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ARTICLES

LEGAL AND POLICY IMPLICATIONS FOR A NEW ERA: THE "WAR ON TERROR"

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"[The War on Terror] is civilization's fight. This is the fight of all who believe in progress and pluralism, tolerance and freedom."[1]

George W. Bush

I. INTRODUCTION

Be it the Middle Ages[2] or the Renaissance,[3] the Great War[4] or the Cold War,[5] the trends of human history have always been characterized by epochs or eras. While it is sometimes difficult to find the exact chronological line separating one era from the next, some eras are born in a single dramatic event of such enormity that the very date overshadows the general theme of the times. As December 7, 1941,[6] was to the World War II[7] era, so too was September 11, 2001,[8] to the new era that many believe has now arrived on the stage of history. Arguably, the post-Cold

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1. George W. Bush, Address to a Joint Session of Congress (Sept. 20, 2001); *see* Cummings, *infra* note 133.

2. The Middle Ages are also commonly known as the Dark Ages due to the total collapse of the great Roman civilization. This period in human history extended from approximately the fall of Rome in 476 A.D., when the last Roman emperor, Romulus Augustulus, was deposed by the barbarian tribes under the leadership of Odoacer the Goth, to 1350 A.D.

3. The Renaissance began in the middle of the 14th century in Italy with a re-awakened interest in all things Greek and Roman. It ended in Germany about 200 years later with Martin Luther's successful challenge to the Roman Catholic Church which had dominated European life and thought.

4. The Great War is also commonly known as World War I. It was the first modern world war and said, at the time, to be the "war to end all wars." The Great War lasted from 1914 until 1918 in which the United States, Great Britain, France, Russia, Italy, Japan, and Belgium defeated Germany, Austria-Hungary, Turkey, and Bulgaria.

5. *See* WALTER LA FEBER, AMERICA, RUSSIA AND THE COLD WAR: 1945-1996 (1996). The Cold War lasted from 1945 until December 1991, with the collapse of the Union of Soviet Socialist Republics into a number of independent republics. *See generally id.*

6. December 7, 1941, was the date of the infamous attack by Japan on the U.S. military facilities at Pearl Harbor, Hawaii. This event directly triggered the U.S. involvement in World War II. Several U.S. lawmakers equated the shock of the terror attack of September 11, 2001, to the surprise Japanese bombing of Pearl Harbor. *See* Miles A. Pomper, *In For the Long Haul*, CONG. Q., Sept. 15, 2001, at 2118.

7. World War II lasted from 1939-1945 in which the United States, Great Britain, the Soviet Union, and other allies defeated Germany, Japan, and Italy.

8. Erica Goode, *A Day of Terror: The Psychology*, N.Y. TIMES, Sept. 12, 2001, at A13 [hereinafter *Day of Terror*]. On September 11, 2001, a total of nineteen members of the terrorist *al-Qa'eda* network hijacked four domestic U.S. passenger aircraft while in flight (five terrorists in three of the planes and four in the fourth). The terrorists crashed two of the aircraft into the twin towers of the World Trade Center in New York. The terrorists crashed another plane into the Pentagon, Washington, D.C., but passengers forced down the fourth plane into a field in Pennsylvania. According to a *New York Times* tally, along with billions of dollars in property loss, approximately 3,067 were killed, not including the 19 terrorists. *See Dead and Missing*, N.Y. TIMES, Feb. 10, 2002, at A12. This figure in-

War[9] era may have indeed given way to a new period labeled by most commentators as the "War on Terror."[10]

The purpose of this monograph is to survey the dominant characteristics of the War on Terror and to briefly highlight some of the legal and policy implications that confront the United States. Ultimately, even if one is cynical enough to believe that the world politic is ruled primarily by the application or threat of force,[11] it is nevertheless of critical importance from both a national and an international perspective that the United States rubricate its leadership role by thoughtful concerns for the positive advancement of the rule of law.[12] The world's most precious commodities—the promotion of democratic values[13] and human rights[14]—must not become causalities of the War on Terror.

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cludes 184 dead at the Pentagon (counting the 59 passengers on the hijacked plane) and 40 dead in Pennsylvania. *See id.*

9. The so-called post-Cold War era began in 1991. It was referred to as the post-Cold War era because no clear new world theme had emerged.

10. *See, e.g.*, Katharine Q. Seelye & Elisabeth Bumiller, *After the Attacks: The President; Bush Labels Aerial Terrorist Attacks 'Acts of War,'* N.Y. TIMES, Sept. 13, 2001, at A16. President Bush first used the phrase "war on terror" on September 11, 2001, aboard Air Force One. His first major public address the next day also declared the terrorist attacks as "acts of war." *See id.* Other synonyms include the "War on Terrorism" and the "War on Global Terrorism." *See also General Franks Says War Will Be Long*, USA TODAY, Mar. 29, 2002, at 15A. In regards to the war on terror, Army General Tommy Franks remarked: "The problem is going to last longer than my life span and the life spans of a lot of people . . . ." *Id.* General Franks is in command of the U.S. Central Command.

11. For an excellent discussion of realist theory of international relations, see Joseph Nye, *The New Rome Meets the New Barbarians*, ECONOMIST, Mar. 23, 2002, at 23. Nye writes: "But the new conventional wisdom that America is invincible is equally dangerous if it leads to a foreign policy that combines unilateralism, arrogance, and parochilism." Nye, *supra.*

12. BLACK'S LAW DICTIONARY 1332 (7th ed. 1999). Black's defines the rule of law as "a substantive legal principle. The doctrine that every person is subject to the ordinary law within the jurisdiction." *See id.* The rule of law in international law is found in both treaty obligations and in "customary international law." Customary international law comes from observing past uniformities among nations of a norm or standard that has reached widespread acceptance in the international community. Evidence of customary international law may be found in judicial decisions, the writing of noted jurists, diplomatic correspondence, and other evidence concerning the practice of States.

13. The term "fundamental freedoms" generally refers to all of those basic rights associated with democratic forms of governments and encapsulated in the U.S. Bill of Rights. *See, e.g.*, COMM'N ON THE BICENTENNIAL OF THE U.S. CONSTITUTION, THE CONSTITUTION OF THE UNITED STATES AND THE DECLARATION OF INDEPENDENCE § Forward (1991).

14. The term "human rights" is commonly meant to include so-called first and second-generation human rights. Through treaty and customary international law, first generation human rights are binding on all nation-states. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987). The Customary International Law of Human Rights lists these first generation human rights as: (1) genocide, (2) slavery or slave trade, (3) the murder, or causing the disappearance of, individuals, (4) torture or

II. Policy Considerations for the War on Terror

"The goal of terror is to kill one and frighten 10,000."[15]
Chinese proverb

A. *What Is Terrorism?*

Although many trace the etymology of the word "terror" to France's Reign of Terror under Robespierre and the Jacobians,[16] the employment of terror is a phenomenon that has been around for a very long time in human history.[17] Interestingly, however, there exists no global consensus on a precise definition of "terrorism."[18] This was due in part to the tensions of the Cold War era where West and East could agree on precious little,[19] but also continues today under the cliché that "one man's terrorist is another man's freedom fighter."[20] For instance, suicide bombers[21] in

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other cruel, inhumane or degrading treatment or punishment, (5) prolonged arbitrary detention, (6) systematic racial discrimination, and (7) a consistent pattern of committing gross violations of internationally recognized human rights. *See id.* Second generation human rights are legally binding only on those nation-states that have obligated themselves through treaty. Second generation human rights speak to political and civil freedoms such as the freedom of religion, peaceful assembly, privacy, association, fair and public trial, open participation in government, movement, etc. Second generation human rights are the functional equivalents of democratic values found in the U.S. Constitution. *See generally* Frank Newman & David Weissbrodt, International Human Rights (1991).

15. *See* Sun-tzu, The Art of War 224 (Ralph D. Sawyer trans., 1994).

16. The lawyer Maximilien Robespierre is most often identified as the chief figure during the Reign of Terror, where the revolutionary leaders of the State engaged in the indiscriminate execution of thousands by the guillotine. The height of the Reign of Terror occurred from 1793-1794. Paradoxically, Robespierre was a victim of the guillotine in 1794.

17. *See, e.g.*, The Complete Works of Flavius Josephus (William Whiston trans., 1981). The Hebrew Zealots conducted random acts of assassination against the occupying Romans in Judea prior to the fall of Jerusalem by the Roman legions under Titus in 70 A.D. *See id.*

18. *See* USA Patriot Act, *infra* note 169, § 411.

19. For an excellent discussion of the politics of the Cold War, see La Feber, *supra* note 5.

20. *See, e.g.*, John Norton Moore et al., National Security Law (1990) [hereinafter National Security Law]. Chapter 10 of the text provides an overview of the historical development of terrorism and discusses the proposition that "the causes of terrorism or the political motivation of the individual terrorists are relevant to the problem of definition." *Id.* at 443. Under this proposition, many have argued that acts of violence against "colonialism" or in wars of "national liberation" fall outside of the definition of terrorism. *See id.* Hence, the dilemma of "[o]ne man's terrorism is another man's heroism." *Id.*

21. For example, *The Minneapolis-St. Paul Star Tribune* prefers not to use the word "terrorist" when reporting on Palistinian suicide bombers because each side calls the other terrorists. *See* Lou Gelfand, *Newspaper Careful in Use of Label 'Terrorist,'* Star Trib.

Israel who intentionally kill innocent Jewish civilians may be considered "heroes" by certain segments of the Palestinian people and terrorists by others.[22]

Recognizing the politics associated with reaching an acceptable global definition for terrorism, the United Nations (U.N.) has elected to avoid the term terrorism altogether,[23] to use it in a general sense only,[24] or to carefully carve out very specific acts in selected international treaties to characterize as terrorism.[25] Perhaps the greatest missed opportunity for the U.N. to establish a firm international definition of terrorism as it relates to States that sponsor or support terrorists[26] occurred in its failure to use the word terrorism in the context of the key 1957 U.N. General Assembly resolution defining "aggression"[27] (as it relates to Article 2[28] and

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(Minneapolis-St. Paul, Minn.), Feb. 3, 2002, at 27A; Bob von Sternberg, *Group Wants Star Tribune to Change Policy on 'Terrorist,'* STAR TRIB. (Minneapolis-St. Paul, Minn.), Apr. 3, 2002, at 06A.

22. *See, e.g.*, James Bennet, *Israelis Declare Arab Woman Was in Fact a Suicide Bomber*, N.Y. TIMES, Feb. 9, 2002, at A6. The Israelis have suffered scores of suicide attacks by Palestinian terrorists in the last year. This particular suicide attack was the first such attack against Israel carried out by a female. *See* Margot Dudkevitch, *Use of Woman Suicide Bomber Changes Security Requirements*, JERUSALEM POST, Jan. 28, 2002, at O3.

23. There have been several Draft proposals over the years by various U.N. Commissions and Sub-Commissions regarding the definition of terrorism. *See, e.g.*, 1954 Draft Code of Offenses Against the Peace and Security of Mankind, 9 U.N. GAOR, Supp. No. 9, at 11-12, U.N. Doc A/2693 (1954). The International Law Commission's 1954 Draft Code of Offenses Against the Peace and Security of Mankind contained the following proposed language at Article 25: "[T]he undertaking or encouragement by the authorities of a State of terrorist activity in another State, or the toleration by the authorities of a State of organized activities calculated to carry out terrorist acts in another State . . . ." *Id.* Unfortunately, as of this writing, the U.N. General Assembly has not been able to reach agreement on a final version. In addition, the latest attempt by the U.N. Sub-Commission on Human Rights to come up with a definition of terrorism has met similar troubles. The first draft report of February 2001 listed three essential elements of terrorism. *See id.* A terrorist act: (1) must be illegal, violating national or international law; (2) must be intended to harm the State for political reasons; and (3) must be capable of generating a state of fear in the general population. *See id.* However, in order to reach consensus on its first progress report, the special rapporteur deleted the entire definition. *See* U.N. Doc. E/CN.4/Sub.2/2001/31.

24. *See* U.N. Sec. Council Res. 1368 (Sept. 12, 2001) [hereinafter SC Res. 1368]. The U.N. Security Council resolution uses the word terror or terrorism six times in the short one page document. *See id.* Like all other U.N. efforts in this area, 1368 uses the term terrorism but offers no definition of terrorism other than to affirm that the September 11, 2001, attack on the U.S. was "horrifying terrorist attack[s]." *Id.*

25. *See infra* note 160 and accompanying text.

26. *See* CHASEY, *infra* note 46 and accompanying text.

27. *Definition of Aggression*, G.A. Res. 3314, 29 U.N. GAOR, Supp. No. 31, at 142, U.N. Doc. A/9631 (1957) [hereinafter *U.N. Definition of Aggression*]. The U.N. Definition of Aggression states in main part:

Article 1

Article 51[29] of the U.N. Charter). The U.N. chose to classify the activities of States who send, organize, or support "armed bands, groups, irregulars, or mercenaries, which carry out acts of armed force against a State . . . ,"[30] as engaging in unlawful aggression in direct violation of the U.N. Charter and not as terrorism.

Aggression is the use of armed force by a State against the sovereignty, territorial integrity, or political independence of another State, or in any manner inconsistent with the Charter of the United Nations . . . .

Article 2

The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression . . . .

Article 3

Any of the following acts, regardless of a declaration of war, shall . . . qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State . . . of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State . . . ;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea, or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State . . . in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; or,

(g) The sending by or on behalf of a State of armed bands, groups, irregulars, or mercenaries, which carry out acts of armed force against another State, of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Id.

28. U.N. CHARTER art. 2, para. 4:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Id.

29. U.N. CHARTER art. 51:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures to maintain international peace and security. Measures taken by Members in the exercise of the right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Id.

30. *U.N. Definition of Aggression*, *supra* note 27, at (g).

In the United States, the difficulties in definition do not relate to a reluctance to use the term terrorism,[31] but rest in the sheer number of different government instrumentalities that have offered independent interpretations which, while similar, are not identical.[32] The latest American effort to define terrorism is found at section 411 of the USA Patriot Act, signed into law in November of 2001.[33] Actually, the USA Patriot Act provides definitions for "terrorist organization," "domestic terrorism," and "international terrorism."[34] A terrorist organization is defined as one that is:

> (1) designated by the Secretary of State as a terrorist organization under the process established under current law; (2) designated by the Secretary of State as a terrorist organization for immigration purposes; or (3) a group of two or more individuals that commits terror-

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31. *See* Jim Meenan, *Clinton: Terrorists Misjudged America*, S. BEND TRIB., Oct. 12, 2001, at A1. Former President Bill Clinton touched on this issue in a speech in the Mendel Center at Lake Michigan College and also reminded the audience that the United States government had engaged in terrorism against slaves and American Indians. *See id.* Perhaps the most infamous example of an American solider employing terror against women and children in the context of war was union general William T. Sherman in his march across the deep South in 1864-1865. Sherman's war crimes were in violation of numerous articles of war contained in the Lieber Code, adopted by the U.S. in 1863 as General Order 100. *See generally* RICHARD SHELLY HARTIGAN, LIEBER'S CODE AND THE LAW OF WAR (1983) [hereinafter LIEBER CODE]; MARSHA LANDRETH, WILLIAM T. SHERMAN (1990).

32. There are numerous federal statutes that offer slightly different definitions of terrorism. *See, e.g.*, 28 C.F.R. § 85 where the Department of Justice defines terrorism as "the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives." 18 U.S.C. § 2331 offers a slightly different definition of international terrorism:

> (1) the term "international terrorism" means activities that—
> (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;
> (B) appear to be intended—
> (i) to intimidate or coerce a civilian population;
> (ii) to influence the policy of a government by intimidation or coercion; or
> (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and
> (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum;

18 U.S.C. § 2331 (2000), *amended by* Pub. L. No. 107-56, Title VIII, § 802(a), 115 Stat. 376 (Oct. 26, 2001).

33. *See* USA Patriot Act, *infra* note 169.

34. *Id.*

ist activities or plans or prepares to commit (including locating targets for) terrorist activities."[35]

Domestic terrorism is defined in the Act as the "unlawful use, or threatened use, of force or violence by a group or individuals based [in the United States] . . . committed against persons or property to intimidate or coerce a government, [or] the civilian population . . . in furtherance of political or social objectives."[36] International terrorism is also set out in the Act as follows:

> International terrorism involves violent acts or acts dangerous to human life that violate the criminal laws of the United States or any state, or that would be a criminal violation if committed within the jurisdiction of the United States or any state. These acts appear intended to intimidate or coerce a civilian population, influence the policy of a government by intimidation to coercion, or affect the conduct of a government by assassination or kidnapping. International terrorist acts occur outside the United States or transcend national boundaries in terms of how terrorists accomplish them, the persons they appear intended to coerce or intimidate, or the place in which the perpetrators operate.[37]

Despite the lack of a fixed universal agreement defining terrorism, the essential goal of terrorism is readily identifiable. As the root word implies, the goal of terrorism is to instill fear in a given civilian population by means of violence. In the oft-repeated Chinese proverb, the objective of the terrorist is to kill one and frighten 10,000.[38] While specific acts of terrorism may appear to be mindless and irrational, terrorism is the antithesis of confused behavior. Terrorism is a goal-directed, calculated, and premeditated use of force.

