

Symposium on Operation Enduring Freedom and the War on Terrorism

"Mirror, Mirror on the Wall . . . ": Assessing the Aftermath of September 11th

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"MIRROR, MIRROR ON THE WALL . . .": ASSESSING THE AFTERMATH OF SEPTEMBER 11TH

Steven W. Becker*

*Behavior is a mirror in which every one shows his image.*¹

I. INTRODUCTION

"Modern American law has come a long way since the time when outbreak of war made every enemy national an outlaw . . ."² Unfortunately, the sentiment expressed by these words, which were penned by United States Supreme Court Justice Robert H. Jackson more than fifty years ago, has not been heeded by those conducting the present "war on terrorism." Instead, Arabs and Muslims have been subjected to mass detentions and, regardless of their American citizenship, have been targeted for harassment and unwarranted suspicion on the basis of physical appearance, religious persuasion, and association. In addition, the measures implemented in the aftermath of September 11th have gone far beyond their declared purpose of fighting terrorism. Not surprisingly, such measures have dramatically increased the power and intrusiveness of the federal government while concomitantly infringing upon the fundamental freedoms of the American people.

These policies, which violate both international and domestic law, represent a victory of politics over law. Yet, if the aggressive nature of such measures is not quickly curtailed, they could have a detrimental impact upon our national policy and a dangerous, long-term effect on the safety of American citizens, in particular.

For example, our present treatment of foreign prisoners of war ("POWs") will surely have serious consequences if American POWs fall

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¹ HOYT'S NEW CYCLOPEDIA OF PRACTICAL QUOTATIONS 493 (Kate Louise Roberts ed., 1940) (quoting JOHANN WOLFGANG VON GOETHE, DIE WAHLVERWANDTSCHAFTEN II. 5).

² Johnson v. Eisentrager, 339 U.S. 763, 768-69 (1950).

into the hands of a foreign power. Similarly, our double standards in the treatment of Arab and Muslim Americans is bound to have a like impact upon the way U.S. citizens are dealt with by populations in other countries. Also, significantly, our unyielding support for Israeli terrorism against the Palestinians, while at the same time undertaking a worldwide "crusade" against Muslim terrorism,³ will only lead to increased terrorist attacks against the United States, either on our own soil or against our citizens and installations abroad.

Therefore, an objective assessment of the strengths and failings of our present policies, absent the red, white, and blue sheen given to such measures by their purveyors, is required.

II. DISCUSSION

A. *The Spirit of America*

The mirror held up to America's national tragedy in the immediate wake of September 11th reflected strength, courage, generosity, and hope among the ruins of the World Trade Center and Pentagon. The selflessness of so many on that terrible day and in the days that followed became living metaphors of the American spirit of generosity and determination.⁴

America's generosity is not limited to such spontaneous gestures at times of national crisis, although that is when it is more evident.⁵ It recurs daily in countless unheralded deeds, involving people from all walks of life, whose helping hand reaches millions at home and abroad.

Although the national disaster of September 11th was unprecedented, the open heart was not new. The United States sacrificed much to defend Europe in two world wars and then to rebuild

³ See Peter Ford, *Europe Cringes at Bush "Crusade" Against Terrorists*, CHRISTIAN SCI. MONITOR, Sept. 19, 2001, at 12 ("President Bush's reference to a 'crusade' against terrorism, which passed almost unnoticed by Americans, rang alarm bells in Europe. It raised fears that the terrorist attacks could spark a 'clash of civilizations' between Christians and Muslims, sowing fresh winds of hatred and mistrust."), available at <http://www.csmonitor.com/2001/0919/p12s2-woeu.html> (last visited Mar. 12, 2003).

⁴ See Joshua B. Freeman, *Working-Class Heroes*, in A JUST RESPONSE: THE NATION ON TERRORISM, DEMOCRACY, AND SEPTEMBER 11, 2001, at 91 (Katrina vanden Heuvel ed., 2002); *The Spirit of America*, NEWSWEEK (Commemorative Issue, Fall 2001).

⁵ Jeff Giles, *The Nation's Neighborhood*, in *The Spirit of America*, *supra* note 4, at 40.

it, as well as Japan, after WWII.⁶ Since then, this nation has given billions of dollars in foreign aid and non-governmental charitable contributions and sent thousands of volunteers through the Peace Corps and other organizations to help people all over the globe. No nation in history has proven so giving and without the expectation of return.

The mirror held up to the national tragedy in the weeks following the tragic attack on New York and Washington reflected the Nation's tolerance, in spite of the harm suffered and the fear that spread. Americans from all ethnic and religious backgrounds stood in solidarity with Arab and Muslim Americans against the backlash of prejudice.⁷ President Bush led the Nation in encouraging religious leaders and their congregations to stand with their Muslim brothers and sisters in an outpouring of the religious solidarity that is at the heart of America's covenant of freedom.⁸

But no nation, this one included, is immune from excesses and errors in policy and judgments. A nation as big and complex as this one necessarily lacks cohesiveness and coherence in its policies and actions at home and abroad.⁹ This is the inherent weakness of a young, dynamic,

⁶ See JAMES BACQUE, CRIMES AND MERCIES: THE FATE OF GERMAN CIVILIANS UNDER ALLIED OCCUPATION, 1944-1950, at 142-82 (1997) (documenting Herbert Hoover's heroic efforts to feed the starving civilian population of post-World War II Germany); DOUGLAS MACARTHUR, REMINISCENCES 269, 324 (1964); FRANCIS TREVELYAN MILLER, GENERAL DOUGLAS MACARTHUR: SOLDIER-STATESMAN 295 (1951) ("The magnificent record of General MacArthur in the rebuilding of Japan from its ruins has never been surpassed in world statesmanship.").

⁷ See *September 11 2001: Continuing Religious Reflections*, at <http://pewforum.org/issues/display.php?IssueID=5> (last visited Jan. 19, 2003) ("Religious communities and leaders have . . . extended their arms to Muslim Americans, holding community meetings between local churches and mosques, even as most Americans struggle to gather information and an understanding about Islam.").

⁸ *Id.* (describing President Bush's September 20, 2001, meeting with leaders from diverse religious groups prior to his address at the Washington National Cathedral for the "National Day of Prayer and Remembrance"); see Remarks by President Bush at Islamic Center of Washington, D.C., 37 WEEKLY COMP. PRES. DOC. 1327 (Sept. 17, 2001).

⁹ A good example of this lack of consistency is the Administration's vacillating position on the applicability of the Geneva Conventions to the Taliban and *al-Qa'eda* detainees. Initially, President Bush determined that the Third Geneva Convention did not apply to these prisoners; then, after sharp criticism from Europe and a request for reconsideration from Secretary of State Colin Powell, the President announced that said Convention *was* applicable to the Taliban troops but not to the *al-Qa'eda* fighters. See Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT'L L. 461, 476-78 (2002). For a detailed discussion of the international legal issues surrounding the status of the detainees being held at Guantánamo Bay, Cuba, see *infra* Part II.D.

and diverse society governed by a democratic system fraught with the dangers of political and economic compromises. The election cycle and its costs, the influence of interest groups, the public's indifference, and the power of the media and influences exercised over it¹⁰ all contribute to the making of a very relative democracy. This explains why the historic commitment to upholding certain legal values has waned. Other factors explain the hegemonistic policies and practices of the United States that so offend others.¹¹ But the nation that was once built on the foundation of certain principles, with a purposeful sense of national values and of national interest, is no longer.

B. *The Afghan War*

No one ever doubted that the U.S. military would prevail over the Taliban, yet the war that began in Afghanistan on October 7, 2001, was presented to the American people by the Administration's public relations campaign as a great epic.¹² The impression created was that we were up against a formidable foe, requiring so much of our military resources.¹³ Whether that government-created perception was objectively or subjectively needed to engender public support for that war is ultimately a matter of political judgment. Some feel that Americans on the whole are too politically immature to understand the meaning of national interest and too selfish to accept sacrifices in its name unless absolutely necessary.

¹⁰ See John R. MacArthur, *Unleash the Press*, in A JUST RESPONSE: THE NATION ON TERRORISM, DEMOCRACY, AND SEPTEMBER 11, 2001, *supra* note 4, at 201. For a discussion of media access and war news, see *infra* Part II.C.

¹¹ See Fareed Zakaria, *Why Do They Hate Us?*, NEWSWEEK, Oct. 15, 2001, at 22; see also Michael Scott Doran, *Somebody Else's Civil War: Ideology, Rage, and the Assault on America*, in HOW DID THIS HAPPEN?: TERRORISM AND THE NEW WAR 31 (James F. Hoge, Jr. & Gideon Rose eds., 2001); cf. *Hiroshima Mayor Says U.S. Is Misguided*, CHI. TRIB., Aug. 7, 2002, at 10 (quoting Hiroshima Mayor Tadatoshi Akiba's recent remark that "[t]he United States government has no right to force Pax Americana on the rest of us, or to unilaterally determine the fate of the world").

¹² Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1347, 1349 (Sept. 20, 2001) [hereinafter Response Address] ("Americans should not expect one battle, but a lengthy campaign, unlike any other we have ever seen.").

¹³ *Id.* at 1348 ("There are thousands of these terrorists in more than 60 countries. They are recruited from their own nations and neighborhoods and brought to camps in places like Afghanistan, where they are trained in the tactics of terror.").

Thus, political handlers feel compelled to package foreign policy issues and sell them as they do marketable products.¹⁴ The war in Afghanistan and the so-called "war against terrorism" were handled in that manner.¹⁵ The facts and the issues, before, during, and after the end of the war in Afghanistan, have been concealed, altered, or manipulated.¹⁶ The American public received only that information which was needed to marshal political support for the Administration's foreign and domestic agenda.¹⁷

During the war we dropped 1.2 million tons of bombs on that mountainous country, which had already been devastated by almost twenty years of war and was devoid of any meaningful infrastructure.¹⁸ The main reason was to avoid using U.S. ground troops and to prevent casualties. Such concern, however, did not only stem from the laudable purpose of saving American lives but because of the perceived national phobia of returning body bags. The long shadow of the Vietnam War still looms large over the Nation, though more so over politicians than most other people.¹⁹ The Bush Administration remembers how eighteen casualties in Somalia caused the Clinton Administration to pull out some 20,000 troops from that troubled country.²⁰ For the world's only super-

¹⁴ See Michael Massing, *Uncle Ben Goes to War*, in *A JUST RESPONSE: THE NATION ON TERRORISM, DEMOCRACY, AND SEPTEMBER 11, 2001*, *supra* note 4, at 205, 205-07; Stephen J. Hedges, *U.S. Pays PR Guru to Make Its Points*, *CHI. TRIB.*, May 12, 2002, at 1C.

¹⁵ Hedges, *supra* note 14 ("The Rendon Group's current Pentagon work is just one part of a multifront, multimedia assault the Bush administration is waging against terrorism. While propaganda, war and presidents have always gone together, the Bush White House is especially attuned to the public relations side of military conflict.")

¹⁶ See MacArthur, *supra* note 10, at 201-02; Liz Sly, *U.S. Grabs at Shadows in Hunt for Al Qaeda*, *CHI. TRIB.*, Sept. 3, 2002, at 1 ("It is a war being fought largely in the shadows, mostly out of the glare of media scrutiny . . ."); Patrick Martin, *CNN Tells Reporters: No Propaganda, Except American* (Nov. 6, 2001), at <http://www.wsws.org/articles/2001/nov2001/cnn-n06.shtml> (last visited Jan. 18, 2003); cf. JOHN R. MACARTHUR, *SECOND FRONT: CENSORSHIP AND PROPAGANDA IN THE GULF WAR* (1992).

¹⁷ Martin, *supra* note 16.

In an extraordinary directive to its staff, Cable News Network has instructed reporters and anchormen to tailor coverage of the US war against Afghanistan to downplay the toll of death and destruction caused by American bombing, for fear that such coverage will undermine popular support for the US military effort.

Id.

¹⁸ Cf. Milton Bearden, *Graveyard of Empires: Afghanistan's Treacherous Peaks*, in *HOW DID THIS HAPPEN?: TERRORISM AND THE NEW WAR*, *supra* note 11, at 83, 85-93.

¹⁹ MacArthur, *supra* note 10, at 202-03.

²⁰ See Ralph Begleiter & Carl Rochelle, *Officials Fear Call for Pullout if U.S. Soldiers Die in Bosnia* (Dec. 21, 1995), at <http://www.cnn.com/WORLD/Bosnia/updates/dec95/12->

power to have such a phobia of military casualties does not do honor to this country's military and underestimates the American public's ability to judge where national sacrifice is needed and where it is not.

But, as a result of this political phobia, the U.S. military inflicts disproportionate harm on the enemy, including impermissible harm to civilians and civilian installations²¹—a practice which has now turned into an accepted military doctrine, even though it may violate international humanitarian law.²²

In addition, the very recent discovery of mass graves at Dasht-e-Leili raises further concerns as to the U.S. commitment to enforcing such humanitarian standards.²³ According to a confidential United Nations memorandum, these graves contain the bodies of almost 1000 Taliban POWs who were asphyxiated in container trucks during transport to the Northern Alliance's prison at Sheberghan.²⁴ Whether U.S. forces were aware of these practices is still being debated.²⁵

21/pm/index.html (last visited Apr. 15, 2003) (referring to President Clinton's announcement of "the U.S. pullout from Somalia after 18 troops were killed in a firefight and a [sic] the body of an American soldier dragged through the streets of Mogadishu").

²¹ Dexter Filkins, *Flaws in U.S. Air War Left Hundreds of Civilians Dead*, N.Y. TIMES, July 21, 2002, at 1 ("The American air campaign in Afghanistan, based on high-tech, out-of-harm's way strategy, has produced a pattern of mistakes that have killed hundreds of Afghan civilians.").

[T]he evidence suggests that many civilians have been killed by air strikes hitting precisely the target they were aimed at. The civilians died, the evidence suggests, because they were made targets by mistake, or because in eagerness to kill Qaeda and Taliban fighters, Americans did not carefully differentiate between civilians and military targets.

Field workers with Global Exchange, an American organization that has sent survey teams into Afghan villages, say they have compiled a list of 812 Afghan civilians who were killed by American airstrikes.

Id. Cf. *Rocket Reportedly Misses U.S. Forces*, CHI. TRIB., May 12, 2002, at 3C (describing deaths and maimings caused by land mine accidents in Afghanistan).

²² See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 51(5), 1125 U.N.T.S. 3 [hereinafter Protocol I].

²³ See Babak Dehghanpisheh et al., *The Death Convoy of Afghanistan*, NEWSWEEK, Aug. 26, 2002, at 20, 22.

²⁴ *Id.*; Report: UN Memo Called for Probe into Taliban POW Deaths, CHI. TRIB., Aug. 19, 2002, at 4.

²⁵ Dehghanpisheh et al., *supra* note 23, at 29-30.

C. *Media Access and the War News*

The Pentagon provided daily military briefings and Secretary Rumsfeld offered his candid but not always forthright views.²⁶ The Pentagon, however, almost always prevented media access to the facts in order to conceal what is euphemistically referred to as "collateral damage" to civilians and civilian property.²⁷ By controlling access to the field and by managing the news, the Pentagon controlled the information that the Americans received.²⁸ In addition, almost no opposing or even disagreeing views were expressed in the media.²⁹ The exclusive emphasis of the media's coverage was on the patriotic support for the war.

Because the Pentagon controlled access to Afghanistan, no one could assess the extent of the "collateral damage." The number of civilians killed and injured, whether in the hundreds or in the thousands, and the extent of the damage to their meager property remains unknown.³⁰ Also, refugee estimates caused by the war, though seldom publicized,³¹ were at two million, and no one knows how many starved or died from disease and the cold of a bitter winter.³² No known humanitarian

²⁶ MacArthur, *supra* note 10, at 201.

²⁷ Martin, *supra* note 16.

²⁸ See Bruce Shapiro, *Information Lockdown*, in A JUST RESPONSE: THE NATION ON TERRORISM, DEMOCRACY, AND SEPTEMBER 11, 2001, *supra* note 4, at 89, 90 ("At the Pentagon, news has been reduced to a trickle far more constricted than anything during Kosovo, which in turn was more restricted than during the Gulf War.").

²⁹ See, e.g., Victor Navasky, *Profiles in Cowardice*, in A JUST RESPONSE: THE NATION ON TERRORISM, DEMOCRACY, AND SEPTEMBER 11, 2001, *supra* note 4, at 81, 81.

Bill Maher got into trouble on *Politically Incorrect* when he correctly observed in the aftermath of September 11 that it's wrong to call the suicide bombers "cowards" and impolitically added, "We have been the cowards, lobbing cruise missiles from 2,000 miles away: That's cowardly. Staying in the airplane when it hits the building, say what you want about it, it's not cowardly."

Two advertisers, Sears and Federal Express, pulled their ads, seventeen stations canceled his program and Maher apologized for being, well, politically incorrect.

Id.

³⁰ Cf. Filkins, *supra* note 21.

³¹ Cf. U.S. Committee for Refugees' Country Report: Afghanistan (2002) ("It was difficult to estimate with any accuracy the number of Afghans who were internally displaced primarily because of conflict, but the U.S. Committee for Refugees (USCR) believed the figure to be about 1 million at year's end."), <http://www.refugees.org/world/countryrpt/scasia/afghanistan.htm> (last visited Jan. 21, 2003).

³² See Jonathan Schell, *Seven Million at Risk*, in A JUST RESPONSE: THE NATION ON TERRORISM, DEMOCRACY, AND SEPTEMBER 11, 2001, *supra* note 4, at 21-23.

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assistance was provided to the refugees by the military during the war, presumably because air force resources were needed for the total war effort. The early humanitarian campaign that was launched with much publicity was limited to some food drops and was short lived. One of its tragedies was that the yellow plastic-wrapped food drops were confused by the hapless recipients with the yellow-painted cluster bombs which killed and maimed some of the starving refugees, most of which were children.³³ No one knows how many died or were injured, but the United States provided no known medical assistance. The food packages' color was, however, subsequently changed.³⁴

The media was compliant with Pentagon-imposed restrictions and seldom critical.³⁵ The more cooperative networks and reporters were rewarded with guided field visits and the opportunity to take pictures of Tora Bora caves.³⁶ Those who asked Secretary Rumsfeld sharp questions found themselves cut out of valuable information, which in the end proved to be nothing more than minor details.³⁷ The media's manipulation was effective, resulting in the public's loss of information, particularly timely information.

