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DYING LIKE MEN, FALLING LIKE PRINCES: REFLECTIONS ON THE WAR ON TERROR

*Edward Rial Armstrong**

I. INTRODUCTION

Regardless of one's jurisprudential philosophy or political leanings, we can all agree that, for good or for ill, laws and lawmakers can have a profound impact on society. When lawmakers formulate policy and shape the law, we can all feel the weight of their hands. Perhaps it was a keen awareness of the significant role that lawmakers play in society that explains, in part, the widespread tendency that existed among ancient peoples to revere their rulers as incarnate gods.¹ One ancient Hebraic text illustrating this tendency provides as follows:

God standeth in the congregation of the mighty; he judgeth among the gods.

How long will ye judge unjustly, and accept the persons of the wicked?
Selah.

...

I have said, Ye are gods; and all of you are children of the most High.

But ye shall die like men, and fall like one of the princes.²

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1. It was not uncommon for ancient people to believe that their rulers were divine incarnations and/or descendants of deity. See SIR JAMES GEORGE FRAZER, *THE GOLDEN BOUGH* (1922), available at <http://www.bartleby.com/196/15.html> (last visited May 10, 2007). Although the importance of the societal role filled by rulers may have contributed to their having been regarded as divine, it is also certain that some ancient rulers played an active part in promulgating the notion of their divinity. Take, for example, Alexander the Great, who popularized the notion that he was the son of Jupiter, and Augustus Caesar, who sought to be worshipped as a descendant of Venus.

2. *Psalms* 82:1-4, 6-7 (King James).

Note that the Hebrew word אֱלֹהִים or “*elohim*,” which is translated into the words “God,” “gods,” and “mighty” in the foregoing passage from the King James Version of the Bible, is rendered “judges” in other English translations of the same text.³ The fact that *elohim* can be translated as either God, gods or judges depending on the context and the preference of the translator suggests that, at one point in their history, the ancient Israelites may have regarded their rulers as gods. However, the same text also distinguishes between gods and God—the mighty and the Almighty, by portraying the gods as imperfect beings subject to both death and divine jurisdiction.

Because our modern and increasingly secular society has largely abandoned the notion of rulers as divine,⁴ I would hazard to guess that the text’s conceit of rulers as gods has little resonance with many contemporary readers. However, given the vast power that is ours to command in this technological age, there is something in the text’s conceit of gods faced with their own mortality and the limits of their power that can serve as an apt and poetic description of the modern⁵ existential plight. After all, we live in an age when people can fly through the sky and walk on the moon; an age in which many horrible diseases that once claimed countless lives can be prevented with a simple injection; an age in which one man can kill dozens in a matter of seconds and a dozen men can kill thousands in a matter of minutes. Indeed, in that respect, we are gods, and yet we can still die like men.

The text’s reminder that princes—considered as a symbol of empire—may fall from their elevated stations is also relevant for our time. In our modern era it has been shown that even a great empire can fall precipitously despite its military might. The former Soviet Union rose and fell in less than a century. It is worth noting that the fall of the Soviet Union was not brought about by a military defeat, but, in part, by unsustainable military spending that strained the Soviet economy.⁶ There may be a lesson in that for our nation and its leaders.

3. In the MODERN LANGUAGE BIBLE, Psalms 82:1 is translated as follows: “God stands in the congregation of the Gods; in the midst of the judges He gives judgment.” *Psalms* 82:1 (Modern Language). In the LIVING BIBLE, this same passage is rendered as follows: “God stands up to open heaven’s court. He pronounces judgment on the judges.” *Psalms* 82:1 (Living Bible).

4. To this day, however, the imperial family of Japan claims descent from the sun goddess Encyclopedia Britannica, *Amaterasu Omikami Amaterasu*, <http://www.britannica.com/eb/article-9006019/Amaterasu> (last visited Apr. 16, 2007).

5. The term “modern” is employed herein in its simple vernacular and ordinary sense as a reference to the present or the recent contiguous past, and is not meant to suggest that the author has decided that the term postmodern is not more properly applicable.

6. See Celeste A. Wallander, *Western Policy and the Demise of the Soviet Union*, 5 J. OF COLD WAR STUD. 4, 137 (2003); see generally Paul Kennedy, THE RISE AND FALL OF THE

The attacks of September 11, 2001, brought home the point that even a mighty nation like ours is vulnerable to injury, and that even a goliath can sometimes be dealt a serious blow by a much smaller opponent. Faced with a world in which individuals can wield incredible destructive power and in which economic weakness can cause an empire to collapse despite its military might, what types of policies and laws should we adopt to confront these realities? In particular, what types of laws and policies should we adopt to deal with the threat of terrorism? This article proceeds on the premises that we should adopt laws and policies that reduce rather than exacerbate the threat of terrorism and that we should avoid profligate spending policies that dissipate our nation's economic strength. Part II considers the attacks of September 11, 2001 and the government's response thereto. Part III introduces various legal definitions of terrorism. Particular consideration is given to the definitions provided in the Arkansas Anti-Terrorism Act of 2003 (the "Anti-Terrorism Act") and the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (the PATRIOT Act). Part IV criticizes certain aspects of these definitions. Part V provides a summary outline—with editorial comment—of some of the dramatic changes in law and policy that have been made at the national level in response to the threat of terrorism. Part VI examines the nature of the problem and proposes alternative approaches for addressing the threat of terrorism. Part VII concludes the article.

II. TERRORISM AND THE MENACE OF MASS DESTRUCTION

By mid-morning of September 11, 2001, millions of anguished faces stared numbly at the billowing black clouds of ash and smoke that rose from the smoldering rubble of what had been the twin towers of the World Trade Center.⁷ Just a few hours earlier, at 8:44 a.m., the World Trade Center had been bustling with its ordinary activity, and the twin towers, each standing 110 stories tall,⁸ dominated the New York City skyline. At 8:45 a.m., all of that changed. Glass shattered, steel sundered, and the world changed as a commercial airliner—carrying ninety-two victims and approximately 10,000

GREAT POWERS (1987) (examining the role of military overextension in the collapse of super powers).

7. CNN.com, *September 11: Chronology of Terror*, Sept. 12, 2001, <http://archives.cnn.com/2001/US/09/11/chronology.attack> [hereinafter September 11: Chronology of Terror]. The north tower of the World Trade Center collapsed at 10:05 a.m., and the south tower collapsed at 10:28 a.m. *Id.*

8. The World Trade Center: Statistics and History, http://www.skyscraper.org/TALLEST_TOWERS/t_wtc.htm (last visited Apr. 16, 2007).

gallons of jet fuel—crashed into the north tower.⁹ As the tragic news was being broadcast, the world watched in stunned disbelief as a second airliner slammed into the south tower of the World Trade Center and burst into a massive ball of fire.¹⁰ The explosion sent shockwaves through the tower and the rest of the country. While many were still reeling from the news, a third airliner struck the Pentagon, headquarters of the United States Department of Defense, causing part of it to collapse.¹¹ A fourth airliner crashed south-east of Pittsburgh, in Somerset County, Pennsylvania, killing all on board.¹² In a matter of hours, approximately 3000 people died as a direct result of these attacks.¹³

Our national government responded swiftly and dramatically to the attacks, immediately instituting a ban on civilian flights over the United States.¹⁴ It was the first shutdown of civilian aviation in the history of the United States.¹⁵ At 1:04 p.m., President Bush announced that all appropriate security measures were being taken, including putting the United States military on high alert worldwide.¹⁶ He solicited prayers for the victims of the attacks and their families and vowed that “the United States will hunt down and punish those responsible for these cowardly acts.”¹⁷ The following day, President Bush addressed the Nation and declared war against the enemy,

9. *Id.*; The 9/11 Commission Report, http://www.9-11commission.gov/report/911Report_Exec.htm (last visited Apr. 16, 2007).

10. CNN.com, *Terror Attacks Hit U.S.*, Sept. 11, 2001, <http://archives.cnn.com/2001/US/09/11/worldtrade.crash/index.html>. In certain parts of the world the news was reportedly celebrated. Celebrations of the September 11, 2001 Attacks, http://en.wikipedia.org/wiki/Celebrations_of_the_September_11,_2001_attacks (last visited Apr. 16, 2007). Some Muslim communities have apparently turned the anniversary into a cause for reflection and celebration. *London Muslims “Celebrate” 9/11*, http://www.city-journal.org/html/12_4_sndgs03.html (last visited Apr. 16, 2007).

11. September 11: Chronology of Terror, *supra* note 7.

12. *Id.*

13. September 11, 2001, <http://www.whitehouse.gov/march11/timeline/one.html> (last visited Apr. 16, 2007). The incredible destructive power of large, fully fueled airliners clearly has numerous implications for the law regulating commercial flights. For a detailed discussion of some of these, see Phillip A. Karber, *Re-Constructing Global Aviations in an Era of the Civil Aircraft as a Weapon of Destruction*, HARV. J.L. & PUB. POL’Y 781 (2002) (which notes that the destructive power of a fully fueled airliner exceeds that of a small nuclear device).

14. Testimony of Secretary of Transportation, Norman Y. Mineta, indicates that he gave the FAA the final order for all civilian planes to land at 9:45 a.m. Norman Y. Mineta, *Statement of Secretary of Transportation Norman Y. Mineta Before the National Commission on Terrorist Attacks upon the United States* (May 23, 2003), available at <http://testimony.ost.dot.gov/test/pasttest/03test/Mineta6.htm>.

15. *Id.*

16. September 11: Chronology of Terror, *supra* note 7.

17. *Id.*

without identifying any enemy by name.¹⁸ By September 13, 2001, officials of the Bush administration were publicly identifying Osama Bin Laden and the Al-Qaeda terrorist group as the likely suspects.¹⁹ On September 18, 2001 the United States Congress passed the Authorization for Use of Military Force bill, which authorized the President to

[U]se all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.²⁰

The bill was signed into law the same day.²¹

Two days later, before a joint session of Congress, President Bush once again declared “war on terror,” this time naming Al-Qaeda and Bin Laden specifically.²² He committed to wage the war on terror not only against them, but also against every terrorist organization of “global reach” in the world.²³ President Bush demanded that the Taliban government of Afghanistan immediately and unconditionally hand over Bin Laden and the leaders of the Al-Qaeda network. When his demands were not met, President Bush authorized military strikes against various targets in Afghanistan on October 7, 2001.²⁴ This operation, styled Operation Enduring Freedom,²⁵ initiated a

18. President George W. Bush, Remarks by the President in Photo Opportunity with the National Security Team, (Sept. 12, 2001) (transcript available at <http://www.whitehouse.gov/news/releases/2001/09/20010912-4.html>); White House, *Responses and Recovery*, <http://www.whitehouse.gov/march11/timeline/three.html> (last visited Apr. 2007).

19. On September 13, 2001, Secretary of State Colin Powell confirmed in a briefing that the administration viewed al Qaeda and the Saudi exile as the leading suspect. “We will go after that group, that network and those who have harbored, supported and aided that network, to rip that network up, and when we are through with that network, we will continue with a global assault against terrorism in general.” Steve Mufson & Alan Sipress, *Powell Calls Bin Laden Prime Suspect*, WASH. POST, Sept. 14, 2001, at A6.

20. 50 U.S.C. § 1541 (2006).

21. Press Release, White House, President Signs Authorization for Use of Military Force Bill (Sept. 18, 2001) (available at <http://www.whitehouse.gov/news/releases/2001/09/20010918-10.html>).

22. President George W. Bush, Address to a Joint Session of Congress and the American People, (Sept. 20, 2001) (transcript available at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>) (“Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped[,] and defeated.”).

23. *Id.*

24. President George W. Bush, Presidential Address to the Nation, (Oct. 7, 2001) (transcript available at <http://www.whitehouse.gov/news/releases/2001/10/20011007-8.html>); United States Dept. of State, Patterns of Global Terrorism, *Appendix G: The United States*

military campaign in Afghanistan that continues to the day of this writing. A detention center was set up in a military base at Guantanamo Bay, Cuba, where persons identified as enemy combatants were, and still are, detained and questioned.²⁶ On November 13, 2001, President Bush issued an executive order establishing military tribunals for enemy combatants.²⁷

In his State of the Union speech on January 29, 2002, President Bush was already declaring that America and Afghanistan had become allies against terror,²⁸ and in a statement that presaged a shift towards United States military involvement in Iraq, President Bush stated that Iraq "continue[d] to flaunt its hostility toward America and to support terror" and that "[t]he Iraqi regime ha[d] plotted to develop anthrax, and nerve gas, and nuclear weapons for over a decade."²⁹ Officials in the Bush Administration began turning away from Osama Bin Laden as the focal point of the war on terror and began focusing on Iraq as a grave and growing danger.³⁰ On various occasions, Bush officials indicated that there were extensive ties between Iraq and Al-Qaeda and that there was a possible link between Iraq and the attacks of 9/11.³¹ In his radio address on September 7, 2002, Bush characterized Iraq as a grave and growing danger perhaps only a year away from developing nuclear capacity and indicated that Iraq had illicitly sought to purchase the equipment needed to enrich uranium for a nuclear weapon.³² Bush stated that Iraq had proven itself to be a danger by "supporting terrorist groups, repressing its own people and pursuing weapons of mass destruction in defiance of a decade of U.N. resolutions."³³ On September 12, 2002, Pres-

Military Campaign in Afghanistan, (May 12, 2002), available at <http://www.state.gov/s/ct/rls/crt/2001/html/10262.htm>.

25. White House, *Operation Enduring Freedom*, <http://www.whitehouse.gov/infocus/defense/enduringfreedom.html> (last visited Apr. 16, 2007).

26. See, e.g., Katharine Seelye, *A Nation Challenged: Prisoners; Move Likely for Inmate Who May be American*, N.Y. TIMES, Apr. 5, 2002, at A1.

27. Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, §2(a), 66 Fed. Reg. 57,833 (Nov. 16, 2001).

28. Press Release, White House, President Delivers State of the Union Address (Jan. 29, 2002) (available at <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>).

29. *Id.*

30. Andrea Lynn, *Bush Administration Has Used 27 Rationales for Way in Iraq*, (May 10, 2004) <http://www.news.uiuc.edu/news/04/0510war.html>.

31. Walter Pinkus & Dana Milbank, *Al Qaeda-Hussein Link Is Dismissed*, (June 17, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A47812-2004Jun16.html>. However, the weight of evidence suggests that there was no reliable basis for making such a link. See KENNETH M. POLLACK, *THE THREATENING STORM: THE CASE FOR INVADING IRAQ* 157 (2002); Elizabeth de la Vega, *UNITED STATES V. GEORGE W. BUSH* (Feb. 10, 2007).

32. President George W. Bush, President Discusses Growing Danger Posed by Saddam Hussein's Regime (Apr. 16, 2007) (transcript available at <http://www.whitehouse.gov/news/releases/2002/09/20020914.html>).

33. *Id.*

ident Bush challenged the United Nations to address the threat posed by Iraq as highlighted by its continuing defiance of the Security Council.³⁴ On September 28, 2002, President Bush announced that he was seeking a strong resolution from Congress authorizing the use of force to defend our national security interests against the threat posed by Saddam Hussein.³⁵ In March 2003, without explicit Security Council approval, President Bush launched "Operation Iraqi Freedom" to disarm Iraq and change its regime.³⁶ The military campaign was broadened beyond the initially stated aims of disarming and overthrowing Saddam Hussein's government so as to include the compulsory introduction of democratic governance into Iraq.³⁷ Administration officials maintained that the war in Iraq was an integral part of the war on terror.³⁸

To aid the executive branch in its war on terror at home and abroad, Congress passed several new laws expanding executive power.³⁹ In addition to these express grants of power from Congress, the President—by virtue of implicit and inherent authority—adopted several new policies and programs on his own initiative to address the threat of "terrorism."⁴⁰

34. *President's Address to U.N. General Assembly*, 38 WEEKLY COMP. PRES. DOC. 1529 (Sept. 12, 2002), available at <http://www.whitehouse.gov/news/releases/2002/09/20020912-1.html> (last visited Feb. 9, 2005).

35. President George W. Bush, Radio Address by the President to the Nation (Sept. 28, 2002) (transcript available at <http://www.whitehouse.gov/news/releases/2002/09/20020928.html>).

36. President George W. Bush, President Discusses Beginning of Operation Iraqi Freedom (Mar. 22, 2003) (transcript available at <http://www.whitehouse.gov/news/releases/2003/03/20030322.html>); Colum Lynch, *Dissent Grows at U.N. over Iran* (Nov. 5, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/04/AR2006110400959.html>. Indeed, Secretary-General of the U.N., Kofi Annan, characterized the 2003 Iraq invasion as illegal. Patrick E. Tyler, *U.N. Chief Ignites Firestorm by Calling Iraq War 'Illegal,'* N.Y. TIMES, Sept. 17, 2004, at A11.

37. President George W. Bush, President Discusses Beginning of Operation Iraqi Freedom (Mar. 22, 2003) (transcript available at <http://www.whitehouse.gov/news/releases/2003/03/20030322.html> and <http://www.whitehouse.gov/news/releases/2006/09/20060902.html>) ("A vital part of our strategy to defeat the terrorists is to help establish a democratic Iraq, which will be a beacon of liberty in the region and an ally in the global war on terror.")

38. Kenneth Katzman, *Iraq: United States Regime Change Efforts and Post-War Governance*, at 11, <http://fpc.state.gov/documents/organization/19708.pdf> (last visited Apr. 6, 2007).

39. These laws include the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Pub. L. No. 107-56 (the PATRIOT Act); the Homeland Security Act, 6 U.S.C. §§ 111; and the Military Commissions Act of 2006, Pub. L. No. 109-366.

40. As to the policies adopted and programs implemented by the current administration, the exact nature and extent of them remains unknown because apparently important aspects of them have been implemented secretly and without express Congressional authorization. Two such programs that have come to light include a domestic surveillance program, and the

III. TERRORISM: DEFINING THE PROBLEM

By the end of September 2001, the war on terror was off to a solid start despite the fact that there was, and still is, considerable debate among legal scholars and the international community as to the precise definition of terrorism.⁴¹ There are even varying definitions of terrorism amongst agencies of the federal government. The United States Department of State, for example, defines terrorism as “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents,” usually intended to influence an audience.⁴² The United States Department of Defense defines terrorism as “[t]he calculated use of unlawful violence or threat of unlawful violence to inculcate fear; intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological.”⁴³ In the Code of Federal Regulations, terrorism is defined to include “the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.”⁴⁴ The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (the Patriot Act), defines “domestic terrorism” as activities that

(A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;

use of secret prisons where persons are held incommunicado, reportedly tortured, and denied traditional due process. Jim VandHei & Dan Eggen, *Cheney Cites Justifications for Domestic Eavesdropping* (Jan. 5, 2006) <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/04/AR2006010400973.html>; CNN.com, *Rights Group Leader Says U.S. Has Secret Jails*, (June 6, 2005) <http://www.cnn.com/2005/US/06/05/amnesty.detainee>.

41. There is considerable disagreement among academics as to the proper and precise definition of terrorism. See, e.g. George P. Fletcher, *The Indefinable Concept of Terrorism*, 4 J. INT'L CRIM. JUST. 894 (2006); Alex Schmid, *Terrorism—The Definitional Problem*, 36 CASE W. RES. J. INT'L L. 375, 376 (2004). If one considers that the Boston Tea Party could have been considered an act of terrorism from the perspective of the British crown, it is apparent that the terms terrorism and patriotism, which carry such different connotations, may occasionally be used in all sincerity by different speakers to characterize the same act based on upon the speaker's values and socio-political perspective. Because use of the term “terrorism” may be subjectively value laden, some news organizations have been wary of using it in certain instances. See Stanley Fish, *Don't Blame Relativism*, 12 THE RESPONSIVE COMMUNITY 27, 30 (2002).

42. 22 U.S.C. § 2656f(d)(2) (2006).

43. Dept. of Defense, Dictionary of Military and Associated Terms 538 (Joint Publication 1-02, Apr. 12, 2001) (as amended through Aug. 31, 2005), available at http://www.dtic.mil/doctrine/jel/new_pubs/jp1_02.pdf.

44. 28 C.F.R. § 0.85 (l) (2007).

(B) appear to be intended—

- (i) to intimidate or coerce a civilian population;
- (ii) to influence the policy of a government by intimidation or coercion; or
- (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and

(C) occur primarily within the territorial jurisdiction of the United States.⁴⁵

None of these federal definitions define terrorism in terms of the number of people affected by the conduct described. Consequently, so long as the other elements of the definitions are satisfied, an act may be found to constitute terrorism even where there is only one victim. However, as defined by the Arkansas Anti-Terrorism Act of 2003 (the “Anti-Terrorism Act”),⁴⁶ the number of persons killed or seriously injured by an act—or merely threatened with the risk of death or serious injury by an act—may actually determine whether that act constitutes an “act of terrorism.”⁴⁷ Under

45. 18 U.S.C. § 2331(5) (2006). Patriot Act, Pub. L. No. 107-56, § 802(a), 115 Stat. 272, 376 (2001).

46. In 2003, the General Assembly enacted the Arkansas Anti-Terrorism Act of 2003 Act 1342 of 2003, codified at ARK CODE ANN. §§ 5-10-101, 5-38-101 to -202, 5-54-201 to -210, 5-71-210 (LEXIS Supp. 2003), and added a subchapter, entitled Terrorism, to Title 5, Chapter 54 of the Arkansas Code. Therein the General Assembly declares that it is illegal for any person to (1) commit an act of terrorism, ARK. CODE ANN. § 5-54-201(1)(A)-(G); (2) “render criminal assistance” to any person who has committed or intends to commit an act of terrorism, *id.* § 5-54-201(14)(A)-(G); solicit support for terrorism, *id.* § 5-54-202(a)(1)(A); make a threat of terrorism, *id.* at § 5-54-203(a)-(c); make a fake threat of terrorism, *id.* § 5-54-204(a)-(b) (Repl. 2005); hinder the prosecution of a terrorist, *id.* § 5-54-207(a)-(b) (Repl. 2005); expose the public to biological, chemical, or radioactive substances, *id.* at § 5-54-208(a)-(b); or use a “hoax substance” for the purpose of frightening the public. *Id.* § 5-54-209(a)-(b).

47. The Anti-Terrorism Act defines an act of terrorism as follows:

- (A) Any act that causes or creates a risk of death or serious physical injury to five (5) or more persons;
- (B) Any act that disables or destroys the usefulness or operation of any communications system;
- (C) Any act or any series of two (2) or more acts committed in furtherance of a single intention, scheme, or design that disables or destroys the usefulness or operation of a computer network, computers, computer programs, or data used by:
 - (i) Any industry;
 - (ii) Any class of business;
 - (iii) Five (5) or more businesses;
 - (iv) The United States Government;
 - (v) State government;
 - (vi) Any unit of local government;

the Anti-Terrorism Act, a person commits the criminal offense of "terrorism" if he or she knowingly commits an "act of terrorism" within the state of Arkansas or even outside of the state of Arkansas if the act "takes effect within this state or produces substantial detrimental effects within this state."⁴⁸

IV. PROBLEMS WITH THE DEFINITIONS OF THE PROBLEM

One clear distinction between the various federal definitions of terrorism noted above and the definition of an act of terrorism set forth in the Anti-Terrorism Act is that the Arkansas definition of an act of terrorism makes no reference to the actor's actual or apparent intent.⁴⁹ Consequently, as de-

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- (vii) A public utility;
 - (viii) A manufacturer of pharmaceuticals;
 - (ix) A national defense contractor; or
 - (x) A manufacturer of chemical or biological products used in connection with agricultural production;
 - (D) Any act that disables or causes substantial damage to or destruction of any structure or facility used in or in connection with:
 - (i) Ground, air, or water transportation;
 - (ii) The production or distribution of electricity, gas, oil, or other fuel;
 - (iii) The treatment of sewage or the treatment or distribution of water; or
 - (iv) Controlling the flow of any body of water;
 - (E) Any act that causes substantial damage to or destruction of livestock or crops or a series of two (2) or more acts committed in furtherance of a single intention, scheme, or design which, in the aggregate, causes substantial damage to or destruction of livestock or crops;
 - (F) Any act that causes substantial damage to or destruction of:
 - (i) Any hospital; or
 - (ii) Any building or facility used by:
 - (a) The United States Government;
 - (b) State government;
 - (c) Any unit of local government;
 - (d) A national defense contractor;
 - (e) A public utility; or
 - (f) A manufacturer of chemical or biological products used in or in connection with agricultural production or the storage or processing of agricultural products or the preparation of agricultural products for food or food products intended for resale or for feed for livestock; or
 - (G) Any act that causes damage of five hundred thousand dollars (\$500,000) to any building or set of buildings.

ARK. CODE ANN. § 5-54-201(1) (Repl. 2005).

48. *Id.* § 5-54-205(a).

49. Interestingly enough, under the statutory definitions provided in the Anti-Terrorism Act, one may commit an act of terrorism without becoming a terrorist as defined in the Act.

fined in the Anti-Terrorism Act, one may negligently commit an act of terrorism. For example, accidentally crashing into a utility pole and downing some cable and electrical lines seems to satisfy the definitional elements of an act of terrorism.⁵⁰ Similarly, so does carelessly dropping a cigarette that ends up starting a fire that causes more than \$500,000 worth of damage to a building or set of buildings.⁵¹ Taking the statute literally, even smoking in a crowded restaurant arguably constitutes an act of terrorism since exposing a room full of persons to second hand smoke may cause or create a risk of death to five or more persons.⁵² However, much to the relief of a person who may inadvertently commit an act of terrorism as defined in the Anti-Terrorism Act, an act of terrorism is not punishable as a criminal offense under the Arkansas criminal code unless the actor knowingly commits the act of terrorism

with the intent to intimidate or coerce a civilian population, influence the policy of a unit of government by using intimidation or coercion, affect the conduct of a unit or level of government by intimidation or coercion, or retaliate against a civilian population or unit of government for a policy or conduct.⁵³

Another distinctive feature of the Anti-Terrorism Act's definition of an act of terrorism is that an act that results in death or serious injury and/or creates a risk of death and/or serious physical injury may not rise to the level of an act of terrorism unless "five (5) or more persons" die, are seriously injured, or are subjected to risk of death or serious injury by the act.⁵⁴ As a

The Anti-Terrorism Act defines a terrorist as "any person who engages in or is about to engage in a terrorist act with the purpose to intimidate or coerce a significant portion of the civilian population or influence the policy of a government or a unit of government." ARK. CODE ANN. § 5-54-201 (15). Consequently, one who engages in or is about to engage in a "terrorist act" may or may not be a terrorist, depending on actor's purpose .

50. ARK. CODE ANN. § 5-54-201(1)(D)(ii).

51. *Id.* § 5-54-201(1)(G).

52. See ARK. CODE ANN. § 5-54-201(1)(A); American Lung Association, *Secondhand Smoke Fact Sheet* (Aug. 2006) <http://www.lungusa.org/site/pp.asp?c=dvLUK9O0E&b=35422> ("Secondhand smoke exposure causes disease and premature death in children and adults who do not smoke. Secondhand smoke contains hundreds of chemicals known to be toxic or carcinogenic, including formaldehyde, benzene, vinyl chloride, arsenic ammonia and hydrogen cyanide.") I am interested in seeing whether the legislature or the courts will eventually specify either the degree or immediacy of the risk of death or injury that an act must present in order to constitute an act of terrorism. Until then, non-smokers have a good faith basis for advising people who light up in an Arkansas restaurant that such an act is not only illegal, but may even constitute an act of terrorism under the Anti-Terrorism Act.

53. ARK. CODE ANN. § 5-54-205(a) (Repl. 2005).

54. ARK. CODE ANN. § 5-54-201(1)(A).

result of this numerical threshold, it is easy to conceive of a broad class of acts that would qualify as terrorist acts under federal definitions of terrorism but that may fall outside of the definition of an act of terrorism provided in the Anti-Terrorism Act (for example, kidnapping the Governor's wife and demanding that the Governor pardon an old traffic offense of Mick Jagger's in exchange for her safe release). Such an act would clearly fall within the scope of the federal definitions of terrorism but would not necessarily rise to the level of an "act of terrorism" under the Anti-Terrorism Act if it were carried out in manner that seriously injured or killed fewer than five people and put fewer than five people at risk of death or serious injury.⁵⁵

The foregoing observations suggest that the Anti-Terrorism Act's definition of an act of terrorism is both too broad, in that it appears to encompass a great number of activities that fall outside of what would generally be regarded as terrorist (or even criminal) acts, and too narrow, in that its numerical threshold clearly disallows its application to many acts that would commonly be considered terrorist acts.⁵⁶

Turning to the national level, it should be noted that the definition of domestic terrorism provided in the Patriot Act also has its critics, such as Nadine Strossen, President of the ACLU, who contends that the definition of terrorism under the Patriot Act is "too broad, permitting the special surveillance powers granted by [the Patriot Act] to be applied far beyond what is commonly thought of by the term."⁵⁷ Perhaps it is not altogether inappro-

55 See ARK. CODE ANN. § 5-54-201(1)(A). For those unfamiliar with Arkansas politics, the notion of the Governor employing his executive power to pardon an old traffic offense for one of the Rolling Stones may seem absurd and surreal. Someone familiar with Arkansas politics, however, is likely to know that former Governor of Arkansas Mike Huckabee pardoned Rolling Stone guitarist Keith Richards for a 1975 reckless driving conviction. *USAToday, Governor Prepares Pardon for Guitarist's Reckless Driving Ticket*, http://www.usatoday.com/news/nation/2006-07-19-richards-pardon_x.htm (last visited May 10, 2007). Of course, the fact that a former Arkansas governor actually employed his pardoning power in such a fashion does not necessarily require anyone to relinquish the notion that such a use of gubernatorial power is absurd.

56. Another part of the Anti-Terrorism Act that could use some fine tuning is Arkansas Code Annotated section 5-54-204(a), under which a person may commit the offense of falsely communicating a terrorist threat where he or she "otherwise creates the impression or belief that a terrorist act is about to be or has been committed." ARK. CODE ANN. § 5-54-204(a) (Repl. 2005).

57. ACLU, *Surveillance Powers: A Chart*, <http://www.aclu.org/privacy/spying/14921res20011010.html> (last visited April 25, 2007). The Patriot Act amended 18 U.S.C. § 2331 to include the above definition of "domestic terrorism." See Patriot Act, *supra* note 45, § 802. This definition closely parallels the preexisting definition of "international terrorism," which is defined as activities that "appear to be intended—(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping, and (C) occur primarily outside the territorial jurisdiction of the United States." 18 U.S.C. § 2331(1) (2001).

appropriate for Ms. Strossen to characterize the Patriot Act's definition of domestic terrorism as overbroad. After all, as defined in the Patriot Act, domestic terrorism includes *every* act that is dangerous to human life that violates *any* criminal law of *any* state⁵⁸ or of the United States and that *appears* to be intended for one of the proscribed purposes set forth in 18 U.S.C. § 2331(5)(B).⁵⁹

Because the Patriot Act's sweeping definition of domestic terrorism incorporates the entire body of criminal law of each state as well as federal criminal law, federal agents may select from the vast array of options provided by the totality of the criminal law of the nation and the various states when trying to make the case that any given activity that they wish to investigate falls within the definition of domestic terrorism. This is significant because the Patriot Act greatly expands governmental powers to investigate and counter "terrorism,"⁶⁰ and some of these expanded powers are applicable to the investigation of "domestic terrorism." The broader the scope of the definition of domestic terrorism, the broader the reach of Uncle Sam's enhanced executive powers.

One of these expanded powers is the civil seizure of terrorist assets. Section 806 of the Patriot Act can result in the civil seizure of a person's assets without a prior hearing and without the person ever being convicted of a crime.⁶¹ Section 806 amended the civil asset forfeiture statute⁶² by granting the government authority to seize and forfeit the following:

(G) All assets, foreign or domestic—

58. To some degree this seems to federalize every state criminal code and imposes the criminal code of every state on the citizens of every state. Given the magnitude of the body of law that is subsumed under the Patriot Act's definition of domestic terrorism, it stretches the limits of credulity to imagine that any person of ordinary intelligence could be sufficiently familiar with the criminal code of every state and the United States so as to know at any given moment exactly what conduct falls within the definition of domestic terrorism, especially if one considers that the definition will vary each time that the federal government or any state adds, amends, or repeals a criminal law. This tends to weigh against a finding that the statute unambiguously puts persons of ordinary intelligence on notice of exactly what conduct is to be avoided. Although state and federal statutes are generally entitled to a strong presumption of constitutionality, they may be invalid as being impermissibly vague if they fail to give a person of ordinary intelligence fair notice to know what conduct is prohibited so that she may act accordingly. *Ark. Tobacco Control Bd. v. Sitton*, 357 Ark. 357, 362, 166 S.W.3d 550, 553 (2004).

59. Under this definition it seems that anyone who organizes and/or participates in a protest march, a strike, or other such political demonstration involving some degree of civil disobedience should tread carefully lest he or she be deemed to *appear* to be seeking to influence the government policy by intimidation or coercion.

60. *See, e.g.*, 18 U.S.C. § 2516(1) (2006) (authority to intercept wire, oral, and electronic communications relating to terrorism).

61. *See* Patriot Act, *supra* note 45, § 806.

62. *Id.* § 981(a)(1).

(i) of any individual, entity, or organization engaged in planning or perpetrating any Federal crime of terrorism (as defined in section 2332b(g)(5)) against the United States, citizens or residents of the United States, or their property, and all assets, foreign or domestic, affording any person a source of influence over any such entity or organization;

(ii) acquired or maintained by any person with the intent and for the purpose of supporting, planning, conducting, or concealing any Federal crime of terrorism (as defined in section 2332b(g)(5)) against the United States, citizens or residents of the United States, or their property;

(iii) derived from, involved in, or used or intended to be used to commit any Federal crime of terrorism (as defined in section 2332b(g)(5)) against the United States, citizens or residents of the United States, or their property;⁶³

Accordingly, the government can seize and/or freeze all of a person's assets on the mere assertion that there is probable cause to believe that the assets were involved in domestic terrorism.⁶⁴ The assets are seized before a person is given a hearing,⁶⁵ but in order to render the seizure a permanent forfeiture, the government must prove by a preponderance of the evidence at a civil hearing that the assets were involved in terrorism.⁶⁶ As a practical matter, however, the hearing may not provide a person with a very meaningful opportunity to present a competent legal defense given that (1) the person is not entitled to be represented by an attorney at public expense because the hearing is a civil proceeding,⁶⁷ and (2) the person may find it difficult to pay an attorney to represent him or her at the hearing when *all* of the person's assets are frozen and/or in government custody.⁶⁸ If a few months pass between the seizure and the forfeiture hearing, a person whose assets have been seized may already have been reduced to pauperism by the time he gets his day in court.

Another expanded power is the power to obtain business and other records through an ex-parte hearing in a secret court without a warrant or probable cause. Section 215 of the Patriot Act allows the Federal Bureau of

63. *Id.* § 981(a)(1)(G)(i)–(iii).

64. *Id.* § 981(b)(2)(B).

65. *See id.* § 981(b)(2).

66. *Id.* § 983(c).

67. *See* Patriot Act, *supra* note 45, § 983(b) (2006) (providing representation to indigent person in a civil forfeiture proceeding only if the person is currently the subject of an ongoing criminal prosecution or if the property involved is real property being used by the indigent person as a primary residence).

68. *See* 8 U.S.C. § 1189 (authorizing the Secretary of the Treasury to freeze the assets of foreign terrorist organizations).

Investigation (FBI) to order any person or entity to turn over “any tangible things, (including books, records, papers, documents, and other items)” provided the FBI “specif[ies]” that the order is “for an authorized investigation . . . to protect against international terrorism or clandestine intelligence activities.”⁶⁹ Those served with Section 215 orders are prohibited from disclosing the fact to anyone else,⁷⁰ and as a result, the subjects of the surveillance are never notified that their privacy has been compromised.

Section 219 of the Patriot Act allows for nationwide search warrants, and it can be used in a manner that, as a practical matter, makes it very difficult to challenge a search warrant. Prior to passage of the Patriot Act a search warrant and other surveillance orders were generally valid only within the federal district in which they were issued.⁷¹ Section 219 amended Rule 41(a) of the Federal Rules of Criminal Procedure and authorized the government to go before a single Federal magistrate judge in any judicial district in which activities relating to professed terrorism may have occurred to obtain a warrant to search property or a person *within or without the district*.⁷² Assuming, hypothetically, that an irate individual used your e-mail account to send an angry e-mail to Senator Ted Stevens of Alaska and that the e-mail had the appearance of being intended to coerce or intimidate Senator Stevens to alter some of his political views, the FBI could go before a magistrate in Alaska and obtain a warrant to search your property in Arkansas (assuming you have property in Arkansas). If you wanted to have the warrant quashed, you would have to find a way to appear before the court in Alaska that issued the warrant. The FBI could make such travel even more difficult if it froze your assets under its section 806 powers.

In sum, the Patriot Act’s definition of domestic terrorism gives federal prosecutors considerable powers and broad discretion regarding the circumstances in which to employ them. Even if one is willing to assume an executive branch that judiciously and voluntarily curbs its own powers, the fact that prosecutors are able to exercise so much discretion under the Patriot Act’s definition of domestic terrorism highlights a possible infirmity with it—namely, that it uses such broad, vague language as to allow for arbitrary or discriminatory enforcement. Although state and federal statutes are generally entitled to a strong presumption of constitutionality,⁷³ they

69. 50 U.S.C. § 1861.

70. 50 U.S.C. § 1861(d).

71. STEPHEN J. SCHULHOFER, *RETHINKING THE PATRIOT ACT: KEEPING AMERICA SAFE AND FREE* (2005).

72. Under prior law, Rule 41(a) of the Federal Rules of Criminal Procedure required that a search warrant be obtained within a district for searches within that district. *See* Fed. R. Civ. P. 41(a) (2000).

73. *Heller v. Doe*, 509 U.S. 312, 319 (1993) (statutes entitled to strong presumption of constitutionality under rational basis review); *Ark. Tobacco Control Bd. v. Sitton*, 357 Ark.

may be invalid as being impermissibly vague if they lack minimal legislative guidelines and permit arbitrary or discriminatory enforcement.⁷⁴

V. DOUBLEPLUSGOOD⁷⁵ LAWS AND POLICIES FOR FIGHTING TERRORISM

Now, putting aside legal definitions of terrorism, it should be noted that the federal government has made striking reforms in law and policy in response to the threat of terrorism. Some of these policy changes are outlined in a document entitled the National Security Strategy of the United States of America, which was published by the White House in September of 2002.⁷⁶ As its title suggests, it provides an overview, in general terms, of the national security strategy of the United States. In no uncertain terms, it posits terrorism as a greater threat to the United States than the threat posed by armies of nation states:

For most of the twentieth century, the world was divided by a great struggle over ideas: destructive totalitarian visions versus freedom and equality. That great struggle is over. . . . America is now threatened less by conquering states than we are by failing ones. We are menaced less by fleets and armies than by catastrophic technologies in the hands of the embittered few. We must defeat these threats to our Nation, allies, and friends.⁷⁷

As expressed therein, the United States has adopted the adage that the "best defense is a good offense" as a guiding precept of its war on terror,⁷⁸ which translates into "increased emphasis on intelligence collection and analysis" and a willingness to act preemptively against threats "even if uncertainty remains as to the time and place of the enemy's attack."⁷⁹ Although international consensus may be sought, the United States reserves the right

357, 362, 166 S.W.3d 550, 553 (2004) ("All statutes are presumed constitutional and we resolve all doubts in favor of constitutionality.").

74. *Ark. Tobacco Control Bd.*, 357 Ark. at 362, 166 S.W.3d at 553 ("[A] statute is void if it is so vague and standardless that it allows for arbitrary and discriminatory enforcement.").

75. "Doubleplusgood" is a term from the fictional propaganda language "Newspeak" employed by the totalitarian government of Big Brother in its efforts to put a positive spin on its activities. See GEORGE ORWELL, 1984 (Signet Classics 1977) (1949).

76. President George W. Bush, The National Security Strategy of the United States (Sept. 17, 2002) (available at <http://www.whitehouse.gov/nsc/nssall.html>).

77. President George W. Bush, Overview of America's International Strategy, (Sept. 2, 2002) (available at <http://www.whitehouse.gov/nsc/nss1.html>).

78. See *id.*, quoting President Bush as saying, "While we recognize that our best defense is a good offense, we are also strengthening America's homeland security to protect against and deter attack." *Id.*

79. *Id.*

to launch such preemptive attacks unilaterally,⁸⁰ as illustrated by the United States led invasion of Iraq.

The Bush administration carried out its plan to increase government emphasis on intelligence gathering with remarkable zeal, ultimately calling for "the largest government reorganization since the Truman Administration created the National Security Council and the Department of Defense."⁸¹ This resulted in the creation of the Department of Homeland Security (DHS), which coordinates the sharing of information gathered "both horizontally across the government and vertically among federal, state and local governments, private sector and citizens as outlined in the President's National Strategy for Homeland Security."⁸² DHS employs a "computer-based counterterrorism communications system connecting all fifty states, five territories, Washington, D.C., and fifty major urban areas" in order to facilitate this information exchange.⁸³ It refers to this network as the Homeland Security Information Network,⁸⁴ which allows all states and major urban areas to collect and disseminate information between federal, state, and local agencies involved in combating terrorism.⁸⁵

In its efforts to better detect and deter terrorism through intelligence gathering, the executive branch even developed a top secret domestic surveillance program carried out by the National Security Agency (NSA).⁸⁶ What is troubling to some is that this surveillance was secretly extended to American citizens, without court oversight or express Congressional approval.⁸⁷ Although some people saw sinister shades of an Orwellian Big Brother in all of this, the President sought to reassure the American people that the domestic surveillance program was an essential part of the war on

80. *Id.* ("We will disrupt and destroy terrorist organizations by . . . defending the United States, the American people, and our interests at home and abroad by identifying and destroying the threat before it reaches our borders. While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self defense by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country.").

81. President George W. Bush, *Strengthen Alliances to Defeat Global Terrorism and Work to Prevent Attacks Against Us and Our Friends*, <http://www.whitehouse.gov/nsc/nss/2002/nss3.html> (Sept. 14, 2001).

82. Homeland Security, Homeland Security Information Network, <http://www.dhs.gov/xinfoshare/> (last visited Apr. 16, 2007).

83. *Id.*

84. *Id.*

85. *Id.*

86. James Risen & Eric Lichtblau, *Bush Lets United States Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, available at <http://www.nytimes.com/2005/12/16/politics/16program.html?ei=5090&en=e32072d786623ac1&ex=1292389200>.

87. *Id.*

terror and that it has already foiled several terrorist plots.⁸⁸ In response to criticism that surveillance should have been conducted under judicial oversight as provided under the Foreign Intelligence and Surveillance Act (FISA), the White House issued a press release explaining that “because of its speed, the NSA program has provided crucial information otherwise not available.”⁸⁹

Not content with passive surveillance, the United States government also took a more aggressive, proactive approach to intelligence gathering by using extraordinary rendition to capture and interrogate persons it suspected of having information.⁹⁰ It also developed secret, hands-on interrogation techniques⁹¹ that have been employed, presumably to great effect, in secret prisons,⁹² where persons have apparently been held incommunicado and without due process.⁹³ The exact details of this program and the nature of these techniques are not publicly discussed by the government, as doing so may provide terrorists with information that they could use to “harm our country.”⁹⁴ However, accounts from some of the former subjects of the new interrogation techniques—rumored to include beatings, electric shock,⁹⁵

88. See President George W. Bush, President Bush Discusses NSA Surveillance Program (May 11, 2006) (transcript available at <http://www.whitehouse.gov/news/releases/2006/05/20060511-1.html>). Critics of the NSA program clearly fail to understand that the terrorists are attacking our freedoms, which is why we should temporarily surrender them to the government for safekeeping.

89. White House, Setting the Record Straight: Critics Launch Attacks Against Program to Detect and Prevent Terrorist Acts, (Dec. 19, 2005) <http://www.whitehouse.gov/news/releases/2006/01/20060104-7.html>.

90. Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake*, WASH. POST, Dec. 4, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/03/AR2005120301476.html>.

91. Dana Priest & Barton Gellman, *United States Decries Abuse but Defends Interrogations*, WASH. POST, Dec. 26, 2002, available at <http://www.washingtonpost.com/ac2/wp-dyn/A37943-2002Dec25?language=printer>. According to one CIA official, the “gloves came off” during interrogations. John Barry et al., *The Roots of Torture*, NEWSWEEK, May 24, 2004, available at <http://www.msnbc.msn.com/id/4989422/#storyContinued>.

92. President George W. Bush, President Discusses Creation of Military Commissions to Try Suspected Terrorists (Sept. 6, 2006) (transcript available at <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html>).

93. CNN.com, *Report: CIA Operates Secret Prisons*, (Nov. 2, 2005) <http://www.cnn.com/2005/US/11/02/terror.suspects/index.html>.

94. President George W. Bush, President Discusses Creation of Military Commissions to Try Suspected Terrorists (Sept. 6, 2006) (transcript available at <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html>) (“Many specifics of this program, including where these detainees have been held and the details of their confinement, cannot be divulged. Doing so would provide our enemies with information they could use to take retribution against our allies and harm our country.”).

95. *CIA Operates Secret Prisons*, *supra* note 93. Some of those seized and shipped to third countries have said they were drugged, beaten and subjected to electric shocks while in custody overseas. *Id.*

water boarding,⁹⁶ mock executions,⁹⁷ and sexual humiliation⁹⁸—suggest that they seem strikingly similar to, if not exactly like, conduct that is prohibited under Common Article Three of the Geneva Conventions, which prohibits, among other things, “outrages upon personal dignity” and “humiliating and degrading treatment.”⁹⁹

Although sexual humiliation and other such interrogation techniques may seem calculated to humiliate and degrade, these techniques were technically fair game in the war on terror because the Geneva Conventions apply only to “prisoners of war,” not non-state actors or enemy combatants. At least that was the contention of the United States Justice Department for a time.¹⁰⁰ By branding detainees enemy combatants as opposed to prisoners of war, and by narrowly defining torture,¹⁰¹ the executive branch sought to advance beyond the “quaint” restrictions of the Geneva conventions.¹⁰²

Unfortunately for the President, the United States Supreme Court complicated the use of some of these secret and “tough” interrogation techniques by holding that Common Article Three of the Geneva Conventions applies even to enemy combatants.¹⁰³ The Court also held that that the Guantanamo

96. Brian Ross & Richard Esposito, *CIA's Harsh Interrogation Techniques Described*, (Nov. 18, 2005) <http://abcnews.go.com/WNT/Investigation/story?id=1322866>. