

# 5 Other Post-9/11 Legal Responses

Although the USA Patriot Act was the federal government's major, and potentially most far-reaching, legal response to the September 11 terrorist attacks, other significant legal responses should not be overlooked. These have come not only from the legislature but also from the executive and judicial branches of government. This chapter examines those legal responses in turn.

## Subsequent Legislative Responses

There have been a number of legislative responses from Congress since the September 11 terrorist attacks. Among them are the Aviation and Transportation Security Act, establishing the TSA; the Enhanced Border Security and Visa Entry Reform Act, designed to reinforce border security; and the Public Health Security and Bioterrorism Preparedness and Response Act. While these are individually important legislative responses to the emerging terrorist threat, they are not as significant as the legislative responses authorizing President Bush to use military force in pursuit of al Qaeda and the initiative to create a new cabinet-level office for homeland security. Consequently, those latter two pieces of legislation are the focus of the following discussion.

### Joint Resolution Authorizing Use of Force

On September 14, 2001, Congress passed a joint resolution authorizing the president to use force "against those responsible for the

recent attacks launched against the United States.” The modus operandi conforms generally to that used by Congress since the passage of the War Powers Resolution in 1973, whereby the latitude conferred on the executive by the legislature is broad enough to accomplish the task at hand with military operations but outside parameters are set beyond that which the executive theoretically cannot maneuver absent an invasion that he is required to repulse.

The language proposed by the administration was extremely broad:

That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, harbored, committed, or aided in the planning or commission of the attacks against the United States that occurred on September 11, 2001, and to deter and pre-empt any future acts of terrorism or aggression against the United States.<sup>1</sup>

Post-9/11  
Legal Responses  
155

According to the chief minority counsel for the House International Relations Committee, who helped negotiate the language on behalf of Congress, reaction to this wording

was immediately negative. . . . [H]ad this authority become law, it would have authorized the President to use force not only against the perpetrators of the September 11<sup>th</sup> attacks, but also against anyone who might be considering future acts of terrorism, as well as against any nation that was planning “aggression” against the United States. Given the breadth of activities potentially encompassed by the term “aggression,” the President might never again have had to seek congressional authorization for the use of force.<sup>2</sup>

As promulgated, the final language of Section 2 provides the specific authorization as well as the specific limitations in scope and purpose:

[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the ter-

rorist 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.<sup>3</sup>

Clearly, the purpose of President Bush's use of military force is constrained to preventing future attacks against the United States. Thus, under the terms of this resolution, our forces could not be used to prevent al Qaeda attacks against Israel or Britain or Japan, although such force might still be used pursuant to some other applicable treaty or security arrangement. Moreover, because the purpose is specifically preventative against future acts, not retributive for past acts, the president must establish a threshold in his determination for when action must be ordered to prevent further attacks. Of course, such threshold will likely be low and definitely preemptive in nature.

The purpose for employment of military force is further limited to acts of "international" terrorism. Consequently, military force is not authorized under this grant of authority for "internal" acts of terrorism by al Qaeda. While the decision by Congress to allow military operations outside the United States but not inside reflects its historic institutional caution about unleashing the armed forces domestically, this characterization of international versus internal acts of terrorism is interesting in that all four of the flights that were hijacked and converted to guided missiles on September 11 originated within the United States. Presumably, these would be considered internal acts of terrorism and, therefore, would not be covered by the terms of Section 2.

Perhaps a case could be made that the attacks were somehow "international" because the actors were foreign and were backed by a foreign-based terrorist network. But this line of reasoning fails when we are confronted with al Qaeda members launching attacks from within the United States who happen to be American citizens, like Jose Padilla. Perhaps domestic police power is sufficient, but the resolution would not cover this situation if Padilla had proceeded to target an area after landing at O'Hare Airport on May 8, 2002, and succeeded in constructing a dirty bomb.

The scope of executive authority is also limited. The president may use military force against those "nations, organizations, or per-

sons he determines planned, authorized, committed or aided” the September 11 attacks or countries that “harbored” those who carried out the attacks. This language confines the president’s range of targets to those who are, even tenuously, linked to the hijackings. On a primary level, this includes the al Qaeda organization and its operatives as individuals, as well as the Taliban government in Afghanistan.

On a secondary level, assuming “harbor” is interpreted loosely, this includes countries that may have provided support for al Qaeda or the Taliban—like Pakistan or perhaps even Saudi Arabia, with its demonstrated financial support. However, such friendly countries are unlikely to find themselves on the receiving end of U.S. military force. Because the resolution was written so soon after the attacks, it is more likely that legislative leeway was provided in the event that it could be shown that unfriendly countries like Iraq, Iran, Libya, or Syria were involved. Such evidence has thus far been lacking.

On a tertiary level, this allows the president to exercise military force in pursuit of anyone or any group associated with the al Qaeda network prior to September 11. Consequently, while U.S. troops can participate in flushing out Abu Sayef rebels on the southern islands of the Philippines because of their prior association with al Qaeda, American forces cannot be employed under the terms of Section 2 against Lebanon’s anti-Israeli terrorist group Hizbollah—which decided to associate itself with the remnants of al Qaeda in June 2002.

Senator Joseph Biden (D-Delaware), chair of the Senate Foreign Relations Committee, summed up the sense of Congress in crafting the language that simultaneously empowers and limits the president in his military response on behalf of America:

In all our anger, all our frustration, all our feelings, very bluntly, of hatred that exists now for those who perpetrated the act against us, we did not pell-mell just say: Go do anything, anytime, anyplace, Mr. President; you have to just go. We operated as our Founders, who were not naive people, intended us to operate. We operated under the rule of law.

We went to our civil bible, the Constitution, and we said: What does it call for here? What it calls for is the U.S. Congress to meet its constitutional responsibility, to say: Mr. President,

we authorize you, in the name of the American people, to take action, and we define the action in generic terms which you can take.

We gave the President today . . . all the authority he needs to prosecute war against the individuals or countries responsible, without yielding our constitutional right to retain the judgment in the future as to whether or not force against others could, should, or would be used. . . . In short, the President is authorized to go after those responsible for the barbaric acts of September 11, 2001 *to ensure that those same actors do not engage in additional acts of international terrorism against the United States.*<sup>4</sup>

Finally, there is no ticking clock other than the periodic reporting requirement (at least once every six months) contained in the War Powers Resolution—which all presidents since 1973 have regarded as an unconstitutional limit on their authority. The September 14 resolution contains no time limit constraining the president in his prosecution of this “war on terrorism,” nor does it contain any reporting provisions. Apparently, the legislature determined that the timing mechanisms in the War Powers Resolution were sufficient.<sup>5</sup>

The second part of Section 2 states, “consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution. Nothing in this resolution supercedes any requirement of the War Powers Resolution.” Thus, the legislature clearly considers the controversial 1973 delineation of war powers applicable, operative, and incorporated by reference in the current situation.

All presidents since Nixon, whose veto of the War Powers Resolution was overridden, have complied at some point with its reporting requirements, except President Carter, who encountered no similar military engagements during his term beyond the failed hostage rescue mission to Iran.<sup>6</sup> President Bush, like his predecessors, considers the War Powers Resolution unconstitutional; however, if history is an indicator, he will likely comply with applicable reporting or consulting provisions ostensibly as a courtesy but realistically to avoid a judicial crisis that may result in a formal loss of

power by the executive branch. As Columbia Law School's Lori Fisler Damrosch notes:

No President explicitly conceded that Congress has a constitutional entitlement to share in the decision to introduce troops into hostilities; no president conceded that Congress could constitutionally control the Commander-in-Chief in the exercise of his Article II powers; yet patterns of compliance with the War Powers Resolution did emerge that are suggestive of an unwillingness to force differences of principle to a concrete confrontation.<sup>7</sup>

Thus, the War Powers Resolution, designed to reinforce the framers' constitutional determination that the power to initiate war lay with Congress while the power to repel sudden attacks lay with the president,<sup>8</sup> operates in the context of this administration's war on terrorism as a gap filler. Indeed, by its own terms, Section 2(c) recognizes the president's Article II authority to respond militarily to "a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."<sup>9</sup> So, where the president introduces military force beyond the scope of the September 14 joint resolution (such as in Iraq absent evidence of linkage to al Qaeda) and not in response to a direct attack on the United States as conceived under Article II of the Constitution, he does so under the War Powers Resolution.