This was the approach followed when the United States invaded Panama. It was not until six months later, when the news was stale, that it was reported that some 2400 civilians were killed.³⁸ Since then, the issue has not been revisited, and no one knows precisely how many civilians were killed by the United States in that invasion as "collateral damage." The same is true with the Afghan war, as no one knows the facts, and, if they are ever known, by then no one will care. One of the

³³ Thalif Deen, 'Bombs for Fathers, Bread for Children' Under Attack, ASIA TIMES ONLINE (Nov. 13, 2001), at <http://www.atimes.com/c-asia/CK10Ag01.html> (last visited Mar. 10, 2002).

³⁴ *Id.*

³⁵ Martin, *supra* note 16.

³⁶ See Philip Smucker, *Al Qaeda's Mule Trail to Pakistan*, CHRISTIAN SCI. MONITOR, Dec. 20, 2001, at 1 (recounting reporter's tour of the Tora Bora caves).

³⁷ See Michael Massing, *Press Watch: October 10, 2001*, in A JUST RESPONSE: THE NATION ON TERRORISM, DEMOCRACY, AND SEPTEMBER 11, 2001, *supra* note 4, at 192.

³⁸ See Hal Hinson, *Movies: Canal Knowledge*, WASH. POST, Oct. 17, 1992, at D7 (noting that the Panama invasion, "which was played up by the media as a smashing success, was not nearly as tidy and efficient as we were led to believe, with perhaps thousands of Panamanian civilians killed, many of them murdered by American troops and shoveled into mass graves").

casualties suffered by this country is the valued right to know and to make political and other informed judgments on the basis of the facts.³⁹

D. POW Treatment

The fate of some 300 men detained in Guantánamo Bay, Cuba, believed to be fighters from *al-Qa'eda* and the Taliban, has been decided not on the basis of the Geneva Conventions, but on the basis of a U.S. political decision of doubtful legality.⁴⁰ The main question is whether these detainees should have been granted POW status, as required by the Third Geneva Convention of 1949.⁴¹ The legal rights of combatants include: (i) the right to attack military objectives (e.g., armed forces personnel, bases, and equipment)⁴² and (ii) the right not to be prosecuted for legitimate military actions (e.g., taking up arms against other combatants).⁴³ Combatants are entitled to POW status, which means that the prisoners have to be released when the conflict ends.⁴⁴ This is, in part, why the Administration argues that the Taliban soldiers are not POWs, so that they do not have to be released after the conflict in Afghanistan ends.⁴⁵ But probably more important is that under the Geneva Conventions, POWs are only required to give name, rank, serial number (if it exists), and date of birth.⁴⁶ This would have defeated the

³⁹ See Shapiro, *supra* note 28, at 90 ("So comprehensive is the shutdown [of information] that on October 13, [2001,] presidents of twenty major journalists' organizations declared in a joint statement that 'these restrictions pose dangers to American democracy and prevent American citizens from obtaining the information they need.'").

⁴⁰ See *White House Fact Sheet on Status of Detainees at Guantánamo* (Feb. 7, 2002), <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html> (last visited Jan. 29, 2003); see also Murphy, *supra* note 9, at 475-80.

⁴¹ Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention].

⁴² See 2 L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 114 (1st ed. 1906) ("Such objects [of land warfare] are chiefly the members of the armed forces of the enemy, but likewise, although in a lesser degree, other enemy persons; further, private and public property, fortresses, and roads.").

⁴³ *Id.* at 263 (noting that, in contrast to those individuals who commit war crimes, soldiers who commit hostile acts in the course of normal warfare "do not lose their privilege of being treated as members of armed forces who have done no wrong").

⁴⁴ See Third Geneva Convention, *supra* note 41, art. 118 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.").

⁴⁵ Joan Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 AM. J. INT'L L. 345, 353 (2002) ("[T]he denial of POW status brings with it far more serious and relevant deprivations, including such vital protections as exemption from punishment for lawful acts of war, repatriation at the conclusion of hostilities, and internationally defined fair trial rights.").

⁴⁶ Third Geneva Convention, *supra* note 41, art. 17.

purpose of U.S. interrogation, and that is why it was argued that they were not POWs.⁴⁷

Although this position is legally erroneous and demonstrates the Administration's lack of sensitivity to the international rule of law, it is placing U.S. military personnel abroad in danger, as we have troops in many parts of the world, and it is reasonable to assume that at some time some of them may be captured.⁴⁸ If the same treatment is applied to them, we would be hard put to argue otherwise. Also, significantly, the double standard that we apply to "us" and to "them" has been one of the main reasons why so many in the world oppose our actions.⁴⁹

The Third Geneva Convention governs the treatment of POWs.⁵⁰ Article 4(A) of the Convention grants POW status to "[m]embers of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces."⁵¹ If a question arises as to the status of such combatants, it is to be determined by a judicial process affording due process of law.⁵² Furthermore, if any combatant is believed to have violated the law of armed conflict, they can be tried before a judicial body affording them due process of law.⁵³ Whether this

⁴⁷ *Id.* "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 unpleasant or disadvantageous treatment of any kind." *Id.*

⁴⁸ See Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT'L L. 337, 340 (2002). Koh states that the Administration's policy

seriously disserves the long-term interests of the United States—whose nonuniformed intelligence and military personnel will conduct extensive armed activities abroad in the months ahead—to assert that any captive who can be labeled an "unlawful combatant" should be denied prisoner-of-war status under the Geneva Conventions, and hence subjected to trial for "war crimes" before military commissions.

Id.

⁴⁹ See David Luban, *The War on Terrorism and the End of Human Rights*, 22 PHIL. & PUB. POL'Y Q. 9, 12-13 (Summer 2002).

To declare that Americans can fight enemies with the latitude of warriors, but if the enemies fight back they are not warriors but criminals, amounts to a kind of heads-I-win-tails-you-lose international morality in which whatever it takes to reduce American risk, no matter what the cost to others, turns out to be justified.

Id.

⁵⁰ Third Geneva Convention, *supra* note 41.

⁵¹ *Id.* art. 4(A)(1).

⁵² *Id.* art. 5.

⁵³ *Id.* art. 84.

process was afforded to the Guantánamo Bay prisoners is presently unknown.⁵⁴ The U.S. approach was driven by the effort to obtain intelligence information from these prisoners.⁵⁵

The Taliban soldiers are regular combatants and are part of the armed forces of that regime. They are covered by the Geneva Conventions of 1949 as lawful combatants irrespective of whether the conflict is characterized as that of an international or a noninternational character.⁵⁶ The civilians in Afghanistan are also covered by the Fourth Geneva Convention, irrespective of whether the conflict is characterized as that of an international or a noninternational character,⁵⁷ but the presence of U.S. and other foreign forces against the then-constituted government of Afghanistan makes it a conflict of an international character.⁵⁸ In that case, in addition to the 1949 Geneva Conventions,

A prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war.

In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized, and, in particular, the procedure of which does not afford the accused the rights and means of defence provided for in Article 105.

Id.

⁵⁴ See Douglass W. Cassel Jr., *No Courts for Guantanamo*, CHI. DAILY L. BULL., Sept. 5, 2002, at 5.

Hundreds of men captured late last year in Afghanistan are about to begin their ninth month under American military guard at Guantanamo Bay, with no end in sight. They are locked up on the say-so of our military, based on secret intelligence. They are denied access to families, lawyers, courts of law or even military tribunals. Although at least some protest their innocence, their stories are kept from public view. Their liberty is entirely at the mercy of their military captors.

Id.

⁵⁵ See *supra* notes 46-47 and accompanying text.

⁵⁶ Third Geneva Convention, *supra* note 41, art. 2 ("[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.").

⁵⁷ See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

⁵⁸ See Fitzpatrick, *supra* note 45, at 349 ("The POW policy suggests that an undeclared international armed conflict existed at some point between the United States and the Taliban.").

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Protocol I of 1977 applies.⁵⁹ It has been ratified by 161 states but not by the United States.⁶⁰

Even if the conflict were to be classified as a conflict of a noninternational character, Article 3 ("Common Article 3"), which is common to all four Geneva Conventions of 1949⁶¹ and Protocol II of 1977,⁶² establishes equivalent protection to lawful combatants of militias and insurgent groups in conflicts of a noninternational character.⁶³ The Geneva Conventions of 1949 differ from Protocol II of 1977 as to the conditions whereby such combatants qualify for POW status. Under the 1949 Conventions, the four conditions are that the combatants: (1) wear a distinctive emblem or insignia; (2) carry their arms in the open; (3) are commanded by superior officers; and (4) are willing to obey the laws of armed conflict.⁶⁴ Protocol II requires only that the last two conditions be met.⁶⁵ It has been ratified by 152 countries but not by the United States.⁶⁶ One hundred eighty-nine countries have ratified the 1949 conventions.⁶⁷ Even under the terms of the 1949 Conventions, the Taliban forces carried their arms in the open, and, if not their dress, surely the combination of headgear and beards made them identifiable.⁶⁸ They were also

⁵⁹ Protocol I, *supra* note 22.

⁶⁰ See *International Humanitarian Law, State Parties & Signatories: by Treaty*, at <http://www.icrc.org/ihl.nsf/WebNORM?OpenView&Start=52.1.97&Count=150&Expand=52.1#52.1> (last visited Jan. 19, 2003).

⁶¹ See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 3, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, art. 3, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Third Geneva Convention, *supra* note 41, art. 3; Fourth Geneva Convention, *supra* note 57, art. 3.

⁶² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

⁶³ *Id.* art. 1(1).

⁶⁴ Third Geneva Convention, *supra* note 41, art. 4(A)(2)(a)-(d).

⁶⁵ Protocol II, *supra* note 62, art. 1(1) (providing that armed forces or other organized groups must be "under responsible command" and "exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol").

⁶⁶ See *International Humanitarian Law, Protocol II: States and Signatories*, at <http://www.icrc.org/ihl.nsf/WebNORM?OpenView&Start=53.1.84&Count=150&Expand=53.1#53.1> (last visited Jan. 14, 2003).

⁶⁷ See *International Humanitarian Law, 1949 Conventions: States and Signatories*, at <http://www.icrc.org/ihl.nsf/WebNORM?OpenView&Start=43.1.106&Count=150&Expand=43.1#43.1> (last visited Jan. 14, 2003) [hereinafter 1949 Conventions].

⁶⁸ See Thom Shanker & Katherine Q. Seelye, *Who is a Prisoner of War? You Could Look it Up. Maybe.*, N.Y. TIMES, Mar. 10, 2002, at 9 (citing opinion of M. Cherif Bassiouni).

commanded by superior officers. Whether they were willing to abide by the laws of armed conflict is something that would have to be determined.⁶⁹ But Afghanistan did ratify the 1949 Conventions⁷⁰ and is bound by them, and thus is also able to benefit from their protections. Taliban combatants are, therefore, entitled to POW status. Additionally, the Third Geneva Convention of 1949 prohibits the procedures carried out by the United States, as the Convention requires that they be given a fair trial with a proper defense (including the right to counsel)⁷¹ and the right to be treated humanely,⁷² which excludes any form of physical or psychological torture.⁷³ Irrespective of whether the conflict is deemed of

⁶⁹ Contrary to the position taken by the Bush Administration, some scholars assert that once a group of combatants, such as the Taliban forces, qualify under Article 4(A)(1) of the Third Geneva Convention as "[m]embers of the armed forces of a Party to the conflict," such groups need not satisfy the four conditions enumerated in Article 4(A)(2) in order to qualify as prisoners of war:

If you are a member of the armed forces of a country or even a government that is not recognized by the U.S. but is the de facto government, then you are a P.O.W., without regard to requirements for an insignia, etcetera. Those rules apply only to certain kinds of nongovernmental armed forces and there are additional rules to apply to people who don't fall under the umbrella.

Shanker & Seelye, *supra* note 68 (quoting Professor Douglass Cassel, director of the Center for International Human Rights at Northwestern University School of Law).

Furthermore, even if the Taliban fighters failed to qualify as POWs under either subsections (1) or (2) of Article 4(A), they would still qualify under subsection (3), which provides POW status for "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power." Third Geneva Convention, *supra* note 41, art. 4(A)(3); see Adam Roberts, *The Prisoner Question*, WASH. POST, Feb. 3, 2002, at B1.

⁷⁰ Afghanistan became a State Party on September 26, 1956. See *1949 Conventions*, *supra* note 67.

⁷¹ Third Geneva Convention, *supra* note 41, arts. 84, 99, 105.

⁷² *Id.* art. 13.

⁷³ *Id.* art. 99; see Murphy, *supra* note 9, at 475. Murphy explained the situation: Photographs of the initial prisoners arriving at the Camp X-Ray showed them kneeling on the ground, manacled, wearing blue surgical masks, ear cups, and large blackened goggles—which the United States asserted to be necessary security precautions during transport. The prisoners were then held in cells with concrete floors, chain-link fence walls, and corrugated metal roofs, kept fully lit at night. Concern that the prisoners were not being treated in accordance with international standards led to criticisms from foreign governments, nongovernmental human rights organizations, and the UN High Commissioner for Human Rights.

Murphy, *supra* note 9, at 475. See Rajiv Chandrasekaran & Peter Finn, *U.S. Behind Secret Transfer of Terror Suspects* (Mar. 11, 2002), at http://www.truthout.org/docs_02/03.25C.Secret.Transfer.p.htm (last visited Jan. 14, 2003).

an international or non-international character, mistreatment of POWs is a war crime.⁷⁴ The 1949 Geneva Conventions and Protocol I refer to them as “grave breaches.”⁷⁵

The 1949 Geneva Conventions anticipated such disagreements on the interpretation and application of its provisions. Consequently, Article 5 of the Third Convention of 1949 dictates that

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of [that] Convention until such time as their status has been determined by a competent tribunal.⁷⁶

The situation with *al-Qa'eda* fighters is different. If some of these men are found to be fighting along side the Taliban forces and are part of a regularly constituted unit satisfying the conditions stated above, they too are entitled to POW status.⁷⁷ But this does not mean that they cannot be tried for previous crimes where federal criminal jurisdiction would be

Since Sept. 11, the U.S. government has secretly transported dozens of people suspected of links to terrorists to countries other than the United States, bypassing extradition procedures and legal formalities, according to Western diplomats and intelligence sources. The suspects have been taken to countries, including Egypt and Jordan, whose intelligence services have close ties to the CIA and where they can be subjected to interrogation tactics—including torture and threats to families—that are illegal in the United States, the sources said. In some cases, U.S. intelligence agents remain closely involved in the interrogation, the sources said.

Id. See also Daryl A. Mundis, *The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts*, 96 AM. J. INT'L L. 320, 325 (2002) (remarking that “hooding the detainees, even temporarily, might violate the 1984 Torture Convention”); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85.

⁷⁴ See Protocol I, *supra* note 22, art. 85(5) (“Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes.”); Third Geneva Convention, *supra* note 41, art. 130.

⁷⁵ Protocol I, *supra* note 22, art. 85; First Geneva Convention, *supra* note 61, art. 50; Second Geneva Convention, *supra* note 61, art. 51; Third Geneva Convention, *supra* note 41, art. 130; Fourth Geneva Convention, *supra* note 57, art. 147.

⁷⁶ Third Geneva Convention, *supra* note 41, art. 5.

⁷⁷ See *id.* art. 4(A)(2); see also Fitzpatrick, *supra* note 45, at 353 (“Members of militias and organized resistance movements may be POWs, under defined circumstances. Thus, some Al Qaeda suspects captured during fighting in Afghanistan may also be entitled to prescriptive POW status.”) (footnote omitted).

applicable.⁷⁸ On the other hand, if *al-Qa'eda* fighters committed crimes against U.S. military personnel during the conflict in Afghanistan, they can be tried by a military commission in the field, as can Taliban combatants who have committed such crimes against U.S. or allied military personnel during that conflict.⁷⁹ Any crimes committed by Taliban combatants or *al-Qa'eda* fighters prior to the commencement of military operations in that country are either subject to Afghanistan criminal jurisdiction⁸⁰ or, if the crimes were committed against the United States, pursuant to federal criminal jurisdiction.⁸¹

Members of *al-Qa'eda* can be charged with crimes against the United States, including conspiracy, if it can be shown that those individuals were indeed part of a conspiracy or were engaged in any act that constituted a crime against the laws of the United States.⁸² In that case, they can be tried under U.S. federal law. The venue can be changed so that they would not have to be tried in Manhattan or in Virginia.

Perhaps it is also possible to argue that *al-Qa'eda* fighters are members of an insurgent group that is engaging in a conflict of a

⁷⁸ See Michael J. Matheson, *U.S. Military Commissions: One of Several Options*, 96 AM. J. INT'L L. 354, 355 (2002) ("U.S. courts have jurisdiction over several offenses that appear to have been committed by Al Qaeda or Taliban personnel.").

⁷⁹ *Id.* at 358 ("[T]he use of U.S. military commissions can be a lawful and appropriate option in some circumstances The best example might be the trial of persons who have committed violations of the law of armed conflict on the battlefield in Afghanistan but have no provable connection to the September 11 attacks.").

⁸⁰ *Id.* at 357 (noting advantages of trial in a foreign court "since Al Qaeda and Taliban personnel captured in Afghanistan are likely to have committed a wide variety of offenses under Afghan law that could be easier to prove and less politically problematic").

⁸¹ See *supra* note 78 and accompanying text.

⁸² See Matheson, *supra* note 78, at 355-56.

Zacarias Moussaoui has been charged with violating various federal antiterrorism statutes in connection with the September 11 attacks, as well as conspiracy to murder U.S. employees and to destroy property. . . . John Walker Lindh has been charged with conspiracy to murder U.S. nationals, providing material support and services to foreign terrorist organizations, engaging in prohibited transactions with the Taliban, and carrying firearms during crimes of violence.

Id. (footnotes omitted). See *United States v. Moussaoui*, No. 01-455A (E.D. Va. filed Dec. 11, 2001); see also *United States v. Walker Lindh*, No. 02-37a (E.D. Va. filed Jan. 15, 2002). Lindh subsequently pled guilty to two counts that alleged he aided the Taliban and carried explosives. Larry Margasak, *Lindh Pleads Guilty in Deal to Spare Him from Life in Prison*, CHI. DAILY L. BULL., July 15, 2002, at 3; see Juliette Kayyem, *Prosecuting Terrorists*, CHI. DAILY L. BULL., July 16, 2002, at 5 ("The Justice Department's willingness to settle the Lindh case can only be understood as reflecting its own worry that, even in [federal court in Virginia], the evidence prosecutors collected did not justify the specifics in the indictment.").

