders and others who fight for their own ends, without state sponsorship.

Excluding members of al Qaeda from Geneva’s protections would thus be relatively easy. Al Qaeda was not a party to the Geneva Conventions, nor could it be, because Geneva was an agreement between nation states, which al Qaeda was not. Therefore, to this way of thinking, its members were not prisoners of war entitled to the protections reserved for combatants of the states who were parties to the treaty. The Taliban was a bit trickier, because it was the government of Afghanistan, which was a party to Geneva. But here too the war council had a workaround: Geneva includes within its protections “militias” and “volunteer corps”—somewhat dated terms that refer to what are now more commonly known as partisans, guerrillas, or insurgents who are not members of a nation’s actual armed forces but who fight under their supervision. In the Vietnam War, for example, in which the armed forces of the government of North Vietnam fought the forces of the government of South Vietnam, the Viet Cong were South Vietnamese fighters allied with the North against the South. But to claim the POW protections of the Geneva Convention, guerrillas or insurgents must look and act like combatants: they must wear distinctive uniforms or other visible insignia, be organized under a responsible commander, carry arms openly, and obey the laws of war themselves. Geneva thus protects combatants who behave as conventional armed forces and who can be readily identified when they are encountered or captured, while excluding unaffiliated fighters out only for their own gain or to settle personal scores.
Here the Taliban fell short, because they did not wear distinctive uniforms and paid no regard to the laws of war. Therefore, as the Addington-Yoo war council saw it, they were “unlawful” enemy combatants—a term that is not found in the Geneva Conventions but one that could plausibly describe the Taliban.

On February 7, 2002, President Bush, over the objections of Secretary of State Colin Powell, himself a career army officer and former chairman of the Joint Chiefs of Staff, signed a directive, drafted by Addington, declaring that neither the al Qaeda nor the Taliban captives were within the protections of Geneva. The directive did state that as a “matter of policy,” the United States “shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.” But it did not elaborate on what treatment would be “consistent with the principles of Geneva” or the “extent” to which such treatment would be “appropriate” or “consistent with military necessity.”

Detainees began to arrive at Guantanamo on January 11, 2002. Staggering off a US Air Force cargo plane in which they had been chained to the fuselage for a fourteen-hour flight from Afghanistan, clad in bright orange jumpsuits, blindfolded and shackled, led stumbling past US Marines with rifles locked and loaded to a fenced holding area, the twenty arrivals hardly seemed like cutthroat terrorists. But Defense Secretary Donald Rumsfeld dispelled that notion in a news conference announcing their arrival. “I mean, these are people that would gnaw hydraulic lines in the back of a C-17 to bring it down. I mean, so this is—these are very, very dangerous people, and that’s how they’re being treated.” In another context, he called them simply “the worst of the worst.”

As events were later to reveal, however, those whom the government believed to be truly the worst of the worst were not sent to Guantanamo. They were sent to “black sites” operated by the Central Intelligence Agency in secret locations in Europe and Asia, subjected to years of “enhanced interrogations” that amounted to outright torture. Those sent to Guantanamo were for show. As more and more were sent there—some 537 in 2002, another 92 in the first three months of 2003—it became clear to their captors at Gitmo, and to the Bush administration in Washington, that most were foot soldiers or low-level followers, or travelers unlucky
enough to have been scooped up by locals or seized out of personal animosity or family feuds, and turned over for bounty. Few of them had any significant intelligence value. In April 2003, fourteen months after his press conference as the “worst of the worst” were being herded off the plane, Rumsfeld told the chairman of the Joint Chiefs that it was time to “stop populating Guantanamo Bay (GTMO) with low-level enemy combatants.” In the rest of that year, there were only 27 new arrivals, and after that almost none at all. Meanwhile, in 2003, 88 were sent home; in 2004, another 102. Except for the transfer of 14 or so true “high-value detainees” from the CIA black sites in 2006, Gitmo ceased receiving detainees fourteen months after it opened.

A great deal has been written about what happened at Guantanamo, which in January 2015 began its fourteenth year as a prison and its sixth year since President Barack Obama, on his first day in office, had ordered it closed within a year. Of the 700 or so who were sent there, its population now has shrunk to about 130, of whom only about a dozen have been charged with crimes—even the crime of supporting terrorism—and fewer still have actually been tried (see chapter 7). But its first and most immediate problem is simply that when it was opened there was no clear understanding of what it was to be. Was it a detention camp? An intelligence-gathering facility? A place to sort out the true terrorists and criminals from its motley population of low-level captives? A venue for trials? A prison for the worst of the worst? Karen Greenberg, in her book *The Least Worst Place: Guantanamo’s First 100 Days*, summarized the situation:

What had at first seemed to be a temporary lack of clarification [about its mission] now became standing policy. A sin of omission had become a sin of commission. Rather than a state of limbo being created out of a policy void, administration lawyers had formulated a policy embracing limbo as its primary characteristic. There was to be no policy. That was the policy. Henceforth, the gray areas that had unsettled the lawyers became all-encompassing. There would be no black versus white, legal versus illegal, right versus wrong. It was a policy destined to spawn disaster both from the military and legal perspectives. Rumsfeld had not only circumvented the statutory process of interagency consultation in the legal sphere as in all others.
He had also, intentionally or unintentionally, subverted the elementary premises of military management.

This, then, was the sand on which the Guantanamo operation was precariously built. It was ominously shifting ground on which no person, no code and no precedent could weigh in with authority. It was not just a legal black hole, as it came to be called later. It was also a military black hole, a legally compromised operation whose premise would ultimately come to threaten the integrity of the military and those under its command.

Guantanamo eventually became all of the above: a place for detention, for intelligence, for ill-starred military trials, and for many, a prison in which they were serving indefinite and interminable sentences imposed by no court, not even a military one. Living conditions did not become more tolerable, but less so. Prisoners were isolated, manhandled and abused; harsh interrogations yielded next to nothing but were repeated over and over; prisoners died, some managing to do so by their own devices; communications with families far away were restricted or prohibited; years of unrelieved and endless despair followed one upon the next. Gitmo’s purpose, it seemed, was simply to be.