This means that such operations would be subject to much stricter reporting and consultation requirements. Specifically, President Bush would have sixty days after the submission of his first report to Congress, or after which it is supposed to have been submitted, to complete his use of military force. After that period, if Congress has not declared war, has not extended the sixty-day period, or is unable to meet due to an armed attack on the United States, the president must withdraw the troops. He has a thirty-day grace period to effectuate this withdrawal if doing so immediately would precipitate a military catastrophe and he certifies such executive decision to Congress in writing. Congress also has the power to demand removal of troops from foreign operations sooner if it directs by concurrent resolution.<sup>10</sup> A glance around the Eastern

Hemisphere reveals where the United States is currently pursuing, and might likely expand, its military operations in its widening war on terrorism.<sup>11</sup>

### Philippines

While the Filipino constitution prohibits military operations by foreign forces within their country, U.S. armed forces have provided logistical support for Manila's campaign against the Abu Sayyaf, a militant Muslim group believed to have links with Osama bin Laden dating back to the early 1990s. Around six hundred American troops have been deployed to assist in the hunt for these rebels, who operate in the south of the country. Filipino officials believe that the Abu Sayyaf has received arms, training, and other logistical support from al Qaeda and that the rebel group's methods of kidnapping and hostage taking are indicative of al Qaeda methods.

### Malaysia

There has been a series of arrests since September 11 of Islamic militants suspected of having links to Osama bin Laden's al Qaeda network. Intelligence and law enforcement agencies in the region now say al Qaeda's roots in Southeast Asia are stronger than was first suspected. Two of the alleged hijackers who took part in the September 11 attacks on the United States, Khaled al-Midhar and Nawaq al-Hamzi, were filmed at a meeting in Kuala Lumpur with other known al Qaeda operatives. Another indication of linkage to al Qaeda is the time spent in Afghanistan by members of the rebel Malaysian Mujahideen Group (KMM), perhaps at terrorist training camps.

### Indonesia

America could target parts of Indonesia, where Islamic militants have gained a strong foothold. The Bush administration is frustrated by the Indonesian government's unwillingness or inability to

target or rein in these groups. Indonesia is the world's largest Islamic country, with a population of 400 million. The head of the country's National Intelligence Agency, Lieutenant General Hendropriyono, recently confirmed that al Qaeda members have been fighting on the island of Sulawesi. Local militant groups, like the Laskar Jihad, which has trained thousands to fight against Christians, are believed to have links with al Qaeda.

There is also an al Qaeda-type pan-Islamic terrorist network operating throughout the archipelago, albeit on a regional rather than a global basis. Jemaah Islamiyah, headed by Abu Bakar Baaysir, has divided the country into three geographic areas, known as *mantiqi*, each with its own terrorist coordinator and each carrying out coordinated but independent missions. This group has worked with al Qaeda in the past but is not reliant on it for logistics, training, money, or direction. The fear is that a network like Jemaah Islamiyah could evolve to fill the void left by al Qaeda when it is finally destroyed. Jemaah Islamiyah was responsible for the 2002 bombing of a Western nightclub in Bali that killed over 200 people and crippled the country's tourist industry and is believed responsible for the August 2003 bombing of the Jakarta Marriott Hotel that claimed 14 lives and injured 148.

U.S. authorities are considering the familial linkage of Indonesian would-be terrorists. Bashir, the head of Jemaah Islamiyah, Jafar Umar Thalib, the head of Laskar Jihad, and Habib Husein Habsy, the head of Indonesian Muslim Brotherhood, are all Indonesian born, but each is Hadrami—a clan whose roots are not in Indonesia but in southern Yemen. Drawing deeper connections such as this may assist in the hardening of further American targets for military action.

## Sudan

In 1998 Sudan was the target of American missile strikes, after the Clinton administration accused it of ties with al Qaeda, which the United States blamed for blowing up its embassies in Kenya and Tanzania earlier that year. There have been reports of an American contingency plan to attack targets in Sudan, where Osama bin Laden was based before moving to Afghanistan. However, since



September 11 the Sudanese government has stepped up its efforts to arrest and hand over terrorist suspects.

### Yemen

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162

Yemen is Osama bin Laden's ancestral home, and the United States suspects that his men were behind the attack on the USS *Cole* in the Port of Aden that killed seventeen American sailors in 2000. In December 2001 Yemeni security forces—with the help of U.S. intelligence—attacked mountain villages suspected of harboring members of bin Laden's al Qaeda network. It was the first time since the September 11 attacks on the United States that an Arab government used military force to confront suspected members of al Qaeda.

A year later, in November 2002, U.S. military unmanned aircraft (operated by the CIA) confirmed satellite identification of six al Qaeda operatives driving in the remote northern region of Yemen and fired missiles at the target, killing all on board. One of those assassinated was Qaed Salim Sinan al-Harethi, al Qaeda's chief operative in Yemen—and the man believed responsible for coordinating the attack on the USS *Cole*.

### Somalia

American intelligence has determined that al Qaeda does have bases in Somalia, and the U.S. Navy has begun patrolling the sea lanes leading to that nation's coastline. The mostly Muslim country has no effective central government, and much of the country is divided into fiefdoms presided over by competing warlords. Somalia's interim prime minister, Hassan Abshir Farah, has strongly rejected American charges, but he has also indicated he would welcome the deployment of U.S. military teams in Somalia to investigate the possible presence of al Qaeda members.

### Tajikistan

American and European military forces have been operating in Tajikistan, Afghanistan's immediate neighbor to the north. Prior to

the September 11 attacks on the United States, al Qaeda trained and backed fundamentalist Islamic rebels fighting the Tajik government. In the past, Tajikistan has been accused by surrounding states—specifically China, which is attempting to suppress its own Islamic rebellion in the far western region of Xinjiang Province—of tolerating the presence of training camps for Islamist rebels on its territory. Tajikistan strongly denies this assertion.

### Uzbekistan

The United States has used the airspace and airports in Uzbekistan, with Russian consent, during the war in Afghanistan. The Uzbek government has its own problems with Islamic militants, and few believe Tashkent's cooperation has come without a price. Washington says the Islamic Movement of Uzbekistan (IMU) has ties to al Qaeda and poses a regional threat that must be rooted out. Many believe that the United States might help Uzbekistan do that, while turning a blind eye to government crackdowns on opposition groups.

Post-9/11  
Legal Responses  
163

### The "Axis of Evil"

#### Iran

Iran was singled out by President Bush as a dangerous regime in his January 2002 State of the Union speech. He said that North Korea, Iraq, and their "terrorist allies," along with Tehran, constitute an "axis of evil." There is no evidence linking Iran to al Qaeda, the Taliban, or the September 11 attacks on the United States. In fact, Iran agreed to offer sanctuary to any American pilots shot down over its territory during the American-led military campaign in neighboring Afghanistan. Nonetheless, Iran was accused of aggressively pursuing WMD and exporting terror. While President Bush said such activities could not be tolerated, he left it vague as to what action the United States would take.

This impasse, however, could be approaching a critical brink—and pushing Iran further away from cooperation with the West. Iran's nuclear capabilities became more alarming when an

unknown plutonium plant was discovered in 2003, complementing the already known uranium plant. A French report on Iran's progress termed it "surprisingly close" to achieving a weapon. Moreover, Tehran recently disclosed that it is holding several senior al Qaeda members in captivity but has refused to hand them over to the United States. The geostrategic position of Iran is also increasingly precarious, with U.S. military forces directly to the east in Afghanistan, to the south in the Persian Gulf, to the west in Iraq, and around air bases in neighboring Pakistan and Turkmenistan.