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noninternational character against the United States.⁸³ In that case, the insurgent group is bound by Common Article 3 of the four Geneva Conventions of 1949, and their attacks upon U.S. targets and U.S. civilians constitute war crimes (as an alternative to considering those acts as crimes against federal or state criminal laws).⁸⁴ Article 2(1) of Protocol II, however, has since clarified the definition of “armed conflict” as contained in Common Article 3⁸⁵ to exclude “isolated and sporadic acts of violence.”⁸⁶ As the almost simultaneous assault upon the World Trade Center and the Pentagon seems to fit squarely within this exclusion, it is reasonable to conclude that “[t]he September 11 attacks did not launch an internal armed conflict within the United States, as understood by international humanitarian law.”⁸⁷

In short, the intellectual dishonesty of the Administration’s position, vis-à-vis the detainees at Guantánamo Bay, is predicated upon the government’s attempt to selectively utilize elements from two distinct constructs, the criminal justice system and the military model, by applying the most advantageous portions of each when it is expedient to do so:

The U.S. has simply chosen the bits of the law model and the bits of the war model that are most convenient for American interests, and ignored the rest. The model abolishes the rights of potential enemies (and their innocent shields) by fiat—not for reasons of moral or legal principle, but solely because the U.S. does not want them to have rights. The more rights they have, the more risk they pose. But Americans’ urgent desire to minimize our risks doesn’t make other people’s rights disappear. Calling our policy a War on Terrorism obscures this point.⁸⁸

⁸³ Cf. Michel Veuthey, *Non-International Armed Conflicts and Guerilla Warfare*, in 1 INTERNATIONAL CRIMINAL LAW: CRIMES 243, 251 (M. Cherif Bassiouni ed., 1986) (quoting the conclusion of the 1962 Commission of Experts that “the existence of an armed conflict, within the meaning of Article 3, cannot be denied if the hostile action, directed against a legal government, is of collective character and consists of a minimum amount of organization”).

⁸⁴ Cf. Fourth Geneva Convention, *supra* note 57, art. 147.

⁸⁵ See Veuthey, *supra* note 83, at 251.

⁸⁶ Protocol II, *supra* note 62, art. 1(2); see Fitzpatrick, *supra* note 45, at 348.

⁸⁷ Fitzpatrick, *supra* note 45, at 348.

⁸⁸ Luban, *supra* note 49, at 12.

In harmony with the war model, the detainees are deprived of the basic rights afforded to criminal defendants, such as the presumption of innocence, the right to counsel, and the right to a prompt hearing.⁸⁹ In line with the legal model, however, the detainees are designated as "unlawful combatants" and are thereby deprived of POW status.⁹⁰ This, in turn, subjects them to severe penal sanctions when, instead, they should be entitled to combat immunity.⁹¹ In addition, rather than being eligible for immediate release at the cessation of hostilities,⁹² they are subject to *indefinite* detention.⁹³

Generally, terrorist acts do not transgress the laws of war.⁹⁴ Moreover, the United States has traditionally prosecuted international terrorists in civilian criminal courts.⁹⁵ Yet, to apply the laws of war to groups such as *al-Qa'eda* could lead, in the case of the September 11th attacks, to anomalous results:

The administration seeks to avoid constitutional and international legal constraints upon the treatment of Al Qaeda captives, and to fight a "war" with essentially no rules. Al Qaeda captives are suspected of past or future terrorist crimes, not violations of the laws of war, and no legal basis exists to detain or try them as "unlawful combatants."

If a new paradigm is being suggested, significant and undesirable implications may result. Characterizing the struggle to eradicate Al Qaeda as an international armed conflict should logically make U.S. military installations legitimate targets for Al Qaeda, using

⁸⁹ *Id.* at 10.

⁹⁰ *Id.*

⁹¹ *Id.* at 9-10.

⁹² See Third Geneva Convention, *supra* note 41, art. 118.

⁹³ Luban, *supra* note 49, at 11; see Christopher Newton, *Judge: No Rights for Detainees: Taliban, al-Qaida Suspects Can Be Held Indefinitely*, CHI. SUN-TIMES, Aug. 1, 2002, at 26.

A federal judge ruled . . . that suspected Taliban and al-Qaida fighters held in Cuba do not have a right to U.S. court hearings, allowing the military to hold them indefinitely without filing charges.

The 600 men held at . . . Guantanamo Bay, Cuba, are not in the United States and thus do not fall under federal court jurisdiction, U.S. District Judge Colleen Kollar-Kotelly said.

Id.

⁹⁴ Fitzpatrick, *supra* note 45, at 346.

⁹⁵ *Id.*

lawful methods of warfare. The result would be to decriminalize violent conduct that can now be treated as terrorist or common crimes.⁹⁶

In sum, the government's attempt to "have its cake and eat it too" has not only caused much confusion and consternation⁹⁷ among both domestic⁹⁸ and international bodies⁹⁹ but, more importantly, has placed the members of our own military at risk of receiving like illegal treatment in the event of their capture during future engagements.

E. *The Presidential Order Establishing Special Military Commissions*

On November 13, 2001, President Bush issued a Military Order regarding the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," which authorized the establishment of special military commissions to try, inter alia, those persons alleged to be responsible for the attacks of September 11th.¹⁰⁰ Although the Order was

⁹⁶ *Id.* at 348-49 (footnote omitted).

⁹⁷ See, e.g., Katherine Q. Seelye, *War on Terrorism Brings Some Odd Legal Twists*, CHI. DAILY L. BULL., June 25, 2002, at 2 ("In one of the strange turns in the war on terrorism, two Americans are being held in military brigades without access to lawyers, while two foreigners accused of terrorist activities are being tried in federal court with the full range of protections usually accorded to Americans."); Lynn Sweet, *Detaining Padilla: Legal Debate on His Rights Opens*, CHI. SUN-TIMES, June 12, 2002, at 7; Laurence H. Tribe, *Citizens and Combatants*, CHI. DAILY L. BULL., June 19, 2002, at 6.

⁹⁸ See David Rennie, *US Acting Like Star Chamber, Says Judge*, DAILY TELEGRAPH (London), Aug. 15, 2002, at 16.

A judge has compared the Bush administration's actions over the detention of an alleged Taliban fighter with those of medieval monarchs.

Yaser Esam Hamdi, who was in custody at the Guantanamo Bay naval base in Cuba, was transferred to a military prison in Virginia after he told authorities he was born in America. He has been held incommunicado ever since.

The government has ruled that Hamdi has no right to see a lawyer, but Robert Doumar, a US district judge, said he could find no precedent "of any kind in any court" for the decision, and compared the government's behaviour to monarchs laying down the law through the secret hearings of the Star Chamber.

Hamdi, 21, has been declared an "enemy combatant" with neither the rights of a US citizen nor those of a foreign prisoner of war. But the government refused to release evidence supporting the description.

Id.

⁹⁹ See Murphy, *supra* note 9, at 475.

¹⁰⁰ Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001) [hereinafter Military Order].

purportedly designed to ensure that accused noncitizens received "a full and fair trial,"¹⁰¹ the effect of the Order was a crushing blow to American democratic values,¹⁰² including the rights to a presumption of innocence, an independent judiciary, trial by jury, unanimous verdicts, public proceedings, due process, and appeals to higher courts.

The Military Order gives the President (or, where designated, the Secretary of Defense) the power to identify the particular persons who will be tried by the military commission,¹⁰³ create the rules that the commission will operate under,¹⁰⁴ appoint those who will be the judges,¹⁰⁵ prosecutors, and defense lawyers,¹⁰⁶ and decide all appeals.¹⁰⁷ The entire process can be held in secret, including execution,¹⁰⁸ and there is no mechanism to provide for any accountability to Congress, the courts, or the American public.¹⁰⁹ In this way, the Order provides the President, and in some instances the Secretary of Defense, with the greatest array of legal powers to be exercised in the justice system that has ever been vested in a single person, office, or branch of government since the birth of this nation.¹¹⁰ In fact, the Order expresses the President's unprecedented finding that, based upon "the nature of

¹⁰¹ *Id.* § 4(c)(2).

¹⁰² See, e.g., Maryam Elahi, *Military Tribunals: A Travesty of Justice*, 29 HUM. RTS. 15, 15 (Winter 2002) ("The president's executive order establishing military tribunals to try those whom he deems to be 'terrorists' is not only in violation of international human rights law, but it also flies in the face of U.S. domestic law."); Bryan Robinson, *Due Process or Star Chamber: Critics Worry Military Tribunals Will Violate Terror Suspects' Rights* (Nov. 15, 2001), at http://abcnews.go.com/sections/us/DailyNews/military_tribunals011115.html (last visited Mar. 10, 2003) ("President Bush's order establishing military commissions to put non-U.S. citizens accused of terrorism on trial will make it easier for the government to win convictions—a decision civil libertarians believe could compromise the basic rights the United States has defended.").

¹⁰³ Military Order, *supra* note 100, § 2(a).

¹⁰⁴ *Id.* § 4(c).

¹⁰⁵ *Id.* § 4(b).

¹⁰⁶ *Id.* § 4(c)(5).

¹⁰⁷ *Id.* § 4(c)(8).

¹⁰⁸ See *id.* § 4(c)(4)(B).

¹⁰⁹ See *id.* § 7(b)(2).

¹¹⁰ See Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1277 (2002).

Under the Order, the executive branch acts as lawmaker, law-enforcer, and judge. That is what James Madison warned against when he wrote: "The accumulation of all powers legislative, executive, and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

Id. (quoting THE FEDERALIST NO. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1961)).

international terrorism” and the danger to the United States, “it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.”¹¹¹

Further, the Order’s lack of any definition for the term “international terrorism”¹¹² means that the President alone will determine the type of conduct that will be held to violate the law. The Military Order also appears to extend the jurisdiction of military commissions beyond trials concerning “violations of the laws of war” to those concerning violations of all “other applicable laws.”¹¹³ This broad phrase easily could be invoked by the Executive branch to use military commissions to try people accused of committing state and federal crimes that have no relationship whatsoever to any terrorist activity.

In addition to the unlimited restraint upon one’s liberty contained in the Order’s detention clauses,¹¹⁴ the Military Order makes clear that no persons brought before a military commission will be entitled to the presumption of innocence, nor will they be entitled to the protection of the requirement that there be proof of guilt beyond a reasonable doubt.¹¹⁵ The Military Order also makes clear that other fundamental principles of our justice system—principles aimed at ensuring the veracity of the evidence presented and relied upon in convictions—are not applicable in military tribunals. In this regard, all evidence deemed to have “probative value to a reasonable person” may be used in the proceeding.¹¹⁶

The Order grants military commissions “exclusive jurisdiction” over the covered offenses¹¹⁷ such that individuals subject to the Order “shall not be privileged to seek any remedy or maintain any proceeding,

¹¹¹ Military Order, *supra* note 100, § 1(f); see Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT’L L. 1, 1-2 (2001) (criticizing the President’s assessment on the grounds that it “defies logic since its validity must be tested contextually, yet it was made before the creation of any military commission for trial of any particular persons and before any particular rules of evidence had been devised”).

¹¹² Military Order, *supra* note 100, § 2(a)(1)(ii).

¹¹³ *Id.* § 1(e) (“[I]t is necessary for individuals subject to this order . . . to be tried for violations of the laws of war and other applicable laws by military tribunals.”).

¹¹⁴ *Id.* § 3.

¹¹⁵ *But cf. infra* text accompanying notes 140-47 (discussing the revised rules for trials of suspected terrorists).

¹¹⁶ Military Order, *supra* note 100, § 4(c)(3).

¹¹⁷ *Id.* § 7(b)(1).

directly or indirectly," in "any court of the United States," "any court of any foreign nation," or "any international tribunal."¹¹⁸ The Order is clearly intended to eliminate all judicial review of the process, including the "Privilege of the Writ of Habeas Corpus,"¹¹⁹ a fundamental constitutional right.¹²⁰

The Military Order expressly authorizes "closure" of a military commission's proceedings, permitting the President and the Secretary of Defense to decide whether or not to conduct secret proceedings.¹²¹ In this way, the Military Order creates a system that answers only to the President.

Neither the Constitution nor any federal statute permits the President to create a military court with the jurisdiction to try all cases of alleged international terrorism against the United States.¹²² The Constitution contains no article, section, or clause that provides the President with the power to create military commissions, and the Supreme Court has never held that the President has any implied authority to do so absent congressional action.¹²³ In fact, the Constitution is quite clear that when Congress acts, it *alone* has the authority to create and permit the use of military commissions.¹²⁴ This

¹¹⁸ *Id.* § 7(b)(2).

¹¹⁹ U.S. CONST. art. I, § 9, cl. 2.

¹²⁰ For a discussion of the constitutionality of the Order's attempt to indefinitely suspend the right to seek habeas corpus relief, see Paust, *supra* note 111, at 12-26.

¹²¹ See Military Order, *supra* note 100, § 4(c)(4)(B); see also Cam Simpson, *Binalshibh a Likely Candidate for 1st Tribunal Trial*, CHI. TRIB., Sept. 18, 2002, at 1 ("Experts said that in the Bush administration's view Binalshibh is the ideal type to be tried by tribunal because of his potential value as an intelligence source and the government's desire to subject him to lawyer-free interrogation.")

¹²² See Katyal & Tribe, *supra* note 110, at 1286 ("[N]either the terrorism statutes on the books as of September 11, or the ones that Congress enacted afterward, provide for a military trial for acts of terrorism.")

¹²³ See *id.* at 1279-80.

Both the majority opinion and the Chase concurrence in *Milligan* hold congressional authorization to be at least a necessary requirement for such tribunals. This general principle of *Milligan*—a principle never repudiated in subsequent cases—leaves the President little unilateral freedom to craft an order to detain people on his own suspicion for indefinite warehousing or trial at his pleasure in a system of military justice.

Id.

¹²⁴ See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139-40 (1866) (Chase, J., concurring and dissenting).

authority is created by the powers vested in Congress to "declare War,"¹²⁵ "raise Armies,"¹²⁶ "constitute Tribunals inferior to the supreme Court,"¹²⁷ "define and punish . . . Offences against the Law of Nations,"¹²⁸ and "make Rules for the Government and Regulation of the land and naval forces."¹²⁹

In addition, the Military Order is in clear violation of the International Covenant on Civil and Political Rights ("ICCPR"),¹³⁰ which became binding upon the United States in 1992.¹³¹ Among other provisions contained in Article 14 of the ICCPR, the Order transgresses an individual's right: to "a fair and public hearing by a competent, independent and impartial tribunal established by law;"¹³² to be presumed innocent until proven guilty;¹³³ and to have "his conviction and sentence . . . reviewed by a higher tribunal according to law."¹³⁴ Furthermore, because the President's Order applies only to individuals who are non-citizens,¹³⁵ it violates the ICCPR's ban on discriminatory

Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success

The power to make the necessary laws is in Congress; the power to execute in the President. . . . Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, *without the sanction of Congress*, institute tribunals for the trial and punishment of offences, either of soldiers or civilians

Id. (emphasis added).

¹²⁵ U.S. CONST. art. I, § 8, cl. 11; see WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENT* 831 (2d ed. 1920).

[I]n general, it is those provisions of the Constitution which empower Congress to "declare war" and "raise armies," and which, in authorizing the initiation of *war*, authorize the employment of all necessary and proper agencies for its due prosecution, from which this tribunal derives its original sanction."

WINTHROP, *supra*.

¹²⁶ U.S. CONST. art. I, § 8, cl. 12.

¹²⁷ *Id.* art. I, § 8, cl. 9.

¹²⁸ *Id.* art. I, § 8, cl. 10.

¹²⁹ *Id.* art. I, § 8, cl. 14.

¹³⁰ Dec. 16, 1966, 999 U.N.T.S. 177 [hereinafter ICCPR].

¹³¹ See *Mundis, supra* note 73, at 324.

¹³² ICCPR, *supra* note 130, art. 14(1).

¹³³ *Id.* art. 14(2).

¹³⁴ *Id.* art. 14(5).

¹³⁵ Military Order, *supra* note 100, § 2(a).

treatment¹³⁶ and implicates equal protection guarantees under domestic law.¹³⁷

William Safire of the *New York Times* stated that the President has assumed

what amounts to dictatorial power to jail or execute aliens

. . . .

[through use of] [h]is kangaroo court [that] can conceal evidence by citing national security, make up its own rules, find a defendant guilty even if a third of the officers disagree, and execute an alien with no review by any civilian court.¹³⁸

The President's plan has been seen as treating foreign suspects before military courts with "second-or third-class justice."¹³⁹ In a sense, the United States is presenting the image of an abandonment of a long-held tradition of fairness and due process.

On March 21, 2002, due to mounting pressure,¹⁴⁰ the Bush Administration modified the rules for trials of suspected terrorists before military tribunals in the following manner: (1) defendants are provided court-appointed military lawyers or, at their expense, are permitted to privately retain counsel of choice;¹⁴¹ (2) rules of evidence are relaxed to allow hearsay testimony and less foundation for the admittance of evidence obtained on the "battlefield;"¹⁴² (3) trials are "public" in that journalists are allowed to observe;¹⁴³ (4) proceedings are closed where

¹³⁶ See ICCPR, *supra* note 130, art. 14(1); Paust, *supra* note 111, at 17.

¹³⁷ See U.S. CONST. amend. XIV; Katyal & Tribe, *supra* note 110, at 1298-1303.

¹³⁸ William Safire, *Seizing Dictatorial Power*, N.Y. TIMES, Nov. 15, 2001, at A31.

¹³⁹ Reuters, *Legal Expert Attacks US Plan for Military Courts* (Nov. 24, 2001) (quoting Richard Goldstone, former chief prosecutor for the U.N. war crimes tribunal), at <http://www.dawn.com/2001/11/25/int2.htm> (last visited Jan. 20, 2003).

¹⁴⁰ Katherine Q. Seelye, *A Nation Challenged: Military Tribunals: Government Sets Rules for Military War Tribunals*, N.Y. TIMES, Mar. 21, 2002, at A1 ("In establishing the rules . . . the administration made concessions to critics who worried that President Bush's original order on Nov. 13 that established such tribunals had codified a secret rigged system that could simply shuttle defendants to hasty deaths.").