Since the victims of terrorism are invariably innocent civilians,[39] it appears fundamentally logical that a definitional approach should concentrate on the act and not the political, religious, or social causes which motivate the act. Under this regime, the use of violence on a civilian target with intent to cause fear in a given civilian population is easily

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35. *Id.*

36. *Id.* § 802.

37. *Id.*

38. *See* SUN-TZU, *supra* note 15, at 224.

39. "Civilians" are defined in the Geneva Convention of August 12, 1949, Relative to the Protections of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3365, 75 U.N.T.S. 287. The central purpose of the rules is to protect innocent civilians in times of armed conflict. *See id.*

classified as a terrorist act.[40] In other words, to the common understanding of the general public, terrorism is immediately associated with violence that is directed at the indiscriminate killing of innocent civilians to create a climate of fear.[41] In this light, bombings of public places, the sending of letter bombs or poisons through the mails,[42] hijackings of aircraft, hostage taking, etc., are all acts of terrorism regardless of the underlying cause said to justify the attack. In a sense, terrorism can simply be described as making "war" on civilians.[43]

This war on civilians can be committed by individuals,[44] sub-State groups,[45] or by States. States who engage in terrorism are further divided as either State-sponsors or State-supporters of terrorism. A State is considered to be a State-sponsor of terrorism when it uses its own resources to secretly commit acts of terror against another State.[46] When a State openly provides aid and support to a terrorist organization, it is said to be a State-supporter of terrorism. Of course, in terms of culpability under

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40. *But see* Joshua Hammer, *Another Lebanon*, NEWSWEEK, Mar. 4, 2002, at 28. Some Palestinian militants urge that only Israeli soldiers should be targeted in the current conflict as they are "legitimate" targets. *See id.*

41. *See* H. H. COOPER, EVALUATING THE TERRORIST THREAT, PRINCIPLES OF APPLIED RISK ASSESSMENT 4 (Int'l Assoc. of Police Chiefs, Clandestine Tactics & Tech. Series, 1974). Terrorism can be defined as "a purposeful human activity primarily directed toward the creation of a general climate of fear designed to influence, in ways destined by protagonists, other human beings, and through them some course of events." *Id.*

42. *See, e.g.*, Jennifer Barrett, *The Year of Living Dangerously*, NEWSWEEK, Jan. 8, 2002, at 10; David Noonan, *Danger: Handle with Care*, NEWSWEEK, Oct. 22, 2001, at 38. From September to November 2001, five U.S. citizens were killed by ingesting the Anthrax virus sent through the U.S. postal system. *See* Kathy E. Nokes, *Tracking the War on Terrorism Sept. 11 Attacks*, PORTLAND OREGONIAN, Dec. 13, 2001, at A14.

43. CALEB CARR, THE LESSONS OF TERROR: A HISTORY OF WARFARE AGAINST CIVILIANS, WHY IT HAS ALWAYS FAILED AND WHY IT WILL FAIL AGAIN (2002).

44. *See generally* LOU MICHEL & DAN HERBECK, AMERICAN TERRORIST: TIMOTHY MCVEIGH AND THE TRAGEDY AT OKLAHOMA CITY (2001). Timothy McVeigh's 1995 bombing of the Murrah Federal Building in Oklahoma City, Oklahoma, is an example of individual terrorism (Terry Nicholas, an accomplice, was also convicted). The bomb killed 167 people.

45. A sub-State terrorist group is defined as a group of individuals operating within a State but without the knowledge of the State. The Japanese Aum Shinri Kyo religious group was referred to as a sub-State terrorist group following their use of a lethal nerve agent in a 1995 attack in a Tokyo subway. *See, e.g.*, ROBERT JAY LIFTON, DESTROYING THE WORLD TO SAVE IT: AUM SHINRIKYO, APOCALYPTIC VIOLENCE, AND THE NEW GLOBAL TERRORISM (2000). Twelve people died and over 3,000 were injured. *See id.*

46. *See, e.g.*, WILLIAM C. CHASEY, THE LOCKERBIE COVERUP (1995). Libya committed a State-sponsored act of terrorism when it secretly employed Libyan government agents to bomb an American-frequented discotheque in then West Berlin, West Germany, in 1986. *See id.* Libya also committed a second State-sponsored act of terror with the in-flight bombing of Pan Am Flight 800 over Lockerbie, Scotland, in 1989 which killed 278 persons. *See id.*

international law, there really exists little difference between a State that sponsors terrorists and a State that supports terrorists. Both situations are equally illegal under the rule of law.[47] While it is subject to legal debate whether a particular terrorist act committed apart from the support or sponsorship of a State would be considered an "act of war,"[48] a terrorist attack with the support or sponsorship of a State could very well be deemed an act of war under international law.[49]

B. *The War on Terror*

The so-called War on Terror began for the United States on September 11, 2001, with coordinated suicide attacks via hijacked domestic airplanes by nineteen members of a sophisticated "para-military" terrorist network known as *al-Qa'eda*.[50] The simultaneous attacks occurred in New York, Washington, D.C. and Pennsylvania, killing over 3,000 people and destroying billions of dollars in property.[51]

The *al-Qa'eda* is an umbrella organization founded in 1989 by a Saudi Arabian named Osama (or Usama) bin Laden. Osama bin Laden formed the group out of elements of the *Maktab al-Khidamat*, which was founded by Osama bin Laden and Abdallah Azzam (a member of the Palestinian Moslem Brotherhood[52]) in the early 1980s to provide money, equipment, and manpower to the Afghan resistance against the Soviet Union occupation of Afghanistan. With the withdrawal of the Soviets in 1989, bin Laden started *al-Qa'eda* in order to redirect his efforts to "attack the enemies of Islam all over the world."[53]

From the early 1990s until the end of 2001, the *al-Qa'eda* operated openly in the country of Afghanistan with the complete support of the Pashtun-dominated Taliban government.[54] During the tenure of the Taliban regime, the relationship between the Taliban and the *al-Qa'eda* terrorist organization provided a seminal example of State-supported ter-

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47. *U.N. Definition of Aggression*, *supra* note 27 and accompanying text.

48. *See* Ruth Wedgewood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 YALE J. INT'L L. 599 (1999). Wedgewood advocates that terrorism may need to be incorporated into a new legal view of what qualifies as warfare. *See id.*

49. *Id.*

50. *See* ANTHONY H. CORDESMAN, STRATEGIC STUDIES INST., TRANSNATIONAL THREATS FROM THE MIDDLE EAST: CRYING WOLF OR CRYING HAVOC? 91-92 (1999) [hereinafter CRYING WOLF OR CRYING HAVOC].

51. *Day of Terror*, *supra* note 8.

52. *See infra* note 110.

53. CRYING WOLF OR CRYING HAVOC, *supra* note 50, at 92.

54. *See, e.g.*, Christopher Dickey, *Training for Terror*, NEWSWEEK, Sept. 24, 2001, at 50.

rorism.[55] In fact, under the Taliban, Afghanistan became a training ground for thousands of Arab and non-Arab *al-Qa'eda* militants including Kashmiris, Chechens, Uzbeks, Uighurs, and others.[56] These training camps sent cells of well-trained terrorists into numerous countries where they were encouraged to recruit additional members and carry out terrorist attacks.[57]

C. *An Act of War*

In a speech delivered in 1984, then United States ambassador to the U.N., Jeanne J. Kirkpatrick, spoke of a coming "terrorist war [against the United States], [that] is part of a total war which sees the whole society as an enemy, and all members of a society as appropriate objects for violent actions."[58] Her words came to pass on September 11, 2001, and the world community came to understand terrorism as an act of war. Indeed, viewing terrorism as an act of war is a new manifestation of the changing nature of armed conflict. As such, it poses not only new challenges for the historically fixed international rules relating to armed conflict,[59] but it also demands the development of new legal regimes which can effectively address the threat of global terrorism.[60]

Apart from the enormity of the *al-Qa'eda* attack, what made the events of September 11, 2001, so vastly different from all previous incidents of terror[61] was that the United States and the North Atlantic Treaty Organization (NATO) both characterized the terror attack as an "armed attack" on the United States. The unprecedented armed attack determination was significant because it, in turn, immediately signaled that the United States intended to frame the terror attack as an event equivalent to an act

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55. *But see* Ali A. Jalali, *Afghanistan: The Anatomy of an Ongoing Conflict*, PARAMETERS, Spring 2001, at 89. Some commentators have argued that the Taliban regime was not a recognized government. *See id.* Only three nations officially recognized the Taliban as the legitimate government of Afghanistan - Saudi Arabia, Pakistan, and Iran. Jalali writes: "Neither the Taliban-led 'Islamic Emirate of Afghanistan' nor the 'Islamic State of Afghanistan' headed by ousted President Rabbani has the political legitimacy or administrative efficiency of a State." *Id.*

56. *See* CRYING WOLF OR CRYING HAVOC, *supra* note 50. At least one American was trained in an *al-Qa'eda* camp in Afghanistan and joined the Taliban forces. United States citizen John Walker is now on trial in a federal district court in Virginia for crimes associated with his involvement with the terror network.

57. *Id.*

58. Jeanne J. Kirkpatrick, Speech at the Jonathan Institute's Conference on International Terrorism, Washington, D.C. (June 25, 1984).

59. *See infra* notes 66-67 and accompanying text.

60. *See infra* notes 134-148 and accompanying text.

61. *See* National Security Institute, *Terrorist Profiles*, *at* http://nsi.org/Library/Terrorism/profterr.txt (last visited Mar. 31, 2002). The lethality of terrorism has only increased over the years with the United States as the most frequent target of terrorism.

of war[62] under international law. Accordingly, several events soon followed: a "use of force" Joint Resolution was passed by the United States Congress;[63] the President labeled the attack an act of war;[64] and, for the first time in its history, NATO invoked its collective self-defense clause, should a NATO member suffer an "armed attack."[65] Thus, the War on Terror is legally couched by the United States in terms of traditional law of war terminology,[66] even though a non-State actor carried out the actual attack.[67]

Understanding the need for international approval in prosecuting the War on Terror under the rule of law, the United States turned to the U.N. Security Council[68] on the day after the attack in hopes of obtaining a strong use of force resolution.[69] Instead, the United States received what might be deemed as a very strong statement of support by means of U.N. Security Council Resolution 1368.[70] Nevertheless, because of the structured magnitude of the terrorist attack, Resolution 1368 specifically recognized America's "inherent right of individual and collective self-

62. The use of the term "war" or "act of war" traditionally refers to the use of aggressive force against a sovereign State by another State in violation of the U.N. Charter and customary international law. Such acts most often occur without a formal declaration of war. *See* George Petrochilos, *The Relevance of the Concepts of War and Armed Conflict to the Law of Neutrality*, 31 VAND. J. TRANSNAT'L L. 575, 575 (1998).

63. *See* Authorization for Use of Military Force Joint Resolution, *infra* note 76 and accompanying text.

64. *See infra* note 10.

65. *See* North Atlantic Treaty, *infra* note 79 and accompanying text.

66. The term "law of war" is also known as the "law of armed conflict" or "international humanitarian law." The law of war terminology will be used in this monograph. The law of war is based on customary principles and treaty law, e.g., the Geneva Conventions, and applies whether or not a State declares war per its domestic processes.

67. The distinction of whether an event qualifies as an act of war is more important in terms of civil law. *See* Pan American World Airlines, Inc. v. Aetna Cas. & Sur. Co., 505 F.2d 989 (2d Cir. 1974). The Court found that the hijacking of an aircraft by a non-State actor did not qualify as an "act of war" for the purpose of activating an exclusionary clause in the insurance policy. *See id.*

68. U.N. CHARTER art. 24, para. 1; U.N. CHARTER art. 27, para. 3. Article 24 of the U.N. Charter gives the Security Council the "primary responsibility for the maintenance of international peace and security." U.N. CHARTER art. 24, para. 1. Article 27 of the U.N. Charter requires that all permanent members of the U.N. Security Council must agree on enforcement provisions, i.e., the use of armed force. U.N. CHARTER art. 27, para. 3. The permanent members listed at Article 23 of the U.N. Charter are the Republic of China, France, the Soviet Union [Russia now holds the seat], the United States, and Britain. U.N. CHARTER art. 23, para. 1

69. *See* Gordon, *infra* note 91. The U.S. was seeking a resolution similar in tone to U.N. Security Resolution 678 which allowed all members to push Iraq out of Kuwait during the Persian Gulf War "by all means necessary." *Id.*

70. SC Res. 1368, *supra* note 24.

defense in accordance with the Charter"[71] and specifically called on "all States to work together urgently to bring to justice the perpetrators, organizers, and *sponsors* of these terrorist attacks."[72] Resolution 1368 further addressed the issue of responsibility for those States who supported or sponsored the terrorist attacks by "stresses[ing] that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable."[73] Taken as a whole, it can be argued that Resolution 1368 provided the United States and its allies with the legal authority necessary to respond to the terrorist attack through the appropriate use of military force in self-defense should a State who supported, sponsored, or harbored the terrorists refuse to cooperate in bringing those responsible to justice.

The United States Congress was also quick to address the attack. Although Congress elected not to "declare war"[74] under Article I of the Constitution,[75] they did issue a joint resolution which left no doubt as to their desire to authorize the President to use military force if necessary.[76] The joint resolution is cited as the "Authorization for Use of Military Force."[77] This resolution was passed by every member of the Senate and every member of the House of Representatives, save one. Among other things, the Congressional Resolution recognized the authority of the President:

> under the Constitution to take action to deter and prevent acts of international terrorism against the United States . . . [,] [and] authorized [the President] to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."[78]

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71. *See* U.N. CHARTER art. 51, *supra* note 29.

72. *See* SC Res. 1368, *supra* note 24 (emphasis added).

73. *Id.*

74. Certain statutory consequences attach to a Congressionally declared war. For example, 50 U.S.C. § 21 provides that "[w]henever there is a declared war . . . all natives, citizens, denizens, or subjects of the hostile nation or government . . . shall be liable to be apprehended, restrained, secured, and removed as alien enemies." 50 U.S.C. § 21 (2000).

75. U.S. CONST. art. I, § 8, cl. 11.

76. *See* Authorization for Use of Military Force Joint Resolution, Public Law 107-40, 115 Stat. 224.

77. *Id.*

78. *Id.*

NATO, of which the United States is a member, invoked its collective self-defense clause under Article 5 of its Charter where "an armed attack on one or more of [its members] shall be considered an attack on all," and that the members may exercise the right of self-defense which includes the "use of armed force, to restore and maintain the security of the North Atlantic area."[79] The real significance of invoking Article 5, however, rests more in the international recognition that the terrorist attack was, indeed, tantamount to an armed attack or act of war.[80]

Armed with the Congressional Joint Resolution, U.N. Resolution 1368 and the NATO Resolution, the President exercised his constitutional authority as the Commander in Chief[81] and quickly set about gathering the necessary evidence to find those who committed the terrorist attacks and to establish linkage to the State or States that may have provided support to the terrorists.[82] A conclusive body of evidence pointed directly to the *al-Qa'eda* terrorist organization as the perpetrators of the attack and to Afghanistan's Taliban as the State-supporter of the terrorist *al-Qa'eda* organization.[83] Determined to respond, if necessary, under the inherent

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79. North Atlantic Treaty, 63 Stat. 2241, T.I.A.S. 1964 (1949). Article 5 of the Treaty reads:

> The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an armed attack against them all; and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual and collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as is deemed necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

Id.

80. *See, e.g.*, William Drozdiak, *Attack on U.S. is an Attack on All, NATO Agrees*, WASH. POST, Sept. 13, 2002, at A25.

81. U.S. CONST. art. II, § 2, cl. 1.

82. *See U.N. Definition of Aggression*, *supra* note 27.