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North Korea

164

There is no evidence linking North Korea to the September 11 attacks on the United States, but President Bush has warned the communist government of Kim Il Sung in Pyongyang that it could soon become a target in the war on terror. In his State of the Union address, the president put North Korea among a small group of the world's most dangerous regimes. He accused it of arming itself with missiles and WMD that could be used in turn to arm international terrorists. In describing North Korea as part of "an axis of evil," he left his warning vague without mentioning specific actions that could be taken but hinted that he would move to use full military force if necessary.

However, North Korea's huge conventional armed forces clearly mitigate against a military solution to the crisis provoked by its recent emergence as a nascent nuclear power (plus the implied ability to take out Tokyo with a single nuclear-tipped Nodong missile). Consequently, despite a hard political line, the administration remains committed, for now, to seeking a diplomatic solution through multilateral talks that include Russia, China, South Korea, and Japan—to which North Korea has finally agreed after much effort seeking bilateral talks with the United States.

Iraq

Despite no clear evidence linking Iraq to the September 11 attacks, that country was invaded by U.S. military forces on the president's order in May 2003 and remains an occupied country. Justification

for action prior to the attack rested primarily on security grounds (possible links to terrorists, possible development of nuclear arms, etc.) but shifted after the war to encompass the removal of despots and the encouragement of democracy and freedom generally. The forcible removal of Saddam Hussein from power occurred in the absence of UN Security Council authorization but with domestic congressional authority in support. Broad public support was encouraged by the administration's persistent efforts to blend any action against Iraq into a wider, more amorphous war on terrorism.

That domestic support, however, was by no means unanimous. Without a substantial link between Saddam Hussein's regime and al Qaeda, many—such as Brent Scowcroft, national security advisor in the first Bush administration—believed that attacking Iraq would detract from the war on terrorism proper. As former secretary of state Madeleine Albright noted:

As evil as Mr. Hussein is, he is not the reason anti-aircraft guns ring the capital, civil liberties are being compromised, a Department of Homeland Defense is being created and the Gettysburg Address again seems directly relevant to our lives. In the aftermath of tragedy a year ago, the chief executive told our nation that fighting terrorism would be "the focus of my presidency." That—not Iraq—remains the right focus.<sup>12</sup>

Nevertheless, approximately 150,000 American forces remain in occupation of Iraq for the foreseeable future. Construction of new military bases are also envisioned there—partly to better stabilize the region and police Iraq's redevelopment and partly to offset the loss of American base use in Saudi Arabia as that country gradually extricates itself from such a visible alliance with the United States, bowing to domestic opposition in the process. It is hoped that, in the long term, the founding and survival of a successful democracy in Iraq will spread the yearning for similar freedoms to other parts of the Middle East, now ruled in large part by autocratic regimes.

### Legal Basis for Future Military Action

Besides the fact that each of the countries included in President Bush's "axis of evil" despises the United States for different reasons,

another common factor shared by them is the lack of evidence tying them to al Qaeda. Without such linkage, Congress's Joint Resolution on the Use of Force would not cover any military action President Bush might undertake against them. This is why the president secured separate congressional authorization for the Iraq war in October 2002.

In the absence of such legislative authorization, he would have to act on his own authority under Article II of the Constitution to repel an imminent attack. Attorneys from the administration's DOJ and Homeland Security Office have argued that this includes the possibility of America conducting a preemptive strike against a foreign country or a group within a country harboring them. They also argue that such a move is supported by the language of the September 14 resolution and that no other congressional articulation on the matter is needed.<sup>13</sup>

However, under international law, the existence of an imminent threat must be shown prior to undertaking such a move (which is ostensibly illegal under the UN charter).<sup>14</sup> So, absent such evidence of an imminent threat, the president would still be bound by the War Powers Resolution regarding the introduction of troops into hostilities. But in either case, he would remain bound by that law's reporting provisions.

### **Creation of Homeland Security Department**

Legislation creating a new Department of Homeland Security was not requested immediately after the September 11 attacks. It was not until several months later that critical defects in federal agency information sharing, threat analysis, and processing capability—which led to the greatest intelligence failure in American history—came to light. The government's responses prior to its decision to create such a unified department in the summer of 2002 were instead focused on establishing an office within the White House to advise the president on homeland security and efforts to internally reform the existing agencies that had failed so spectacularly in their mission to protect the United States.

On October 8, 2001, President Bush issued an executive order establishing the Office of Homeland Security. The office's mission was to "develop and coordinate the implementation of a compre-

hensive national strategy to secure the United States from terrorist threats or attacks.” It had the following functions: national strategy, detection, preparedness, prevention, protection, response and recovery, incident management, continuity of government, public affairs, cooperation with state and local governments and private entities, review of legal authorities and development of legislative proposals, and budget review.

However, as noted in chapter 3, this office was widely regarded inadequate to the task in terms of power and budget to achieve its goals. The only major initiative generated was the color-coded public warning system for terrorism alerts. While seemingly innocuous, there is growing concern that this system not only alerts the public to the appropriate level of awareness they should undertake, but also can be interpreted by local and state law enforcement officials as telegraphing permission to infringe greater levels of civil liberty as they seek to provide greater levels of security and “watchfulness.”

Under this theory, it was no coincidence that, after America went to a heightened level of orange alert on September 10, 2002, Florida law enforcement officers overreacted to a tip from a woman who overheard three Middle Eastern medical students talking about the 9/11 anniversary in a Shoney’s Restaurant. The officers tracked and stopped their cars, closed down Interstate 75 between Miami and Ft. Meyers, and detained them for questioning without reasonable suspicion or probable cause.

Beyond establishing the advisor’s position in the White House, the executive order also established the Homeland Security Council. This group comprises the director of the Federal Emergency Management Agency (FEMA), the director of the FBI, and the director of the CIA. The order stated that it did not alter the existing authorities of the U.S. government departments and agencies but that they were ordered to assist the council and the assistant to the president for homeland security in carrying out the order’s purposes.<sup>15</sup>

Simultaneously, in an effort to get the key agencies in its administration to form an alliance and to increase their communication and effectiveness, the White House used the tools provided it by the USA Patriot Act to make changes within the FBI and the CIA, including the shift within the FBI from solving crimes to gathering domestic intelligence and giving the CIA the authority to influence FBI surveillance operations within the United States, plus the ability to obtain evidence from the FBI gathered by grand juries and wire-

taps. This shift within the FBI meant that the agency's primary focus turned to counterterrorism.<sup>16</sup>

Then the attorney general announced a "wartime reorganization and mobilization" of the DOJ that included the abandonment or reduction of manpower working current responsibilities (running the gamut from civil rights enforcement to environmental pollution prosecution to local investigations such as undercover drug operations). Ashcroft said that they "must focus on our core mission and responsibilities, understanding that the department will not be all things to all people." Ten percent of DOJ, FBI, and other agency employees would be transferred to field offices around the country as part of a five-year restructuring plan. Reforms planned for the FBI and the INS proceeded and emphasized counterterrorism.<sup>17</sup>

The effort to internally reform agencies and make them work together more efficiently continued into the new year. In January 2002, James Ziglar, head of the INS, stated that his agency would work more closely with the FBI and CIA to share information and screen visitors before they arrive. During the prior month, he had announced that the names of 314,000 foreign nationals who remained in the United States despite deportation orders would be entered into the FBI national database.<sup>18</sup>