¹⁴¹ Department of Defense Military Commission Order No. 1, § 4(C)(3)(a), (b) (Mar. 21, 2002) [hereinafter MCO No. 1], available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf> (last visited Mar. 10, 2003).

¹⁴² *Id.* § 6(D)(1), (3).

¹⁴³ *Id.* § 6(B)(3).

there is discussion about classified materials;¹⁴⁴ (5) defendants are presumed innocent;¹⁴⁵ (6) conviction requires proof beyond a reasonable doubt by a two-thirds vote of the tribunal, but the invocation of the death penalty requires a unanimous verdict;¹⁴⁶ and (7) appeals would be heard by panels of military and/or civilian specialists.¹⁴⁷

Contrary to the Administration's claims,¹⁴⁸ however, the regulations may be ineffective in correcting the deficiencies contained in the President's November 13th Military Order. Specifically, section 7(B) of the Department of Defense's ("DOD") Military Commission Order provides: "In the event of any inconsistency between the President's Military Order and this Order, including any supplementary regulations or instructions issued under Section 7(A), *the provisions of the President's Military Order shall govern.*"¹⁴⁹ As one author has noted,

[C]ommentators who have praised the regulations may not have read far enough through them. . . . [Section 7(B)] could render the putative improvements made by the regulations . . . illusory. . . . [A]s long as the right to answer such questions remains with the executive branch itself, some of the central provisions of the regulations may turn out to be ones "that palter with us in a double sense, that keep the word of promise to our ear, and break it to our hope."¹⁵⁰

Moreover, not enough attention has been focused on the threshold question of whether the President's Order establishing special military

¹⁴⁴ *Id.* § 4(A)(5)(a), 6(B)(3).

¹⁴⁵ *Id.* § 5(B).

¹⁴⁶ *Id.* § 6(F).

¹⁴⁷ *Id.* § 6(H)(4).

¹⁴⁸ See Seelye, *supra* note 140 ("Mr. Rumsfeld said the government had been working for months to find ways to conduct the tribunals, known as commissions, in a manner that is consistent . . . with fairness and justice under American law.").

¹⁴⁹ MCO No. 1, *supra* note 141, § 7(B) (emphasis added); see Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure*, 23 MICH J. INT'L L. 677, 680-81 (2002); Paust, *supra*, at 678-90 (criticizing new DOD rules).

¹⁵⁰ Eric M. Freedman, *The Bush Military Tribunals: Where Have We Been? Where Are We Going?*, 17 CRIM. JUST. 14, 17 (Summer 2002) (quoting WILLIAM SHAKESPEARE, *MACBETH* act 5, sc. 8).

commissions is *ultra vires* because it was issued without Congress first formally declaring war.¹⁵¹

In this regard, it is important to note that, following the September 11th attacks, Congress *did not* declare war, which is its exclusive province under the separation of powers doctrine.¹⁵² The Joint Resolution passed by Congress on September 18, 2001, was not a declaration of war but only authorized the use of "force" to prevent "any future acts of international terrorism against the United States."¹⁵³ In fact, "Congress studiously avoided the use of the word 'war'" in its Resolution.¹⁵⁴ Furthermore, President Bush's strong rhetoric about the "war on terrorism" notwithstanding, the United States is not "at war" with *al-Qa'eda*.¹⁵⁵ Wars are confrontations between states, not individuals.¹⁵⁶

¹⁵¹ *But see* Katyal & Tribe, *supra* note 110, at 1266 ("The military trial of 'unlawful combatants' is no different: Congress at a minimum must clearly provide by law for the trial of such combatants by military commissions; it can do so either through a formal declaration of war or by specific authorizing legislation."); *id.* at 1297 ("Because the executive branch has acted *ultra vires* in even issuing the Order, the Order lacks the constitutional basis necessary to survive separation-of-powers scrutiny."); Alfred Rubin, *Applying the Geneva Conventions: Military Commissions, Armed Conflict, and Al-Qaeda*, 26 FLETCHER F. WORLD AFF. 79, 79 (Winter/Spring 2002) ("[L]egally, there is a serious question as to the President's authority to establish [military commissions] in the absence of a declaration of war by Congress."); Juan R. Torruella, *On the Slippery Slopes of Afghanistan: Military Commissions and the Exercise of Presidential Power*, 4 U. PA. J. CONST. L. 648, 656 (2002) ("Without a congressional declaration of war, however, the President's authority to promulgate a directive like the [Military] Order is questionable. Historically, such presidential actions have been circumscribed to conditions prevalent during constitutionally declared wars.");

¹⁵² *See* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 642 (Jackson, J., concurring) ("Nothing in our Constitution is plainer than that declaration of a war is entrusted only to Congress.");

¹⁵³ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001); *cf.* Koh, *supra* note 48, at 340 n.20 ("The Act of Congress passed immediately after September 11 does not authorize the adjudication by military commissions of past acts by apprehended terrorists.");

¹⁵⁴ Katyal & Tribe, *supra* note 110, at 1285.

¹⁵⁵ *See generally* Fitzpatrick, *supra* note 45, at 348-49 (rebuffing the notion of "the war" on *al-Qa'eda*).

The fact that military forces participate in law enforcement activities against terrorists or drug traffickers has not in the past sufficed to change the character of the "war on terrorism" or the "war on drugs" from a criminal law paradigm to an armed conflict paradigm.

Id. at 346.

¹⁵⁶ 2 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 203 (H. Lauterpacht ed., 7th ed. 1952).

The Bush Administration has cited to two United States Supreme Court opinions, *Ex parte Quirin*¹⁵⁷ and *In re Yamashita*,¹⁵⁸ in support of its position that the President's Order establishing special military commissions is not illegal.¹⁵⁹ These precedents, however, have not been properly represented.

In *Ex parte Quirin*, the Supreme Court addressed the propriety of President Roosevelt's July 2, 1942, order appointing a special military commission to try eight Nazis who came to the United States by submarine and who were alleged to have entered the country for the purpose of destroying war industries and facilities.¹⁶⁰ Roosevelt's order, however, was issued long after the United States had formally declared war against Germany.¹⁶¹ Moreover, not only did the *Quirin* court "mak[e] much of the fact that war had been declared,"¹⁶² but it specifically noted that "[i]t is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation."¹⁶³

Less than one month after the President Roosevelt's order, the Supreme Court upheld the legality of the petitioners' trial on the ground that the prisoners were "unlawful belligerents" on U.S. soil during a war officially declared by Congress.¹⁶⁴ Yet, at that time, the Geneva Conventions of 1949 did not exist, and the laws and customs of war were that combatants not wearing a uniform, acting behind enemy lines, and engaging in acts of espionage or sabotage, could be subject to execution by a firing squad if such facts were established.¹⁶⁵

¹⁵⁷ 317 U.S. 1 (1942).

¹⁵⁸ 327 U.S. 1 (1946).

¹⁵⁹ See Jess Bravin, *Bush Signs Executive Order Establishing Military Tribunals to Try Terror Suspects*, WALL ST. J., Nov. 14, 2001, at A3; *Justice Deformed: War and the Constitution*, N.Y. TIMES, Dec. 2, 2001, § 4, at 14 [hereinafter *Justice Deformed*].

¹⁶⁰ *Quirin*, 317 U.S. at 21, 23.

¹⁶¹ See Joint Resolution of Dec. 11, 1941, Pub. L. No. 77-331, 55 Stat. 796, 796 (1941).

¹⁶² Katyal & Tribe, *supra* note 110, at 1281; see *id.* at 1281 n.86 (marshaling citations from *Quirin* that indicate the necessity of a declared war).

¹⁶³ *Quirin*, 317 U.S. at 29.

¹⁶⁴ *Id.* at 30-37, 48.

¹⁶⁵ Mundis, *supra* note 73, at 321 ("Because unlawful combatants, saboteurs, and spies, among others, are not subject to the jurisdiction of court-martial, such persons have historically been prosecuted by military commissions.").

By a long course of practical administrative construction by its military authorities, our Government has likewise recognized that those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission.¹⁶⁶

This is surely not the case, however, with respect to civilians in the United States—even those who may plan or who have engaged in criminal acts which we now call terrorism.¹⁶⁷ The criminal laws of the United States and the criminal justice system that we have can more than adequately deal with these situations.¹⁶⁸

Lastly, the precedential value of *Quirin* is highly suspect,¹⁶⁹ as “a principal reason for authorization of these military tribunals was the government’s wish to cover up the evidence of the FBI’s bungling of the case.”¹⁷⁰ Accordingly, the Bush Administration’s reliance on *Quirin* is misplaced.

In addition, any attempt to find support for the President’s Military Order in 10 U.S.C. § 821 is similarly unavailing. Section 821, which is Article 21 of the Uniform Code of Military Justice, provides, in pertinent part:

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions . . . or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by

¹⁶⁶ *Quirin*, 317 U.S. at 35.

¹⁶⁷ Cf. Koh, *supra* note 48, at 340 (“*Quirin* nowhere gave the president carte blanche unilaterally to create an alternative military system of criminal justice for suspicious aliens captured abroad.”).

¹⁶⁸ *Id.* at 337 (“[F]ederal prosecutors have successfully tried and convicted in U.S. courts numerous members of Al Qaeda, the very terrorist group charged with planning the September 11 attacks, for earlier attacks on the World Trade Center and the U.S. embassies in Tanzania and Kenya.”).

¹⁶⁹ *Id.* at 340 n.17.

¹⁷⁰ Katyal & Tribe, *supra* note 110, at 1291; see David J. Danelski, *The Saboteur’s Case*, 1 J. SUP. CT. HIST. 61 (1996); see also *Justice Deformed*, *supra* note 159 (pointing out that the trial in *Quirin* “was an embarrassing skirting of the legal process that occurred mainly to cover up the FBI’s failure to listen when one of the saboteurs attempted to confess and turn in his comrades”).

statute or by the law of war may be tried by military commissions . . . or other military tribunals.¹⁷¹

The predecessor of § 821 was Article 15 of the Articles of War,¹⁷² upon which the Court in *Quirin* predicated its ruling that President Roosevelt was justified in issuing his July 1942 order establishing the military commission:

By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. . . . By his Order creating the present Commission [the President] has undertaken to exercise the authority conferred upon him by Congress¹⁷³

Yet, the Supreme Court distinctly qualified its holding by noting that “the President, as Commander in Chief, by his Proclamation *in time of war* has invoked that law.”¹⁷⁴ In any event,

independent evidence [demonstrates] that 821 did not absorb constructions its predecessor, Article 15, had been given during declared wars: When the UCMJ was codified in 1950, Congress deleted the words “in time of war” from another provision, Article of War 78, to make clear that that provision, evidently in contrast to such others as Article 15, permitted a court-martial to impose death or other punishment for certain forms of trespass in circumstances “amounting to a state of belligerency, but where a formal state of war does not exist.”

In general, the UCMJ has been read narrowly to avoid military trials, *in the absence of a formal declaration of war*, of those who do not serve in our armed forces. . . .

The UCMJ’s term “in a time of war” thus requires a congressionally declared war to provide jurisdiction

¹⁷¹ 10 U.S.C. § 821 (2000).

¹⁷² Katyal & Tribe, *supra* note 110, at 1287.

¹⁷³ *Ex parte Quirin*, 317 U.S. 1, 28 (1942).

¹⁷⁴ *Id.* (emphasis added).

over civilians for courts-martial or military tribunals. This strict reading provides an answer to those who treat *Quirin* as giving a definitive gloss to 821, for it explains why the Court's "in time of war" language should be read narrowly. . . .

Indeed, if the UCMJ were stretched to give the President the power to create the tribunals purportedly authorized by this Order, then it would risk making the statute an unconstitutional delegation of power.¹⁷⁵

In re Yamashita, another case arising out of the Second World War, involved General Tomoyuki Yamashita, who was tried before a military commission convened in the Philippine Islands by order of General Douglas MacArthur pursuant to the latter's authority as military commander in the field under the Articles of War.¹⁷⁶ Yamashita, the former commander of the Japanese armed forces in the Philippines, was charged with failing to control the activities of his troops and permitting them to commit numerous atrocities.¹⁷⁷ Despite the fact that no affirmative act was alleged or proven against him,¹⁷⁸ the commission found Yamashita guilty and sentenced him to death by hanging.¹⁷⁹ After the Supreme Court denied relief, the commander was executed.¹⁸⁰

Contrary to the claims of the Bush Administration, however, language from the Court's opinion directly undercuts the assertion that the President's Order is valid absent a formal declaration of war. For, in its decision, the *Yamashita* Court explicitly cautioned that the power of military tribunals to try and punish combatants is without qualification only "so long as a state of war exists—from its declaration until peace is proclaimed."¹⁸¹ Additionally, the proceedings in *Yamashita* have since been severely criticized by legal scholars.¹⁸² Thus, claims that these two World War II cases justify the present Military Order are baseless.

¹⁷⁵ Katyal & Tribe, *supra* note 110, at 1288-90 (emphasis added) (footnotes omitted).

¹⁷⁶ *Yamashita*, 327 U.S. 1, 10-11 (1946).

¹⁷⁷ *Id.* at 13-14.

¹⁷⁸ *Id.* at 34 (Murphy, J., dissenting).

¹⁷⁹ *Id.* at 5.

¹⁸⁰ See M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 431 (2d rev. ed. 1999).

¹⁸¹ *Yamashita*, 327 U.S. at 11-12 (emphasis added).

¹⁸² A. FRANK REEL, THE CASE OF GENERAL YAMASHITA (1949); F.J.P. VEALE, ADVANCE TO BARBARISM: HOW THE REVERSION TO BARBARISM IN WARFARE AND WAR-TRIALS MENACES

The policies and practices mentioned above in connection with the President's Order establishing military commissions bring no credit to this government nor to this people in the eyes of the world, but our blind spot to others' perceptions makes us lose sight where it is in our national interest to see clearly. As a result, we believe in our own propaganda and reject the truths that others see. And, in time, we ask incredulously why it is that we are disliked and even hated by so many. Seeing ourselves in the reflection of our own mirror leads us to the conclusion that it is "they" who are wrong. After all, that mirror tells us that we are the fairest of them all.

F. *The USA PATRIOT Act and its Constitutional Validity*

After scant deliberation, the United States Congress passed the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001" ("USA PATRIOT Act" or "Act"),¹⁸³ which was signed into law by President Bush on October 26, 2001.¹⁸⁴ The passage of the Act caused much debate due to its many controversial provisions that violate equal protection and due process.¹⁸⁵ It is also noteworthy that these very provisions, which comprise the heart of the USA PATRIOT Act, were already prepared long before the attack that occurred on September 11th.¹⁸⁶ The happenings of September 11th simply provided law-enforcement and intelligence interests with the golden opportunity to (1) enact proposals that previously had been rejected or were found to be unconstitutional¹⁸⁷ and (2) enlarge their own powers while concomitantly eroding the civil liberties of law-abiding American citizens. Contrary to popular

OUR FUTURE 224-26 (1953); M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 36-37 (1997).

¹⁸³ Pub. L. No. 107-56, 115 Stat. 272 (2001). The USA PATRIOT Act can also be found in U.S. FEDERAL LEGAL RESPONSES TO TERRORISM 309-496 (Yonah Alexander & Edgar H. Brenner eds., 2002) [hereinafter RESPONSES]. This source is very helpful because it includes the language of the Act itself and the pertinent sections of the United States Code that it altered.

¹⁸⁴ RESPONSES, *supra* note 183, at xxvi.

¹⁸⁵ See sources cited *infra* note 287.

¹⁸⁶ Jennifer Van Bergen, *The USA PATRIOT Act Was Planned Before 9/11* (May 20, 2002) ("Many people do not know that the USA PATRIOT Act was already written and ready to go long before September 11th."), at http://www.truthout.org/docs_02/05.21B.jvb.usapa.911.htm (last visited Mar. 10, 2003); see JAMES X. DEMPSEY & DAVID COLE, TERRORISM & THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY (2002).

¹⁸⁷ Van Bergen, *supra* note 186.

perception, the USA PATRIOT Act is not directed exclusively at suspected foreign terrorists.¹⁸⁸

1. Coordination Between Law Enforcement and Intelligence

Perhaps the USA PATRIOT Act's greatest threat to personal privacy, as well as to the Fourth Amendment's requirement of "probable cause,"¹⁸⁹ is contained in the Act's provisions that sanction the sharing of information between law enforcement and intelligence agencies.

Traditionally, law enforcement has focused on the investigation of crime and the collection of evidence for trial.¹⁹⁰ The methods by which such evidence is obtained are often subject to public scrutiny, and law enforcement organizations are generally required to operate within the strict parameters of the law.¹⁹¹ In contrast, intelligence agencies operate in secret; their activities are often illegal, and they give "the highest priority to protection of [their] sources and methods."¹⁹² In addition, such organizations engage in covert disruption¹⁹³ and, when operating abroad, have been known to participate directly in the destabilization of foreign regimes.¹⁹⁴

The Federal Bureau of Investigation ("FBI") is, of course, considered the leading national law enforcement agency in the United States, being described by the Attorney General as "the primary criminal investigative agency in the federal government."¹⁹⁵ On the other hand, the Central

¹⁸⁸ See Nancy Chang, *The USA PATRIOT Act: What's So Patriotic About Trampling on the Bill of Rights?* (Nov. 2001) at 2, at http://www.ccr-ny.org/v2/reports/docs/USA_PATRIOT_ACT.pdf (last visited Mar. 10, 2003) ("The Administration's blatant power grab, coupled with the wide array of anti-terrorism tools that the USA PATRIOT Act puts at its disposal, portends a wholesale suspension of civil liberties that will reach far beyond those who are involved in terrorist activities.").

¹⁸⁹ Van Bergen, *supra* note 186 ("For all practical purposes, the section 218 USAPA amendment of FISA allows government to completely avoid Fourth Amendment probable cause requirements for searches and seizures of American citizens (not just immigrants).").

¹⁹⁰ See THE ATTORNEY GENERAL'S GUIDELINES ON GENERAL CRIMES, RACKETEERING ENTERPRISE AND TERRORISM ENTERPRISE INVESTIGATIONS 10 (May 30, 2002), <http://www.usdoj.gov/olp/generalcrimes2.pdf> (last visited Mar. 10, 2003) [hereinafter ATTORNEY GENERAL'S GUIDELINES] ("A general crimes investigation . . . may be conducted to prevent, solve, or prosecute such criminal activity.").

¹⁹¹ Kate Martin, *Intelligence, Terrorism, and Civil Liberties*, 29 HUM. RTS. 5, 6 (Winter 2002).

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ See, e.g., *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14.

¹⁹⁵ ATTORNEY GENERAL'S GUIDELINES, *supra* note 190, at ii.

Intelligence Agency ("CIA"), from its creation in 1947 by the National Security Act, has been statutorily prohibited from exercising any "police, subpoena, or law enforcement powers or internal security functions."¹⁹⁶ It has always been understood that the CIA's intelligence operations were to be directed overseas and to focus on foreign nationals.¹⁹⁷

In the late 1960s and early 1970s, an unprecedented amount of intelligence activity in the United States was directed at innocent citizens and domestic organizations by, inter alia, the FBI, the CIA, and the military.¹⁹⁸ Following revelations of the alarming scope of such activities, the Senate "Church Committee" ("Committee") issued a lengthy report in which it concluded that

virtually every element of our society has been subjected to excessive government-ordered intelligence inquiries. Opposition to government policy or the expression of controversial views was frequently considered sufficient for collecting data on Americans.

The committee finds that this extreme breadth of intelligence activity is inconsistent with the principles of our Constitution which protect the rights of speech, political activity, and privacy against unjustified governmental intrusion.¹⁹⁹

The Committee further found that

such intelligence surveillance of groups and individuals has greatly exceeded the legitimate interest of the government in law enforcement and the prevention of violence. Where unsupported determinations as to 'potential' behavior are the basis for surveillance of groups and individuals, no one is safe from the inquisitive eye of the intelligence agency.²⁰⁰

¹⁹⁶ 50 U.S.C. § 403-3(d)(1) (2000).

¹⁹⁷ S. REP. NO. 94-755, bk. 3, at 684 (1976) ("CIA's charter in the 1947 National Security Act speaks of 'intelligence.' The legislative history establishes that this means 'foreign intelligence' in the case of the CIA."); James X. Dempsey, *Civil Liberties in a Time of Crisis*, 29 HUM. RTS. 8, 9 (Winter 2002).

¹⁹⁸ S. REP. NO. 94-755, bk. 2, at 165-82.

¹⁹⁹ *Id.* bk. 2, at 169.

²⁰⁰ *Id.* bk. 2, at 177-78.

Significantly, the Committee noted that intelligence agencies "pursued a 'vacuum cleaner' approach to intelligence collection drawing in all available information about groups and individuals, including their lawful political activities and details of their personal lives."²⁰¹

Among other unlawful government intrusions, the Committee highlighted the FBI's COINTELPRO operation, a clandestine program in which the FBI conducted undercover surveillance and disrupted political and religious groups that it viewed as threatening,²⁰² and the CIA's CHAOS project, in which the CIA "amassed thousands of files on Americans, indexed hundreds of thousands of Americans into its computer records, and disseminated thousands of reports to the FBI and other government offices."²⁰³ In this latter regard, the Committee pointed out that the CIA

expanded its program, increasing its coverage of Americans overseas and building an even larger 'data base' on domestic political activity. Intelligence was exchanged with the FBI, National Security Agency, and other agencies, and eventually CIA agents who had infiltrated domestic organizations for other purposes supplied general information on the groups' activities.²⁰⁴

In addition, the Army's surveillance of civilians was described in Senate Report 1183 ("Report") as "[o]ne of the most pervasive of the intrusive information programs which have concerned the Congress and the public in recent years."²⁰⁵ The Report described such military monitoring as follows:

Allegedly for the purpose of predicting and preventing civil disturbances which might develop beyond the control of state and local officials, Army agents were sent throughout the country to keep surveillance over the way the civilian population expressed [its] sentiments about government policies. In churches, on campuses, in classrooms, in public meetings, they took notes, taperecorded, and

²⁰¹ *Id.* bk. 2, at 178.

²⁰² *Id.* bk. 3, at 1-77.

²⁰³ *Id.* bk. 3, at 682; *see id.* bk. 3, at 681-732.

²⁰⁴ *Id.* bk. 2, at 181.

²⁰⁵ S. REP. NO. 93-1183, at 13 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6916, 6928.

photographed people who dissented in thought, word or deed. This included clergymen, editors, public officials, and anyone who sympathized with the dissenters.

... Out of this surveillance the Army created blacklists of organizations and personalities which were circulated to many federal, state and local agencies, [which] were all requested to supplement the data provided. Not only descriptions of the contents of speeches and political comments were included, but irrelevant entries about personal finances, such as the fact that a militant leader's credit card was withdrawn. In some cases, a psychiatric diagnosis taken from Army or other medical records was included.

This information on individuals was programmed into at least four computers according to their political beliefs, or their memberships, or their geographic residence.

The Army did not just collect and share this information. Analysts were assigned the task of evaluating and labeling these people on the basis of reports on their attitudes, remarks and activities. They were then coded for entry into computers or microfilm data banks.²⁰⁶

Following the intelligence abuses of the early 1970s, there was a significant effort in the United States

to create a wall between law enforcement and intelligence agencies and to eject the CIA from domestic activities. That wall has been most visible in the statutory authorities for eavesdropping: Title III²⁰⁷ governs wiretapping in the investigation of crimes and the 1978 Foreign Intelligence Surveillance Act (FISA)²⁰⁸

²⁰⁶ *Id.* at 14, reprinted in 1974 U.S.C.C.A.N. 6916, 6929 (quoting *Hearings Before the Subcomm. on Constitutional Rights of the Judiciary Comm.*, 92d Cong. (1971)) (containing a summary of Senator Ervin's statements).

²⁰⁷ 18 U.S.C. §§ 2510-2522 (2000).

²⁰⁸ 50 U.S.C. §§ 1801-1862 (2000).

governs wiretapping of agents of a foreign power inside the United States for the purpose of gathering foreign intelligence.²⁰⁹

This separation between law enforcement and intelligence was also clearly evidenced in the two sets of guidelines, first prepared by the Attorney General in 1976 that established rules to regulate the FBI's bifurcated duties: (1) The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Domestic Security/Terrorism Investigations²¹⁰ and (2) Attorney General Guidelines for FBI Foreign Intelligence Collection and Foreign Counterintelligence Investigations.²¹¹ These guidelines provided "one set of rules for criminal investigations and another for gathering foreign intelligence relating to espionage or international terrorism inside the United States."²¹²

Yet, following the September 11th attacks, the safeguards separating law enforcement and intelligence were rapidly dismantled. Several provisions of the USA PATRIOT Act are especially pertinent in this regard.

For example, section 203 of the Act provides that "it shall be lawful for foreign intelligence or counterintelligence . . . or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any Federal law enforcement, intelligence . . . or national security official in order to assist the official receiving that information in the performance of his official duties."²¹³ Because the definition of "foreign intelligence information" is so expansive,²¹⁴ "the sharing of such a broad range of information raises the specter of intelligence agencies, once again, collecting, profiling, and potentially harassing U.S. persons engaged in lawful, First Amendment-protected activities."²¹⁵

In a similar vein, section 905 of the Act provides, in pertinent part, that

²⁰⁹ Martin, *supra* note 191, at 5 (citations added).

²¹⁰ <http://www.cnss.gwu.edu/~cnss/levismithdomesticcrimes.pdf> (last visited Mar. 10, 2003).

²¹¹ <http://www.cnss.gwu.edu/~cnss/forintelguide1995.pdf> (last visited Mar. 10, 2003).

²¹² Martin, *supra* note 191, at 5.

²¹³ USA PATRIOT Act § 203(d)(1), 115 Stat. 272, 281 (2001).

²¹⁴ *Id.* § 203(d)(2), 115 Stat. at 281.

²¹⁵ John Podesta, *USA Patriot Act: The Good, the Bad, and the Sunset*, 29 HUM. RTS. 3, 3 (Winter 2002).

the Attorney General, or the head of any other department or agency of the Federal Government with law enforcement responsibilities, *shall* expeditiously disclose to the Director of Central Intelligence . . . foreign intelligence acquired by an element of the Department of Justice or an element of such department or agency, as the case may be, in the course of a criminal investigation.²¹⁶

It is important to point out that the disclosure of such information is *mandatory* under the statutory language.

In addition, section 218 of the Act lowers the standard by which foreign intelligence information can be gathered for use as evidence in criminal cases. Prior to the passage of the Act, the FBI was authorized under FISA to conduct electronic surveillance and to carry out physical searches without satisfying the probable cause standard required in criminal cases.²¹⁷ FISA mandated only that the government applicant had probable cause to believe that the target was “an agent of a foreign power.”²¹⁸ Yet, because of the extraordinary nature of wiretaps and searches under FISA (the target “is never notified of the intrusion”), the use of such methods was permitted only on the understanding that such surveillance techniques would not be utilized for investigating crimes.²¹⁹ Congress, however, recognized that, during the process of gathering foreign intelligence information, evidence of crimes, such as espionage, might be collected.²²⁰ Thus, Congress allowed the use of material collected under FISA to be used as evidence in criminal cases but only in circumstances where the “primary purpose” of the investigation was the gathering of foreign intelligence.²²¹ Otherwise, FISA would provide the government with a loophole by which to bypass the traditional probable cause requirements mandated for searches and seizures in criminal cases.²²² Section 218 of the Act, however, amended FISA to allow

²¹⁶ USA PATRIOT Act § 905(a)(2) 115 Stat. at 388-89(emphasis added).

²¹⁷ Dempsey, *supra* note 197, at 10.

²¹⁸ See 50 U.S.C. §§ 1805(a)(3)(A), 1824(a)(3)(A) (2000).

²¹⁹ Dempsey, *supra* note 197, at 10.

²²⁰ *Id.*

²²¹ *Id.*; cf. 50 U.S.C. §§ 1804(a)(7)(B), 1823(a)(7)(B) (2000).

²²² Dempsey, *supra* note 197, at 10; see U.S. CONST. amend. IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause,

wiretaps and searches as long as "a significant purpose" of the surveillance is the gathering of foreign intelligence information.²²³

Furthermore, on May 30, 2002, the Attorney General issued a new set of guidelines, which announced that the FBI's "highest priority is to protect the security of the nation and the safety of the American people against the depredations of terrorists and foreign aggressors."²²⁴ More significantly, the revised guidelines provide that, "[f]or the purpose of detecting or preventing terrorist activities, the FBI is authorized to visit any place and attend any event that is open to the public, on the same terms and conditions as members of the public generally."²²⁵ This authorization eliminates the decades-old restriction that prevented the FBI from spying on lawful activities, including political gatherings and religious services, absent some indication of a potential federal crime.²²⁶ In fact, the new guidelines even purport to supercede the restrictions of § 552a(e)(7) of the Privacy Act,²²⁷ which prohibits executive agencies from collecting and maintaining First Amendment records, by unilaterally declaring that all of the investigative conduct contemplated by the revised guidelines constitutes "authorized law enforcement activit[ies]" and that, therefore, maintenance of materials collected by such methods is justified.²²⁸

Thus, under the pretext of the war on terrorism, United States law enforcement and intelligence agencies have again been empowered to work in concert with each other, with almost unlimited discretion to choose the targets of their attention. Some of the immediate dangers inherent in such a union are summarized below:

supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

²²³ USA PATRIOT Act § 218, 115 Stat. 272, 291 (2001); see Dempsey, *supra* note 197, at 10.

²²⁴ ATTORNEY GENERAL'S GUIDELINES, *supra* note 190, at ii.

²²⁵ *Id.* at 22.

²²⁶ David Cole, *Misdirected Snooping*, CHI. DAILY L. BULL., June 5, 2002, at 6, 24; see Neil A. Lewis, *Echo of FBI Abuses in Queries on New Role*, *id.*, June 13, 2002, at 2 (quoting Representative Sensenbrenner's question that, "given the fact that the FBI is stretched to the limit, why should they be investigating matters when there is no criminal activity suggested?"); Adam Liptak, *FBI Faces No Legal Obstacles to Domestic Spying*, *id.*, May 31, 2002, at 2, 24.

²²⁷ 5 U.S.C. § 552a(e)(7) (2000). For a discussion of § 552a(e)(7), see generally Steven W. Becker, Comment, *Maintaining Secret Government Dossiers on the First Amendment Activities of American Citizens: The Law Enforcement Activity Exception to the Privacy Act*, 50 DEPAUL L. REV. 675 (2000).

²²⁸ ATTORNEY GENERAL'S GUIDELINES, *supra* note 190, at 23.

- *Privacy Concerns.* As the domestic experience of the United States in the late 1960s and early 1970s vividly illustrates, when law enforcement and intelligence are allowed to work in tandem, the inevitable result will be that innocent and protected activity will be monitored, catalogued, and retained for future use against individuals who find themselves at odds with the prevailing government authority. In addition, even where the inquiring agency is investigating potential criminal conduct, experience teaches that, under the “vacuum cleaner” approach, agents will compile data on a group’s lawful pursuits, as well as private information on the organization’s individual members.²²⁹
- *Evidentiary Standards.* Another serious objection to allowing the sharing of information between intelligence and law enforcement is that the evidentiary value of materials used in criminal prosecutions may become tainted because materials were not obtained under the appropriate and elevated law-enforcement standard. For example, if foreign intelligence information is shared with a law enforcement agency or prosecutors, and such material (or any information obtained therefrom) is later introduced at a criminal trial, the evidence could be suppressed on the grounds that it was not obtained under the accepted criminal standard, i.e., probable cause. Such commingling of information could result in the inadmissibility of critical evidence or, ultimately, in the dismissal of entire cases.²³⁰
- *Indicia of Reliability.* In addition, information gained by means of foreign intelligence techniques does not have the same assurance of reliability and accuracy as that obtained in accordance with traditional law-enforcement standards. For one thing, hearsay, which is an integral component of the foreign intelligence dynamic, is generally inadmissible in penal proceedings. Secondly, because the intelligence community operates clandestinely, often illegally, and, above all, seeks to protect its intelligence-gathering methods and contacts, the manner in which intelligence information

²²⁹ See *supra* text accompanying note 201.

²³⁰ See John Gibeaut, *Winds of Change*, 87 A.B.A. J. 32, 33-34 (Nov. 2001).

is procured and the sources of such data cannot be disclosed and, thus, are not subject to adversary testing.

- *Disruption.* Cooperation between law enforcement and intelligence also poses an increased danger for deliberate disruption of lawful associations based upon political targeting. Intelligence agencies often participate in disruption and, in the case of operations abroad, in the destabilization of undesirable regimes. As is demonstrated by previous domestic experience in the United States, these same tactics will eventually be adopted by law enforcement organizations acting in concert with intelligence agencies.
- *Definition of "Terrorism."* Until there is an internationally recognized and *sufficiently restrictive* definition of "terrorism," the confluence of law enforcement and intelligence should be avoided. Presently, the international community has yet to agree upon a single definition of "terrorism" or "terrorists."²³¹ Without a narrow and workable definition of terrorism, anyone involved in political activity, lawful dissent, religious observance, or even humanitarian and charitable efforts, will be subject to surveillance, seizure of assets, and criminal prosecution.²³² Furthermore, such comprehensive governmental monitoring, or even just the threat of it, will have a chilling effect on the exercise of these cherished activities.²³³
- *Effectiveness in the Fight Against Terrorism.* Lastly, there is little proof that the marriage between law enforcement and intelligence will appreciably advance the battle against

²³¹ William C. Smith, *Legal Arsenal: International Law Can Be an Important Element in the United States' Campaign Against Terrorism*, *id.* 43, 44 (Dec. 2001) (citing the opinion of Professor M. Cherif Bassiouni).

²³² See David Cole, *Terrorizing Immigrants in the Name of Fighting Terrorism*, 29 HUM. RTS. 11, 12 (Winter 2002) ("Once a group is designated as a 'terrorist group,' aliens are deportable for asking people to join it, fundraising for it, or providing any kind of material support to it, including dues."); Curtis Lawrence, *Charges Against Charity Stand: Judge Clears Way for Perjury Trial*, CHI. SUN-TIMES, May 14, 2002, at 10 (describing government proceedings against Benevolence International Foundation, a Muslim charity); see also Steven W. Becker, *The USA PATRIOT Act, Profiling, and U.S. Double Standards*, in MICHELLE GOODWIN, RACE DEMOCRACY & CITIZENSHIP: RACIAL PROFILING IN AMERICA (forthcoming Dec. 2003) (discussing the targeting of Muslim charities).

²³³ See Becker, *supra* note 227, at 698-99, 739.

terrorism. Following the September 11th assault, the FBI, CIA, and the National Security Agency ("NSA") were each independently criticized for failing to act on information that each agency already had in its possession, which could have helped to prevent, or at least warn of, the coming attack.²³⁴ Since each agency, whether through incompetence or administrative inefficiency, failed to act upon material information in its own hands, why would we consider that such agencies would work more effectively together? It is well known that the larger the bureaucracy, the less effectively it operates. To conjoin these law enforcement and intelligence organizations would not enhance their collective ability to fight terrorism, it would only further depreciate it, along with our privacy.

That the above concerns are well grounded is amply demonstrated by the very recent and almost unprecedented release of an opinion from the secret United States Foreign Intelligence Surveillance Court ("FISC").²³⁵ The FISC has been described as "a modern Star Chamber [that] meets behind a cipher-locked door in a windowless, bug-proof, vault-like room guarded 24 hours a day on the top floor of the Justice Department building."²³⁶

On August 22, 2002, the FISC released its May 17, 2002, opinion in *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*,²³⁷ in which it severely criticized federal agents for providing erroneous

²³⁴ The FBI was criticized for its handling of the Zacarias Moussaoui case; the CIA for its inability to promptly convince the FBI to track two of the alleged September 11th hijackers, which the CIA knew had met with *al-Qa'eda* personnel in Malaysia in January 2000; and the NSA for its failure to translate two intercepted messages, which identified September 11th as "zero day" and the beginning of the "match," until September 12th. See Ted Bridis, *FBI Plans Total Makeover Amid Criticism of Terror Intelligence*, CHI. DAILY L. BULL., May 29, 2002, at 3; 'Zero Day': Specific Translations of Possible Pre-Sept. 11 Conversation Revealed (June 19, 2002), http://abcnews.go.com/sections/US/DailyNews/intercept911_020619.html (last visited Mar. 10, 2003).

²³⁵ James Bamford, *U.S. Justice Department Bends the Rules*, CHI. DAILY L. BULL., Aug. 27, 2002, at 5 (noting that this is only the second opinion publicly released by the United States Foreign Intelligence Surveillance Court ("FISC") in its almost twenty-five year history).

²³⁶ *Id.* ("A key problem is that, in its nearly 25-year history, the secret court has approved over 10,000 warrants—with the numbers growing every year—and never turned down a single request.").

²³⁷ No. 02-429 (U.S. Foreign Intelligence Surveillance Ct. May 17, 2002), <http://news.findlaw.com/hdocs/docs/terrorism/fisa51702opn.pdf> (last visited Apr. 9, 2003) [hereinafter *In re FISC*].

information to the court in more than seventy-five applications for secret wiretaps and search warrants.²³⁸ Specifically, the court pointed out that "[i]n virtually every instance, the government's misstatements and omissions in FISA applications and violations of the Court's orders involved information sharing and unauthorized disseminations to criminal investigators and prosecutors."²³⁹ The court also stated that a fair reading of the government's proposed new supplementary minimization procedures²⁴⁰ led to only one conclusion:

[C]riminal prosecutors are to have a significant role directing FISA surveillances and searches from start to finish in counterintelligence cases having overlapping intelligence and criminal investigations or interests, guiding them to criminal prosecution. The government makes no secret of this policy, asserting its interpretation of the [USA PATRIOT] Act's new amendments which "allows FISA to be used primarily for a law enforcement purpose."

Given our experience in FISA surveillances and searches, we find that these provisions . . . particularly those which authorize criminal prosecutors to advise FBI intelligence officials on the initiation, operation, continuation or expansion of FISA's intrusive seizures, are designed to enhance the acquisition, retention and dissemination of *evidence for law enforcement purposes*, instead of being consistent with the need of the United States to "obtain, produce, and disseminate *foreign intelligence information*" as mandated in [50 U.S.C.] §1801(h) and §1821(4). The 2002 procedures appear to be designed to amend the law and substitute the FISA for Title III electronic surveillances and Rule 41 searches. This may be because the government is unable to meet

²³⁸ *Id.* at 16-17; see Dan Eggen & Susan Schmidt, *Secret Terror Court Rebukes U.S.: Justice Department Accused of Repeatedly Lying to Obtain Warrants, Wiretaps*, CHI. TRIB., Aug. 23, 2002, at 1.

²³⁹ *In re FISC*, *supra* note 237, at 18.

²⁴⁰ "Minimization procedures" are those specific procedures designed to "minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons . . ." *Id.* at 8.

the substantive requirements of these law enforcement tools²⁴¹

The FISC held that, with respect to portions of the government's proposed procedures, "the intrusiveness of foreign intelligence surveillance and searches on the privacy of U.S. persons" was not "'consistent' with the need of the United States to collect foreign intelligence information from foreign powers and their agents."²⁴²

After the rebuke it received from the secret foreign intelligence court, the Department of Justice ("DOJ") then launched its ill-fated "Operation TIPS" ("TIPS"), which is an acronym for "Terrorism Information and Prevention System."²⁴³ Through this program, the government sought to recruit "meter readers, truck drivers, cable guys, and other workers whose jobs routinely take them through the nation's neighborhoods to report signs of terrorism to a national hotline."²⁴⁴ Fortunately, TIPS met with immediate and widespread opposition. The United States Postal Service refused to participate in TIPS.²⁴⁵ Civil liberties organizations accused the government of trying to form an "unlicensed security force conducting warrantless searches of people's homes."²⁴⁶ Legislators voiced fears that TIPS would create an Orwellian database to collect and maintain information on innocent citizens.²⁴⁷ The DOJ's proposal to encourage Americans to spy on each other for the government is frighteningly reminiscent of the well-known practice in former

²⁴¹ *Id.* at 22 (emphasis added).

²⁴² *Id.* at 8-9; *see id.* at 25. Unfortunately, this well-reasoned opinion by the FISC was subsequently reversed by the first and only decision ever issued by the United States Foreign Intelligence Surveillance Court of Review. *See In re Sealed Case No. 02-001* (U.S. Foreign Intelligence Ct. Rev. Nov. 18, 2002), <http://news.findlaw.com/hdocs/docs/terrorism/fisa111802opn.pdf> (last visited Apr. 1, 2003). The reviewing court, however, did concede that if the FISC "concluded that the government's sole objective was merely to gain evidence of past criminal conduct—even foreign intelligence crimes—. . . the application should be denied." *Id.* at 35.

²⁴³ *See* Andy Newman, *Operation TIPS: Citizen Snoops Wanted to Report Signs of Terrorism*, CHI. DAILY L. BULL., July 24, 2002, at 1.

²⁴⁴ *Id.*

²⁴⁵ *Postal Service Isn't Involved in Anti-Terror 'TIPS' Program*, *id.*, July 18, 2002, at 1.

²⁴⁶ Newman, *supra* note 243.

²⁴⁷ Jesse J. Holland, *Ashcroft Says TIPS Program Won't Affect Civil Liberties*, CHI. DAILY L. BULL., July 26, 2002, at 2.

communist countries of neighbors turning in one another to the authorities.²⁴⁸

2. "Domestic Terrorism"

One of the other provisions of the USA PATRIOT Act that has sparked the most controversy is that which creates a new federal crime denominated "domestic terrorism."²⁴⁹ Because the Act's definition of "domestic terrorism" is so expansive, it jeopardizes our much-cherished First Amendment rights of freedom of speech and political association.²⁵⁰ Specifically, section 802 defines "domestic terrorism" to include any criminal act occurring primarily within the United States that is "dangerous to human life" which "appear[s] to be intended" "to influence the policy of a government by intimidation or coercion."²⁵¹ Due to the vague and broad terms of the provision, there is likely to be criminalization of legitimate dissent and the authorization of federal law enforcement agencies to investigate and conduct surveillance of various organizations based on their opposition to official policies.²⁵² Also, minor offenses perpetrated by groups such as Green Peace during its protests will constitute "domestic terrorism."²⁵³

3. "Sneak and Peek" Searches

Section 213 of the Act permits "sneak and peek" searches, whereby law enforcement officials are authorized to delay notice of physical or electronic searches by making a showing that "immediate notification of the execution of the warrant may have an adverse result."²⁵⁴ In other words, federal agents could "enter your home, office, or other private place and conduct a search, take photographs, and download your computer files without notifying you until after the fact."²⁵⁵ In this

²⁴⁸ Michele Kayal, *Beyond Civil Liberties: The Societal Costs of Surveillance*, *id.*, July 26, 2002, at 5; Newman, *supra* note 243.

²⁴⁹ Steve Lash, *Aftermath of Sept. 11 Sparks Debate on Security, Liberties*, CHI. DAILY L. BULL., Apr. 27, 2002, at 1.

²⁵⁰ For an overview of the right to association, see Becker, *supra* note 227, at 697-99.

²⁵¹ USA PATRIOT Act § 802(a)(5), 115 Stat. 272, 376 (2001).

²⁵² Chang, *supra* note 188, at 2.

²⁵³ See *id.* ("Environmental activists, anti-globalization activists, and anti-abortion activists who use direct action to further their political agendas are particularly vulnerable to prosecution as 'domestic terrorists.'").

²⁵⁴ USA PATRIOT Act § 213, 115 Stat. at 285-86.

²⁵⁵ Anthony D. Romero, *In Defense of Liberty at a Time of National Emergency*, 29 HUM. RTS. 16, 16 (Winter 2002).

regard, the contemporaneous notice that is normally required by the Fourth Amendment in such situations²⁵⁶ could be suspended for months.²⁵⁷ Furthermore, this provision is equally applicable to United States citizens as to aliens suspected of terrorism.²⁵⁸ In addition, section 213's fundamental alteration of traditional law enforcement procedures is not subject to the Act's sunset provisions.²⁵⁹

4. Monitoring Computer and Internet Use

Section 216 of the Act "substantially changes the law with respect to law enforcement access to information about computer use including Web surfing."²⁶⁰ Enlarging upon concepts relating to pen registers and trap-and-trace devices, which were designed to record incoming and outgoing phone numbers,²⁶¹ section 216 permits the installation of devices that monitor all computer "dialing, routing, addressing, or signaling information" based upon nothing more than the certification of a government attorney or state investigative or law enforcement officer that "the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation."²⁶² This permits government officials to record intimately private information such as the addresses to which you send e-mails and the Internet web sites that you visit.²⁶³

Lastly, notwithstanding language in this provision to the effect that recorded information "shall not include the contents of any communication,"²⁶⁴ the intrusive powers granted to government officials by section 216 are so pregnant for abuse as to render the above prohibition virtually meaningless. This is because the address portion of most e-mails contains a description of the subject of the communication, and, of course, once the surveillance device records the web page being

²⁵⁶ Without such notice, the person subjected to the search cannot contest the warrant's deficiencies with the executing officer or challenge whether the search was conducted in accordance with the warrant's terms. Chang, *supra* note 188, at 3; see U.S. CONST. amend. IV.

²⁵⁷ Dempsey, *supra* note 197, at 9.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ Podesta, *supra* note 215, at 3.

²⁶¹ *Id.*

²⁶² USA PATRIOT Act § 216(b)(1), (c), 115 Stat. 272, 288-90 (2001).

²⁶³ See Romero, *supra* note 255, at 16.

²⁶⁴ USA PATRIOT Act § 216(c), 115 Stat. at 290

visited, a government agent can return to that page and learn precisely the "contents" of what the subject of the surveillance was viewing.²⁶⁵

5. Roving Wiretaps

Section 206 of the Act²⁶⁶ amends FISA and eases restrictions involving domestic intelligence gathering by "allow[ing] a single wiretap to legally 'roam' from device to device, to tap the person rather than the phone."²⁶⁷

This provision could pose particular problems of intrusion because it would, for example, permit the government to tap all of the pay phones in a geographic area simply on the basis that a suspected terrorist was in the neighborhood.²⁶⁸

6. Grand Jury Secrecy Compromised

Traditionally, the disclosure of grand jury materials has, with few exceptions, been limited to those directly participating in the federal criminal law enforcement process, such as government attorneys and their assistants.²⁶⁹ Section 203(a)(1) of the USA PATRIOT Act, however, dramatically alters the rules relating to grand jury secrecy. The Act now "permits disclosure, without court order, to a long list of federal agencies with duties unrelated to law enforcement."²⁷⁰ Specifically, section 203(a)(1) amends Federal Rule of Criminal Procedure 6(e)(3)(C) to allow disclosure "when the matters involve foreign intelligence or counterintelligence . . . or foreign intelligence information . . . to any Federal law enforcement, intelligence, protective, immigration, national

²⁶⁵ See Chang, *supra* note 188, at 3.

Unlike telephone communications, where the provision of dialing information does not run the risk of revealing content, email messages move together in packets that include both address and content information. Also, the question of whether a list of web sites and web pages that have been visited constitutes "dialing, routing, addressing and signaling information" or "content" has yet to be resolved.

Id. (footnote omitted).

²⁶⁶ USA PATRIOT Act § 206, 115 Stat. at 282.

²⁶⁷ Podesta, *supra* note 215, at 4.

²⁶⁸ *Id.*

²⁶⁹ See FED. R. CRIM. P. 6(e); Sara Sun Beale & James E. Felman, *Assessing the USA PATRIOT Act's Changes to Grand Jury Secrecy*, 17 CRIM. JUST. 42, 43-44 (Summer 2002).

²⁷⁰ Beale & Felman, *supra* note 269, at 46.

defense, or national security official in order to assist the official receiving that information in the performance of his official duties."²⁷¹

Apart from the obvious risk that such expansive disclosure poses to the preservation of the secrecy of the materials themselves, there is no judicial supervision of the disclosures, nor is there any requirement that the requesting official make a showing of need in order to override the presumption of secrecy.²⁷² These lack of safeguards are particularly troubling "because the enormous investigative powers wielded by the grand jury and the relatively limited rights possessed by witnesses and targets have been tailored exclusively for the purpose of criminal law enforcement."²⁷³ Now, without any scrutiny, federal prosecutors, on their own initiative or with prompting from other executive agencies, will be able to misuse the almost unlimited investigative powers of grand juries to conduct fishing expeditions into matters totally unrelated to law enforcement, such as those involving foreign intelligence or immigration.²⁷⁴

7. Immigrants' Rights Curtailed

The Act also deprives immigrants of their due process rights and First Amendment protections through two statutory mechanisms that work in concert.²⁷⁵

First, section 411 greatly enlarges the class of immigrants who are subject to removal on terrorist grounds as a result of the Act's broad definitions of "terrorist activities," "engage in terrorist activity," and "terrorist organization."²⁷⁶ For example, the Act defines "terrorist organization" as any "group of two or more individuals, whether organized or not," that engages in "terrorist activity."²⁷⁷ The Secretary of State and the Attorney General are given the power to select *domestic* groups for designation as "terrorist organizations."²⁷⁸ Under the Anti-

²⁷¹ USA PATRIOT Act § 203(a)(1), 115 Stat. at 279.

²⁷² Beale & Felman, *supra* note 269, at 48.

²⁷³ *Id.* at 49.

²⁷⁴ *Cf. id.* at 49 ("The potential for misuse of the grand jury is especially troubling in view of the absence of any requirement of judicial approval of foreign intelligence and counterintelligence information under the Patriot Act.").

²⁷⁵ Chang, *supra* note 188, at 4.

²⁷⁶ *Id.*; USA PATRIOT Act § 411(a), 115 Stat. at 345-48.

²⁷⁷ USA PATRIOT Act § 411(a), 115 Stat. at 348.

²⁷⁸ *Id.* at 347-48.

Terrorism and Effective Death Penalty Act of 1996,²⁷⁹ only foreign groups could be designated as such.²⁸⁰ In addition, the term "engage in terrorist activity" has been greatly enlarged to include soliciting funds for, soliciting membership in, or affording "material support" to a "terrorist organization."²⁸¹ Thus, a noncitizen who gives a donation to a charity can be found to have "engaged in terrorist activity" even when that organization serves social and humanitarian ends and the individual seeks only to further those legitimate ends.²⁸² Therefore, section 411 permits guilt to be imposed solely on the basis of political association protected by the First Amendment:

Before the advent of the Patriot Act, aliens were deportable for engaging in or supporting *terrorist activity*. The Patriot Act makes them deportable for virtually any *associational activity* with a "terrorist organization," irrespective of whether the alien's support has any connection to an act of violence, much less terrorism.²⁸³

Second, section 412 expands the authority of the Attorney General to place noncitizens who he "has reasonable grounds to believe" are involved in terrorist activities in detention during the pendency of removal proceedings.²⁸⁴ These noncitizens may be detained up to seven days without any charges being filed.²⁸⁵ In addition, immigrants that have been "certified" by the Attorney General as suspected terrorists may be subject to *indefinite* detention by the Immigration and Naturalization Service ("INS") "irrespective of any relief from removal for which the alien may be eligible, or any relief from removal granted the alien, until the Attorney General determines that the alien is no longer an alien who may be certified."²⁸⁶ These procedures ignore the salient fact that the "Due Process Clause applies to all 'persons' within

²⁷⁹ Pub. L. No. 104-132, § 302(a), 110 Stat. 1214, 1248-49 (1996).

²⁸⁰ See 8 U.S.C. § 1189(a)(1)(A) (2000).

²⁸¹ USA PATRIOT Act § 411(a), 115 Stat. at 346-47.

²⁸² See Cole, *supra* note 232, at 11-12; Lash, *supra* note 249, at 16; Chang, *supra* note 188, at 4.

²⁸³ Cole, *supra* note 232, at 11.

²⁸⁴ USA PATRIOT Act § 412(a), 115 Stat. at 350-52; see Chang, *supra* note 188, at 5.

²⁸⁵ USA PATRIOT Act § 412(a), 115 Stat. at 351.

²⁸⁶ *Id.*

the United States, including aliens, whether their presence is lawful, unlawful, temporary, or permanent."²⁸⁷

Following the September 11th attacks, the government rounded up 1200 immigrants,²⁸⁸ "mostly Muslims from Arab, Middle Eastern or southern Asian nations, who were held on immigration charges while authorities tried to determine whether they were terrorists."²⁸⁹ These detainees "are being tried in secret proceedings, closed to the public, the press, or even family members. Immigration judges are instructed not to list the cases on the docket, and to refuse to confirm or deny that the cases even exist. Such practices are unprecedented."²⁹⁰ The DOJ has since released a letter in which it stated that of the more than 750 individuals detained by the INS, over 600 had secret hearings.²⁹¹

The government's efforts to conduct such clandestine proceedings have not, however, met with a favorable reception from the courts. On August 3, 2002, a federal district judge ordered the DOJ to release the names of its September 11th detainees pursuant to the Freedom of Information Act.²⁹² The court found that disclosure of the identity of the detainees or their attorneys did not fall within the scope of exemption 7(A), such that it could "interfere with enforcement proceedings."²⁹³ In addition, in late August 2002, the Sixth Circuit Court of Appeals ruled that the government could not hold secret deportation hearings for a man alleged to have terrorist ties.²⁹⁴ In its opinion, the court wrote that "[a] government operating in the shadow of secrecy stands in complete opposition to the society envisioned by the framers of our Constitution."²⁹⁵

²⁸⁷ *Zadvydas v. Davis*, 533 U.S. 678, 679 (2001); see U.S. CONST. amend. XIV, § 1; *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("The Fourteenth Amendment to the Constitution is not confined to the protection of citizens.").

²⁸⁸ See Tamara Audi, *U.S. Detained 600 for Secret Hearings*, CHI. TRIB., July 19, 2002, at 13.

²⁸⁹ Wayne Parry, *Many Held, Few Charged in Terror Roundup*, CHI. DAILY L. BULL., Aug. 27, 2002, at 3.

²⁹⁰ Cole, *supra* note 232, at 12.

²⁹¹ See Audi, *supra* note 288.

²⁹² *FOIA Compels Government to Disclose Names of Detainees in Terrorist Investigation*, 71 BNA CRIM. L. REP. 570, 570-71 (Aug. 14, 2002).

²⁹³ 5 U.S.C. § 552(b)(7)(A) (2000).

²⁹⁴ See Adam Liptak, *In Tense Times, a Court Insists on Open Doors*, CHI. DAILY L. BULL., Sept. 3, 2002, at 2; Parry, *supra* note 289.

²⁹⁵ Parry, *supra* note 289.

As expressed above, the USA PATRIOT Act may in fact be just the opposite. The Act defies the spirit of our forefathers and hinders the cherished values that are the backbone of this great nation. In the recent words of Supreme Court Justice Sandra Day O'Connor, "we're likely to experience more restrictions on personal freedom than has ever been the case in this country."²⁹⁶

G. *The Anti-Terrorism Objective and Domestic Civil Rights Issues*

The war on terrorism netted the Pentagon's budget an extra fifty billion dollars which, being essentially an intelligence and law enforcement activity, is hardly relevant to the war on terrorism.²⁹⁷ Congress, whose business since September 11th is essentially terrorism (over 80% of all legislation in Congress has been related to that subject), lacked the moral courage to oppose the allocation of such resources for the development and production of sophisticated weapon systems.

The mirror that reflected the best in America also reflected an incipient anti-Arab and anti-Muslim prejudice²⁹⁸ and an encroachment on human values and civil rights, all in the name of patriotism.²⁹⁹ In a climate of fear in which existence has become uncertain and clouded by the prospect of further acts of terror-violence, there have been lapses into racial prejudice.³⁰⁰ That this can occur in such a large country can be expected, but what cannot be accepted is government-sponsored

²⁹⁶ Linda Greenhouse, *A Nation Challenged: The Supreme Court; In New York Visit, O'Connor Foresees Limits on Freedom*, N.Y. TIMES, Sept. 29, 2001, at B5.

²⁹⁷ See *US Senate Passes 393-Billion Dollar Defense Bill*, PEOPLE'S DAILY, June 28, 2002, http://english.peopledaily.com.cn/200206/28/eng20020628_98711.shtml (last visited Mar. 10, 2003) (noting that the bill provides for fifty billion dollar increase in defense spending over that authorized for 2002).

²⁹⁸ See Julia Lieblich, *Lack of Trust Tears at Muslims: Fallout from Terrorist Attacks Leaves Many in the U.S. Questioning Their Place in a Country They Have Embraced*, CHI. TRIB., Sept. 13, 2002, at 1; see also Eric Schmitt, *U.S. Seeks to Fingerprint Visa Holders: Civil Groups Outraged*, CHI. DAILY L. BULL., June 6, 2002, at 2.

²⁹⁹ See M. Cherif Bassiouni, *Beware Patriotism When It Seeks to Take Away Rights*, CHI. TRIB., Dec. 30, 2001, at 3.

³⁰⁰ See William J. Haddad, *When the Innocent are Made Victim*, CHI. DAILY L. BULL., Apr. 27, 2002, at 22.

Immediately after the tragedy there emerged a backlash of hate crimes against Arabs and Muslims in the United States. The national media reported stories of murder, armed assaults and batteries (using guns, knives, pepper spray, cars, trucks, and rifles). There were also arsons and firebombings, and even vehicular driving attacks, targeting schools, mosques, and churches.

Id.

discrimination, the erosion of our constitutional freedoms, and the distortion of our rule of law.

The collective political will has been expressed in ways that have raised the specter of the treatment of Japanese-Americans during World War II.³⁰¹ The FBI and the INS have used official racial profiling in detaining more than 1200 Muslims,³⁰² few of whom were actually charged with anything other than immigration violations, which are common among many immigrant nationalities.³⁰³ This new racially driven policy, which has deprived the detainees of their constitutional rights, such as not being arrested without "probable cause," the right to remain silent, and the right to counsel, is a danger to our system of law.³⁰⁴

The climate of war has blurred our peacetime freedoms and broadened the discourse of what may become permissible for the elusive sake of full security. The FBI has even hinted that such abhorrent practices as truth serums and moderate forms of physical pressure³⁰⁵ should be allowed against those only suspected as material witnesses³⁰⁶ and who invoke their constitutional rights to remain silent. Invading the

³⁰¹ Frank H. Wu, *Profiling in the Wake of September 11: The Precedent of the Japanese American Internment*, 17 CRIM. JUST. 52 (Summer 2002); see *Korematsu v. United States*, 323 U.S. 214 (1944).

³⁰² See David A. Harris, *Racial Profiling Revisited: "Just Common Sense" in the Fight Against Terrorism?*, 17 CRIM. JUST. 36, 40-41 (Summer 2002); Kim Barker, *Federal Tactics Criticized in Roundup of 1,100: FBI Defends Detention Policy, But Some Courts Aren't Convinced*, CHI. TRIB., Sept. 11, 2002, at 16; Cam Simpson, *Roundup Unnerves Oklahoma Muslims; Norman Detainees Tell of Ordeals; No Terror Charges Filed*, *id.*, Apr. 21, 2002, at 1.

³⁰³ Barker, *supra* note 302 ("Generally, those detained had overstayed their visas, the kind of immigration law violation commonly overlooked.").

³⁰⁴ See Haddad, *supra* note 300.

³⁰⁵ Kevin Johnson & Richard Willing, *Ex-CIA Chief Revitalizes 'Truth Serum' Debate*, USA TODAY, Apr. 26, 2002, <http://www.usatoday.com/news/nation/2002/04/26/torture.htm> (last visited Mar. 10, 2003).

³⁰⁶ It should be noted that the government's policy of detaining material witnesses for grand jury investigations has recently been ruled unconstitutional. See Larry Neumeister, *Judge Hits Jailing of 9/11 Witness: Rules that Policy is Unconstitutional; Ashcroft Defends It*, CHI. SUN-TIMES, May 1, 2002, at 32; Benjamin Weiser, *Judge Rules Against U.S. on Material-Witness Law*, CHI. DAILY L. BULL., May 1, 2002, at 1. But see *Federal Material Witness Statute Applies to Grand Jury Proceedings*, 71 BNA CRIM. L. REP. 511 (July 24, 2002) (describing opinion upholding government's right to utilize 18 U.S.C. § 3144 to detain witness for grand jury investigation).

privacy of the right to counsel, the DOJ has also been listening in on the conversations of lawyers with clients in federal custody.³⁰⁷

These new measures also demonstrate how much further diversity remains to be accommodated in American society. Federal agencies, including the CIA, FBI, and INS, have few among their ranks who know firsthand, or understand well, Arab and Muslim culture, including the Arabic language. Recent recruits who responded to the FBI's web site are so marginally skilled that they are likely to be more of a hindrance than helpful.³⁰⁸ The result of this current crisis has made matters worse for those affected: it has increased suspicion; prolonged detentions of suspects; and caused an inordinate number of investigative hours spent on dead-ends by our over-burdened law enforcement officers.

If the same mind set and approach used by the CIA, FBI, and INS continue, we are condemned to make the same mistakes that led to September 11th. Massive dragnets are no alternative to a better cultural understanding of the risks we face. That is why these agencies failed to anticipate what happened, and, to-date, they have failed to uncover the planners and support network in the United States for the September 11th attacks.

As detailed above, the USA PATRIOT Act contains numerous violations of constitutional standards,³⁰⁹ and President Bush's Order establishing special military commissions permits evidence to be kept secret and procedural rights to be abridged.³¹⁰ Military commissions are valid for war crimes abroad³¹¹ but are not an acceptable alternative under our system of justice for persons in the United States to whom the Constitution applies. This is precisely what we steadfastly threw in the face of the U.S.S.R., China, and other regimes we deemed undemocratic.

³⁰⁷ See Paul R. Rice & Benjamin Parlin Saul, *Is the War on Terrorism a War on Attorney-Client Privilege?*, 17 CRIM. JUST. 22 (Summer 2002); Deborah L. Rhode, *Terrorists and Their Lawyers*, CHI. DAILY L. BULL., Apr. 16, 2002, at 5 (noting that, in connection with the indictment of defense attorney Lynne Stewart, "a Justice Department surveillance directive, being applied for the first time in this case, gives the government unchecked power to eavesdrop on confidential conversations between lawyers and any clients suspected of terrorism—without prior judicial authorization or statutory basis").

³⁰⁸ See J.M. Lawrence, *FBI on a Mission to Hire Hundreds of New Agents*, BOSTON HERALD, Apr. 1, 2002, at 14.

³⁰⁹ See *supra* Part II.F.

³¹⁰ See *supra* Part II.E.

³¹¹ M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, 43 HARV. INT'L L.J. 83, 100-01 (2002).

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Had any other country announced this, we would have roundly denounced it.

Our valued civil rights are fast becoming a self-inflicted casualty of efforts to prevent terrorism, even though this will not enhance our security.³¹² Our system of criminal justice, with due process for all, is fully capable of dealing with all types of criminal violations.³¹³ If it is a question of venue, there are federal courts in distant places such as Alaska and Guam where security can be assured. It will be up to a few courageous judges to find these measures unconstitutional, informed, perhaps, by Benjamin Franklin's notion that "[t]hey that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."³¹⁴

Vigilant at home and pursuing enemies abroad, government policy goes largely unchallenged by the media and society at large. Those who dare to question or criticize face accusations of justifying evil or "aiding and abetting the enemy"—an intimidation that is perhaps the greatest danger to the American covenant of freedom.³¹⁵ Our ability to criticize

³¹² See David Kravets, *9/11 Attacks Prompt Changes in Legal Rights*, CHI. DAILY L. BULL., Sept. 10, 2002, at 3.

The USA Patriot Act, hurriedly adopted by Congress and signed by Bush six weeks after the terror attacks, tipped laws in the government's favor in 350 subject areas involving 40 federal agencies.

The Bush administration has since imposed other legal changes without congressional consent, such as allowing federal agents to monitor attorney-client conversations in federal prison, and encouraging bureaucrats to deny public access to many documents requested under the Freedom of Information Act.

Id. See also Will Lester, *Threatened Public Could Allow Erosion of Civil Liberties*, *id.*, May 20, 2002, at 2.

³¹³ See M. Cherif Bassiouni, *Jurisdiction in "Terrorism" Cases*, Address at U.S. Naval War College, Conference on International Law & the War on Terrorism (June 26-28, 2002) (on file with author).

³¹⁴ JOHN BARTLETT, BARTLETT'S FAMILIAR QUOTATIONS 422 (14th ed. 1968) (quoting Benjamin Franklin from HISTORICAL REVIEW OF PENNSYLVANIA (1759)).

³¹⁵ In December 2001, Attorney General John Ashcroft told the Senate Judiciary Committee:

To those who pit Americans against immigrants and citizens against non-citizens, to those who scare peace-loving people with phantoms of lost liberty, my message is this: your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America's enemies and pause to America's friends. They encourage people of good will to remain silent in the face of evil.

Senate Judiciary Committee Hearing on Anti-Terrorism Policy, 106th Cong. (2001) (testimony of Attorney General Ashcroft); Lash, *supra* note 249.

must never be inhibited or dulled, for it is one of our fundamental freedoms.

The DOJ's sweeping law enforcement actions against Arabs and Muslims violated established constitutional protections and the rule of law. Attorney General Ashcroft's disparaging remarks about Islam³¹⁶ just added to the simmering anti-Muslim campaign propagated by Hollywood as part of its patriotic effort to combat terrorism. Regrettably, this was urged by Presidential Assistant Karl Rove when he met in Los Angeles with senior industry leaders.³¹⁷ The religious right political movement is abetting this anti-Muslim campaign with derogatory public statements by Pat Robertson³¹⁸ and evangelist Billy Graham's son, Franklin Graham.³¹⁹ Conversely, President Bush has made many efforts to counteract this negativism.³²⁰

The public and the media hardly questioned the domestic policies that were hastily developed in the aftermath of September 11th. Only a few opposed the USA PATRIOT Act; fewer spoke out against the Executive Order establishing Military Commissions, which tribunals could try even permanent residents of the United States. The 1996 law that allows "secret evidence" to be used against persons in the United States, including permanent residents and other lawfully admitted aliens, is still in effect and few dare oppose it.³²¹ This law is a clear violation of the constitutional right to confront and cross-examine those who proffer charges or testimony against another.³²² The DOJ has even illegally expanded the scope of the "secret evidence" to seize assets of charitable Muslim organizations.³²³ This practice, which was a mainstay

³¹⁶ See Salim Muwakkil, *Faith-based Violence and Religious Zealotry*, CHI. TRIB., Mar. 25, 2002, at 17; *infra* text accompanying note 352.

³¹⁷ Massing, *supra* note 14, at 203.

³¹⁸ See Muwakkil, *supra* note 316.

³¹⁹ See *Graham's Son Chides Muslims on 9/11*, CHI. TRIB., Aug. 15, 2002, at 14.

³²⁰ See *supra* note 8 and accompanying text.

³²¹ 8 U.S.C. § 1534(e) (2000).

³²² See U.S. CONST. amend. VI.

³²³ See Curtis Lawrence, *Charity's Rights Not Violated, Judge Says: U.S. Had Cause to Take Muslim Group's Assets, He Rules*, CHI. SUN-TIMES, June 12, 2002, at 22 (noting that seizure of \$900,000 in charity's assets was based upon secret evidence, which charity's attorneys were not permitted to review in charity's suit seeking return of its funds); cf. Ana Mendieta, *45 Protesters Seek Release of Muslim Charity Chief*, *id.*, Sept. 18, 2002, at 18 (quoting statement of Caise Hassan, member of the board of Grenada Muslims and Jews for Human Rights, that "[t]hese are the tactics of a police state, the apartheid in South Africa and the occupied territories in Israel, and they are not worthy of a democratic system"); Steve Warmbir, *Charity Chief Cleared, Charged Again*, *id.*, Sept. 14, 2002, at 10.

of every tyrannical regime in history and which the United States has consistently denounced, is now accepted.³²⁴

To oppose such abuses is viewed as anti-American at a time of national crisis, and few dared to do so. The President set the tone at home when he told foreign governments that "either you are with us, or you are with the terrorists."³²⁵ The zero-sum game meant that any reasonable disagreement with what DOJ is doing, or some of the Madison Avenue approaches of the White House and Department of State ("DOS") political spinsters, becomes impossible.

The challenges of terrorism remain, notwithstanding the security precautions the Administration is rightfully taking,³²⁶ even though airport security appears much more excessive than necessary. Future threats depend, in part, on assessing what happened and on preventing what may happen. We still do not know how September 11th happened; we have no clue as to who planned it, how many on the ground assisted, who may still be in the United States, if they are noncitizens, or whether there were also American-born actors.

The assumption that the nineteen persons identified on the five hijacked planes acted alone in the operation is flawed. Terrorism experts know that such an operation, though basically low-tech, nevertheless

³²⁴ Another mainstay of tyrannical regimes is the use of the military in civilian law enforcement. In this regard, the Bush Administration has called for a review of the Posse Comitatus Act on the grounds that "the threat of terrorism may force government planners to consider using the military for domestic law enforcement, now largely prohibited by federal law." Scott Lindlaw, *Use of Military for Domestic Law Enforcement Study Pending*, CHI. DAILY L. BULL., July 22, 2002, at 2.

The Posse Comitatus Act, 18 U.S.C. § 1385 (2000), provides that

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.

18 U.S.C. § 1385. The statute's historical strictures, however, have been relaxed in modern times in order to allow law enforcement officers engaged in the "war on drugs" access to military and national guard resources and personnel. See 10 U.S.C. § 371 (2000) (allowing use of information collected during military operations); 32 U.S.C. § 112 (2000) (concerning drug interdiction and counter-drug activities); CAROL MOORE, *THE DAVIDIAN MASSACRE* 99, 104 (1995) (describing abuses of the posse comitatus law in the Bureau of Alcohol, Tobacco, and Firearms' assault upon the Branch Davidian church in Waco, Texas in 1993).

³²⁵ Response Address, *supra* note 12, at 1349.

³²⁶ Cf. Gregg Easterbrook, *The All-Too-Friendly Skies: Security as an Afterthought*, in *HOW DID THIS HAPPEN?: TERRORISM AND THE NEW WAR*, *supra* note 11, at 163.

required more than the nineteen or twenty perpetrators identified so far. An operation of such scale requires a great deal of support, planning, and preparation. It necessarily requires a number of persons or teams to deal with logistics, surveillance, transportation, security evaluation, avionics expertise, communications, planning and coordination, and escape for those on the ground. It is also quite rare, if not implausible, to conclude that the nineteen persons identified on the hijacked planes were all part of a suicide pact. The likelihood that nineteen persons were part of a suicide pact is highly improbable. This has never before occurred. Thus, maybe only one person on each plane knew of the suicide mission.

It is convenient to reassure the American public that all nineteen of the perpetrators were foreigners and died in the crashes. This leaves no loose ends, even if intelligence and law enforcement experts know that to be unlikely. The DOJ resorted to that approach in the Oklahoma City bombing by conveying the impression that Timothy McVeigh acted alone, though this may not be the case.³²⁷ The same approach, the single-killer theory, was taken in connection with the assassination of President Kennedy. The danger with that type of distorted reassurance is that it lulls the public into a false sense of security, and the consequences of future preparedness can be harmful.

H. The Intelligence Failure

There was some minimal congressional inquiry into the CIA and FBI failures.³²⁸ But it did not address the cultural tunnel-vision of those organizations when it comes to matters concerning Muslim and Arab cultures. Suffice it to recall how the FBI was scrambling after September 11th to find Arabic interpreters.³²⁹ Neither the FBI nor CIA have anything more than a few token consultants whose background and expertise can help the security of the United States. Americans of Muslim and Arab origin do not figure among presidential appointees,

³²⁷ See GORE VIDAL, *PERPETUAL WAR FOR PERPETUAL PEACE: HOW WE GOT TO BE SO HATED* 47 (2002) (concluding that Timothy McVeigh did not act alone).

³²⁸ See Ken Guggenheim, *Intelligence Panels Invite Spouses of 2 Victims: 9/11 Inquiry Sets 1st Public Hearing*, CHI. TRIB., Sept. 12, 2002, at 14; Ken Guggenheim, *U.S. Missed Many Clues of Sept. 11: Overseas Plane Plot Reported Month Earlier*, CHI. SUN-TIMES, Sept. 19, 2002, at 24 ("Intelligence agencies failed to anticipate terrorists flying planes into buildings despite a dozen clues that Osama bin Laden or others might do it, a congressional investigator said . . ."); cf. Dan Eggen & Bill Miller, *Bush Was Told of Potential Hijacking*, WASH. POST, May 16, 2002, at 1.