83. *See Bin Laden Video*, *infra* note 93; Neil King, Jr., *Bush Tough Talk Shakes Up Diplomatic Stance*, WALL STREET J., Jan. 31, 2002, at A20. Any reasonable doubts as to the involvement of Osama bin Laden's terrorist group in the attacks of September 11, 2001, were dispelled by the December 14, 2001, public release of the "bin Laden videotape." The tape establishes that bin Laden: (1) knew when the hijackers would strike; (2) knew that the hijackers understood that they were on a "martyrdom operation," but had no details until shortly before the attacks; (3) was pleasantly surprised by the total collapse of the two towers of the World Trade Center in New York; (4) listened with anticipation to radio broadcasts to confirm the terror attacks; and (5) expressed joy and amusement as he detailed the story of the attacks. *See Bin Laden Video*, *infra* note 93. Perhaps the most convincing segment of the thirty-nine minute tape occurred when bin Laden stated to an unidentified Shaykh: "We calculated in advance the number of casualties from the enemy, who would be killed based on the position of the tower. We calculated that the floors that would be hit would be three or four floors. I was the most optimistic of them all. Due to my experience in this field, I was thinking that the fire from the gas in the plane would melt

right of self-defense as codified in Article 51 of the U.N. Charter,[84] the Bush Administration offered the Taliban government a time-certain ultimatum to turn over the *al-Qa'eda* leaders and to shut down all terrorist camps in Afghanistan.[85] When the Taliban leadership refused to comply with the demand, the United States exercised,[86] in conjunction with NATO and its other allies,[87] the lawful use of military force to accomplish those aims.[88]

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the iron structure of the building and collapse the area where the plane hit and all the floors above it only. This is all that we had hoped for." *Id.*

84. U.N. CHARTER art. 51, *supra* note 29.

85. *Bush Issues Ultimatum to the Taliban, Calls Upon Nation and World to Unite and Destroy Terrorism*, CONG. Q., Sept. 22, 2001, at 2226. President Bush issued the ultimatum in a speech given to a joint session of Congress on September 20, 2001. Bush, *supra* note 1. The pertinent part reads: "And tonight, the United States of America makes the following demands on the Taliban: Deliver to the United States authorities all the leaders of *al-Qa'eda* who hide in your land . . . [,] [c]lose immediately and permanently every terrorist training camp in Afghanistan, and hand over every terrorist, and every person in their support structure, to appropriate authorities. Give the United States full access to terrorist training camps, so we can make sure they are no longer operating. These demands are not open to negotiation or discussion. The Taliban must act, and act immediately. They will hand over the terrorists, or they will suffer their fate." *Id.*

86. There is a long history of U.S. Presidents utilizing military forces abroad in situations of military conflict or potential conflict to protect United States citizens or promote United States interests. The number of instances where the President has used military forces abroad in such situations without a Congressional declaration of War well exceeds 250 in number. Selected instances include: 1798-1800 - Undeclared Naval War with France; 1801-1805 - The First Barbary War (Tripoli declared war but not the U.S.); 1806 - Mexico Incursion; 1806-1810 - Gulf of Mexico Incursion; 1810 - West Florida Incursion; 1812 - Amelia Island in Florida; 1813 - West Florida; 1813-1814 - Marquesas Islands; 1814-1825 - Caribbean (engagements between pirates and U.S. war ships in response to over 3,000 pirate attacks on merchantmen between 1815-1823); 1815 - Second Barbary War; 1950-1953 - Korean War; 1958 - Lebanon; 1962 - Cuba; 1962 - Thailand; 1964 - Congo; 1964-1973 - Vietnam War; 1965 - Dominican Republic; 1980 - Iran; 1981 - El Salvador; 1982 - Lebanon; 1983 - Honduras; 1983 - Chad; 1983 - Grenada; 1986 - Libya; 1989 - Panama; 1989 - Andean Region; 1991 - Persian Gulf War; 1993 - Bosnia; 1993-1995 - Somalia; 1993-1995 - Haiti; 1997 - Serbia, etc.

87. Numerous nations contributed assistance to the U.S. led effort, including Pakistan, Saudi Arabia, Britain, Russia, Germany, Australia, Canada, Japan, etc. In addition, much of the actual ground combat was borne by indigenous Afghan tribal fighters, primarily the so-called Northern Alliance under the guidance and support of U.S. Army Special Forces and other U.S. Special Operations Forces conducting direct action and unconventional warfare missions. For an excellent overview of the roles and missions of the Army's elite Special Forces, see HANS HALBERSTADT, GREEN BERETS, UNCONVENTIONAL WARRIORS (1988).

88. *See supra* note 66. The employment of military force in an international armed conflict must also comply with the law of war. From a targeting perspective this means: (1) the target must be deemed a military objective–military necessity, (2) the use of force must be proportional - proportionality, and (3) suffering must be reduced as practicable–unnecessary suffering.

In tandem with the removal of the Taliban regime from power, the United States and its allies were able to destroy many of the *al-Qa'eda* camps and dismantle much of the infrastructure of the terrorist group in Afghanistan by the end of December 2001.[89] By any account, the Bush strategy[90] of using American air power, American Special Forces and the ground forces of various Afghan resistance groups worked well in terms of mitigating the loss of life to American forces[91] and reducing civilian suffering.[92] Since the fall of the Taliban government, the *al-Qa'eda* no longer operates with the open support of a State, but has been forced to revert to clandestine operations primarily as a sub-State terror group.[93] As of April 2002, States throughout the world had arrested well over 1,300 members of the *al-Qa'eda* network on a variety of terror-related charges.[94]

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89. *See, e.g.*, James Risen, *A Nation Challenged: Al Qaeda; Bin Laden Aide Reported Killed by U.S. Bombs*, N.Y. TIMES, Nov. 17, 2001, at A1. The military campaign to dislodge the Taliban and *al-Qa'eda* from open control of Afghanistan took approximately three months, from October 7 to December 23, 2001. Approximately 6,500 air combat missions were flown which attacked over 120 fixed targets. Four hundred vehicles were destroyed, and an undetermined number of enemy combatants were killed (some have put the figure as high as 10,000). "In the first detailed assessment of the air war in Afghanistan, military officials say about 75 percent of the bombs and missiles used hit their targets and probably destroyed or disabled them . . . ." Eric Schmitt, *A Nation Challenged: The Bombing; Improved U.S. Accuracy Claimed in Afghan Air War*, N.Y. TIMES, Apr. 9, 2002, at A16.

90. *See, e.g.*, Dan Balz, *Bush Confronts a Nightmare Scenario: Crisis Looms as Refining Test of President's Leadership*, WASH. POST, Sept. 12, 2002, at A2.

91. *See* Michael R. Gordon, *A Nation Challenged: The Debate; Gauging the Use of Ground Troops and the Scale of the Afghan War*, N.Y. TIMES, Nov. 4, 2001, at A3. Early critics of the Bush approach incorrectly predicted that the United States could not achieve victory without the use of massive American ground forces and an attendant heavy loss of life. This same pessimism was seen in exaggerated predictions of American lives that would be lost in the Persian Gulf War should the U.S. attempt to expel Iraq from Kuwait in accordance with U.N. Security Council Resolution 678 (Nov. 29, 1990).

92. *But see* Barry Bearak et al., *Unknown Toll in the Fog of War: Civilian Deaths in Afghanistan*, N.Y. TIMES, Feb. 10, 2002, at A1. The article discusses the issue of collateral damage to civilians and civilian property caused by the U.S. air strikes. *See id.* The average estimate ranges between 1,000 to 1,300 civilian deaths. *See also* Jonathan Weisman, *Rumsfeld Admits Allies Were Killed*, Feb. 22, 2002, USA TODAY, at A4.

93. *See* James M. Dorsey, *Some Fear Bin Laden Video Will Strain Relations Between U.S. and Saudi Arabia,* WALL STREET J., Dec. 17, 2001, at A13 [hereinafter *Bin Laden Video*].

94. *See, e.g.*, David S. Cloud, *Despite Numerous Arrest, CIA Chief Says al-Qa'eda Group Is Still a Big Threat to U.S.*, WALL STREET J., Feb. 7, 2002, at A12; WALL STREET J. EUR., Mar. 20, 2002, at A1.

III. EXPANDING THE WAR ON TERROR

"The United States of America will not permit the world's most dangerous regimes to threaten us with the world's most destructive weapons."[95]

George W. Bush

With the establishment of an interim Afghan government under the leadership of Hamid Karzai, the United States led coalition continues to track down the remnants of the *al-Qa'eda* and Taliban now in hiding.[96] More importantly, from a foreign policy stance, the United States is clearly attempting to parlay the resounding success it achieved in removing the renegade Taliban government from power into a deterrence signal to other States who either support or sponsor terrorism. In his state of the union message of January 29, 2002, President Bush cautioned the American people that even though Afghanistan was no longer a supporter of terrorist organizations, the War on Terror was not over.[97] President Bush also specifically labeled Iraq, Iran, and North Korea as "an axis of evil,"[98] due to their continuing support and sponsorship of terrorist groups.[99] Beyond these three States, the yearly United States State Department official list of nations considered as either States who support or sponsor terrorism currently includes Libya, Syria, Sudan, and Cuba (North Korea, Iraq, and Iran are also on this list).[100] In this context, the President's key point in the address to the nation signaled his resolve that the "United States of America will not permit the world's

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95. President George W. Bush, State of the Union Address, Jan. 29, 2002; *see also* Sanger, *infra* note 97.

96. A member of the *al-Qa'eda* core leadership killed as of May 2002 includes Mohammed Atef. *See Obituary of Mohammed Atef Terrorist Thought to Have Planned Al-Qa'eda's Attacks on the World Trade Centre and US Embassies in Africa*, DAILY TELEGRAPH (London), Nov. 19, 2001, at P23. The number two ranking official of *al-Qa'eda*, Aby Zubaydah, was turned over to United States authorities on April 1, 2002. *See* Kevin Johnson & Jonathan Weisman, *Al-Qaeda Figure a 'Huge' Catch*, USA TODAY, Apr. 2, 2002, at A1.

97. *See* David E. Sanger, *Bush, Focusing on Terrorism, Says Secure U.S. Is Top Priority*, N.Y. TIMES, Jan. 30, 2002, at A1.

98. *Id.*

99. The term "axis" is commonly associated with the alliance between Japan, Germany, and Italy in World War II. In the case of Iraq, Iran, and North Korea there is no similar treaty alliance, only a shared willingness to support or sponsor international terrorism.

100. For a list of known terrorist organizations and terrorist States published by the U.S. State Department, see National Security Institute, *supra* note 61.

most dangerous regimes to threaten us with the world's most destructive weapons."[101]

President Bush's remarks raised much debate – both as a policy matter and as a legal matter. Considering that the use of armed force can only be justified under international law when used in self-defense,[102] can the United States go beyond the rhetoric and actually carry the War on Terror to those rogue nations who are identified so closely as supporters and sponsors of terrorist activities, but have not actually physically engaged in an act of aggression against the United States?[103] Furthermore, even if the United States has legal justification to employ its military force against, for example, Iraq, there are practical matters which must be carefully weighed.[104] At a minimum, the United States must demonstrate from the particular circumstances that the use of armed force in self-defense will not create an even greater danger to international peace and security.[105]

The question of whether the War on Terror should be expanded involves two disturbing trends which pose a direct challenge to the peace and stability of the world and stand at odds with the central goals of the U.N. Charter to "maintain international peace and security"[106] and to "promot[e] and encourag[e] respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."[107] The first aspect relates to the radical ideological beliefs of the new breed of terrorists and the totalitarian States which harbor them. The second aspect relates to the willingness of these new-styled terrorists to use weapons of mass destruction[108] in their desire to carry out grandiose schemes to kill multitudes of civilians. Taken together, the mix is

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101. *Bush Issues Ultimatum to the Taliban, Calls Upon Nation and World to Unite and Destroy Terrorism*, *supra* note 85.

102. U.N. CHARTER art. 51, *supra* note 29.

103. *See U.N. Definition of Aggression*, *supra* note 27. The use of armed force against a State who continues to openly harbor the remnants of the *al-Qa'eda* would pose little legal argument.

104. Such practical matters include the moral and proportionality factors set forth in the Catholic "just war" tradition. *See* U.S. Conference of Catholic Bishops, *Living with Faith and Hope After September 11*, Pub. L. No. 5-491 (Dec. 2001).

105. *See* NATIONAL SECURITY LAW, *supra* note 20.

106. U.N. CHARTER art. 1, para. 1.

107. U.N. CHARTER art. 1, para. 3.

108. According to section 1403 of the National Defense Authorization Act for fiscal year 1997, a weapon of mass destruction is defined as: "Any weapon or device that is intended, or has the capability to cause death or serious bodily injury to a significant number of people through the release of toxic or poisonous chemicals or their precursors, a disease organism, or radiation or radioactivity." National Defense Authorization Act for Fiscal Year 1997 § 1403, Pub. L. No. 104-201, 110 Stat. 2422 (codified at 50 U.S.C. § 2302).

lethal and a clear and present danger to the international peace and security of the global community.

First, the ideological motivations of many *al-Qa'eda*-styled terrorist organizations appear to be focused on the advancement of cult-like "religious" objectives rather than the more typical aspirations of traditional old-styled terrorist groups who are primarily concerned with the achievement of political or territorial goals.[109] Driven by extremist Islamic apocalyptic visions, these new groups are bent on destroying through violence those individuals and things which are deemed to be outside of a very narrow *weltanschauung* (world view).[110] Interestingly, a 1995 RAND-St. Andrews Chronology of International Terrorism study revealed that "25 of 58, or 42 percent of known, active, international terrorists groups had a predominately religious component or motivation,"[111] most often associated with radical Islamic fundamentalism.

Perhaps the most chilling revelation of this vicious mindset is found in the so-called "bin Laden videotape,"[112] released to the public on December 13, 2001. The tape clearly illustrates the religious machinations of the *al-Qa'eda* terrorists and others who use religion to justify the mass murder of innocent civilians.[113] In fact, in the case of many of the militant Islamic terrorist organizations, direct links have been established to vari-

109. *But see* CRYING WOLF OR CRYING HAVOC, *supra* note 50, at 11-12. Cordesman stresses that all religions have their extremists, but believes that Islam itself is a powerful stabilizing force in most of the Middle East. *See id.*

110. *Id* at 83-94. There are numerous *al-Qa'eda*-styled terrorist organizations that fit this mold: Abu Nidal Organization, a.k.a. Fatah Revolutionary Council; Armed Islamic Group; al-Gama'at al-Islamiyya; Islamic Resistance Movement (Hamas); Hezbollah, a.k.a. Party of God, Islamic Jihad; International Islamic Jihad Against Jews and Crusaders; Jamaat ul-Fuqra; al-Jihad, a.k.a. Islamic Jihad; The Palestine Islamic Jihad; Abu Sayyaf; al Aqsa Martyrs Brigade; etc. *See* CRYING WOLF OR CRYING HAVOC, *supra* note 50; National Security Institute, *supra* note 61.

111. IAN O. LESSER ET AL., RAND, COUNTERING THE NEW TERRORISM 17 (1999). The RAND database includes all terrorist incidents since 1968. *See id.*

112. *See Bin Laden Video*, *supra* note 93.

113. *Id.* In the conversation between bin Laden and an unidentified Shaykh regarding the attacks of September 11, 2001, numerous references are made to "Allah," "Muhammad," the "fiqu [holy war] of Muhammad," etc. At one point bin Laden boasts the attacks were beneficial to a "true" understanding of Islam. "[The attacks] made people think (about true Islam), which benefited them greatly." The tape closes with the guest praising bin Laden in the name of Allah, "By Allah my Shaykh [bin Laden]. We congratulate you for the great work. Thank Allah." *Id.*

ous Deobandi religious schools or "madrassas,"[114] which openly advocate the most violent forms of terrorism against Western interests.[115]

Osama bin Laden and his followers are not simply another isolated sub-State religious terror cult like Japan's Aum Shinriko.[116] According to a thought provoking special report from *Newsweek* entitled, "Why Do They Hate Us," these groups "come out of a culture that reinforces their hostility, distrust and hatred of the West – and of America in particular."[117] Like all enemies of freedom and pluralism, be it the German Nazis or the Stalinist Communists, the Islamic terrorists attack the West for what it *is*, not for what it has done.[118] In a nutshell, whether the anti-Americanism is motivated by religious enmity,[119] radical idiosyncrasies, or just blind hatred, these *al-Qa'eda*-styled terrorist groups have clearly demonstrated that they have no regard or respect for human life let alone the human rights and fundamental freedoms of others.[120]

Related to the inherent dangerousness of *al-Qa'eda*-styled terrorist groups, is the fact that States which provide safe harbor or support to these people suffer from the scourge of totalitarianism.[121] This is an im-

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114. *But see, e.g.*, Alan Zarembo, *A Merger of Mosque and State*, NEWSWEEK, Oct. 15, 2001, at 28. Sheik Muhammad Raffaat Othman who teaches Islamic law at Cairo's Al-Azhar University believes the Koran prohibits "attacking innocent, unarmed people." *Id.* The "Prophet Muhammad demanded that we not kill women, children or the elderly. Attacks should be against soldiers and armed civilians." *Id.*

115. Rick Bragg, *A Nation Challenged: Schools; Shaping Young Islamic Hearts and Hatreds*, N.Y. TIMES, Oct. 14, 2001, at A1.