In May FBI director Mueller proposed creating a new "super squad"—headquartered in Washington—to conduct all major international terrorism investigations. The proposal would employ hundreds of agents and analysts and would involve creating an Office of Intelligence (the director would be a former CIA official); the Office of Intelligence would become a national clearinghouse for classified terrorism information. Nonterrorism investigations would continue to be pursued, but not at the same level. The Office of Intelligence would be used to analyze information. The next day, INS officials announced that the backlog of immigration applications was growing rapidly due to the inability in some offices to access a new security database (Interagency Border Inspection System) and the lack of training to use the database.<sup>19</sup>

By the end of that month, Mueller had announced the FBI's plan for reorganization (discussed in chapter 3), putting twenty-six thousand agents on permanent counterterrorism duty and attempting to hire nine hundred linguists, computer experts, engineers, and scientists—all in an effort to improve both the gathering and analysis

of information. In addition, fifty CIA employees were put on Joint Terrorism Task Forces in field offices, while another twenty-five CIA employees were transferred to the FBI as counterterrorism analysts. Ashcroft also rewrote department guidelines to give field agents more authority to open terrorism investigations, to conduct preliminary inquiries for a full year without being based on leads or probable cause, and to open undercover probes without having to seek clearance from FBI headquarters.<sup>20</sup>

Nonetheless, it had become apparent by the end of spring that agency reform efforts would not alone suffice to meet the country's enhanced security needs. Thus, President Bush decided to move ahead with the internally debated action of requesting legislation to create a new cabinet-level Department of Homeland Security in June 2002 that would unite several agencies, including the Coast Guard, Border Patrol, Customs Service, TSA, and FEMA. The department would have four tasks: controlling borders; working with state and local authorities to respond quickly to emergencies; developing technologies that detect biological, chemical, and nuclear weapons while working on vaccines and treatments for increased protection; and reviewing intelligence and law enforcement information. Most employees would be drawn from the combined agencies in order to avoid duplication and overlap.<sup>21</sup>

One of the divisions, Information Analysis and Infrastructure Protection, would analyze almost all of the information gathered by the FBI, CIA, and other agencies. Then the department would develop strategies for response. The FBI would no longer issue terrorist-related warnings to local law enforcement but would cede that responsibility to the department. Eighty percent of the Information Analysis and Infrastructure Protection data would be pulled from the FBI's National Infrastructure Protection Center. The CIA and FBI would continue to run their operations and analyze their data but would be expected to turn over most of the intelligence gathered.<sup>22</sup> Both the FBI and CIA directors testified in support of the legislation, referring to the new department as a "customer" for their respective intelligence-gathering and analytical capabilities.

In support of the initiative, and to further clarify its vision for the new bureaucracy, the White House unveiled the National Strategy for Homeland Security with the creation of the new department as its centerpiece. It identifies three objectives: preventing terrorist



attacks in the United States; reducing America's vulnerability to terrorism; and, in the event of attacks, accelerating recovery while making damage as minimal as possible.<sup>23</sup>

Two of the more ominous notes struck by the National Strategy for Homeland Security concerned information control and use of the military. The "law" portion of the plan called for tightening up public disclosure of information related to the war on terror and the government's efforts to further it. This, of course, would hamper the public's ability to monitor whether the executive's actions remain within the realm of the law. Review of the *posse comitatus* doctrine was also suggested. Under this doctrine, the U.S. military services are prohibited from enforcing law within the United States absent authorization to do so by Congress. Giving the military a free hand within our borders would be a massive increase in power to the executive branch. No legislation has been requested on these points yet.<sup>24</sup>

Congress responded to the president's request by passing the Homeland Security Act, creating the new Department of Homeland Security, and confirming Tom Ridge as its first secretary. After its creation, many federal agencies were transferred to Homeland Security, such as FEMA, the DOJ's INS, the Department of Transportation's Coast Guard and TSA, the Department of Treasury's Secret Service and Customs Service, and the Department of Energy's Nuclear Incident Response Team.

As the new cabinet-level entity comes on-line, the executive Office of Homeland Security is likely to be marginalized and could eventually fade from the scene, while its limited initiatives, such as the creation of the color-coded federal alert mechanism, are likely to be incorporated into the department's threat analysis and public information systems.

Despite worries in Congress, the new department is not likely to get into the raw intelligence collection business, relying on the FBI and CIA instead. However, the degree to which overlap in analytical functions exists could open the FBI to charges that agents assigned to redundant terrorism analysis tasks come at the expense of nonterrorism criminal investigations. Knowing this, any increase in organized crime, white-collar crime, drug-related activity, or Racketeer Influenced and Corrupt Organizations (RICO) infractions can be used to demonstrate that intelligence sharing and analysis arrangements must be reorchestrated.

## Executive Action

Perhaps more so than the other two, more deliberative branches, the executive branch is expected by the public it serves to respond quickly, directly, and decisively when tragedies on the scale of the September 11 terrorist attacks unfold. When the Japanese Empire attacked Pearl Harbor in 1941, President Roosevelt mobilized our forces and publicly requested a declaration of war from Congress the next day. When the Cuban missile crisis erupted into a cold war showdown in 1962, President Kennedy circled the wagons and announced not only to America but to the world that we were ready and practically willing to engage in a nuclear exchange with Khrushchev's Soviet Union. Immediate threats to our country do not go unchallenged, and it is incumbent upon any president to present a strong and confrontational figure in such situations.

Not surprisingly, President Bush's response to al Qaeda's coordinated attacks on Manhattan and Washington, D.C., comported exactly with these expectations. Indeed, he cut a particularly strong and resolute figure when he addressed a joint session of Congress five days after the disaster. Although he did not request Congress to invoke its Article I war power, he did insist that a state of war existed between the civilized world and the forces of terror, formally linked those forces to existing states that offer them aid and sanctuary, issued threatening demands on the Taliban government of Afghanistan, and announced the creation of a new cabinet-level office dedicated to ensuring homeland security.

All parties agreed that the president emerged that day as a changed figure on the national scene. Gone were the unsure glances skyward, the bottom-lip-chewing boyish face of indecision, and the stuttering, broken syntax so characteristic of his father. Indeed, George Walker Bush became a walking example of the moment defining the man. He grew into his job that week, projecting a persona of confidence and direction and the single-minded determination of a man who suddenly understands the significance of his chief mission. The president's cabinet reflected his aura as well—some, such as Attorney General Ashcroft, to the unfortunate extent that they characterized anyone who questioned the administration's policy initiatives as unpatriotic supporters of terrorism.

So it was that the president's legal responses directly following

the attacks were understandably laced with emotion of the moment and promulgated perhaps too quickly for adequate consideration of consequences under the considerable public pressure that any president faces in like circumstances. Nonetheless, after several months' reflection, policy flaws can, and do, emerge that must be responsibly addressed. The challenge to those who suggest such modifications (such as the authors of this book) is to do so without questioning the integrity of the officials who formulated the response. Equally, the challenge to officials tasked with implementation is to accept such analysis in the vein of bettering the policies, to engage in the dialogue of democracy, and to unweave themselves from a personal stake in that part of our government's response to terrorism that they are charged with undertaking.

However, the cavalier attitude of this administration in conducting the war on terrorism has drawn criticism from the press already. Hearst Newspaper columnist Helen Thomas, former White House correspondent for United Press International since the Kennedy administration and keen observer of every administration since, was provoked to pen these words:

The imperial presidency has arrived. On the domestic front President Bush has found that in many ways he can govern by executive order. In foreign affairs he has the nerve to tell other people that they should get rid of their current leaders. Amazingly, with Americans turning into a new silent majority and Congress into a bunch of obese lawmakers, he is getting away with such acts. The lawmakers are worried that Bush will play the "patriot card" in the November elections to attack dissenters and opponents. The Democratic leaders have already rolled over. They have given him a blank check by passing the USA Patriot Act, which permits outrageous invasions of privacy, and by seconding Bush's foreign policy with a weak "me too."

