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America and the World: Human Rights at Home and Abroad.

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SPEAKER PRESENTATION

AMERICA AND THE WORLD: HUMAN RIGHTS AT HOME AND ABROAD¹

JOE W. (CHIP) PITTS III†

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I. INTRODUCTION

I spent much of the last year, from the spring through the early fall, in Europe and Africa, both on business and in association with United Nations' activities. These included the first ever United Nations (U.N.) Social Forum in Geneva and the World Summit on Sustainable Development in Johannesburg. The Social Forum was developed as a

1. This article is drawn from a presentation delivered to St. Mary's Law School faculty and students in September 2002; except for a few corrections to accommodate transcription to the page as opposed to the lecture stage, the text reflects the remarks as delivered, accounting for a style more casual than usually found in these pages.

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way to bring into the U.N. voices that aren't typically heard, especially those of poor and vulnerable populations not represented elsewhere, either in the Davos World Economic Forum or even at the competing World Social Forum in Brazil. The Johannesburg Summit also addressed many issues relevant to these groups. While in Geneva, I also had the pleasure of attending the U.N.'s Sub-Commission on Human Rights, which is the expert advisory committee to the main U.N. body, the Commission on Human Rights. In the Sub-Commission, among the topics we discussed were the war on terrorism and related human rights and civil liberties implications, as well as issues of global corporate accountability and ethics that were in the news at that time.

While apparently unrelated, these topics all raise common considerations of strategically effective, ethical judgment and decision-making. On one hand, following the news from a distance may have given me less accurate information than that available to you here at home. On the other hand, I think it may have given me more objective, complete, and accurate information, because I was able to view the issues from an American perspective and also hear the perspectives of the representatives of Europe, Africa, and other nations. I have to tell you honestly that I am just flabbergasted about what is happening in our country, and with our administration's apparent obliviousness to the effect of those actions on the rest of the world.

II. EVISCERATING THE BILL OF RIGHTS

What I propose to do at the outset today is to try and provide a bit of an inventory of some of the main provisions of the Bill of Rights² that appear to me to have been gutted in this country in the last year. I invite your reactions because I'm going to say some things that will be provocative, particularly for proponents of the administration's position on these policies. If you have a difference of opinion, please speak up. One thing you should know is that I strongly favor dissent; I think it's extremely patriotic, extremely democratic, and extremely necessary in these days to vigorously debate alternative views on the issues we are facing. It's also essential in the process of trying to reach higher quality decisions.

A. *First Amendment Concerns*

Let me start out by giving you my impressions of some of the main provisions of the Bill of Rights that have been seriously jeopardized of late. The First Amendment comes to mind first—not just because it's the first in order, but also because of its preferred position as uniquely impor-

2. U.S. CONST. amend. I – X.

tant in our Bill of Rights and constitutional jurisprudence. The First Amendment is both exceptionally rich in content and especially important in function. Most people will recall that the First Amendment deals with freedom of speech, but not everyone remembers that it also deals with several other rights that are foundational to our regime of ordered liberty. In addition to speech, the First Amendment is where you'll find freedom of the press, freedom of religion both against the establishment of a state religion and for free exercise, freedom of peaceful assembly, and freedom to petition the government for a redress of grievances. There are five basic rights, really six, because the religion one is two sided. Perhaps the common denominator of all these rights is the right to believe and think what you want, and to freely express those beliefs, which is premised on a right that is not explicit; the implicit right to receive information. In other words, there is a bias toward the openness and transparency in the First Amendment, which reinforces the right to information about what is happening within the government and as a result of government action, so that you can, in turn, influence that action.

What we're seeing today by contrast, is a dramatically increased climate of secrecy. The hastily passed "USA Patriot Act"³ included intrusive new surveillance powers that cumulatively could deter dissent, freedom of speech, and assembly. This law is perhaps the most quickly passed and least read law in American history. Most members of Congress freely admit that they didn't have time to read the Patriot Act before its passage, due to extreme pressure from the administration and the public to do something, combined with the anthrax scare that hit the government at that time. Senator Russ Feingold deserves particular commendation for being the one senator who courageously voted against the law. Although in my opinion serious constitutional questions surround many provisions of the law, it purported to give the government expansive new powers; for example, the power to delve into private business or university databases, to require librarians or bookstore owners to reveal information about your reading or web-surfing habits. This would obviously seem to impinge upon the right to obtain information, which again is a prerequisite to the right to freely form opinions, debate, and express thoughts and beliefs. Even more threatening to those rights is the government's secret detention and secret trial of immigrants and citizens. Lawsuits have actually been required recently in order to find out the names of people detained in this country. Again, it's hard for me to believe this is happening here, but it is. There have been legal challenges against the government's claimed ability to rely on secret evidence in these trials. In fact, most of the trials and hearings have been closed to

3. USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

the people and the press. These governmental actions are not consistent with the presumption of openness at the heart of the First Amendment, nor the right to information implicitly contained therein.

Other First Amendment rights have been burdened by the recent governmental crackdowns against suspected terrorists as well as innocent immigrants, including mainly young males who happen to be almost exclusively Arab or Muslim. While the government claims that it is not targeting those of a specific national origin or religion, don't the facts clearly indicate the contrary? And aren't those groups then deterred in some measure from freely assembling, from petitioning the government for redress of grievances, from freely practicing their religion, and from freely expressing their views on administration policies?

B. *Fourth Amendment Concerns*

The next major provision of the Bill of Rights diminished by recent actions is the Fourth Amendment. This provision protects the right to be secure in your person, home, papers, and effects, against unreasonable searches and seizures. It also requires probable cause before arrest; a standard higher than the mere suspicion that has recently been used in some cases to detain people. The Fourth Amendment is under pressure from government action and powerful technologies; this can be abused if the government does not abide by traditional protections. Take 'Magic Lantern' technology, for example. This software can clandestinely be installed on your computer either directly when you're not around, or even discreetly over the Internet. It tracks every keystroke on your computer. There are different names for many of the relevant technologies and they change the names every so often, but 'Carnivore' and successor related technology, similarly allows the clandestine monitoring of e-mail communications and web-surfing habits. The Patriot Act included new provisions allowing your Internet Service Providers (ISPs), like Yahoo, AOL or Earthlink, to disclose your e-mail to the government should the provider deem it necessary to protect life or limb.⁴ The new Homeland Security Act passed in November of 2002, broadens this exemption, to insulate ISPs from liability, should the ISP deem that a disclosure was generally needed in the name of national security.⁵ The problem with e-mail, as you know, is that we are very casual about it. Sometimes we say

4. USA Patriot Act of 2001, Pub. L. No. 107-56, § 212, 115 Stat. 272, 284-85.

5. Homeland Security Act of 2002, Pub. L. No. 107-296, §225, 116 Stat. 2135, 2154 (codified at 18 U.S.C. § 2703(e) (2003)). The act added the words "statutory authorization" to the permitted list of reasons for disclosing information without liability. *Id.* The "statutory authorization" is provided by the aforementioned discretionary provision in the Patriot Act. USA Patriot Act § 212.

things that we wouldn't say in conversation. It encourages a very different mode of conversation. You may joke, and yet it's not taken as a joke in e-mail. In other words, things can be taken out of context, as we've seen in the Microsoft antitrust case and in several other trials that turned on discovered e-mail.

I have already alluded to the increased power the government has claimed under the Patriot Act, to search business and medical records, the books you check out of libraries or buy in bookstores, and to search your web-surfing habits. But the Patriot Act actually goes even further than this. Wiretaps on phones and internet communications are much easier to obtain. Some of this makes sense as simple updates to technological innovation, as with the new powers allowing 'roving' wiretaps; once judicially authorized, they are specific not to a piece of equipment such as a single telephone or a disposable mobile phone, but to the person. Other provisions, including the lowering of standards for issuing warrants, and the overall decrease of judicial oversight, are more problematic.

Of all the realms protected by the Fourth Amendment, among those traditionally safest from government intrusion is the home. Just about a year before September 11, 2001, Justice Scalia wrote a decision for the Supreme Court, precluding the government from using new heat-sensitive, external monitoring technologies to 'see into' a home without a warrant, in an effort to determine whether heat lamps were used for growing marijuana.⁶ The principle he reaffirmed, even in the face of evolving technology, was that the home is sacrosanct. But the Patriot Act now claims governmental power to go into your home without telling you in advance, to search the premises, as well as your papers and effects. Before, this would have been clearly impermissible under the Fourth Amendment; however, it's now a law on which the government is relying. The government could be searching any of your homes right now, without your knowing it. We now have a climate in which that degree of intrusion is acceptable. That causes me great concern and should concern all of you as well.