116. *See* LIFTON, *supra* note 45 and accompanying text.

117. Fareed Zakaria, *Why Do They Hate Us?*, NEWSWEEK, Oct. 22, 2001, at 24. However, Zakaria makes the point in the same article that "[e]very Islamic country in the world has condemned the attacks of Sept. 11 [except for Iraq]. To many, bin Laden belongs to a long line of extremists who have invoked religion to justify mass murder and spur men to suicide." *Id.*

118. *Id.* The *al-Qa'eda* has cited numerous grievances against the U.S. which justifies their use of terror to include puppet Arab governments, importation of oil, support for Israel, Westerners living in Arab lands, morally corrupt Western culture, etc. *See id.*

119. *See* Andrea Stone, *In Poll, Islamic World Says Arabs Not Involved in 9/11*, USA TODAY, Feb. 27, 2002, at A1. A Gallup poll indicates that a majority of the Arab world condemned the attack on the U.S., but believes that Arabs did not carry it out. *See id.* This opinion is shared despite the fact that all nineteen of the hijackers were Arabs. *See* CRYING WOLF OR CRYING HAVOC, *supra* note 50, at 91-92.

120. *See Bin Laden Video*, *supra* note 93.

121. For an excellent umbrella definition of a totalitarian regime, see NATIONAL SECURITY LAW, *supra* note 20, at 77. Professor John Norton Moore, University of Virginia School of Law, writes:

> A radical totalitarian regime . . . seems to blend together a mixture of a failing centrally planned economy, severe limitations on economic freedom, a one party political system, an absence of an independent judiciary, a police state with minimal human rights and political freedoms at home, denials of the right to immigrate, heavy involve-

portant phenomenon because terror groups could probably not flourish into sophisticated networks without the overt support of a State.

Democracies do not sponsor or support terrorism, dictatorships do. There exists an abundance of empirical evidence that democracies do not engage in international terrorism, instigate war, engage in democide (genocide and mass murder),[122] or abuse the human rights of their people.[123] As Anthony Lake, a former Clinton Administration Special Assistant to the President for National Security Affairs, related in an address at John Hopkins University: "Democracies tend not to wage war on each other and they tend not to support terrorism – in fact, they don't. They are more trustworthy in diplomacy and they do a better job of respecting the . . . human rights of their people."[124] Certainly, in the preamble to the U.N. Charter[125] and in Article 1 of the Charter,[126] it is evident that the framers also understood nations who respect human rights and fundamental freedoms do not support or engage in terrorism.

Second, the world must wake out of its millenary sleep and recognize the real possibility that weapons of mass destruction will be used against

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ment of the military in leadership, a large percentage of GNP devoted to the military sector, a high percentage of the population in the military, leaders strongly motivated by an ideology of *true beliefs* including willingness to use force, aggressively anti-Western and antidemocratic in behavior, and selective support for wars of national liberation, terrorism, and disinformation against Western or democratic interests.

Id.

122. *See, e.g.*, R. J. RUMMEL, DEATH BY GOVERNMENT: GENOCIDE AND MASS MURDER IN THE TWENTIETH CENTURY (1994) [hereinafter DEATH BY GOVERNMENT]. Rummel's exhaustive statistical research is considered to be the groundbreaking work in this area and points the way to a new paradigm on war avoidance. In short, if democracies do not fight each other, then it is in the interest of the global community to promote the spread of democratic behavior.

123. One of the most disturbing aspects of the Taliban was their systematic abuse of women. *See* Tim McGirk & Shomali Plain, *Lifting the Veil on Sex Slavery*, TIME, Feb. 18, 2002, at 8. "Of all the ways the Taliban abused women, this [systematic rape and slavery] may be the worst." *Id.*

124. Anthony Lake, Special Assistant to the President for National Security Affairs, Address at Johns Hopkins University, School of Advanced International Studies (Oct. 21, 1993).

125. U.N. CHARTER preamble:

> [T]o reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and . . . to promote social progress and better standards of life in larger freedom AND FOR THESE ENDS to practice tolerance and live together in peace with one another as good neighbors, and to unite our strength to maintain international peace and security . . . .

Id.

126. *See* U.N. CHARTER art. 1.

large civilian population centers. Clearly, the terror attacks of September 11, 2001, have demonstrated that international terrorism has now "brought us across the threshold" of creating mass casualties. The *al-Qa'eda*-styled terrorist is not content to kill in the tens or twenties; he aggressively seeks access to weapons of mass destruction in order to murder in the thousands and tens of thousands. While nuclear weapons may be beyond the reach of international terrorists at this time,[127] biological and chemical weapons are not. Biological and chemical agents are inexpensive, easy to obtain, hard to trace and capable of killing thousands.

Add into the equation the fact that *al-Qa'eda* terrorists have evidenced a clear desire to use weapons of mass destruction,[128] and a doomsday scenario becomes a central consideration of whether or not the War on Terror should be expanded.[129] Even one or two dedicated suicide bombers armed with a chemical, biological, or nuclear weapon could inflict catastrophic death and destruction in an urban environment.[130]

The problem, of course, is how does one deal with an ideology steeped in pseudo-religious fanaticism which compels its foot soldiers of terror to gladly commit suicide in order to kill innocent civilians?[131] If it seems obvious that third party dispute mechanisms will bear no fruit with terrorists who are filled with such hate and contempt of the democratic ethos; one is left with the unpleasant truism voiced by the ancient Romans - "*oderint dum metuatant*" (let them hate us as long as they respect us).[132]

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127. *See* Peter Eisler et al., *U.S. Cities Brace for the Next Acts of Terrorism*, USA TODAY, Sept. 24, 2001, at 5A [hereinafter *Next Acts of Terrorism*].

128. *See, e.g.*, Public Agenda, *Special Report: Terrorism*, *at* http://www.publicagenda.org/specials/terrorism/terror.htm (last modified Mar. 13, 2002). There are four general scenarios regarding the terrorist use of nuclear devices: the terrorist makes a crude nuclear bomb using smuggled uranium or fissile material; an unstable nation falls into the hands of terrorists (e.g., Pakistan is said to have dozens of nuclear weapons); a conventional bomb is employed to explode radioactive materials (so-called "dirty bomb"); or a nuclear power plant is attacked. *See id.*

129. Andrew Quinn, *Loss of Nuclear Material Tabulated*, SAN JOSE MERCURY NEWS, Mar. 7, 2002, at A1. Researchers at Stanford University have complied a "database of lost, stolen and misplaced nuclear material – depicting a world awash in weapons grade uranium and plutonium that is not publicly accounted for." *Id.*

130. *See Next Acts of Terrorism*, *supra* note 127.

131. For an excellent overview of this issue, see Zakaria, *supra* note 117, at 21.

132. *See generally* ARTHUR FERRILL, THE FALL OF THE ROMAN EMPIRE (1986); MARGARET LYTTELTON & WERNER FORMAN, THE ROMANS (1985). *But see* CARR, *supra* note 43. Carr argues that as long as Rome exercised its military power in a way that did not terrorize civilians it was highly successful. *See* CARR, *supra* note 43. The Roman practice of offering Roman citizenship to tribes who agreed to serve in the Roman Army as auxiliary troops greatly benefited the expansion of the Empire. For example, the Honariani Atecotti Seniores were formed from captured pirates from the Scottish Atecotti tribe circa

In the short term, the United States was not able to reason with the *al-Qa'eda* and the Taliban to comply with the principles of peace embodied in the U.N. Charter. Fortunately, America was able to employ the proper application of force under the rule of law, as President Bush pledged in his first major speech following the September 11, 2001, attack, to "bring them to justice or bring justice to them."[133]

A more troubling question for the United States and the entire civilized world is how to prevent future attacks by sophisticated State-supported or State-sponsored terrorist groups, particularly in light of their use of weapons of mass destruction. If the employment of a weapon of mass destruction is on the near horizon, do the international rules related to the use of force, i.e., only used in self-defense, actually work in the real world? In other words, must a State wait for a catastrophic State-sponsored or State-supported terrorist attack before it can respond,[134] or does a threatened State have the right to engage in anticipatory self-defense,[135] or even, perhaps, in a controversial legal theory known as "counterproliferation self-help?"[136]

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300 A.D. and served in the Auxilium Palatinum (the author is a descendant of this tribe). On the other hand, the later Roman practice of slaughtering civilians only stiffened resistance amongst the barbarians who eventually conquered Rome.

133. *See, e.g.*, Jeanne Cummings, *Bush Says Our Nation Saw Evil, but Isn't Frightened into Chaos,* WALL STREET J., Sept. 12, 2001, at A6.

134. The concept of self-defense is not created by the U.N. Charter. U.N. Charter art. 51 simply recognizes the "inherent right of self-defense." U.N. CHARTER art. 51, *supra* note 29. In the U.S., the customary right of a State to use military force in self-defense is traced to the famous Caroline Doctrine formulated by Secretary of State Daniel Webster in response to an 1837 raid by Canadian troops into New York. *See* William McHugh, *Forcible Self-help in International Law,* 25 NAVAL WAR C. REV. 61 (1972). Under the Caroline Doctrine a State may resort to necessary and proportional acts of self-defense if such acts arise out of an instant and overwhelming necessity, leaving no choice of means, and no moment of deliberation. *See id.*

135. *See* MYERS S. MCDOUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER (1961). The concept of anticipatory self-defense is viewed in the context of an "imminent" armed attack and is viewed as a part of the "inherent" right of self-defense of Article 51 of the Charter. For an opposing view, see Josef L. Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations,* 41 AM. J. INT'L L. 872, 878 (1947). Regardless, the use of force in self-defense must be reasonably proportionate to the specific danger that is to be averted. *See* GERHARD VON GLAHN, LAW AMONG NATIONS (6th ed. 1992).

136. *See, e.g.*, Guy B. Roberts, *The Counterproliferation Self-Help Paradigm: A Legal Regime for Enforcing the Norm Prohibiting the Proliferation of Weapons of Mass Destruction,* 27 DENVER J. INT'L L. & POL'Y 483, 485 (1999) [hereinafter *Counterproliferation Self-Help*].

The concept of anticipatory self-defense is also termed alternatively as "preventative self-defense"[137] or "first strike," and has been used by the Israelis against another State, as illustrated by Israel's air strike on Arab airfields in the 1967 War and against individuals, as illustrated in the Palestinian conflict.[138] The United States Deputy Secretary of Defense, Paul Wolfolwitz, is a leading proponent of anticipatory self-defense and has not only spoken with approval of the Israeli military's use of preemptive force in regards to the killing of known Palestinian terrorists,[139] but has embraced the idea as a necessary instrument of United States policy in the War on Terror: "Our approach has been to aim at prevention and not merely punishment. We are at war. Self-defense requires prevention and sometimes preemption."[140]

The idea of counterproliferation self-help is focused on dealing with rogue totalitarian States that seek to acquire weapons of mass destruction. The concept argues that when a totalitarian State or terrorist group using a weapon of mass destruction directly threatens the national survival of another State, a new international legal regime should allow for the threatened State to engage in the "preventive or preemptive use of force to either deter acquisition plans, eliminate acquisition programs, or destroy illicit weapons of mass destruction sites at any stage in the proliferator's acquisition efforts."[141] The 1981 Israeli air attack on Iraq's Osiraq nuclear reactor is the best illustration of this emerging doctrine, although it has also been cited as an instance of anticipatory self-defense.[142]

Clearly, the argument that the War on Terror must be enlarged because of the overwhelming danger posed to the global community is not an impossible position to advance in the era of weapons of mass destruction. Nevertheless, if respect for the rule of law is to survive as the measure of civilized behavior, it does not contribute to the discussion to advocate the use of armed force apart from those long established parameters. The

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137. For an excellent discussion of the issues, see NATIONAL SECURITY LAW, *supra* note 20.

138. The Israelis have long used the concept of first strike to target known terrorists fighters before they commit future acts of terrorism.

139. *See* Steven Erlanger, *A Nation Challenged: Diplomacy; Russian Aide Warns U.S. Not to Extend War to Iraq*, N.Y. TIMES, Feb. 4, 2002, at A10.

140. *Id.*

141. *Counterproliferation Self-Help*, *supra* note 136. Roberts argues that the Israeli strike on Iraq's Osiraq nuclear reactor could be classified as an example of this new paradigm in practice. *See id.*

142. *See* Louis Rene Beres & Yoash Tsiddon-Chatto, *Reconsidering Israel's Destruction of Iraq's Osiraq Nuclear Reactor*, 9 TEMP. INT'L & COMP. L.J. 437 (1995); W. Thomas Mallison & Sally V. Mallison, *The Israeli Aerial Attack of June 7, 1981, Upon the Iraqi Nuclear Reactor: Aggression or Self-Defense?*, 75 VAND. J. TRANSNAT'L L. 417 (1982).

United States must abide by the international principles as they now exist and defeat global terrorism within the framework of the rule of law. While it is certainly prudent to sternly warn States that by supporting or sponsoring terrorism they will be held absolutely accountable for any acts of aggression; anticipatory self-defense can only be used if the United States can demonstrate a significant terrorist attack is truly imminent[143] and satisfy an appropriate response criterion based on the following four factors:

- the gravity of the threat—what type of support is being provided by the totalitarian regime to the terrorist group?;
- an analysis of past practices, *mutates mutandis* (in other contexts), i.e., what is the track record of the subject totalitarian regime vis a vis terrorism?;
- have all other means of action to deter the aggressive conduct been exhausted?; and
- what will be the real and political repercussions of the use of armed force?

Thus, even if the attack of September 11, 2001, is to be considered an act of war by the *al-Qa'eda* and the Taliban, the United States cannot unilaterally expand the War on Terror to nations not directly linked to the September 11, 2001, assault. This would be beyond the scope of Resolution 1368. Again, unless the United States obtains concrete evidence that a significant State-sponsored or State-supported terrorist attack is imminent, it is both prudent and necessary for the United States to follow the pattern it has set for itself since the end of the Cold War and seek specific U.N. Security Council approval for future uses of armed force in self-defense.[144]

What United States policy makers can and must do is develop an active global-based strategy designed to deter and defeat future *al-Qa'eda*-styled terror attacks. At a minimum, this means three things. First, the U.N. must be energized to immediately address the issue of reaching consensus on a definition for terrorism, which should also include language regarding when a particular act of terrorism should be considered as an act of war.[145] Second, the United States must insist the concept of counterproliferation self-help be placed on the table as a viable addition

143. *See supra* note 135 and accompanying text.

144. During the Persian Gulf War, the U.S. sought and obtained specific U.N. Security Council authority for the use of military force. U.N. Security Council Resolution 678 (Nov., 29 1990). Resolution 678 reads in part: "The Security Council . . . 2. Authorizes member States cooperating with the government of Kuwait, unless Iraq on or before January 15, 1991, fully implements . . . the foregoing Resolutions, to use all necessary means to . . . restore peace and security in the area . . . ." *Id.*

145. *See supra* note 23 and accompanying text.

to the international rule of law regarding the use of force against a State that sponsors or supports terrorists or engages in aggression.[146] In this regard, the United States will do well to obtain the direct assistance and input of the major powers,[147] particularly the Russians.[148]

Third, juxtaposed to pressing the international community for concrete definitions and new legal approaches on how to fight terrorism in the new era, the United States should also earnestly promote the spread of democratic values as the absolute best avenue to promote war and terrorism avoidance.[149] Democracy is not an American value; democracy is a normative world value. The world community has wisely given assistance to the new Afghan government to build roads, schools, factories, homes, etc., contingent on its movement towards the adoption of democratic values, yet even more must be done in this region of the world.[150] In the long view, the totalitarian ponds that foster terrorism must be drained.

Finally, whatever the future may hold, the United States must continue to reinforce the basic truism that a democracy never answers terror with terror in the context of the employment of military force in self-defense. The United States is absolutely obligated under international law to follow the law of war as codified in the Geneva Conventions of 1949 and as set out in custom.[151] By all accounts, the American military did an outstanding job in the combat activities in Afghanistan in abiding by the law of armed conflict while caring for basic humanitarian needs of civilians

146. *See Counterproliferation Self-Help*, *supra* note 136 and accompanying text.

147. Joseph Nye, dean of Harvard's Kennedy School of Government, argues that "America must mobilise [sic] international coalitions to address shared threats and challenges." Nye, *supra* note 11, at 25.

148. Karen Elliott House & Andrew Higgins, *Putan Warns Bush Against Going It Alone When it Comes to Iraq*, WALL STREET J., Feb. 11, 2002, at A1.

149. *See* DEATH BY GOVERNMENT, *supra* note 122.

150. Carlotta Gall & Mark Landler, *A Nation Challenged: Rebuilding; Afghans Planning Army in Place of 'Rule of Gun,'* N.Y. TIMES, Jan. 11, 2002, at A11.

151. *See* Jeffrey F. Addicott, *The Lessons of My Lai*, 31 REVUE DE DROIT MILITAIRE ET DE DROIT DE LA GUERRE [The Military Law and Law of War Review] 73 (1992). Apart from the legal requirement to follow the law of war there are at least five practical reasons that the rules should be followed. First, the law of war rests on an ancient foundation of intrinsically accepted humanitarian concerns. Second, the issue of reciprocity dictates that we should follow the rules if we want the opposing side in the conflict to do likewise. Third, abuses of the law of war do not shorten the conflict or facilitate the restoration of peaceful relations. Abuses merely sow the seeds of hatred in the next generation. Fourth, the use of military assets to engage in attacks on civilians is a waste of those resources. Fifth, civilized nations will not provide the necessary homefront support to a war that is waged in violation of the law of war or civilized behavior.

caught up in the conflict.[152] As the world's leading democracy, it is imperative that the United States continue to exercise the lawful use of military force in accordance with the letter and spirit of the rule of law or face the possibility that it will be battling the children of terrorism in the next generation.[153]

IV. CIVIL LIBERTIES AND THE WAR ON TERROR

"The boisterous sea of liberty is never without a wave."[154]

Thomas Jefferson

The probability that terrorist organizations like *al-Qa'eda* may employ chemical, nuclear, or biological weapons of mass destruction in suicide attacks poses not only a direct threat to the well-being of tens of thousands of innocent people, but raises new controversies regarding the possible curtailment of long-recognized civil liberties.[155] On the one hand, the United States government must have the necessary tools to protect the most basic rights of its citizens who suffer as the victims of terrorism. While on the other hand, when creating greater security from future terrorist attacks, the United States government must not trample on American liberties in the name of preserving them. Without question, the looming challenges of severe international and domestic terrorism pose significant and acute dilemmas for democratic policymakers. Currently, six main areas of concern have emerged as the government develops new approaches to deal with future terrorist threats. They involve: (1) the use of military tribunals; (2) the power of the United States to investigate, detain, and question terrorist suspects; (3) the expansion of the use of the United States military to enforce domestic law; (4) immigration; (5) the use of new information-gathering technologies; and (6) the increase in security measures at airports and other public facilities.

A. *Brief Overview of Past Efforts to Address Terrorism*

As the world watched helplessly while hijacked planes smashed into the World Trade Center and the Pentagon, the attack exposed gaping vulnerabilities in both United States military and law enforcement strategies

152. *See* Patrick E. Tyler, *A Nation Challenged: The Aide*, N.Y. TIMES, Sept. 28, 2001, at B2. In conjunction with the military campaign, the U.S. airdropped tons of food to Afghan civilians.

153. *See, e.g.*, Jeffrey F. Addicott, *U.S. Must Follow the Law of War or Battle Enemy's Children*, BIRMINGHAM NEWS, Oct. 28, 2001, at C5.

154. ROBERT ANDREWS, THE COLUMBIA BOOK OF QUOTATIONS 517 (1993).

155. The term "civil liberties" generally refers to "freedom from undue governmental interference or restraint" as measured against the protections of the Constitution. *See* BLACK'S LAW DICTIONARY 239 (7th ed. 1999).

to guard the nation against a full-fledged international terrorist attack. Although the threat of a significant terrorist attack on United States soil was not an unknown topic of discussion prior to the events of September 11, 2001,[156] the federal government did very little in the area of antiterrorism.[157] In part, it might be said that actions to address the threat of organized terrorism were piecemeal and misguided[158] because the United States had no frame of reference in which to gauge the magnitude of the threat.[159]

In the international sphere, a brief survey of the United States' approach to global terrorism prior to September 11, 2001, reveals America was content to enter into a handful of specific international conventions aimed at encouraging multi-lateral cooperation in punishing certain narrowly defined acts of terrorism, such as hostage taking and hijacking of aircraft.[160] The United States' position[161] was simply a mirror of the

156. *See, e.g.*, Malcolm Gladwell, *At Least 5 Die, 500 Hurt as Explosion Rips Garage Under WTC*, WASH. POST, Feb. 27, 1993, at A1. The February 26, 1993, terrorist attack on the World Trade Center in New York prompted much discussion on the topic, but no action beyond the prosecution of those directly responsible. The terrorists exploded a homemade bomb in a parking garage of the World Trade Center. *See id.*

157. Antiterrorism refers to proactive steps taken to decrease the probability of a terrorist incident, e.g., increased security screening measures at airports, concrete barriers used to block traffic from public buildings, etc.

158. *See, e.g.*, Brian McGrory & Michael Kranish, *Clinton Aides Regret Letting bin-Laden Off*, HOUSTON CHRON., Sept. 23, 2001, at 7A. After the dual bombings of two U.S. embassies in Africa left more than 300 people dead in the summer of 1998, then President Clinton vowed that "[n]o matter how long it takes, or where it takes us, we will pursue terrorists until the cases are solved and justice is done." *Id.* Militarily, President Clinton launched 75 cruise missiles at some *al-Qa'eda* terrorist training camps in Afghanistan and a suspected VX nerve gas production facility at the Shifa Pharmaceutical Plant in Khartoum, Sudan. *See id.* Nancy Soderberg, a former National Security Council senior aide in the Clinton administration admitted: "In hindsight, it wasn't enough, and anyone involved in policy would have to admit that." *Id.*

159. *See* MICHEL & HERBECK, *supra* note 44. The closest analogy was the domestic terror bombing in Oklahoma City in 1995.

160. Some examples of specific antiterrorist conventions include: The Convention on Offenses and Certain Other Acts Committed on Board Aircraft (Tokyo Convention), T.I.A.S. No. 159 (1963); Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention), 22 U.S.T. 1641, T.I.A.S. No. 7192 (1971); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention), T.I.A.S. 7570 (1973); Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (New York Convention), T.I.A.S. 8532 (1976-77); International Convention Against the Taking of Hostages (Hostages Convention), 34 U.N. GAOR Supp. No. 39, at 23, U.N. Doc. A/34/39 (1979).

161. *See* Terrorism at Home and Abroad: Applicable Federal and State Laws, CRS Report 95-1050 (updated Sept. 24, 2001).

world community's ineffective approach to the problem of global terrorism.[162] Washington seemed content to react to incidents.[163]

In the domestic arena, apart from various criminal reforms making terrorist acts abroad a crime under United States domestic law,[164] most of the attention of the Executive Branch and Congress was focused on passing various domestic counterterrorism[165] legislation. This legislation was limited in scope and designed primarily to assist in planning and training efforts for the use of emergency personnel responding to a major terrorist incident involving a weapon of mass destruction.[166] Early on, these initiatives received much deserved criticism as a band-aid approach to the real-world problem of a major terrorist attack.[167]

The Bush Administration has taken two major steps to fulfill its obligation to protect the American people from future attacks by international terrorists. The first is the creation of a new Cabinet-level department entitled Office of Homeland Security[168] and the second is the passage of an exhaustive piece of anti-terror legislation known as the USA Patriot Act.[169]

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162. See *supra* note 23 and accompanying text for a discussion of the U.N.'s inability to reach consensus on a definition of terrorism.

163. STEVEN SLOAN, BEATING INTERNATIONAL TERRORISM 43 (1986).

164. For a discussion regarding debate on two such bills, see THOMAS M. FRANCK & MICHAEL J. GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW 198-207 (1993).

165. Counterterrorism refers to all those steps taken by authorities in response to a terrorist attack, e.g., mobilization of medical providers, rescue crews dispatched to the scene, activation of the National Guard, etc.

166. The central Clinton era legislation was the 1996 "Defense Against Weapons of Mass Destruction Act," commonly called the NLD Act after the sponsors. *See* Defense Against Weapons of Mass Destruction Act, National Authorization Act for FY 1997, Title XIV, Pub. L. No. 104-201 (Sept. 23, 1996). This act appropriated money for 8-12 person government training teams to conduct emergency training for the firefighters, police, and medical technicians of major cities in the U.S. *See id.* Approximately $300,000 was spent on each city. *See id.*

167. *See, e.g.,* Bradley Graham, *Anti-Terrorism Plans Termed Inadequate*, WASH. POST, Oct. 3, 1998, at A9.

168. *See* 66 Fed. Reg. 51,812-17 (Oct. 10, 2001). On October 8, 2001, President Bush issued Executive Order 13,228 establishing the Office of Homeland Security as an agency within the Executive Office and named Tom Ridge as the Assistant to the President for Homeland Security. *See id.* On September 20, 2001, the President's address to a joint session of Congress stated the mission of the office is to "lead, oversee, and coordinate a comprehensive national strategy to safeguard our country against terrorism and respond to any attacks that may come." Bush, *supra* note 1; *see also* PRESIDENT GEORGE W. BUSH, SECURING THE HOMELAND, STRENGTHENING THE NATION (2001), *available at* http://www.whitehouse.gov/homeland/homeland_security_book.html.

169. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001) [hereinafter USA Patriot Act]. The bill passed in the Senate by a

B. *Federal Courts and Military Tribunals*

In the wake of the military campaign in Afghanistan approximately five hundred *al-Qa'eda* and Taliban fighters were captured and turned over to United States forces for disposition.[170] As of May 2002, the United States transported approximately three hundred to Guantanamo Bay, Cuba,[171] for temporary internment.[172] Two questions immediately arose in regard to due process[173] concerns for these individuals. First, were they entitled to treatment as prisoners of war under the Geneva Conventions?[174] Second, if criminal trials were to be pursued by the United States, should these individuals be tried in a United States federal district court or by means of a United States military tribunal (or military commission)?[175]

An analysis of the first question regarding the status of *al-Qa'eda* and Taliban fighters under international law begins with the fact that the United States has long incorporated in its laws the international law of war, both customary and codified.[176] After some internal debate, the

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vote of 98-1. 147 CONG. REC. S11,059-60 (daily ed. Oct. 25, 2001). The House of Representatives passed their version by a vote of 357-66. 147 CONG. REC. H7224 (daily ed. Oct. 24, 2001).

170. *See* Scott Lindlaw, *Bush Stresses Importance of Terror War*, ASSOCIATED PRESS, Mar. 11, 2002, *available at* 2002 WL 16388775.

171. The U.S. Naval Station at Guantanamo, Cuba was established in 1903 following the U.S. war with Spain in 1898. It is not considered U.S. sovereign territory. The initial detention facility was named Camp X-Ray. As of early April 2002, 300 detainees from 33 countries were in custody.

172. The vast majority of captured enemy combatants were processed and released in Afghanistan. Those held by the United States military were deemed to be either too dangerous to parole or suspected of committing war crimes. Apparently those who continue in custody will be detained until either hostilities cease or until specific charges are levied for associated war crimes. *See The Abrams Report* (MSNBC television broadcast, Apr. 4, 2002) (referring to an interview with the author).

173. The term "due process" is most commonly related to the Fourteenth Amendment to the U.S. Constitution which applies as a restraint to the States. Section 1 reads:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1. The term "due process" also has come to be associated with American values of fairness and reasonableness in the treatment of others.

174. Geneva Convention of Aug. 12, 1949, Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter G.C. Relative to POWs].

175. The term military tribunal is synonymous with military commissions.

176. The Paquete Habana, 175 U.S. 677, 700 (1900).

Bush Administration correctly affirmed the Geneva Conventions of 1949[177] did apply to the conflict in Afghanistan and, hence, the Taliban government. However, President Bush also determined that the captured *al-Qa'eda* and Taliban fighters were not eligible for prisoner of war status.[178]

Since the *al-Qa'eda* fighters belong to a terrorist organization[179] and are not recognized members of an armed force,[180] they are unlawful belligerents under the law of war.[181] This means they are responsible for breaches of the law of war but are not entitled to the status of prisoners of war.[182] In the view of the Bush Administration, the *al-Qa'eda* engaged in acts of war both in the September 11, 2001, attack and in fighting

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177. The 1949 Geneva Conventions cover four categories: (1) Geneva Convention of August 12, 1949 for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; (2) Geneva Convention of August 12, 1949 for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; (3) Geneva Convention of August 12, 1949 Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; and (4) Geneva Convention of August 12, 1949 Relative to the Protections of Civilian Persons in Time of War, 6 U.S.T. 3316, T.I.A.S. 3365, 75 U.N.T.S. 287.

178. Jess Bravin, *Bush Says No Taliban, Al Qaeda Fighters Are POWs Under Geneva Conventions*, WALL STREET J., Feb. 8, 2002, at A20 [hereinafter *Bush Says No*].

179. *See* INTERNATIONAL LAW COMMITTEE REPORT TO ABA, *infra* note 234, at 7-8. "The law of war applies to non-state [sic] actors, such as insurgents. Given the degree of violence in these attacks [September 11, 2001] and the nature and scope of the organization necessary to carry them out, it is much more difficult to argue that they are not acts of war than to argue that they are." *Id.*

180. The U.S. is not a signatory to Protocol Additional to the Geneva Conventions of Aug. 12, 1946, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]. Protocol I seeks to extend coverage to non-international conflicts in which "peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination." *Id.*; *see* Abraham Sofaer, *The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims*, 82 AM. J. INT'L L. 784, 785 (1988).

181. FM 27-10, *infra* note 184. FM 27-10, paragraph 60(b) indicates that "[p]ersons who are not members of the armed forces as defined in [the Geneva Conventions], who bear arms or engage in other conduct hostile to the enemy thereby deprive themselves of many of the privileges attaching to the members of the civilian population." *Id.* Nevertheless, it can be argued that the *al-Qa'eda* should be given POW status as they qualify under Article 4(1) of the Geneva Convention Relative to the Treatment of Prisoners of War. Article 4(1) defines prisoners of war as: "Members 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." G.C. Relative to POWs, *supra* note 174.

182. *See* G.C. Relative to POWs, *supra* note 174. The President's determination would apply to *al-Qa'eda* members who were actually engaged in combat. The matter is less clear for those members of *al-Qa'eda* who did not actively participate in the conflict as to whether they would be considered illegal belligerents.

alongside the Taliban forces in the internationally recognized armed conflict in Afghanistan.[183]

As to the captured Taliban fighters, the United States determined they were likewise not entitled to prisoner of war status under the Geneva Conventions because of their failure to comply with the Conventions' criteria which require lawful combatants to wear distinctive military insignia, i.e., uniforms which would make them distinguishable from the civilian population at a distance.[184] In finding the Taliban "have not effectively distinguished themselves from the civilian population,"[185] the United States also added that the Taliban fighters had further forfeited any special status because they had "adopted and provided support to the unlawful terrorist objectives of the al Qaeda."[186] While the later finding would not necessarily indicate the Taliban fighters would not be entitled to prisoner of war status, the former finding would.[187] Still, the Bush Administration has repeatedly indicated all detainees were to be treated in accordance with humanitarian concerns[188] set out in the Geneva Conventions even though they were not entitled to the protections the Geneva Conventions give to prisoners of war.[189]

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183. It can be argued that the *al-Qa'eda* have been engaged in acts of war against the U.S. government since 1996. The *al-Qa'eda* have been linked to the 1996 bombing of the U.S. military barracks at Khobar Towers, Saudi Arabia, the 1998 U.S. Embassy bombings in Kenya and Tanzania, and the 2000 suicide boat attack on the U.S.S. Cole in Yemen.

184. THE LAW OF LAND WARFARE, U.S. ARMY FIELD MANUAL 27-10, para. 504(g) (July 1956) [hereinafter FM 27-10]. FM 27-10 is considered as the embodiment of the U.S. Army's interpretation of the law of war in the field. FM 27-10 lists as a war crime (in addition to the "grave breaches" of the Geneva Conventions) the "[u]se of civilian clothing by troops to conceal their military character during hostilities." *Id.*; *see Bush Says No*, *supra* note 178.

185. *Bush Says No*, *supra* note 178.

186. *Id.*

187. *But see* G.C. Relative to POWs, *supra* note 174, at art. 5. What constitutes a "uniform" is subject to debate. Furthermore, the determination as to status should be made by a separate military board, not the President of the U.S. The applicable provision reads: "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy . . . shall enjoy the protections of the present Convention until such time as their status has been determined by a competent tribunal." *Id.*

188. *But see* Susan Sachs, *Group Reports Mistreatment of Detainees*, USA TODAY, Mar. 15, 2002, at A11. Amnesty International issued a report alleging that the U.S. had violated detainees' right to humane treatment. *See id.* The report cites no access to lawyers, no right to challenge the lawfulness of detention, lack of a presumption of innocence, solitary confinement, heavy shackling, and lack of exercise. *See* AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL'S CONCERNS REGARDING POST SEPTEMBER 11 DETENTIONS IN THE USA (2002), *available at* http://web.amnesty.org/ai.nsf/Index/AMR510442002?OpenDocument&of=COUNTRIES\USA.

189. Sachs, *supra* note 188; *see, e.g.*, G.C. Relative to POWs, *supra* note 174, at arts. 13, 22. The Bush Administration has repeatedly stressed that all of the detainees were

Second, if the *al-Qa'eda* and Taliban detainees are not prisoners of war and it is determined that there is sufficient evidence to believe a particular individual has committed war crimes,[190] what is the appropriate forum for prosecution? Ostensibly, the United States has four options which it may pursue – turn the accused over to an appropriate foreign jurisdiction, e.g., the new government in Afghanistan; turn the accused over to an International Tribunal; try the accused in a United States federal district court; or try the accused in a United States military tribunal. If one is only concerned with expediency, the first option is probably the most attractive and need not be discussed here. Likewise, the use of an International Tribunal is attractive but probably not workable due to concerns over such issues as the absence of a death penalty, possible security compromises of sources and techniques, and reduced levels of due process provided to the accused.[191]

As to prosecuting these individuals in a federal district court of the United States, it is well settled that said courts have the legal authority under both domestic and international law to prosecute nonresident aliens for terrorist crimes committed on foreign soil as well as for war crimes.[192] A widely cited precedent, which amplifies just how far the jurisdictional reach extends in this regard, is the case of *United States v.*

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treated in accordance with the humanitarian mandates of international law and the Geneva Conventions requirement that all "prisoners of war must at all times be humanely treated." G.C. Relative to POWs, *supra* note 174, at art. 13. POWs shall be afforded "every guarantee of hygiene and healthfulness." *Id.* at art. 22. Numerous international humanitarian groups have been allowed to visit the detainees to include the International Committee of the Red Cross.

190. *See* FM 27-10, *supra* note 184. FM 27-10, article 498 indicates that "[a]ny person, whether a member of the armed forces or a civilian, who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment. Such offenses in connection with war comprise: a. Crimes against peace. b. Crimes against humanity c. War crimes." *Id.* at art. 498. FM 27-10, article 499 defines war crimes as "the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime." *Id.* at art. 499. The U.S. policy is that U.S. soldiers accused of violations of the law of war will be prosecuted under the provisions of the Uniform Code of Military Justice (UCMJ) for the substantive offense. A deliberate attack on noncombatant civilians clearly violates the law of war and customary law of war. Indeed, the law of war was designed to protect innocent civilians. *See, e.g.*, Geneva Convention of August 12, 1949 Relative to the Protections of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

191. For example, speaking strictly in terms of American due process, the accused war criminal Slobodan Milosevic is being tried in the U.N.-generated international war crimes tribunal in the Hague for war crimes, genocide, and crimes against humanity. Under the tribunal rules, Milosevic can be convicted on any single charge by only a simple majority of the panel of judges. By contrast, a U.S. military tribunal would require at least a two-thirds vote for guilt.

192. INTERNATIONAL LAW COMMITTEE REPORT TO ABA, *infra* note 234.

Yunis.[193] The *Yunis* case involved the criminal trial of an Arab terrorist by the name of Fawaz Yunis who participated in the hijacking of a Royal Jordanian Airlines airplane at Beirut International Airport in June 1985.[194] The only connection the hijacking had with the United States was the fact the plane contained some American citizens on board.[195] After reviewing the pertinent international agreements relating to hostage taking[196] and hijacking,[197] the federal district court denied a defense motion to dismiss for lack of jurisdiction, and Yunis was convicted of conspiracy, hostage taking, and air piracy.[198]

On appeal of his conviction, the Court of Appeals for the D.C. Circuit said the following about the concept of customary international law as it applied to certain criminal acts: "Nor is jurisdiction precluded by norms of customary international law. The district court [correctly] concluded that two jurisdictional theories of international law, the "universal principle"[199] and the "passive personal principle,"[200] supported assertion of United States jurisdiction to prosecute Yunis on hijacking and hostage-taking charges."[201]

In summary, then, United States federal district courts have jurisdiction to try individuals for terrorist-related offenses under a variety of statutes,[202] and, in at least one case involving a foreign national who tried to commit an in-flight bombing of an American Airlines flight from Paris to

193. 681 F. Supp. 896 (D.D.C. 1988).

194. *See id.*; Ihsan A. Hijazi, *Beirut Highjackers Free Travelers, Blow Up Jet*, N.Y. TIMES, June 13, 1985, at A8.

195. *Id.*

196. *See supra* note 160.

197. *Id.*

198. Fawaz Yunis received concurrent sentences of five years for conspiracy, thirty years for hostage taking, and twenty years for air piracy. His conviction and the D.C. court's jurisdiction was upheld by the Court of Appeals for the D.C. Circuit. *See* United States v. Yunis, 924 F.2d 1086 (D.C. Cir. 1991).

199. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 404, 423 (1987). The "universal principle" of jurisdiction allows States to prosecute those "offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism." *Id.* § 404.

200. *See* United States v. Benitez, 741 F.2d 1312 (11th Cir. 1984), *cert. denied*, 471 U.S. 1137 (1985). Under the "passive personal principle," a State may prosecute non-nationals for crimes committed against its nationals outside of its territory.

201. *Yunis*, 924 F.2d at 1089-90.

202. United States citizen John Walker Lindh of California, the so-called American Taliban, is being tried by a federal district court in Virginia for crimes associated with his involvement with the *al-Qa'eda* terror organization. *See* Jess Bravin & Greg Jaffe, *American Prisoner in Cuba to Be Moved to U.S.*, WALL STREET J., Apr. 5, 2002, at A4. As of May 2002, another U.S. citizen captured in Afghanistan, Yasser Esam Humdi, is being held by U.S. military authorities in the U.S., although the U.S. Department of Justice has not

Miami on December 22, 2001,[203] that power is being exercised.[204] However, instead of charging suspected *al-Qa'eda* war criminals with violations of the law of war, the federal courts would simply apply parallel statutes related to the *malum en se* crime,[205] or apply the appropriate "terrorist statute."

The final forum, which is available to prosecute those individuals taken from Afghanistan who are suspected of committing war crimes, is the military tribunal. On November 13, 2001, President Bush signed an executive (military) order which authorized the creation of military tribunals to try certain "non-citizens" for engaging in terrorist acts against the United States or aiding or abetting in terrorist acts against the United States.[206] Because military tribunals have not been used since the end of World War II, the efficacy of using this forum to prosecute the *al-Qa'eda* and Taliban fighters for war crimes mandates analysis from both legal and historical perspectives.

Military tribunals are non-Article III courts.[207] They derive their basic grant of authority from Articles I and II of the United States Constitution. Respectively, Congress has the power to "define and punish . . . offenses against the Law of Nations,"[208] and the President is the "Com-

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brought charges against him. *See generally id.* Neither are subject to prosecution by a military commission due to their U.S. citizenship. *See id.*

203. Alan Cowell, *A Nation Challenged: Shoe Bomb Suspect; Reports Narrow Down Movement of Man with Plastic Explosive*, N.Y. TIMES, Dec. 28, 2001, at B5.

204. *See* Michael Elliott, *The Shoe Bomber's World*, TIME, Feb. 25, 2002, at 46. Richard Reid, a.k.a. Abdel Rahim, is a British citizen with direct ties to the *al-Qa'eda* network. *See id.* He attempted to explode bombs hidden in his shoes while the aircraft was in flight over the Atlantic Ocean. *See id.* Each shoe contained about four ounces of an explosive named pentaerythritoltetranitrate. *See id.* The crew and passengers subdued him. *See id.* On January 16, 2002, Mr. Reid was indicted by a federal grand jury on nine counts, including the use of a weapon of mass destruction and attempted murder. *See id.*

205. The U.S. has apparently determined that those terrorists associated with the September 11, 2001, attack that are captured in the U.S. will be tried in federal district courts. *See* Kevin Johnson & Richard Willing, *Array of Unknowns Still Troubling*, USA TODAY, Mar. 8, 2002, at A4. Zacarias Moussaoui, the alleged "twentieth" hijacker of September 11, 2001, is being tried in a federal district court in Alexandria, Virginia, on a six-count indictment.

206. *See* Military Order of Nov. 13, 2001. The President specifically relied on his constitutional authority as the Commander in Chief, the Authorization for Use of Military Force Joint Resolution, and 10 U.S.C. §§ 821, 836. The Presidential order applied both to those who were implicated in the September 11, 2001, attack and to individuals complicit in "acts of international terrorism." The issue of whether individuals not directly associated with violations of the law of war could be tried via a military tribunal is unsettled.

207. U.S. CONST. art. III.

208. U.S. CONST. art. I, § 8. The term Law of Nations is equivalent to international law.

mander in Chief of the Army and Navy."[209] Furthermore, Congress has specifically provided for the use of military commissions in Article 21 of the Uniform Code of Military Justice (UCMJ).[210]

Historically, military commissions have been used in a variety of situations associated with urgent government needs related to war. In *Madsen v. Kinsella*, the Supreme Court spoke at some length on the history of military tribunals, saying: "Since our nation's earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities relating to war."[211] In addition, the Courts have recognized the fact that military tribunals have been used without Congress specifically "declaring war."[212] For example, military tribunals were used in the War with Mexico,[213] even though Congress never formally declared war.[214]

A military tribunal consists of a panel of officers who are authorized to render a verdict and sentence. The historical concern in this instance is not whether military tribunals can be used to prosecute United States citizens who may or may not be belligerents, but whether tribunals are constitutionally able to prosecute non-citizen belligerents for offenses in violation of the law of war. Regarding the use of military tribunals to try United States citizens who are not belligerents, the Supreme Court rendered its opinion in the post American Civil War case of *Ex Parte Milligan*,[215] where it held that as long as the civilian courts were operating,[216]

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209. U.S. CONST. art. II, § 2.

210. 10 U.S.C. § 821 (2000). The Uniform Code of Military Justice (UCMJ) section 821 states, "The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commission, provost court, or other military tribunal." *Id.*

211. Madsen v. Kinsella, 343 U.S. 341, 346 (1952). "They [military tribunals] have been called our common-law war courts." *Id.*

212. *See* Talbot v. Seeman, 5 U.S. 1, 28 (1801). Chief Justice John Marshall recognized the use of military force in "partial hostilities, in which case the laws of war, so far as they apply to our situation, must be noticed." *Id.*

213. The Mexican War lasted from 1846-1848. The War broke out when Texas, an American settled province of Mexico that had broken away in 1836, was annexed as a State by the U.S. in 1845.

214. Prize Cases, 67 U.S. 365 (1862). Congress passed the Act of Congress of May 13, 1846, which did not declare war, but recognized "a state of war as existing by the act of the Republic of Mexico." *See also* Spence J. Crona & Niel A. Richardson, *Justice for War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism*, 21 OKLA. CITY U. L. REV. 349 (1996).

215. 71 U.S. (4 Wall) 2 (1866). In December 1866, the U.S. Supreme Court granted a writ of *habeas corpus* to a civilian non-combatant named Lambdin P. Milligan, a pro-Confederate Indiana resident who was convicted in October 1864 by a military tribunal convened in Indianapolis, Indiana. *See id.* Milligan was convicted of treason and sentenced to be hanged. *See id.* The lower federal court had denied his petition for *habeas corpus*. *See*

the use of military tribunals to try United States citizens who were not actual belligerents was unconstitutional.[217] As to the use of military tribunals to prosecute non-citizen belligerents for offenses in violation of the law of war, the standard is set out in the World War II era case of *Ex Parte Quirin*.[218]

In *Ex Parte Quirin*,[219] the United States Supreme Court upheld the convictions of eight German saboteurs who had been captured in the United States and tried by a military tribunal ordered by President Franklin Roosevelt.[220] The Court upheld the jurisdiction of the military tribunal, stating: "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."[221] The Court easily distinguished the case from *Ex Parte Milligan*,[222] holding that offenses against the law of war by non-citizen belligerents were constitutionally authorized to be tried by military commission.[223] Besides the trials of the German saboteurs during World War II, subsequent military tribunals were used to prosecute approximately 2,600 members of the Axis for violations of the

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id. In granting the writ, the Supreme Court held that although the American Civil War was still in progress at the time of the trial, the circumstances in Indiana, a union State, did not justify the use of a military tribunal to prosecute a U.S. citizen because the civil courts were open and free to function. *See id.*

216. The case occurred against the backdrop of the American Civil War, which lasted from April 1861-April 1865.

217. *But see Ex Parte* Mudd, 17 F. Cas. 954 (S.D. Fla. 1868) (No. 9,899). In September 1868, the U.S. District Court for the Southern District of Florida denied a writ of *habeas corpus* for Dr. Samuel Mudd, a civilian citizen of Maryland, a union State, who had been convicted by a military tribunal for his part in the Lincoln assassination of April 14, 1865. *See id.* On June 30, 1865, the military tribunal convicted Dr. Mudd and sentenced him to life in prison. *See id.* Dr. Mudd was transferred to a prison in Florida where he filed the writ of *habeas corpus* relying on *Ex Parte Milligan*. *See id.* In denying the petition, Judge Thomas J. Boynton distinguished the murder of Lincoln as a military crime, even though the War had ended prior to the assassination of Lincoln. *See id.* The appeal of this decision reached the U.S. Supreme Court in February 1869, but was dismissed by Chief Justice Chase as moot due to the fact that President Johnson had pardoned Dr. Mudd and the two other remaining civilians so affected.

218. *Ex Parte* Quirin, 317 U.S. 1 (1942).

219. *Id.*

220. President Roosevelt issued Proclamation 2561 and a Military Order (executive order) appointing a military commission after the capture of the German saboteurs. 7 Fed. Reg. 5101, 5103 (July 7, 1942).

221. *Quirin*, 317 U.S. at 28. Congress incorporated the Articles of War into the UCMJ in 1950. Article 15 is now contained in substantial part at Article 21, UCMJ. There has been no use of Article 21 to date regarding military tribunals.

222. *See supra* note 217 and accompanying text.

223. *Quirin*, 317 U.S. at 45-46.

law of war,[224] to include the murder of captured American soldiers at the Battle of the Bulge.[225] The surviving high-ranking war criminals in the German military and government were tried by a special international tribunal in Nuremberg, Germany, at the Nuremberg Trials,[226] and the Japanese leaders were tried at the International Military Tribunal for the Far East.[227]

Although the Supreme Court has long held the Constitution's Fifth[228] and Sixth Amendment[229] protections apply to non-United States citizens,[230] such protections do not extend to individuals subjected to trial in military tribunals for war crimes. Seemingly, the use of military tribunals has deeply seated historical and legal precedent as long as the non-citizen combatants are charged with violations of the law of war. In *Application of Yamashita*,[231] the Court traced the history of military tribunals and concluded: "By thus recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants . . . Congress

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224. For an excellent historical development, see H.W. ELLIOTT, THE TRIAL AND PUNISHMENT OF WAR CRIMINALS IN THE "NEW WORLD ORDER" (unpublished Doctor of Juridical Science Thesis 1996, rare book room U. of Va. School of Law) [hereinafter ELLIOTT S.J.D. THESIS].

225. *See* Jan E. Aldykiewicz, *Authority to Court Martial Non-US Military Personnel for Serious Violations of International Humanitarian Law Committed During Internal Armed Conflicts*, 167 MIL. L. REV. 74 (2001).

226. The international tribunal was created, and the crimes within its jurisdiction spelled out, in the London Charter of Aug. 8, 1945. The tribunal consisted of representatives from the major allied powers—the U.S., the U.S.S.R., Great Britain, and France. The accused were charged with a combination of offenses labeled: crimes against humanity, crimes against peace ("the planning, preparation, initiation or waging of a war of aggression . . ."), and war crimes. The tribunal lasted from Nov. 20, 1945-Oct. 1, 1946. Twelve of the twenty-two defendants were convicted and sentenced to death, seven were convicted and sentenced to terms in prison ranging from ten years to life, and three were acquitted. For a critique of some aspects of the Nuremberg Trials regarding standards of proof, rules of evidence, etc., see, H. K. THOMPSON, JR., & HENRY STRUTZ, DOENITZ AT NUREMBERG: A REPRISAL (1976).