³²⁹ See Lawrence, *supra* note 308.

nor are they among the high-level experts consulted by the White House, DOD, DOJ, or CIA. Worse yet, there are few agents in the field from these societies. Thus, most of the information available is what can be bought outside the United States and that is always of questionable value. The CIA can rely on some cooperation from counterpart agencies in the Arab world and elsewhere, but there is no substitute for our own expert analysts who are born to these cultures.

The CIA, FBI, and other intelligence agencies believe that *al-Qa'eda* is an organization but are unable to understand the organization table. The known models of the mafia and other organized crime groups are not applicable in the case of *al-Qa'eda*,³³⁰ neither is the structure of communist cells. The models employed by organizations, such as the Egyptian Islamic Jihad, is more relevant.³³¹ But *al-Qa'eda* combines the features of a movement and several organizational models. The movement model makes it difficult to assess how a worldwide movement can evolve in different countries. In each country where the movement exists, it can affiliate with different local organizations and develop structures that differ from those in other countries.

I. *The War Against Terror Goes On*

The two main targets of the war, Osama bin Laden and Mullah Omar, whose captures were originally presented to us as paramount goals of the war, have not been reached and have become inconsequential.³³² The President's "dead or alive" pronouncement of the two men is still in effect,³³³ but in the meantime, it appears that they are organizing a guerilla war in Afghanistan and more terrorist attacks against U.S. targets whether at home or abroad. The war we won is still ongoing.³³⁴

³³⁰ See Brian M. Jenkins, *The Organization Men: Anatomy of a Terrorist Attack*, in HOW DID THIS HAPPEN?: TERRORISM AND THE NEW WAR, *supra* note 11, at 1, 12.

³³¹ Cf. M. Cherif Bassiouni, *The Face of Terror: Nations Have Struggled with Extremism, Even as They Employed It*, CHI. TRIB., Oct. 21, 2001, § 2, at 1.

³³² Liz Sly, *Bin Laden, Dead or Alive, Eludes U.S. Searchers*, *id.*, Sept. 11, 2002, at 4; Sly, *supra* note 16.

³³³ See Remarks by the President to Employees at the Pentagon and an Exchange with Reporters in Arlington, Virginia, 37 WEEKLY COMP. PRES. DOC. 1324, 1327 (Sept. 17, 2001) (containing President Bush's "dead or alive" announcement).

³³⁴ See Peter Baker, *GIs Battle 'Ghosts' in Afghanistan: Search for Elusive Enemy Frustrates Americans*, WASH. POST, May 16, 2002, at A1.

The guerilla warfare in Afghanistan is likely to increase, and it may also sting beyond what we may be able to absorb. The Taliban and *al-Qa'eda* guerillas, though limited in numbers, benefit from Pakistani and some Afghani popular support, and that is important to their efforts.³³⁵

Future attacks by the Taliban are likely to also be directed against U.N. forces and personnel in Afghanistan and against officials of that interim government.³³⁶ What the results will be on the international community to help Afghanistan remains to be seen. Intertribal conflict is also likely to rekindle, making the task of rebuilding the country more difficult and the U.S. mission there more complicated.³³⁷ To date, the assistance and support we publicly announced to help rebuild Afghanistan have not been forthcoming.

President Bush's prediction that it is going to be a long war is correct.³³⁸ Whether we will have the staying power and the patience to deal with it for as long as it takes remains to be seen. Our political culture has evidenced in the past a deficit in these qualities. Above all, that culture also revealed our predilection for use of force to settle problems that require other means, particularly when it comes to nation-building.³³⁹

J. Diversions

Since the "crusade" against evil directed against the *al-Qa'eda* and Taliban in Afghanistan³⁴⁰ was successfully completed according to the impression created by the White House and DOS spinsters, a new crusade was developed. The Administration's new campaign against the

³³⁵ See Rajan Menon, *The Restless Region: The Brittle States of Central and South Asia*, in HOW DID THIS HAPPEN?: TERRORISM AND THE NEW WAR, *supra* note 11, at 97, 101-02.

³³⁶ See Liz Sly, *Karzai Assassin Fails: Attempt on President's Life, Fatal Explosion Jolt Afghanistan*, CHI. TRIB., Sept. 6, 2002, at 1.

³³⁷ See *The Loya Jirga: One Small Step Forward?*, AFGHANISTAN BRIEFING 3-4 (Int'l Crisis Group, Kabal/Brussels, May 16, 2002) (describing unstable situation between tribes).

³³⁸ See *supra* note 12.

³³⁹ See Michael Ignatieff, *Nation Building Lite*, N.Y. TIMES MAG., July 28, 2002, at 26; see also Joel Rogers, *The End of Innocence*, in A JUST RESPONSE: THE NATION ON TERRORISM, DEMOCRACY, AND SEPTEMBER 11, 2001, *supra* note 4, at 101, 103 (describing the "unauthorized uses of force" employed by the United States).

³⁴⁰ See Ford, *supra* note 3.

“axis of evil,” namely Iran, Iraq, and North Korea,³⁴¹ is at best a diversion.

The first two of these countries are Muslim countries, although nothing logically connects them. Iran has proven in the last few years to be a fairly responsible participant in international affairs.³⁴² The fact that it is developing its conventional military capabilities is no more alarming than what several other countries are doing. As to North Korea’s development of missile and nuclear technology, it is a genuine concern that has to be dealt with but not by linking it to Iran and Iraq. Iraq, on the other hand, has been our albatross since the first Bush Administration, and we never had an effective policy to deal with Saddam Hussein’s regime. Linking these three unrelated countries in an all-encompassing moral sweep has hardly convinced any of our NATO Allies, and for that matter, any other government.

The “axis of evil” pronouncement is not a policy but a public relations diversion. It may strike a responsive chord at home, but abroad it evokes the specter of further U.S. unilateral military action, which most see as a threat to peace and stability.

K. *External Reactions*

The sympathies of 1.3 billion Muslims have not been in our direction, rather they have swung decisively against us.³⁴³ An Egyptian pop-philosophy story goes like this: A man sees another on his hands and knees under a streetlight at night seemingly searching for something. “What are you looking for?” “My watch, I lost it over there,” pointing to the unlit side of the street. “Then, why are you looking here?” “Because here I can see.” In the United States, understanding the culture, religion, and reactions of Arabs and Muslims, and they are different, is done under Washington’s lamplight where all concerned can see what they want. That it has little to do with what is going on in that unlit part of the world blissfully escapes these observers.³⁴⁴ It is not

³⁴¹ Address Before a Joint Session of the Congress on the State of the Union, 38 WEEKLY COMP. PRES. DOC. 133, 135 (Jan. 29, 2002) (naming Iran, Iraq, and North Korea).

³⁴² See, e.g., H. Josef Herbert, *Iran Turns Over Al-Qaida Suspects*, CHI. SUN-TIMES, Aug. 12, 2002, at 21.

³⁴³ See Tom Hundley, *Muslim Anger Toward U.S. Intensifies in Post-9/11 Era*, CHI. TRIB., Sept. 13, 2002, at 16; R.C. Longworth, *In Many Nations, Sympathy Has Turned Into Hostility: Post-9/11 Policies Eroding Goodwill*, *id.*, Sept. 12, 2002, at 8.

³⁴⁴ See Longworth, *supra* note 343 (“Many Arabs and other Muslims, like Third World residents of Latin America and Africa, honor the American victims of terror but insist that

because this country lacks experts on these cultures and societies, but because these views, if different from Washington's wisdom, are not wanted.

The foreign policy establishment, political spinsters, and the media have their way of seeing and doing things. Their list of Washington and New York sages on Islam and Arab affairs seldom includes experts from such ethnic backgrounds. Even congressional hearings draw on that same list. Their explanations are always the same: Arabs and Muslims are violent, intolerant, ignorant, anti-Western, against modernity, and anti-Jewish. Nothing is said about the reasons: U.S. double standards, the plight of these societies at the hands of corrupt and undemocratic regimes supported by the United States, and the injustice suffered by the Palestinians with the U.S.' unflinching support of Israel.³⁴⁵

The Administration has a public relations setup in the White House with the DOS and the DOD to sell its policies to Arab and Muslim peoples all over the world.³⁴⁶ The White House/DOS effort is headed by Charlotte Beers, a former Chicago advertising executive, now an Under-Secretary of State.³⁴⁷ She is approaching these different worlds with Madison Avenue techniques. Paid ads on al-Jazeera TV were at one time contemplated; now there is a special radio broadcast which few in that part of the world are likely to be influenced by.³⁴⁸ Recently Congressman Henry Hyde, Chairman of the House Committee on

the Sept. 11 attacks were payback for the damage that U.S. government policies have done to their countries.").

[A]n overwhelming majority of Muslims worldwide do not believe the attacks were orchestrated by Osama bin Laden, or by Arabs or Muslims. Many believe instead that either the United States or Israel was responsible in an elaborate effort to further demonize the Arab World.

....

What has soured many Muslims on the U.S. over the past year is the way the Bush administration has realigned American foreign policy in a manner that appears deliberately to scapegoat Muslims. In such a view, allowing Israel to define its dispute with the Palestinians as a war on terrorism is the most notable example, but hardly the only one.

Hundley, *supra* note 343.

³⁴⁵ See ISMAIL ZAYID, *PALESTINE: A STOLEN HERITAGE* (1974); M. Cherif Bassiouni, *As the Middle East Goes Up in Flames: Israel's Territorial Expansion Is Presented as an Acceptable Matter of Fact and Not as Illegal Under International Law*, CHI. TRIB., July 20, 2001, at 21.

³⁴⁶ See Hedges, *supra* note 14.

³⁴⁷ Massing, *supra* note 14, at 203; Hedges, *supra* note 14.

³⁴⁸ David Hoffman, *Beyond Public Diplomacy*, 81 FOREIGN AFF. 83, 85 (Mar./Apr. 2002).

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International Relations, had hearings on why the United States cannot sell its policies to the Muslim and Arab masses.³⁴⁹ Had he called knowledgeable experts from that background, he would have known. Here's what they would have said on how things are viewed on the unlit side of the street "that is over there" about America's double standards:

- Islamic fundamentalism is portrayed as violent and "evil," but Jewish and Christian fundamentalism is virtuous orthodoxy.
- "Islam is a religion in which God requires you to send your son to die for him. Christianity is a faith in which God sends his son to die for you."³⁵⁰
- The plight of Arab and Muslim masses is caused by Islam and not by the poverty, ignorance, and despair due to the types of regimes supported by the United States.
- Islamic charities in the United States that support schools, orphanages, and hospitals in Palestine fund "terrorism" and their assets frozen and seized,³⁵¹ while Jewish funding of settlers in Israel who seize Palestinians' land and engage in violence against those who oppose them³⁵² is given tax deductions.
- Teaching Palestinian children that their land was taken by foreign settlers is teaching hatred, while teaching Israeli children that Palestine belongs to the Jewish people is laudable.
- Supporting "moderate" Arab governments is in the interest of the United States, while opposing their undemocratic practices, corruption, and human rights violations is not.
- Justifying the death of an estimated half-a-million Iraqi children resulting from U.S.-sponsored sanctions as the

³⁴⁹ *Id.* at 84.

³⁵⁰ Muwakkil, *supra* note 316 (quoting Attorney General John Ashcroft).

³⁵¹ See Lawrence, *supra* note 323; Mike Robinson, *Islamic Charity's Lawsuit Put on Hold Until Question of Terrorism Support is Cleared*, CHI. DAILY L. BULL., May 14, 2002, at 3.

³⁵² Bassiouni, *supra* note 345.

responsibility of the Iraqi regime,³⁵³ while condemning all killings by Arabs.

- The media is quick to report the injury of 100 Israelis, while you will hardly see anywhere the mention of about 11,000 Palestinians injured.³⁵⁴
- When an Israeli child is killed, it is headline news, a front-page story, and public opinion is shocked. On the other hand, when a Palestinian child is killed it goes as an inside story and is recounted as if it were a traffic incident.³⁵⁵
- The killing of innocent Israelis by suicide bombers is abhorrent terrorism, but the killing of innocent Palestinians by F-16s, Apache helicopter gun ships, M-4 tanks, and artillery and infantry ordinance, even when clearly disproportionate or apparently unjustified, seldom raises concerns.³⁵⁶
- Forcibly removing Taliban combatants from Afghanistan to a U.S. military base in Cuba and denying them POW status is not a violation of the Geneva Conventions³⁵⁷ but, if done to our soldiers by any other power, it would be a war crime.

These are only a few examples of how things are viewed differently "over there" other than under the Potomac limelight. The thing to do is to eliminate double standards and to train some light on the other side of

³⁵³ See National Mobilization to End the Sanctions Against Iraq, at <http://www.8thdaycenter.org/062600.html> (last visited Mar. 10, 2003).

On August 6, 1990 the UN Security Council, under pressure from the US, imposed a near total embargo on Iraq, the most comprehensive sanctions in the history of the United Nations. To date, these sanctions have taken the lives of over one million persons, 500,000 of whom were children under the age of five, in a population of just 22 million person[s]. The death toll continues to climb according to UN reports. Sanctions are a more deadly weapon of mass destruction than the atomic bomb dropped on Hiroshima on August 6, 1945.

Id.

³⁵⁴ M. Cherif Bassiouni, *Rights Should Not Evaporate Amid Conflict*, CHI. TRIB., Mar. 4, 2001, § 2, at 1.

³⁵⁵ Bassiouni, *supra* note 345.

³⁵⁶ M. Cherif Bassiouni, *Arab and Muslims on the Middle East Conflict is Not Inevitable, Nor is Peace Impossible*, CHI. TRIB., Dec. 12, 2001, at 31.

³⁵⁷ See *supra* Part II.D (discussing the treatment of POWs).

the street for answers. When that is recognized and things change, the United States, which is still admired, will also be respected.

L. *Retrenchment*

Since the Administration basically declared victory on all fronts—a dangerous overstatement by the White House and DOS spinsters—it did not turn its attention to the causes of terrorism, which are in large part the result of despair and bitterness. Obviously, this requires long-term policies. But the Administration's policies in the countries from which so many terrorists come remain unchanged: support for the same regimes, no effective efforts to push for the establishment of democracy and the rule of law, and a failure to insist on the enforcement of human rights. But to its credit, the Administration's *Country Report on Human Rights* released in March 2002 identifies many of these countries' failings.³⁵⁸ There is also no change in U.S. policies committing this administration to bringing peace between Israelis and Palestinians through engaged involvement. The latter have suffered most of the consequences of the reciprocal violence through U.S.-supplied F-16s, Apache helicopters, gun-ships, and other military and financial support. The Administration has failed to uphold U.S. law that prohibits Israel from using such weapons to repress civilians³⁵⁹—not even a protest has been lodged.

III. CONCLUSION

The best that can be said about the Afghan war, notwithstanding the bravery of our troops and those of our allies, is that we vanquished without much danger and triumphed without much glory.

If this was a war to win the hearts and minds of the 1.3 billion Muslims, it has been a total failure. What has come out is a callous, arrogant, and insensitive image of America—and that feeds the claims of terrorists. Though President Bush and his Administration have made laudable efforts to convey to the Muslim world that they are not at war with Islam, the message is still weak and without much credibility. The Administration should do more to bring its message to the people of Muslim states and back it with tangible action abroad and at home. One

³⁵⁸ The Department of State's *Country Reports on Human Rights Practices* are available at <http://www.state.gov/g/drl/rls/hrrpt/2001/> (last visited Mar. 10, 2003).

³⁵⁹ See 22 U.S.C. § 2754 (2000) ("Defense articles and defense services shall be sold or leased by the United States Government under this chapter to friendly countries *solely* for internal security, for legitimate self-defense . . .") (emphasis added).

of the first steps toward solving the war on terrorism and gaining the trust of Muslims would be to promote and push for peace in the Middle East. Peace can be achieved if the same rules could be applied to each side. The first step towards peace is human reconciliation, which occurs when both sides demonstrate respect for the lives and well being of others. The establishment of a Palestinian state on the West Bank and Gaza with some territorial adjustments, as was discussed in Camp David in July 2000, is feasible but not with all the security limitations on Palestinian sovereignty that the plan contained.

As to our victory over the Taliban, it did not enhance our moral standing with most governments nor with world public opinion. Besides, it is not over yet. Terrorism is not analogous to war because it is essentially a crime, and crimes are best dealt with through law enforcement. The response to terrorism is the pursuit of justice, relentless and unyielding. Our response should be guided by the fact that we are dealing with individuals who are relatively few in number, belonging to one or more organizations, possibly present or active in several countries with a wider support base in still other countries, and with the financial resources to carry out their criminal activity. Terrorism, like drug trafficking and organized crime, is a worldwide phenomenon; globalization makes it even more so. A country, no matter how powerful, cannot by itself fight a few small criminal organizations scattered all over the world. What is needed is strengthened international cooperation to facilitate extradition, obtaining criminal evidence abroad, and freezing and seizing assets used to finance transnational criminal activities. We need to develop multiple strategies as we reassess intelligence gathering and sharing in the United States, security measures at airports, other law-enforcement issues, and the new role of the military in combating terrorism.

The American people have lost the innocence attached to our way of life. If terrorists manage to cause this society to curtail its constitutional liberties or to become divided, they will have succeeded in their ultimate goal. Will the American people be satisfied with the pursuit of justice, which can only come through legal means, or will they want revenge, which has thus far motivated the Administration's resort to extra-legal practices?

We have proved to be a mighty nation, but a nation is only great when it acts on the basis of high moral principles by *consistently* doing what is right.

Yet, the most immediate question to be addressed is whether the federal government has seized upon the tragic events of September 11th as a pretext to expand its powers by surreptitiously taking away our civil liberties under the guise of the "war on terrorism." In order to soberly answer this disturbing question, however, we need to stop admiring ourselves in front of the mirror; lest, when we turn around from our present state of patriotic narcissism, our freedoms are all gone, snatched away like a thief in the night.³⁶⁰

³⁶⁰ See 1 *Thessalonians* 5:3-6.

3 For when they shall say, Peace and safety; then sudden destruction cometh upon them, as travail upon a woman with child; and they shall not escape.

4 But ye, brethren, are not in darkness that that day should overtake you as a thief.

5 Ye are all the children of light, and the children of the day: we are not of the night, nor of darkness.

6 Therefore let us not sleep, as do others; but let us watch and be sober.

Id.; cf. 1 *Thessalonians* 5:2.