C. *Fifth and Fourteenth Amendment Concerns*

The Fifth Amendment right to due process, paralleled by the Fourteenth Amendment, which applies that right to the states, is also implicated by the government's actions. Due process includes, above all, a right to a hearing before an impartial judge, to present your case, to defend yourself, and to confront your accusers. Yet right now, in this coun-

6. *Kyllo v. United States*, 533 U.S. 27 (2001).

try, we have hundreds, even thousands of people if you include the detainees at the American military base in Guantanamo, Cuba, who are without any recourse to an impartial court. Incredibly, even United States citizens are being detained without charge, without trial, and without access to counsel, simply by virtue of being suspected of and labeled 'enemy combatants.' I'm thinking both of Jose Padilla,⁷ the so-called dirty bomber who was arrested at Chicago's O'Hare airport, and Yasser Hamdi,⁸ an American citizen born in Baton Rouge, Louisiana (my own birthplace), who was captured on the battle field in Afghanistan.

These detainees, including the two United States citizens now being held in prison, without a trial or the other rights necessary to present a basic legal defense, remind us of the extra-judicial 'disappearances' for which the United States has historically condemned other nations. Our own government's official position, articulated by representatives of the Department of Justice, is that the government's suspicion that they might be involved with terrorist activities, means that the two citizens have no right to be recognized as persons under the law and have 'no right to judicial review whatsoever,' simply because of the label the executive branch has unilaterally applied to them. The government argues that the label, 'enemy combatant,' places them outside of the sphere of the legal system, and in the sphere of the war system. The odd thing is that the government doesn't want to give them even the rights contemplated by the war system, since if they were deemed prisoners of war they'd have a right to a hearing under the relevant Geneva Convention.⁹ Again, I'm talking not just about the Guantanamo detainees, but also about United States citizens. So, the argument that ordinary citizens need not worry about this deprivation of rights because they affect only foreigners, does not hold.

While numbers remain elusive because of government secrecy, my understanding is that up to two thousand people have been detained in this country without being charged, even without taking the Guantanamo detainees into account. If you look at the hundreds of people who have been detained, they are basically all of Muslim and Arab descent. If

7. Padilla ex rel. Newman v. Rumsfeld, 2003 WL 1057319, at *14. March 11, 2003, U.S. District Judge, Michael B. Mukasey, entered an order permitting Jose Padilla to consult with counsel, "this is not a suggestion or a request that Padilla be permitted to consult with counsel, and it is certainly not an invitation to conduct a further "dialogue" about whether he will be permitted to do so. It is a ruling—a determination—that he will be permitted to do so." *Id.*

8. Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003) (determining Hamdi was constitutionally detained as he was captured in an active combat zone).

9. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

that's not racial profiling, and unconstitutional discrimination in violation of the due process of law, I don't know what is.

This use of language – depriving people of personhood by labeling them ‘enemy combatants,’ denying that racial profiling is taking place as if that would make it so, accusing detainees guilty of nothing more than immigration violations of being ‘terrorists’—is truly frightening. I heard President Bush on the one-year anniversary of September 11, 2001, say, “[w]e’ve captured more than two thousand terrorists.”¹⁰ You know who he was talking about? He was referring to the 2000 or so people detained, on what were mainly technical immigration violations of the sort that previously would not have resulted in detention, and the other people rounded up as ‘material witnesses’ or actual suspects, none of whom have been convicted of being terrorists, and only a handful of whom have been charged with any kind of terrorist-related crime. Often these detainees are kept in solitary confinement or in shackles. They’re often unable to see their families, and have been denied access to needed health care. Some of them have already died in prison. Amnesty International and other human rights organizations have already produced several disturbing reports on detention conditions in the United States and the United Kingdom. Compounding the violation of rights is the extreme difficulty of finding out what is happening because of the secrecy policy. I’m confident in saying that 99.9% of them are definitely not terrorists, but merely people who have overstayed their student visas or were arrested on technical immigration violations. Many are people who have been here for years, and many even have families in this country. Yet these are the ‘terrorists’ that the President was referring to. Now it is conceivable and theoretically possible, that some of them are terrorists. If we have an individualized suspicion based on any evidence whatsoever, that this might be the case, I would not have a problem at all with investigating, charging, and putting such individuals into a system of law that looks into whether the facts justify continued detention. But for us to generalize, as the President did on the anniversary of the attacks, to say they’ve captured two thousand terrorists, is frankly the worse demagoguery and abuse of language that I’ve heard in some time. It’s not only factually inaccurate, it is also morally wrong.

Similar issues surround the treatment of the Guantanamo detainees. Some may be associated with Al-Qaida, but the bulk of the detainees are undoubtedly members of the Taliban or associated militias who were ordered to defend their country. Put yourself in their position for a minute.

10. President George W. Bush, Remarks by the President in Observance of September 11th at The Pentagon (September 11, 2002), *available at* <http://www.whitehouse.gov/news/releases/2002/09/20020911.html> (last visited Mar. 26, 2003).

They're in Afghanistan with a repressive government, and they are told by the Taliban, "you fight or you die." And then they're fighting in order to save themselves and their families, and they now find themselves imprisoned without adequate rights and in violation of the Geneva Convention. The Geneva Convention clearly gives the right to an individualized hearing on the status of those detainees, and we're ignoring that right.

D. *Sixth Amendment Concerns*

Given what I've been saying, you might not be surprised to hear that the Sixth Amendment's guarantee of a speedy and public trial is under some stress these days. The facts speak for themselves. We're not seeing any kind of a trial, let alone a speedy trial or public trial. Indefinite, secret detention is the exact opposite of the Sixth Amendment. The Sixth Amendment also provides for a right to be informed of the charges against you, to be confronted with the witnesses against you, and to have assistance of legal counsel, among other rights. These rights are obviously being routinely violated. The government might say that these detainees are not accused of 'crimes,' so that the Sixth Amendment doesn't apply. Or it might say that the rights are being granted in a diluted form appropriate under the circumstances of extreme danger. But the bottom line is that the Sixth Amendment represents basic norms of fairness that are being violated by our government both within the United States and with respect to the detainees abroad. The military tribunals contemplated for trials of those held abroad contemplate at least a theoretical right to counsel, but it will be difficult for the accused to have effective counsel in practice. And while we have not yet seen any military hearings under the new regulations, other flaws in the regulations include the lack of a right to appeal to an independent authority; the only appeal is to the executive authority that put you in prison in the first place.

E. *Eighth Amendment Concerns*

You might be more surprised to hear that there are actually concerns that the United States is violating the Eighth Amendment against cruel and unusual punishment, in connection with the war on terror. But the concerns are real. As I've mentioned, there has been some inhumane treatment in addition to the talk of whether torture is justified in stopping terrorism, which I'm glad has subsided a little bit, despite the defense of torture by eminent "civil liberties" lawyers like Alan Dershowitz.¹¹ After explicit consideration of torture by some governmental authorities, it had

11. See e.g., ALAN DERSHOWITZ, SHOUTING FIRE: CIVIL LIBERTIES IN A TURBULENT AGE 470-77 (2002) (arguing that torture may sometimes be necessary, but advocating a system of 'torture warrants' granted by judges to insulate the torturers from liability).

seemed that torture was legally 'off-limits' even if the hypothetical 'ticking bomb' problem were to arise. Now if there were in fact an actual 'ticking bomb,' the use of torture might be revisited as a practical matter because in any audience you'll get a spectrum of people, some of who will argue that torture in such-and-such an instance is justified, while other individuals will say it's not. But the reality, to my knowledge, is that there's never actually been a real 'ticking bomb' situation. Moreover, as Bill Schulz of Amnesty International has pointed out, torture just doesn't work. People under torture will often say whatever they need to say to avoid or stop the torture.

The problems at this point relate mainly to those people who become sick or have died in prison, but there are also issues with solitary confinement, shackling, undue psychological pressure or physical coercion during interrogation, both directly by the United States and by allies, including some unsavory allies, to whom we ship prisoners to be questioned. Again, often these are students or immigrant workers guilty of nothing, but held as 'material witnesses,' or they may have violated a technical immigration requirement and despite years spent responsibly living and working in their communities, they may now be held under bright lights for twenty-four hours per day, subjected to loud sounds, and unable to walk from the cell to the bathroom without shackles and some guard as well as cameras watching them.