227. *See* ELLIOT S.J.D. THESIS, *supra* note 224.

228. U.S. CONST. amend. V.

229. U.S. CONST. amend. VI.

230. *See* Wong Wing v. United States, 163 U.S. 228 (1896). The case regards aliens present in the U.S. and charged with criminal offenses. *See id.*

231. Japanese General Tomoyuki Yamashita was tried before a U.S. military commission for his failure to exercise command over 20,000 Japanese sailors who engaged in a rape and murder rampage in Manila in the closing days of World War II. *See* LAWRENCE TAYLOR, A TRIAL OF GENERALS 165-67 (1981); Jeffrey F. Addicott & William A. Hudson, Jr., *The Twenty-Fifth Anniversary of My Lai: A Time to Inculcate the Lessons*, 139 MIL. L. REV. 153, 169 n.66 (1993). The court did not prove that Yamashita ordered the war crimes, but convicted him under a "should have known standard." *See* Addicott & Hudson, Jr., *supra*, at 169 n.66.

gave sanction, as we held in *Ex Parte Quirin*, to any use of military commissions contemplated by the common law of war."[232]

While various issues remain to be worked out,[233] challenging the constitutionality of military tribunals to try the *al-Qa'eda* terrorists for war crimes will prove a difficult task. In its January 2002 report on the lawfulness of using military tribunals, the American Bar Association (ABA) Task Force on Terrorism and Law found the terror attacks of September 11, 2001, were arguably violations of the law of war that would justify the use of military tribunals to prosecute accused terrorists.[234] Similarly, in February 2002, the ABA House of Delegates supported the President's proposed use of military tribunals, but recommended the implementing regulations afforded to "an accused in any military tribunal be raised to the level that would satisfy the requirements of fundamental fairness."[235]

A more fertile area for discussion is associated with the rules and procedures by which the military tribunals will operate.[236] After months of speculation,[237] on March 21, 2002, the Secretary of Defense promulgated Military Commission Order No. 1, entitled: Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War on

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232. *In re* Yamashita, 327 U.S. 1 (1946).

233. *See* Paul Leavitt, *Judge Rejects Lawsuit Regarding Detainees*, USA TODAY, Feb. 22, 2002, at 4A. A federal district court Judge dismissed a lawsuit filed by "civil rights" advocates to force the U.S. to bring the detainees into a federal district court for trial. *See id.* The Court held that the U.S. Naval Station in Cuba is not U.S. territory. *See id.*

234. *See* Anne Gearan, *ABA Panel Supports Limited Military Trials*, WASH. POST, Jan. 8, 2002, at A4. See the ABA website for a posting of the full report at AMERICAN BAR ASSOCIATION TASK FORCE ON TERRORISM AND THE LAW, REPORT AND RECOMMENDATIONS ON MILITARY COMMISSIONS (Jan. 4, 2002), *at* http://www.abanet.org/leadership/military.pdf (last modified Jan. 4, 2002) [hereinafter INTERNATIONAL LAW COMMITTEE REPORT TO ABA].

235. AMERICAN BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA, REPORT TO THE HOUSE OF DELEGATES (2002), *at* http://www.abanet.org/leadership/2002/8c.pdf (last modified Feb. 2002). In the summary:

> The recommendation proposes that military commissions . . . be structured and implemented . . . having procedures that conform to those established for general courts-martial conducted pursuant to the UCMJ, and being made subject to judicial review in an appropriate federal court. The Recommendation takes no position on any issue other than those stated, and assumes that the President has inherent authority to authorize military commissions.

Id.

236. *See* Evan J. Wallach, *The Procedural and Evidentiary Rules of the Post-World War II War Crimes Trials: Did They Provide an Outline for International Legal Procedure?*, 37 COLUM. J. TRANSNAT'L L. 851 (1999) (discussing the standards promulgated by the office of the President).

237. *See* Toni Locy & Richard Willing, *Proposal Would Widen Defendants' Rights*, USA TODAY, Dec. 31, 2001, at 9A.

Terrorism.[238] As expected, the rules and procedures generally contain many of the same provisions found in the Manual for Courts-Martial,[239] which applies to United States military personnel when tried under the UCMJ.[240] Specifically, the rules provide the following rights for the accused who is charged with a violation of the law of war:[241]

- a copy of the charges in English and a language he understands;
- a presumption of innocence for the accused;
- guilt must be proved by the government beyond a reasonable doubt;
- access to evidence that the prosecution plans to present at trial;
- access to evidence known to the prosecution tending to exculpate the accused;
- right to remain silent;
- right to testify subject to cross-examination;
- right to obtain witnesses and documents for defense;
- right to present evidence and cross-examine witnesses;
- the appointment of interpreters to assist defense;
- right to be present at every stage of trial (except when proceedings are closed by the Presiding Officer) unless disruptive;
- access to sentencing evidence;
- cannot be tried again by military commission once verdict is final;
- right to submit a plea agreement;
- two-thirds of the military officers on the panel must agree on findings of guilt;
- unanimous decision of a seven member panel for death sentence;
- right to a free military attorney or to hire a civilian attorney; and
- trial would be open to public (exceptions recognized for physical safety of participants, protection of classified information, etc.).

The military commission itself will be appointed by the Secretary of Defense or his designee and will contain a panel of three to seven members, all of who are commissioned officers in the United States military. A presiding officer (PO) will be appointed to preside over the proceedings. The PO will be a judge advocate (military attorney) and will also serve as a voting member of the panel. The prosecutor will be a judge advocate although the Attorney General may provide special trial counsel to assist. The military commission is authorized to summon witnesses,

238. Department of Defense Military Commission Order No. 1, March 21, 2002 [hereinafter MCO #1].

239. MANUAL FOR COURTS-MARTIAL (MCM), U.S. (1988).

240. Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 801 *et seq.* (2000).

241. *See* MCO #1, *supra* note 238, ¶¶ 4-6.

administer oaths, require document production, and to designate special commissioners to take evidence.[242]

Two areas of remaining tension associated with the use of military commissions concern the matters of post-trial review and admissible evidence.[243] For post-trial review, the rules state that the record of trial will be transmitted to a Review Panel of three officers, one of whom has experience as a judge (the rules do provide that the Review Panel can contain civilians appointed by the President). The Review Panel will review the record of trial, and within 30 days, forward the case to the Secretary of Defense with a recommendation or remand the case for further proceedings. If the Review Panel sends the record of trial to the Secretary of Defense, he will then conduct an independent review and either remand the case for further proceedings or forward it to the President with his recommendation for a final decision (the rules do provide that the President can grant the Secretary of Defense the authority to approve the findings and sentence).[244]

In regards to the issue of admissible evidence at trail, the rules allow that the military tribunal will operate in the traditional manner of all previous tribunals and consider hearsay evidence and information gathered without a search warrant.[245] The standard for admissible evidence is that it would have probative value to a reasonable person.[246] In addition, witnesses may testify by telephone or audiovisual means, evidence from previous trials may be considered, and the panel may take conclusive notice of facts not subject to dispute.[247]

Surely, it is evident that in a democratic society the preferred framework for addressing terrorist crimes in normal situations is the federal criminal justice system. However, considering the number of possible defendants and the fact that the United States gained custody of these indi-

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242. *Id.* ¶ 4.

243. *See* Jess Bravin, *Military-Tribunal Defendants Get Fewer Rights and Procedural Rules*, WALL STREET J., Mar. 22, 2002, at A4.

244. *See* MCO #1, *supra* note 238, ¶ 6H.

245. This is not an uncommon matter in criminal cases in civil law countries in Europe. A panel of professional judges decides all factual and legal issues and may consider information they consider relevant to the case (e.g., hearsay). Furthermore, in most circumstances, judges may question the accused. *See, e.g.*, MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS (2d ed. 1994).

246. A parallel system operates in the context of administrative hearings. "[R]elevant evidence not admissible in [criminal] court, including hearsay, is admissible at an administrative hearing." Tyra v. Sec'y of Health & Human Servs., 896 F.2d 1024, 1030 (6th Cir. 1990). Furthermore, per *Opp Cotton Mills v. Administrator*, "[T]echnical rules for the exclusion of evidence applicable in jury trials do not apply to proceedings before federal administrative agencies . . . ." Opp Cotton Mills v. Adm'r, 312 U.S. 126, 155 (1941).

247. *See* MCO #1, *supra* note 238, ¶ 6D.

viduals in the context of armed conflict against this terrorist network and their State sponsors, the military tribunal model is, for now, appropriate in the current crisis.

C. *Investigating Terrorist Suspects*

One of the first issues of concern to draw the attention of the public following the terrorist attack of September 11, 2001, was the possibility that other *al-Qa'eda* terrorist cells were at-large on American soil.[248] Federal, State, and local law enforcement personnel were put on the highest alert, and an immediate search for suspected terrorists associated with the attack on America began under the direction of the Department of Justice.[249] Over one thousand illegal aliens were detained for questioning, and within four months about two-thirds accepted voluntary departure orders or were deported.[250]

To better assist law enforcement to prevent future acts of terrorism against the United States, Congress passed the USA Patriot Act[251] which contains a variety of criminal procedure provisions. Because almost all of the provisions in the USA Patriot Act amend or add language to existing federal statues, it will be some time before the meaning and impact of many of the provisions can be fully evaluated in terms of constitutionality. For example, section 203 of the Act amends the Federal Rules of Criminal Procedure (FRCP)[252] to allow the sharing of grand jury information with other interested agencies if it relates to foreign intelligence, section 219 amends the FRCP[253] to authorize nationwide search warrants for terrorism cases, section 213 adds a subsection to 18 U.S.C. § 3103a in order to authorize a delayed notice of execution of a search warrant (under specific conditions), etc.

Although an in-depth analysis of the new changes authorized by the USA Patriot Act is beyond the scope of this monograph, a provision giving the Attorney General broad powers to take into custody and detain illegal aliens suspected of terrorism will most likely prove to be the most

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248. *See, e.g.,* Kevin Johnson & Toni Locy, *Terror-Related Arrests Soar*, USA TODAY, Nov. 1, 2001, at A1. The violation of immigration laws served as the primary authority for the FBI and immigration officials to detain over 1,000 individuals across the U.S. in the wake of the terrorist attacks. *See id.* As of the beginning of May 2002, approximately 300 individuals were still being detained and investigated for possible terrorist connections.

249. The Department of Justice (DOJ) is the lead agency for domestic terrorism. DOJ uses the Federal Bureau of Investigation (FBI) as its primary action organization in this regard.

250. *See, e.g., 326 Still Detained*, ATLANTA J.-CONST., Feb. 23, 2002, at A12.

251. *See* USA Patriot Act, *supra* note 169.

252. FED. R. CRIM. P. 6(e)(3)(C).

253. FED. R. CRIM. P. 41(a).

controversial and bears analysis here. The power to indefinitely detain illegal aliens raises, at the very least, a constitutional due process issue under the Fifth Amendment, a matter which will most certainly require resolution by the federal judiciary.[254]

Specifically, section 412(a) of the USA Patriot Act adds section 236a to the Immigration and Nationality Act,[255] allowing the Attorney General to take into custody any alien *certified* to be inadmissible or deportable on one of six grounds: (1) espionage, (2) sabotage, (3) export restrictions, (4) attempt to overthrow the United States Government, (5) terrorist activities, and (6) any other "activity that endangers the national security of the United States."[256] Section 412(a)(5) then requires the government to either begin criminal or deportation proceedings within seven days of the detention.[257] Ostensibly, however, section 412(a)(6) empowers the government to indefinitely detain certain certified alien terrorists who are not likely to be deported in the foreseeable future due to the continuing nature of the investigation.[258] The question of concern regards the matter of how long a certified individual terrorist may be detained and under what conditions?[259]

The United States Supreme Court has yet to rule on the constitutionality of section 412(a)(6). Nevertheless, because of a 2001 decision entitled *Zadvydas v. Davis*,[260] it seems likely the Court will probably find that section 412(a)(6) is constitutional. In *Zadvydas* the Court was concerned with the constitutionality of whether the government can detain a removable alien beyond the removable period, i.e., indefinitely, or "only for a period reasonably necessary to secure the alien's removal from the country."[261] The Court construed the applicable section of the Immigration and Nationality Act[262] narrowly, firmly disapproving the indefinite detention of aliens who were not likely to be deported.[263] However, the Court

254. *See* Foucha v. Louisiana, 504 U.S. 71 (1992). Protection from detention by the government rests at the heart of constitutional due process concerns.

255. Immigration and Nationality Act, 8 U.S.C. § 1001 *et seq.* (2001). The changes are codified as 8 U.S.C. § 1226a.

256. *Id.* at (3).

257. *Id.* at (5).

258. Immigration and Nationality Act, 8 U.S.C. § 1001 *et seq.* The changes are codified as 8 U.S.C. § 1226a(6).

259. A collateral question also arises in terms of the Attorney General's power to determine who qualifies is a terrorist. This question will certainly be argued along the lines of how much deference is given by the courts to the political branches in matters of national security. *See, e.g.*, Cooler & Gell v. Hartmarz Corp., 496 U.S. 384, 400 (1990).

260. 121 S. Ct. 2491 (2001).

261. *Id.*

262. 8 U.S.C. § 1231(a)(6).

263. *Zadvydas*, 121 S. Ct. at 2498.

in *Zadvydas* did recognize in the opinion that suspected terrorists could be held for indefinite periods in preventive detention.[264] The Court understood that removable aliens detained for "terrorism or other special circumstances where special arguments might be made for forms of preventive detention," should not be affected by the general rule disapproving the indefinite detention of resident aliens not likely to be deported.[265] *Zadvydas* seemingly exempted suspected alien terrorists as a "small segment of particularly dangerous individuals" that the government could subject to indefinite detention.[266]

The USA Patriot Act's provisions on indefinite detention for certified (i.e., terrorists) detainees is likely to pass constitutional muster because it actually exceeds the *Zadvydas* standard regarding suspected terrorists held on an indefinite basis. First, section 412(b) specifically provides judicial review of suspected alien terrorists' detentions via habeas corpus.[267] Second, the new law proscribes fixed time limits for review of the Attorney General's initial certification. Section 412(a)(6) provides that an alien whose "removal is unlikely in the reasonably foreseeable future, may be detained for additional periods of up to six months if release threatens national security or the safety of an individual or the community."[268] Furthermore, section 412(a)(7) requires the Attorney General to review said certification every six months and allows the suspected alien terrorist to request a reconsideration of the certification every six months.[269] If these provisions are satisfied, the said terrorist suspect may be held indefinitely. If the Court follows its reasoning in *Zadvydas*, section 412(a)(6) will not be struck down as unconstitutional.

D. *Use of the Military in Domestic Law Enforcement*

There have been a number of new developments associated with the War on Terror that impact on the use of the United States military. Recognizing the need to increase military preparedness to fight the War on Terror, Congress has increased defense spending by ten percent over last year to $343 billion dollars.[270] More importantly, the Pentagon issued its long-awaited Quadrennial Defense Review (QDR) on October 1,

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264. *Id.* at 2499; *see also* Kansas v. Hendricks, 521 U.S. 346, 368 (1997) (cited with approval by the *Zadvydas* Court).

265. *Zadvydas*, 121 S. Ct. at 2502.

266. *Id.* at 2499.

267. 8 U.S.C. § 1226b. Actually, the section limits judicial review to habeas corpus without providing for a standard of review. *See id.*

268. 8 U.S.C. § 1226a(6).

269. *Id.* at (7).

270. Adam Uymer, *Democrats in Senate Back Down on Missile Shield Issue*, N.Y. TIMES, Sept. 22, 2001, at A3.

2001.[271] The QDR is the official strategic policy of how the United States armed forces should be utilized. The new QDR eliminates the long-standing vision of structuring the United States military to fight two simultaneous wars,[272] and now envisions a military that is based on a "capabilities-based model" flexible enough to fight asymmetrically and to deal with, among other things, international terrorism.[273] The Pentagon has also created a new Combatant Command[274] headed by a four-star general and responsible for coordinating military support in defending the territory of the United States.[275] But even with these changes, the United States military has yet to cross the mental bridge from conventional warfare to developing action-oriented tactics and strategies that combat international terrorism in the homeland.[276]

One of the areas being examined in the context of new missions for the American military is the question of whether a long-standing law prohibiting the use of the active duty military to support domestic law enforcement within the borders of the United States should be revoked or modified.[277] This law is the 1878 Posse Comitatus Act which prohibits the use of the military to execute the civil laws of the United States "except in cases under circumstances expressly authorized by the Constitution or act of Congress."[278] The Posse Comitatus Act does not apply to a member of the Reserve component when not on active federal duty, nor

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271. For an excellent synopsis of the QDR, see Ann McFeatters, *Defense Plan Begins at Home: Pentagon Drops 2-War Preparation to Focus on Terror*, PITTSBURGH POST-GAZETTE, Oct. 2, 2001, at A6 [hereinafter QDR].

272. ROBERT H. SCALES, JR., U.S. ARMY WAR COLLEGE, FUTURE WARFARE (1999). Scales argued early on for the adoption of a new strategic vision based on training a prepared force to handle a variety of contingencies. *See id.*

273. *See* QDR, *supra* note 271; U.S. Dep't of Defense, *The Quadrennial Defense Review*, May 1997, *at* http://www.defenselink.mil/topstory/quad.html.

274. Combatant commands are headed by four-star general officers and are responsible for coordinating all U.S. military forces within a specific geographic area of the world. For example, Central Command based in Tampa, Florida, is responsible for the Middle East, while Southern Command is responsible for Latin America and the Caribbean. The proposed name for the new command envisioned for the territory of the U.S. is Northern Command.

275. *See* Press Release by Federal Document Clearing House, Honorable Ike Skelton (D-Mo.), Proposal for DoD Homeland Defense Command (Jan. 28, 2002).

276. *See* AARON BANK, OSS TO GREEN BERETS (1986). This tension in tactics and strategy regarding how to fight unconventional warfare has always existed between the regular Army and the U.S. Army Special Forces.

277. Press Release, *supra* note 275. All recent government commissions on terrorism have "recommended against using U.S. soldiers as a quasi police force." *Id.*

278. Posse Comitatus Act, 10 U.S.C. § 375 (2001); 18 U.S.C. § 1385 (2001). The Act came about due to the use of federal troops in the southern States to assist civilian law enforcement during the Reconstruction period following the American Civil War. It originally only applied to the U.S. Army.

to a member of the State National Guard when not in federal service.[279] The Act also does not apply to the use of United States armed forces who either arrest or assist in the arrest of international criminals outside of the territory of the United States.[280] A variety of courts have held that military support to domestic law enforcement short of actual search, seizure, arrest, or similar confrontation with civilians does not violate the Act.[281] Specific examples of permitted support to domestic law enforcement include traffic direction and the provision of information, equipment, and facilities.[282]

As the new Homeland Combatant Command stands up and Congress weighs other calls for the increased use of active duty forces in homeland defense, the issue of the Posse Comitatus Act is sure to be raised again.[283] Arguments that the Posse Comitatus Act is a Congressional statute and can be repealed *in toto* do not rest well with the long national tradition of excluding the military from domestic law enforcement.[284] The use of military forces in domestic matters should only be used in the unique situation where there is a complete collapse of law and order. In a letter sent to Defense Secretary Rumsfeld in October of 2001, Senator John Warner (R-VA) asked if the Posse Comitatus Act should "now be changed to enable our active-duty military to more fully join other domestic assets in this war against terrorism?"[285] For now, the answer appears to be no.

E. *Immigration*

Concerns for security measures have caused the United States to revisit the issue of immigration laws regarding who is allowed into the country and under what conditions they are allowed to remain. By most measures, the Immigration and Naturalization Service (INS) has done a poor job in carrying out existing laws.[286] According to the latest statistics released by the INS, over 30 million visas were granted to foreign nationals

279. Thus, the use of State National Guard personnel to conduct security screening at airports is not a violation of the Posse Comitatus Act.

280. United States v Yunis, 681 F. Supp. 896 (D.D.C. 1988).

281. Paul J. Rice, *New Laws and Insight Encircle the Posse Comitatus Act*, 138 MIL. L. REV. 109 (1984).

282. STRATEGIC STUDIES INSTITUTE, TRANSNATIONAL THREATS: BLENDING LAW ENFORCEMENT AND MILITARY STRATEGIES (Carolyn W. Pumphrey ed., 2000), *available at* http://carlisle-www.army.mil/usassi/welcome.htm.

283. *See* Terry Badger, *War Prompts Debate on Military Law*, HOUSTON CHRON., Nov. 11, 2001, at A39.

284. *See* Thomas Lujan, *Legal Aspects of Domestic Employment of the Army*, PARAMETERS, Fall 1997, at 90.

285. *Id.*

286. The INS had a budget of 5.6 billion dollars and a staff of 35,000 for 2001. *See Inept National Security*, ECONOMIST, Mar. 23, 2002, at 28.

in 1998 to enter the United States.[287] The reason for entry into the United States generally includes reasons related to study, teaching, travel, or conduct business. Of paramount concern in weighing this figure is the fact that about 40 percent of the nation's undocumented immigrants have overstayed their visas and about "90 percent of nondetained individuals who receive final deportation orders fail to surrender [to the INS]."[288] This state of affairs prompted one Congressman to label the INS as "worse than useless."[289]

In the final analysis, whatever new changes Congress may make to existing laws,[290] it is painfully obvious that a far better job has to be done. This critique extends to screening and background checks of individuals seeking visas to enter the borders of the United States[291] and to tracking the millions of illegal aliens who have overstayed their visas. Nevertheless, concerns must be voiced in the public square that an inordinate tightening of immigration laws may promote "racial profiling"[292] and/or encourage an atmosphere of bigotry and fear in the general population.[293] Changes in the law should not impact negatively on the vast majority of law-abiding aliens; no American wishes to see a return to the

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287. For an excellent overview of the issue, see Sonja Garza, *Immigration Clampdown Expected to Be Far-Reaching*, SAN ANTONIO EXPRESS-NEWS, Sept. 2, 2002, at A20. The 40 percent figure quoted in the text equates to anywhere between three to five million people.

288. Suzanne Gamboa, *Rules for Immigration Visas Tightened*, SAN ANTONIO EXPRESS-NEWS, Apr. 9, 2002, at 7A; *see* Garza, *supra* note 287.

289. *Inept National Security*, *supra* note 286. Congressman Darrell Issa from California made the remark at a March 19 House Judiciary Committee hearing on the INS. *See id.*

290. Exercising its rulemaking authority, the INS has proposed a new rule to "reduce from six months to 30 days the amount of time a business traveler or tourist can stay in America." Gamboa, *supra* note 288.

291. *See* Eric Schmitt, *Agency Finds Itself Under Siege, With Many Responsibilities and Critics*, USA TODAY, Mar. 15, 2002, A11.

292. Laurie Goodstein, *American Sikhs Contend They Have Become a Focus of Profiling at Airports*, N.Y. TIMES, Nov. 10, 2001, at B6 [hereinafter *Profiling*]. Since the attacks of September 11, 2001, the Department of Transportation (DOT) has issued memorandums to workers in transportation centers that discrimination is prohibited. *See id.* The official policy of all federal agencies, to include the DOT, prohibits the use of racial profiling. *See id.* Nevertheless, there have been numerous complaints of racial or religious profiling filed against airport workers. *See id.*

293. An example of this hysteria occurred when a Dallas man, bent on revenge for all Americans after September 11, killed an Indian man, thinking the victim was of Middle Eastern descent. *See Nation in Brief*, WASH. POST, Apr. 3, 2002, at A24. "In a television interview in February, Stroman admitted to the three shootings [of convenience store clerks], saying he was so focused on revenge after Sept. 11 that he went after any store clerk whose heritage appeared to be of the Muslim world." *Man Guilty in Clerk Killings*, AP ONLINE, Apr. 3, 2002, *available at* 2002 WL 18179103. Stroman has been convicted of capital murder in at least one of these shootings. *See Nation in Brief*, *supra*.

poisoned atmosphere that occurred when President Franklin Roosevelt ordered the internment of American citizens of Japanese descent[294] during World War II.[295]

F. *New Information Gathering Technologies*

If the ability to engage in preventive measures to defeat terrorism are to be realized, the government will most certainly seek to employ new information gathering technologies which will include at the very least the increased use of video surveillance in public places, image-recognition modeling to scan faces,[296] and eavesdropping on electronic message traffic.[297] Within days after September 11, 2001, the Attorney General proposed a laundry list of new wiretap and electronic eavesdropping powers to enable law enforcement officials to "act more quickly in fast-moving cases [of terrorism]."[298] Many of these requests, such as a revision of wiretapping laws pertaining to cell phones, etc., have already been enacted into law;[299] many more issues are sure to be debated as the balance between privacy and security is stretched to the limit. While there exists no specific constitutional right to privacy in public places,[300] some privacy advocates fear that the next wave of government requests might "short-circuit constitutional safeguards under the guise of counterterrorism."[301] A survey of some of the new proposals for combating terrorism clearly adds to the discussion of where the line should be drawn between privacy

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294. *See* WILLIAM DUDLEY, JAPANESE AMERICAN INTERNMENT CAMPS (2002). The order extended to both foreign Japanese nationals and American citizens of Japanese descent.

295. *See Profiling*, *supra* note 292. William Harrell, executive director for the ACLU's Texas chapter compared the "current political climate and hysteria to . . . when Japanese-Americans were interned in camps." *Id.*

296. This technology will be focused on immigration matters. *See* Customs Border Security Act of 2001, H.R. Rep. No. 320, 107th Cong., 1st Sess., *available at* 2001 WL 1558423.

297. *See, e.g.*, Daniel G. Dupont, *Seen Before*, SCI. AM., Dec. 1999, at 56.

298. Guy Gugliotta & Jonathan Kim, *Push for Increased Surveillance Powers Worries Some*, WASH. POST, Sept. 25, 2001, at A4.

299. *See* USA Patriot Act, *supra* note 169 and accompanying text.

300. *See* RESTATEMENT (SECOND) OF TORTS § 652B cmt. C. (1977). An exception to the right of privacy is granted by excluding a defendant from liability when said defendant observes or photographs an individual who is not in seclusion, but rather has placed himself for public gaze. *See id.* The Supreme Court has recognized a citizen's right to privacy only within the ambit of the home, the family, marriage, motherhood, and child rearing. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65-66 (1973).

301. Gugliotta & Kim, *supra* note 298.

and security.[302] Two new ideas currently in the mill involve electronic profiling and electronic eavesdropping.

Since the War on Terror, the Pentagon has stepped up its tests of various image-recognition technology hardwares through the Defense Advance Research Projects Agency (DARPA).[303] DARPA is developing sophisticated technology that is similar to new automatic teller machines, which can scan a customer's face for positive identification. This technology has already been tested in England where over 300 outdoor cameras were used in the East London Borough of Newham to keep watch on "pedestrians and passerby, employing a facial-recognition system that can automatically pick out known criminals and alert local authorities to their presence."[304] These cameras can compare hundreds of thousands of faces on file against a particular subject face within seconds.[305]

An even more Orwellian advance is found in the FBI's sophisticated eavesdropping technology which uses electronic message traffic as a possible tool to track terrorists.[306] The hardware is called "Carnivore" and is installed at the Internet service provider such as America Online.[307] Once installed, Carnivore can capture all messages to and from a given account, functioning as a type of wiretap that traces all calls and eavesdrops on all conversations.[308]

G. *Increased Security Measures in Public Places*

The final area of interest has little to do with civil rights although it is often seen as a severe restriction on the freedom of movement which Americans have long enjoyed. It has, however, much do to with inconvenience and cost to the public. Acting primarily through the rule-making power delegated to administrative agencies,[309] such as the Federal Aviation Administration (FAA), the United States is increasing the security of various public transportation facilities with particular emphasis on airports. Congress has passed a number of new pieces of legislation includ-

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302. The U.S. is also preparing for so-called "information warfare," where terrorists will target the Internet for electronic destruction. *See* Michael N. Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUM. J. TRANSNAT'L L. 3 (1999).

303. Interview with Pentagon Official (Mar. 1, 2002).

304. Dupont, *supra* note 297; *see* Kevin J. Delaney, *Tech vs. Terror*, WALL STREET J. EUROPE, Oct. 8, 2001, at 8.

305. *See* Delaney, *supra* note 304; Dupont, *supra* note 297.

306. *See* Marcia Coyle & Bob Van Voris, *A New Landscape as U.S. Seeks to Protect Itself*, NAT'L L.J., Sept. 24, 2002, at A4.

307. *Id.*

308. *Id.*

309. *See, e.g.*, CORNELIUS M. KERWIN, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY (1999) [hereinafter RULEMAKING].

ing the 2002 Aviation Transportation and Security Act,[310] which requires increased airport screening through the use of advanced detection devices, physical searches, and positive passenger bag match. This new law will prove a burden to both passengers and to the industry in general.[311] For example, a proposed 12 billion dollar expansion to LAX International Airport in Los Angeles, California, is now on hold until a new baggage-inspection facility[312] and screening machines required by the FAA are built.[313]

The Office of Homeland Security has also finished work on a new Homeland Security Advisory System (HSAS) created by Presidential Directive 3. Utilizing a color-coded warning system, HSAS is an advisory system for federal, State, and local authorities to improve coordination and communication among all levels of government and the public.

It appears that increased security at public facilities and other public places is rapidly becoming a part of the reality of the modern era. It is perhaps the most obvious signpost that Americans are living in a new epoch. Paradoxically, it is not only our elected representatives who will decide how much security Americans will receive; those decisions will be made in part, and implemented in the main, by administrative agencies – the so-called headless "fourth branch" of government.[314]

V. CONCLUSION

"The price of freedom is eternal vigilance."[315]

George Washington

To some, the War on Terror portends a society in which the rights of the individual will more and more have to give way in favor of ever increasing security measures designed to vindicate the expanding desire of protecting the safety of the public from global terrorism. It may be a correct assessment that the continuing War on Terror places our civil rights *vulnerable* to erosion,[316] but the so-called "slippery slope" argu-

310. Aviation and Security Act, Pub. L. No. 107-71 (Nov. 16, 2001).

311. *See, e.g.*, Memorandum from American Airlines, to Jeffrey F. Addicott (Feb. 7, 2002) (referring to the Aviation Transportation and Security Act with the latest updates and details available at http://www.aa.com).

312. Dan Cray, *The New Airport: Safety Over Speed*, TIME, Feb. 11, 2002, at 17.

313. *See, e.g.*, Matthew L. Wald, *At Airports, New Watchdog Is Taking Over*, N.Y. TIMES, Jan. 27, 2002, at A16.

314. *See* RULEMAKING, *supra* note 309, at 47. The critique revolves around the fact that agencies are not specifically mentioned in the Constitution. *See id.*

315. WILLIAM J. FEDERER, AMERICA'S GOD & COUNTRY, ENCYCLOPEDIA OF QUOTATIONS 662 (1994); *see also* KATE LOUISE ROBUTS, NEW ENCYCLOPEDIA OF PRACTICAL QUOTATIONS 438 (1940).

316. *See* Gonzales, *infra* note 318 and accompanying text.

ment which resists all changes in the law must be viewed against the clear and present threat of *al-Qa'eda*-styled terrorist organizations and their possible use of weapons of mass destruction. The all too real specter of mass casualties, billions of dollars in physical damage, and civil disorder absolutely demands that the federal government fulfill its primary mission of ensuring the safety of its citizens and the viability of democratic institutions.

To date, the American people have overwhelmingly approved of the overall performance of the government in finding a working balance between defending their freedoms[317] while protecting their freedoms.[318] Nevertheless, as the federal government makes policy and directs the nation in the War on Terror, it is prudent to recall the caution of George Washington: "The price of freedom is eternal vigilance."[319] Accordingly, all measures employed to combat terrorism must be within the bounds of democratic principles and the rule of law, and, more importantly, so-called extraordinary laws should be proportionate to the terrorist threat and frequently reviewed, revised, and rescinded if no longer required.

317. *See* Richard Beneditto & Laurence McQuillan, *Bush Rates High in Security, Lower in Health Care*, USA TODAY, Mar. 29, 2002, at 13A. A *USA Today*, CNN, Gallup Poll released on March 29, 2002, showed that 86% approved of the way President Bush was handling "terrorism prevention." *See id.*

318. *But see, e.g.*, Emanuel Gonzales, *Forum Explores Idea of Diminished Civil Rights*, SAN ANTONIO EXPRESS-NEWS, Feb. 2, 2002, at 5C. At a debate focused on the legal implications of the War on Terror, an attorney with the San Antonio Chapter of the American Civil Liberties Union argued that the U.S. government is responding to the War on Terror in such a manner that "inalienable freedoms are withering away." *Id.*

319. FEDERER, *supra* note 315; *see also* ROBUTS, *supra* note 315.