Whatever happened to congressional oversight? I remember all too well the senators who gave President Lyndon B. Johnson a free hand to do whatever he believed was necessary in Southeast Asia. They lived to regret it. The result was the Vietnam War that ripped our country apart. The list of the president's self-empowerment moves grows almost daily and will continue unless the Supreme Court calls his hand. Did I

say Supreme Court? Forget it. Not with this court. It handed him the 2000 election, and it would probably cite some World War II decisions that allowed the government to violate citizens' civil rights, especially those of Japanese Americans, in the name of national security.

Civil rights are now clearly being ignored by government agents in the war on terrorism who want to make the vulnerable detainees talk. The agents' methods of extracting information are not disclosed. And the imprisoned suspects and material witnesses cannot get in touch with lawyers or their families. I'm not talking about Russia's infamous gulags. I am talking about us. The president made the arbitrary decision to designate as a foreign "enemy combatant" the Brooklyn-born Jose Padilla, who is suspected of being an al-Qaeda scout seeking to locate targets for a "dirty bomb" attack. He is being held incommunicado in a military brig without due process of law and without being charged.

Where are the great constitutional law experts who might protest such treatment? It appears they have bowed to the exigencies of our time and are accepting Bush's end-runs around the law involving some 2,400 detainees, who are reportedly being held indefinitely by U.S. authorities. Can Americans really tolerate the denial of rights to these people?

Overseeing much of the chipping away at our privacy and other civil liberties is Attorney General John Ashcroft. He is enthusiastically using the patriot law to let federal agents wiretap and access the e-mail of untold numbers of citizens and to listen in on conversations between lawyers and clients. Now FBI agents are checking lists of readers at libraries and book stores. Is book burning in our future?

Ashcroft also sent a memo to federal agencies promising that the Justice Department will back them up anytime they want to deny freedom of information requests from scholars and journalists. Here, he is protecting Bush from criticism over the administration's clamp-down on government information. Rest assured he could not do this without the imprimatur of the White House.

We should not forget that Bush, early in his tenure, blocked the implementation of the release of President Reagan's White House papers. Under the Presidential Records Act of 1978, his

official documents were to be available to the public 12 years after he left office. So they were due for release last year, but Bush simply overrode that law. Was he trying to protect Reagan from the probing of historians and the media? Or was he really trying to protect his father, George H. W. Bush, who was Reagan's vice president and who succeeded him as president? White House aides issued a flimsy excuse—that the order was designed to institute an orderly release of the papers. But my guess is that No. 43, as W calls himself, was trying to protect No. 41.

Equally blatant examples of Bush's arrogance of power are in his foreign policy. What right does he have to tell Yasser Arafat that he has to go or to tell the Palestinians they cannot vote for Arafat in coming elections? Bush's speech could have been written by Israeli Prime Minister Ariel Sharon. Although he speaks of his compassion for the suffering Palestinians under Israel's military occupation, Bush is tightening the screws by making it clear he will deny them any aid unless Arafat is deposed. Plans to topple Iraq's Saddam Hussein have also been on the president's radar screen since he took office. When did the United States get the right to tell other countries and people who should lead them?

The president has been flexing America's military muscles and threatening pre-emptive first strikes against nations suspected—suspected!—of wanting to harm the United States. That also is a break with our past traditions. Bush is due for a reality check. We need allies whenever we contemplate such drastic actions, and our allies are worried about his constant saber rattling. Some day he is going to try to give a war and nobody is going to come.<sup>25</sup>

The legislature's capitulation to the executive branch in passing the USA Patriot Act served as a *de facto* and *de jure* green light for the administration to move ahead with accretion of power to itself on other fronts. Shortly thereafter, the president announced the creation of military tribunals to try suspected terrorists outside the jurisdiction of federal courts. Then the attorney general issued new directives within the DOJ expanding his power to detain immigrants indefinitely, increasing the use of secret deportation hear-

ings, contracting the information available to the public under the Freedom of Information Act, and waiving the attorney-client privilege for terrorist suspects in custody by executive fiat.

In the still vacuum of legislative and judicial silence, FBI investigation and surveillance rules were rewritten—allowing agents to enter houses of worship and to monitor civilians and noncivilians without any indicia of illegal activity, not even reasonable suspicion, let alone probable cause. Sensing no groundswell of opposition, the administration took its next step—indefinite detention of American citizens within the United States without access to counsel, without charges being filed, without trial by jury, and held incommunicado while in solitary confinement. This last act touched a nerve in the American psyche, causing both conservative and liberal political and libertarian groups to rouse themselves in suspicion of the executive’s motives.

But the increased power had already settled into the minds of administration officials, apparently convincing them that they held a monopoly on truth; thus, their actions in the best interest of the country were beyond reproach. Consequently, the DOJ, fearful that they could lose custody of their terrorist suspects who were American citizens, labeled them “enemy combatants” and handed them over to the DOD—which promptly threw them into military brigades for interrogation without counsel. They continue to languish there today. The remaining sections of the chapter explore some of these administration initiatives in greater depth.

### Presidential Military Order

One month after the administration had secured passage of the USA Patriot Act and detected no strong opposition, the president issued a military order establishing military commissions to try terrorists captured in America’s new war on terrorism. According to the terms of the order, its provisions do not apply to U.S. citizens, this prohibition having been established during the Civil War by the Supreme Court’s opinion in *Ex Parte Milligan*.<sup>26</sup> Therefore, only aliens can be tried by such military tribunals, but how wide is this jurisdictional net cast?

Three types of aliens, detained either here or abroad, are subject to this order. First is any former or current member of al Qaeda. Sec-

ond is anyone who has “engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor” directed at the United States or its interests or citizens—in other words, any nondomestic terrorist threatening America. Third is anyone who “knowingly harbors” a person that falls into the definition laid out in the prior two categories.<sup>27</sup>

Upon promulgation, Harvard constitutional law scholar Laurence Tribe pronounced the order “rife with constitutional problems and riddled with flaws,” noting that its language allowed the government to capture and arrest not only terrorists abroad but resident aliens at home who might once have had contact with a terrorist a decade ago. According to Tribe, the undefined terms “knowingly harbored,” “aided and abetted,” and “international terrorism” give the order an elasticity that makes it almost impossible to limit.<sup>28</sup> Moreover, the absence of a temporal limit on activities for which people could be apprehended raises *ex post facto* issues.

The order also suspends the writ of habeas corpus. Section 7 states that defendants tried by military commission “shall not be privileged to seek any remedy or maintain any proceeding . . . in any [U.S.] court.”<sup>29</sup> Other departures from normal criminal process by the order include a much lowered standard of admissible evidence (“probative value to a reasonable person”), which can include hearsay, the defendant’s right to counsel, right to appeal, right to confront witnesses against him, right to trial by jury, right to examine evidence against him, and right against indefinite detention.

Most of these rights that flow from our Constitution do not necessarily attach to the detainees while they are outside of the United States. However, the Third Geneva Convention protecting the rights of prisoners of war guarantees many of them.<sup>30</sup> Thus, if the Geneva Convention, a treaty to which both the United States and Afghanistan belong, is found to apply to the detainees held at Guantanamo Bay, Cuba, then those parts of the president’s military order that violate the treaty’s provisions are illegal and will fail. This is because, under Article VI of the Constitution, treaties and federal statutes are coequal as supreme law of the land and therefore override contrary executive orders and Supreme Court opinions. Treaties such as the Geneva Convention cannot be overridden by subsequent presidential orders.<sup>31</sup>

In order for the Third Geneva Convention protections to apply,

two criteria must be met. America must be at war, and those captured by us must be enemy combatants. According to our government, we are at war and have been since September 11, 2001. In his address to a joint session of Congress five days after the attacks, President Bush announced that America was at war with terror, and again he said this in his State of the Union message in January 2002—a point he reiterated in his speeches commemorating the one-year anniversary of the catastrophe.<sup>32</sup> Indeed, Congress passed a joint resolution authorizing the use of American military forces to prosecute the war. Although this measure was not a formal declaration of war, the chairman of the Senate Foreign Relations Committee referred to it as the constitutional equivalent.<sup>33</sup> Thus, by all accounts, the country is engaged in war, and the first criterion for the Geneva Convention to apply is met.