Much of this is just absurd as well as inhumane. Many of these measures are meant to give the American populace a feeling of security. But I would argue that none of the government's primary policy actions—from the Patriot Act, on down to these detentions and, frankly, including the attack on Afghanistan and the new moves toward war with Iraq – has done much to enhance security against the shadowy network of a non-state actor, such as the secret cells that constitute Al-Qaida. That terrorist network, much more than state terrorism which has been on the decline, is the main risk we face. The common denominator of a lot of these actions is that they're 'feel good' actions meant for show and to convey a sense of action in the name of security. They have a sort of marketing quality, and I'm not just referring to Bush's Chief of Staff, Andrew Card's admission that they didn't tell people about plans for a war on Iraq earlier because, "[y]ou don't introduce new products in August."¹²

All too often, the administration's actions are not just ineffective, but actively counterproductive – as when they alienate the Muslim and Arab communities either here at home or abroad. Most law enforcement and intelligence officials will tell you how important good community rela-

12. Elisabeth Bumiller, *Bush Aides Set Strategy to Sell Policy on Iraq*, N.Y. TIMES, Sept. 7, 2002, at A.

tions are to developing information that is most likely to catch criminals and prevent bad acts. Whether at home or abroad, genuine security is enhanced more by respect for civil liberties and human rights than by abusing those rights.

III. ROLLING BACK INTERNATIONAL HUMAN RIGHTS

For each provision of the Bill of Rights, there is an international equivalent in the Universal Declaration of Human Rights,¹³ spelled out in more detail in various international treaties on the subject. While not identical, the major international human rights are similar in essence to their United States counterparts. For example, the First Amendment is so rich that it took several international articles of the Universal Declaration of Human Rights to handle the various aspects. Article 18 deals with thought, conscience, and religion. Article 19 deals with freedom of expression.

A. *The Universal Declaration of Human Rights*

For those of you who aren't familiar with the Universal Declaration, it is truly one of the greatest achievements in history. It was passed a little over fifty years ago at the U.N. after great input from hundreds of philosophers around the world, from all sorts of religious, spiritual, and ethical traditions, from various countries and experts, and from some of the most distinguished people living during the last century. Eleanor Roosevelt chaired the Commission on Human Rights during the drafting process, and distinguished delegates included P.C. Chang of China, Malik of Lebanon, Cassin of France, Romulo of Philippines, Mehta of India, and Santa Cruz of Chile, among others. Contrary to some, therefore, I don't think it accurate to characterize the Universal Declaration as a merely 'Western' invention. Yes, it took as a starting point the Enlightenment ideals that influenced our own Bill of Rights and the French Revolution's 'Rights of Man.' And, the Declaration would not have been created at all without the United States' leadership and persistence. But the Universal Declaration added to the American and French revolutionary doctrines notions from other cultures that yielded a truly new balance of rights with responsibilities. For the first time in human history, it said for the world that 'even my enemies have rights,' which is a pretty remarkable thing. That means that even in the context of the war on terror or against genocidal maniacs, the alleged leaders of Al-Qaida or even dictators like Slobodan Milosovic and Saddam Hussein are entitled to some due process of law,

13. Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess. (1948).

as opposed to our just killing them for what we think they did. In fact, Milosovic is in the dock at the Hague right now, and even though it's a little troubling for some of us to see the good defense on some points that he is offering, the judicial process is working in that case right now; the evidence still clearly shows that he was guilty of serious international crimes, including genocide and ethnic cleansing.

B. *Rights Enhance and Repression Diminishes Security*

Everyone has a story to tell and it's important, I think, for purposes of history as well as for purposes of justice, truth, and reconciliation, to allow stories to be told. The reason I say that is, if we don't allow stories to be told, we will see an upsurge in the sort of increased radicalism and extremism that erupts in terrorism. There is a direct link between the rights contained in our Bill of Rights and in the Universal Declaration, on one hand, and preventing terrorism and achieving national security, on the other. If you repress people, if you don't give them that democratic safety valve in an open society to peacefully express dissent, what are they going to do? I'll tell you what they are going to do: they're going to do exactly what Osama bin Laden did. He started in Saudi Arabia, then he went to Yemen, then to Sudan, then to Bosnia, then Afghanistan, getting more and more radicalized in each place. He left what he saw as repression and corruption in Saudi Arabia and was able to go into these other places because they are failed states that can't really stop rogue actors from entering. And he set up training camps for terrorism in a number of them, including—most notoriously—Afghanistan. So these rights aren't just 'feel good' rights. They're not merely 'luxuries' that we respect only when we feel it's convenient. They're well thought-out. They're tested in practice. They're the product of centuries of evolution of human consciousness, and frankly, there are good pragmatic reasons for the rights, as well as the idealistic reasons that make respecting all these rights the 'right thing to do.'

C. *A Global Cascade of Shrinking Rights*

A downside of the linkage between our domestic civil liberties and international human rights is that when we repress provisions of the Bill of Rights at home, nations feel free to repress the rights of their own citizens and nationals abroad. This again divorces rights from common sense in an artificial and counterproductive manner. What we're seeing right now is a terrible follow-on effect, a sort of negative spillover effect, of repression of immigrants and ordinary citizens here in the United States. Gutting, as I've described it, the most important half of the Bill of Rights is not an insignificant thing. But we're seeing the same sorts of actions now in about fifty or sixty other countries over the last twelve months. These

are countries that have passed similar legislation to the Patriot Act and the President's military tribunal order. These are the sorts of legislative and executive actions that our country used to condemn, under Presidents ranging from Carter to Reagan, with a broad bipartisan, pro-human rights consensus. While we haven't always lived up to our rhetoric, at least on the rhetorical level we have been the leader in promoting these rights. We've put out excellent State Department reports every year that have said basically, country by country, 'you are executing people without a trial; you are using a military trial to deny due process; you're making these people disappear; you are setting up a surveillance system, a secret police that wrongly spies on the activities of your citizens.' Well, now we're doing all these things that we used to object to when done by other countries. And because we, the so-called 'beacon of international human rights,' is seen doing it, other countries will feel justified in doing it as well. Consider for example the recent Amnesty International report on detention in the United Kingdom.

I won't go through the entire list of countries that have passed new repressive legislation. But the reason that the United States is now more tolerant of repression by China, for example, not only of Tibetans but also against their substantial Muslim populace, and the reason that we're more tolerant of Russia and its war against Chechnya, is that it's the easier path. It's easier not to have to worry about the complex questions of how you both promote security and civil liberties. But sidestepping the tough issues represents a very shortsighted approach. If we continue to allow this follow-on effect, allowing other countries to repress human rights, we're back to the situation that Reagan's U.N. Ambassador, Jeanne Kirkpatrick defended in a famous or infamous article entitled "Dictatorships and Double Standards."¹⁴ The basic argument was that the evils of Communism were so bad that they excused and even required the United States to align itself with repressive dictators, for example Pinochet in Chile. Well that same logic now, after a hiatus of about a decade - the pleasant 90's which we wish we could get back to; is employed to justify human rights violations under the war against terrorism in the same way violations were justified in the war against Communism. We're back to dictatorships and double standards. We're newly aligned with many of the worst violators in the world, including China.

Now China is an impressive ancient civilization, but it doesn't respect human rights. Let's be clear about that. China is starting to open up with some economic freedom, but the argument that this will inevitably lead to political freedom is, in my opinion, very flawed—and China has proven

14. See Jeanne Kirkpatrick, *Dictatorships and Double Standards*, COMMENT., Nov. 1979.

that it's flawed. Wearing my business hat last week, I was contacted in South Africa by Google.com. China had blocked them from that market, perhaps because Google's internet search engine is such a powerful force for freedom in China. Google, unlike Yahoo and many other internet service providers, did not sign the self-censorship pledge requested by the Chinese government. Google realized that you can't have a free society without free information and dissent. After some international pressure, China did lift the ban. But who's to say whether it will be imposed again? In addition to China, other countries as well as Saudi Arabia and North Korea, are examples of this important issue related to internet filtering and citizen access to information. This is why the new Arab satellite new network, Al Jazeera, raises such interesting issues. On one hand, much of what's on Al Jazeera is propaganda. On the other, it's certainly offering much more free access to information than previously available to many societies in the Middle East, and as such is a force for freedom, somewhat analogous to the Voice of America.

IV. STRATEGY: WHAT WORKS AND WHAT DOESN'T

The bottom line; repression doesn't work. In fact it produces results that are the opposite of those intended: repression creates more terrorism. The incredibly strong and growing anti-Americanism that we're seeing has arisen as a predictable response to our nation's actions. Everyone is asking, 'why do they hate us?' Much of the answer is attributable to our double standards; for example, our policies showing excessive deference to the government of Israel. Now I'm a strong supporter of the existence of the State of Israel and the Israeli people. But just as I would hope our Israeli friends condemn counterproductive, repressive actions by our administration, I believe that it's the duty of true friends of Israel to speak out when the Sharon government or any Israeli government violates Palestinian rights through collective punishment, assassinations, and the like. Quite clearly, none of those actions have measurably enhanced Israeli security; instead, they've made life in Israel more precarious. Repression simply doesn't work.

I will wrap this up with a few comments on the new national security strategy and the 'Bush Doctrine' endorsing preemptive action of armed attack against any nation that *might* pose a possible threat in the future. I ask you: is that calculated to enhance global peace and stability? I mean, what can they be thinking? Having spent much of my life as a strategist for clients, I must say that this doesn't exactly strike me as good strategy. A good strategy has to be first of all, based on the facts, on reality, on truth, and on evidence, but we don't see that. What we're seeing instead, is excessive emphasis on ideological concerns, on marketing, on public relations - as in the United States having hired advertising executive

Charlotte Beers as Undersecretary of State for Public Diplomacy, to preach the message of America to the rest of the world. Did anyone see the little cards we dropped from the sky during the war in Afghanistan? The ones that had a picture of Osama bin Laden, shaven and in a white suit, which said, “[H]e sold you out, you must surrender or die.” Does anyone with any sense really think that’s going to persuade any Afghans? We should be more thoughtful and realistic about what will work and what won’t.

Note that the doctrine of preemption is being applied both in the domestic and foreign policy spheres. Instead of strategic actions in either sphere based on the facts, on evidence, on truth, on reality, and on what works . . . we’re seeing actions based on mere suspicions, possibilities, and generalizations. Saddam Hussein is undoubtedly guilty of state terrorism, and probably still possesses some weapons of mass destruction, and just as clearly, has used chemical and biological weapons in the past, including on his own people. He is a very bad guy and a genocidal dictator, but based on all the evidence to date, to say that he’s linked to Al-Qaida, just seems misleading. There may be a couple of Al-Qaida in Iraq. But there are Al-Qaida in this country, and there are Al-Qaida in Germany. That’s where they planned the September 11th attacks. Are we going to bomb Germany? Let’s be realistic here. Blurring distinctions that should remain distinct will not help form a good strategy. State actors like Iraq are very different from nebulous, non-state actors like Al-Qaida. Secular leaders like Saddam are very different from and antagonistic to, religious fundamentalist fanatics like bin Laden. To blur these threats and not consider what actions you need for each distinct threat amounts to both bad strategy and bad policy.

Another flaw in overbroad, ‘preemptive’ strategies at home and abroad is that they harm the innocent more than they stop the guilty. The American public has not heard much about it, but I understand that three thousand innocent people died in Afghanistan. That strikes me as posing a fearsome symmetry with the three thousand or so lives lost at the World Trade Center. Is our action in bombing Afghanistan justified, when you have that degree of civilian carnage, and few benefits to justify those costs? That is, Al-Qaida is still operating, and at this point seems little diminished by the Afghan action. We’re seeing more victories lately, such as the arrests in the United States and Pakistan, as a result not of military actions, but of law enforcement and intelligence efforts. Such efforts continue to be the main hope in the long run.

Such overbroad, preemptive strategies are also counterproductive. The real battle here is a battle for the hearts and minds of the billion or so Muslims in the world. Samuel Huntington wrote a book called *The Clash of Civilizations*, based on his original Foreign Affairs article of the same name. And although we don’t have a clash of civilizations just yet, there

are tensions between civilizations. It need not be a clash though: we are all people; the commonalities of human nature outweigh the civilizational or cultural differences. We all strive for the same things, including peace and security for ourselves and our families. At his best, President Bush recognizes this. But if we alienate the world's Muslim and Arab populations, or alienate those populations here in the United States, we will seriously undermine the information potential that we need for effective intelligence and law enforcement. Similarly, if we alienate those populations abroad, for example by bombing Iraq without the consensus or approval of the international community, and without adequate attention to post-war reconstruction, we're going to make the problems worse rather than better.

Finally, the overbroad and preemptive strategies also are illegal. Whether at home or abroad, proceeding without the facts or due process violates fundamental norms of law and basic fairness in ways that are wrong both morally and strategically. When, for example, we suddenly say that we're no longer going to respect and honestly apply the Geneva Conventions which the United States had such a major role in drafting and negotiating, we directly put our troops at risk. What happens when our prisoners are taken by Saddam, and we want to assert our rights but we can't?¹⁵ The reason for such rules is clear; reciprocal rules are understood by everyone to be both fair, and pragmatic. By contrast, selective, hypocritical, or arrogant interpretations that hold others to the rules but claim to exempt the United States are both immoral and practically dangerous. They strike other nations that way, such as when President Bush preaches humility then says, "Either you're with us or you're against us."¹⁶ Or, when he says things that aren't literally true, as with the earliest incarnation of the Bush Doctrine, equating terrorists with the states harboring them. Yet this American exceptionalism has been the hallmark of the recent United States approach, as we've used international treaties and organizations like the U.N. when they serve our interests, but either walked away from treaties or interpreted them selectively in our self-interest when it suits us.

V. A DUAL FAILURE OF VISION

So, in conclusion, we have a dual failure of vision here. There's a failure to clearly see extremely important realities. Like the distinction be-

15. *House Set to Honor American POWs; DeLay Outraged by Inhumane Treatment*, U.S. NEWSWIRE, Mar. 26, 2003, available at WL 3729439 (expressing anger over the treatment of the American POWs in Iraq).

16. Bill Tammeus, *Bush's [B]ully [P]ulpit*, KANSAS CITY STAR, Feb. 23, 2002, available at 2002 WL 4535895 (explaining the distrust that some of Bush's comments cause).

tween Al-Qaida and nations like Iraq, like the links between human rights at home and abroad, and to see that military power alone won't solve the problem, and in fact is part of the problem. The original complaint of Osama bin Laden was due to our military presence in Mecca and Medina. In addition to the failure to see such important realities, there's also a failure to envision and take steps toward a more peaceful and secure world.

People all over the world had tremendous sympathy for us in the wake of September 11th. But we didn't act on that sympathy. We did not capitalize on that opportunity to truly create a more peaceful, just, and sustainable world. Instead, we alienated the world with incredibly unilateral actions up until the President went to the U.N. on Iraq a couple of weeks ago. We have walked away from treaty after treaty, including treaties that are very important to the problems of terrorism and proliferation of weapons of mass destruction. I'm thinking of the Small Arms Treaty, the Protocol to the Biological Weapons Convention, and the Anti-ballistic Missile Treaty. The list goes on and on, including the International Criminal Court. What better mechanism could there be than this court, to finally bring to justice genocidal maniacs like Saddam Hussein, or war criminals, or people like Osama bin Laden, who perpetuate crimes against humanity? This was an unprecedented historical effort, of the overwhelming majority of the world's nations, to come together and sign this treaty to prosecute such criminals. But we have myopically decided that's against our interests, and we're not going to accept it. That's unrealistic; it's bad strategy. Our strategy should be fact-based, logical, consistent, credible to others, and proactive – in terms of building relationships that we know we will need to depend on later. The administration's 'preemptive' strategy meets none of these criteria. There is an important difference between being 'preemptive' and 'proactive.'

Even more important than these failures to see the facts accurately, I think, is the other failure of vision; the failure to imagine and communicate a just vision, inspiring to all, that is always the foundation of excellent strategy. We have alienated our closest allies. We have all-too-often used the U.N. as a cloak or mask to legitimize the pursuit of our selfish interests, instead of the genuinely global interests that we all have in this newly interdependent world. The reality now is that our interests are so often the same as their interests. The sooner the United States recognizes that reality, the better. Only with such a more informed appreciation of interdependence will the United States help lead the way to a more truly just, sustainable, and secure world. Thank you very much for your attention.