The second criterion—whether those captured are enemy combatants—is more problematic. Naturally, the critique directed at characterizing those captured in this war on terrorism as POWs, and therefore entitled to Geneva Convention protections, is that other non-Americans captured in other public policy “wars” like the War on Drugs or the War on Poverty have not been treated as POWs. However, such critique is easily dismissed. First, the war on terrorism constitutes an armed conflict under international law, whereas the other public policy wars do not. Second, the intent of the actors is widely divergent. The intent of terrorists is typically to kill in furtherance of a political objective. The intent of drug manufacturers and dealers in the War on Drugs is to widen addiction and secure profit. The intent of slum lords preying on the poor in the War on Poverty is also to maximize their profit with minimum investment.

According to international law:

Entitlement for prisoner of war status under the Geneva Conventions is restricted to those who can show that they fulfill the four conditions necessary to acquire the status of “combatants.” The Geneva Convention extended privileged prisoner of war treatment to resistance movements operating in occupied territory. Another category, possibly not identical to the aforementioned group, but still qualifying for prisoner of war status, includes members of armed forces who profess allegiance to a government or an “authority” not recognized by the detaining



power. Such members would, in any event, fight “on behalf” of a party to the conflict. There is still some uncertainty as to what link is required between independent forces such as resistance movements and parties to the Convention.

By changing the required conditions for combatants, Protocol I of 1977 widens the protection of prisoners of war: since the conditions are reduced a person may now qualify as a prisoner of war although he would not have enjoyed protection under the Third Geneva Convention. This extension will prove to be more useful than the presumption clause in the Geneva Convention that protection of a prisoner of war will continue until any question concerning his status has been settled by a competent Tribunal.

In practice even persons who do not fulfill the conditions of combatancy have been given prisoner of war status. To encourage the surrender of guerillas and spies, commanders have sometimes asked the political organs of their home state for permission to treat unprivileged combatants as prisoners of war. Such practice developed, for example, in the Malaysian conflict to distinguish between “captured enemy personnel” (CEP) and “surrendered enemy personnel” (SEP), whereby the latter group would also be treated as prisoners of war. The all-important question for prisoner of war status is whether there is a war. If a State can argue that there is no such conflict it may also attempt to evade all obligations incumbent on it relating to the specific treatment of prisoners of war. It is clear that non-recognition of an entity as a State does not necessarily lead to non-combatant status of persons. China refused to admit that there was a war in Korea and denied United States pilots, for that reason, the status of prisoners of war. They were instead treated as “spies” captured overflying China’s territory.<sup>34</sup>

President Bush’s military order establishing secret military tribunals to try, convict, and sentence these suspects undermines such a process. It delineates a clear distinction between American citizens—who continue to enjoy access to open courts with strict evidentiary and procedural rules, trial by a jury of civilians, and conviction only upon unanimity—and noncitizens (probably Muslims), who will disappear into closed courts administered by neither the judiciary nor the DOJ but by the DOD, with relaxed evidentiary and

procedural rules, and undergo trial by a panel of military officers who may convict on a two-thirds vote.<sup>35</sup>

The illegal nature of this order only serves to perpetuate a sense of unfairness. As written, this order does run afoul of the Third Geneva Convention. The Truman administration signed this treaty in 1949, and it was ratified under Eisenhower in 1956, fourteen years after the last military commission in the United States, convened by Roosevelt, tried and convicted eight Nazi saboteurs.<sup>36</sup> This 1942 conviction is the precedent cited most often in defense of the president's order as applied within the United States. Military commissions were last used outside the United States by General MacArthur in Japan in 1945. Obviously, no more recent cases can be cited because the rules changed in 1956 with the entry into force of the treaty—which extinguished prior law or court opinions that were in conflict. Thus, the government's reliance on prior case law is faulty.

Assuming noncitizens suspected of terrorism who are captured in this conflict are considered prisoners of war, not a far leap of logic since the government insists that "we are at war,"<sup>37</sup> such people are guaranteed certain procedural safeguards by the Geneva Convention. Specifically, they are granted the right to be tried by an independent and impartial court, freedom from coerced confession, the right to counsel with private conferral, the right to a speedy trial (no longer than three months in prior detention), use of the Uniform Code of Military Justice (UCMJ) in sentencing, and the right of appeal. The president's military order guarantees some Geneva Convention protections, such as humane treatment, adequate sustenance, free exercise of religion during detention, and the right to counsel during trial.

However, it breaches other protections by eliminating the right to appeal, by not ensuring an independent and impartial court, and by not providing for private conferral with counsel. Moreover, the possibility of receiving the death sentence "upon the concurrence of two-thirds of the members of the commission present" does not track the unanimity requirement in the UCMJ<sup>38</sup> as it must according to the treaty. Incongruencies between the president's order and the treaty make the order legally untenable. The military order of November 13 cannot modify provisions of the Third Geneva Convention; it must comply with them. Only a subsequent statute or treaty, both requiring congressional action, can modify those terms.

The administration's response to this legal problem has been to

studiously ignore it. They have labeled those captured on the battlefield in Afghanistan and brought to Camp X-Ray “unlawful combatants” instead of enemy combatants to avoid calling the detainees POWs—which would mean providing them their treaty rights. According to the administration’s view, articulated more clearly by Yale University’s Professor Wedgwood, while POWs would normally be tried by military courts under the UCMJ, non-POWs receive no such privilege:

A privileged prisoner of war is sometimes tried in the same mode as his adversary’s soldiers. But al-Qaeda members have not fulfilled the prerequisite conditions of the Third Geneva Convention of 1949—failing to observe the laws of war, or to wear identifying insignia, or to carry arms openly—and may thus fairly be considered as “unlawful combatants.”<sup>39</sup>

The administration’s sudden discovery of “unlawful combatant” status is certainly a clever way to dodge U.S. obligations under the Geneva Convention and to save the legality of the presidential order. However, designating these detainees as unqualified for POW status through executive political fiat is not allowed under the terms of the treaty. Article 5 requires a determination by a competent tribunal of a prisoner’s status under the convention when that status is in doubt. For the administration to merely state that they have no doubt as to the detainees’ status and to expect the world to believe they are complying with their treaty-bound duties is to deny the language of the treaty its ordinary meaning as required under international legal rules of treaty interpretation. Ironically, the Senate Foreign Relations Committee said in 1995, upon approving the Geneva Conventions:

We should not be dissuaded by the possibility that at some later date a contracting party may invoke specious reasons to evade compliance with the obligations of decent treatment which it has freely assumed in these instruments. Its conduct can now be measured against their approved standards, and the weight of world opinion cannot but exercise a salutary restraint on otherwise unbridled actions.<sup>40</sup>

Nonetheless, Defense Secretary Rumsfeld had the power to save the president’s order from manifest illegality. Sections 4 and 6 of the

order required Rumsfeld to issue rules and procedures for the establishment and functioning of military commissions. By drafting these guidelines to closely mirror UCMJ safeguards protecting American military servicemen—such as the unanimity rule, right of appeal, establishment of guilt beyond a reasonable doubt, and strict rules of evidence—compliance with the treaty would have been implicit because the UCMJ itself complies with it.<sup>41</sup> Therefore, the order could have become legal.

However, the DOD failed to take advantage of that opportunity. The rules issued by the DOD under the military order in March 2002, while ameliorating some of the harsher aspects of the process, did not go far enough to save the tribunals from being illegal upon their creation. In fact, DOD officials announced on the day the rules were issued that detainees who are tried and acquitted can still remain in custody indefinitely as a threat to national security. Consequently, the tone was set for basic human rights—such as the right against indefinite detention without charges or counsel, guaranteed by customary international law and other multilateral treaties, to be violated even if the tribunals worked in the unlikely event to acquit anyone.<sup>42</sup>

Even if the protections of the Geneva Convention can be kept at arms length through definitional hijinks, customary international law and human rights norms require minimum procedural safeguards. The University of Houston's Professor Jordan Paust, a former military lawyer, identified these violations shortly after the implementation rules were disclosed:

The President's . . . Military Order had set up several per se violations of international law. Instead of attempting to avoid them, the DOD Order . . . continued the violations . . . [which include] intentional and per se discrimination on the basis of national or social origin, intentional and per se denial of equal protection, and "denial of justice" to aliens in violation of various international laws. Nearly every impropriety concerning the Peruvian military commissions addressed by the Inter-American Court of Human Rights has been built into the Bush military commissions.<sup>43</sup>

In particular, under the DOD order, civilians may not be tried in civilian courts, the accused have been detained for months without charges, detainees do not enjoy the right to be brought promptly

before a judge or to file habeas corpus petitions, defense attorneys will lack access to some witnesses, the accused will not be able to cross-examine all witnesses against them, portions of trials can be held in secret, and the accused lack the right of appeal to an independent and impartial tribunal. Furthermore, most of the customary minimum due process requirements reflected, for example, in Article 14 of the International Covenant on Civil and Political Rights, have been spurned.

In particular, there will be a denial of a “fair and public hearing by a competent, independent and impartial tribunal established by law”; detainees have not been “informed promptly and in detail . . . of the nature and cause” of any charges against them; an accused will not fully enjoy the right to “counsel of his choosing”; an accused will not fully enjoy the right “to be tried in his presence” or to “defend himself . . . through legal assistance of his own choosing”; an accused will not fully enjoy the right “to examine, or have examined, the witnesses against him”; and an accused will not enjoy “the right to his conviction and sentence being reviewed by a higher tribunal according to law.”<sup>44</sup>

Yet another deficiency in the rules, according to Amnesty International, is the absence of any provision making evidence obtained through torture or coercion inadmissible.<sup>45</sup> In American civilian and military courts, such evidence is deemed untrustworthy, and therefore cannot be considered against the defendant. However, the lower bar to evidence under the DOD rules would allow in any evidence of “reasonable probative value” as determined by the presiding judge or a majority of the panel—which could be constituted of nonlawyer military officers (only the presiding judge must be a judge advocate general [JAG] officer).

Observance of laws, both domestic and international, is key to America’s success. This is all the more important when the United States, as a free country, helps craft the laws in the treaties and agrees to be bound by them. What message does it send to the world when America acts to change the rules of the game in order to win? If our country is acting justly, with faith in its cause and truth on its side, then it will prevail. America doesn’t need to change the rules. They are sufficient for their purpose and fairly crafted to ensure a legitimate outcome. Indeed, as defenders of human rights around the world for decades, it has been the United States that has criticized others for unfair use of secret military courts.

Condemning similar practices in Peru in 1999, the Department of State noted, “proceedings in these military courts—and those for terrorism in civilian courts—do not meet internationally accepted standards of openness, fairness, and due process.” And addressing denials of fair public trials in Egyptian military courts, the United States found that

the military courts do not ensure civilian defendants due process before an independent tribunal. . . . There is no appellate process for verdicts issued by military courts; instead, verdicts are subject to review by other military judges and confirmation by the President, who in practice usually delegates the review function to a senior military officer.<sup>46</sup>

Under President Bush’s military order and the DOD rules, verdicts against the detainees are subject to review by other military judges and then the recommendation is sent to the president, who may delegate his final review function to the secretary of defense. Did the Bush administration actually adopt the very review process used by Egyptian military courts that America condemned as violative of human rights not three years earlier? The similarity, and hypocrisy, cannot be ignored.

True, establishment of such tribunals is rightly justified by prosecutors as more expeditious and less complicated due to the ability to use classified evidence without compromising national security.<sup>47</sup> But the inherent distinction based on nationality unwittingly feeds the mind-set of non-American Muslims as victimized and unworthy of treatment according to higher standards reserved for Americans. This, of course, does nothing to ameliorate the hatred simmering below the surface. Shortly after the catastrophe, former secretary of state Madeleine Albright reassured the world on television that America was “a nation of laws,” and President Bush promised to bring those involved to “justice.” Redefining the laws and redefining “justice” for non-Americans as somehow less than that accorded Americans actively works at cross-purposes with our mission to spread American democratic values.

### **Military Action in Conformity with International Law**

The U.S. invasion of Afghanistan that toppled the Taliban government in early 2002 was undertaken in conformity with domestic law,

under Congress's September 14 joint resolution, and sanctioned by international law. This is important if the response is to be viewed as legitimate by the world and especially by the Islamic world.<sup>48</sup>

First, under the UN charter, America has the right of self-defense. Article 51 allows us to exercise this individually or collectively in response to an armed attack and to continue its exercise "until the Security Council has taken the measures necessary to maintain international peace and security." Indeed, in resolutions issued the day after the attack and again on September 28, the UN Security Council defined the situation as an inherent threat to international peace and security and recognized the invocation of Article 51.<sup>49</sup> Given the gravity of the September 11 attacks and the tacit support of the most traditionally recalcitrant permanent members of the council, Russia and China, it is unlikely that the council would act to truncate the ongoing action in Afghanistan.

Second, under the North Atlantic Charter, America is backed in this action by its NATO allies. For the first time since its adoption in 1949, the charter's military response obligation in Article 5 has been triggered.<sup>50</sup> This key provision declares that

an armed attack against one . . . of them . . . shall be considered an 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 or collective self-defence recognised 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 . . . necessary, including the use of armed force.<sup>51</sup>

Thus, the forces deploying on the ground in Afghanistan for peacekeeping purposes are primarily NATO forces. The British will occupy the airbase at Bagram field north of Kabul, the French will occupy the airbase at Mazar-e Sharif, and the Turks will lead a multinational mostly Muslim force to police Kabul, "ensuring that no single Afghan militia is able to monopolize power in the capital."<sup>52</sup>

Third, under customary practice, because the attack came during peacetime and was in violation of international law, the president can invoke the old doctrine of reprisal against the offending state. Of course, the perpetrators were an organization, not a state; thus,

President Bush went out of his way to connect the terrorists to the state by linking them in a principal-agency relationship so this legal rationale can be utilized. The other elements of the doctrine require a request for redress, which Bush made in his address to Congress when he ticked off the list of demands for the Taliban,<sup>53</sup> followed by a denial, which the Taliban dutifully provided. The military response that flows from this doctrine of reprisal must then be proportional to the injury suffered.<sup>54</sup> Here, the toppling of the repressive Taliban, the pursuit of international terrorists, and the creation of conditions for a new coalition government in Afghanistan are certainly proportional to the massive loss of life in America coupled with the attending physical destruction of airliners, skyscrapers, government facilities, and collateral infrastructure damage.

Many international law scholars hold that armed reprisals became unlawful with the adoption of the UN charter in 1945. They argue that the charter preempts the field of states' prerogatives on international use of force and allows for only the self-defense exception contained in Article 51. They rely heavily on a combination of Resolution 188, where the UN Security Council, in response to Britain's attack on Yemen in 1964, condemned military reprisals as incompatible with the purpose of the UN, and a literal reading of Article 2(4), which provides:

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

However, an even closer reading of Article 2(4) by Ohio State University's Professor Gregory Travalio reveals that this prohibition is perhaps not the blanket prohibition that antireprisalists make it out to be. He argues that, in the context of using military force in response to terrorist attacks, "force to eliminate a terrorist threat does not violate the territorial integrity or political independence of the state in which the terrorists are being harbored, and is otherwise consistent with the U.N. Charter" due to the flood of pronouncements against terrorism in the last two decades.<sup>55</sup> Thus, from a purpose standpoint, what in effect are reprisals, such as America's launch of cruise missiles against Sudan and Afghanistan in 1998 in



response to the attack on our embassies in Africa, were not precluded by Article 2(4)<sup>56</sup> and, therefore, did not need to be justified under Article 51.

Others take the view that the “inherent” clause of Article 51 preserves customary law as it was in 1945 to include both reprisal and preemptive strikes (or anticipatory self-defense) as legal possibilities. The academic debate on this point appears to be resolving in favor of defining both as illegal under Article 51, even as states such as the United States and Israel continue to invoke it as inclusive and condemnation of those actions on the ground remains far from universal.<sup>57</sup> Thus, the legal basis in the charter, aside from customary practice, may yet allow for reprisals to lurk in the passages of Articles 2(4) and 51.

Beyond legality, in the real world, some scholars recognize a potential deterrent value in the possibility of a military reprisal.<sup>58</sup> But this value remains distinct from its purpose. Unlike the self-defense mechanism allowed under Article 51, the purpose of which is to counter an immediate physical danger to the invoking state, the purpose of a reprisal is to “coerce another state to abide by international law.”<sup>59</sup> Indeed, the U.S. Army Field Manual defines appropriate reprisals as

[a]cts of retaliation in the form of conduct which would otherwise be unlawful, resorted to by one belligerent against enemy personnel or property for acts of warfare committed by the other belligerent in violation of the law of war, for the purpose of enforcing future compliance with the recognized rules of civilized warfare.<sup>60</sup>

Thus, revenge is rejected as a motivating factor,<sup>61</sup> even though that might be what the aggrieved public demands at the time. Catholic University’s Professor Michael Noone predicted that, in response to the September 11 terrorist attacks, “U.S. authorities could respond to public demands for retaliation by saying that the customary international law of reprisal would permit attacks, targeting, and tactics that would otherwise be illegal, but the right to do so is limited to opposing belligerent forces, however ill-defined, and by the principle of proportionality.”<sup>62</sup> This is what happened with the American invasion of Afghanistan and the coercion of that

country to follow international law, which it now does (absent the Taliban regime and al Qaeda headquarters).

The political significance of legal changes since September 11 has altered the global dynamic such that support continues to coalesce around our efforts. Specifically, the broad coalition assembled by Secretary of State Colin Powell involved lifting sanctions against Pakistan<sup>63</sup> and India imposed after their nuclear tests several years ago. Further signals of support to the Islamic world include intervening to dismiss the civil damages case by former hostages against Iran in exchange for Tehran's acquiescence in the campaign and the agreement to help downed U.S. airmen on Iranian soil;<sup>64</sup> lifting sanctions against Sudan imposed after the American embassy bombings in Africa;<sup>65</sup> allowing Syria to accede to the UN Security Council despite past involvement in terrorist activities;<sup>66</sup> and restarting the Middle East peace process by resurrecting the dormant Mitchell Plan (although in the wake of Arafat's inability to control Palestinian suicide bombers, this effort has wilted).<sup>67</sup> Accordingly, legitimacy has been secured for America's action under international law and through international cooperation.

### Prosecutorial Discretion

It is better that ten guilty persons escape than one innocent suffer.

—Sir William Blackstone, English jurist (1723–80),  
*Commentaries on the Laws of England*

Prosecutorial discretion is an executive function carried out by thousands of prosecutors (local and federal) across the country thousands of times each week. It is nothing more than the judicious exercise of discretion as to whether the government will charge an individual with a particular crime and seek to try him for it. Many times, this decision rests on whether the state can effectively bring a winnable case before a jury in open court. Prosecutors, as elected or appointed officials, will usually seek to pursue as many winnable cases as possible so as to bolster their conviction record. The winnability of a case, in turn, depends on the quality of evidence available against the accused. So, in reality, the exercise of prosecutorial discretion is oftentimes a function of whether the prosecutor

believes he or she can prevail in court, not whether the accused is innocent or guilty.

John Ashcroft's DOJ has been presented with many opportunities to exercise such prosecutorial discretion since 9/11. By most accounts, this discretion has been abused. Ashcroft has tried to manipulate federal statutes, such as the material witness law, to hold Americans in custody indefinitely without charging them; however, this move has met resistance in federal courts. Consequently, he has shifted such individuals over to the DOD after classifying them as "enemy combatants"—subjecting them to military jurisdiction; again no charges need be brought, access to counsel is denied, and the men are held incommunicado.

Immigrants, by virtue of their status as noncitizens rather than as human beings, are treated worse. Hundreds of Middle Eastern and South Asian men have been rounded up in a huge dragnet, held in secret for months, interrogated, subjected to secret immigration hearings, and then summarily deported. Thousands of others who could not be arrested on technical visa or traffic violations were "invited" to appear before the U.S. attorneys in their districts for questioning about any knowledge or involvement with al Qaeda, the Taliban, the September 11 attacks, or terrorism generally.

Indeed, not only has the administration been hijacked by a bunker mentality since 9/11 but the DOJ in particular has demonstrated its zealous intent to pursue those responsible for the attacks by altering constitutional and legal checks on its power where possible and violating other constraints where necessary. Such abuse of power has not gone unnoticed by the public. When asked in an Associated Press poll conducted in August 2002, "How concerned are you that new measures enacted to fight terrorism in this country could end up restricting our individual freedoms?" 63 percent replied that they were concerned or somewhat concerned and only 35 percent replied that they were either unconcerned (15 percent) or not too concerned (20 percent), while 2 percent replied that they "didn't know."<sup>68</sup>

The incongruent treatment accorded various prisoners based on their status should be troubling to the American judiciary. Status-based detentions are usually suspect as constitutionally violative. Table 3 demonstrates the seemingly arbitrary discrepancies.

**TABLE 3. Incongruent Status/Treatment of Persons Detained/Prosecuted by Federal Government since 9/11**

Person(s)	U.S. Citizen?	Legal Classification	Current Status
Jose Padilla (Abdullah al-Muhajir) (held in U.S.)	Yes <ul style="list-style-type: none"> <li>• Born in Puerto Rico</li> <li>• Apprehended in Chicago</li> </ul>	“Enemy combatant” Member of al Qaeda	Turned over to military, denied access to counsel, held indefinitely by DOD
John Walker Lindh (held in U.S.)	Yes <ul style="list-style-type: none"> <li>• Born in Marin Co., CA</li> <li>• Apprehended in Afghanistan</li> </ul>	“Enemy combatant” Member of Taliban	Indicted by federal grand jury and prosecuted by DOJ in U.S. federal district court—case settled
Yaser Esam Hamdi (held in U.S.)	Yes <ul style="list-style-type: none"> <li>• Born in Louisiana</li> <li>• Apprehended in Afghanistan</li> </ul>	“Enemy combatant” Member of al Qaeda	Turned over to military, denied access to counsel, held indefinitely by DOD
Zacarias Moussaoui (held in U.S.)	No <ul style="list-style-type: none"> <li>• Born in France</li> <li>• Apprehended in Minneapolis</li> </ul>	“Enemy combatant?” Member of al Qaeda	Indicted by federal grand jury and prosecuted by DOJ in U.S. federal district court—case in progress
DOD detainees (held in Cuba)	No <ul style="list-style-type: none"> <li>• Various nationalities (e.g., Saudi, Egypt, France, UK, Pakistan)</li> <li>• Apprehended in Afghanistan</li> </ul>	“Unlawful combatants” GC apparently doesn’t apply and detainees are subject to MTIs	Turned over to military, denied access to counsel, held indefinitely by DOD
DOJ (INS) detainees (held in U.S.)	No <ul style="list-style-type: none"> <li>• Various nationalities (mostly Middle Eastern)</li> <li>• Apprehended in U.S.</li> </ul>	Immigration violators, some designated as “material witnesses” and transferred to DOD	Denied access to counsel, deported or held indefinitely by DOJ or DOD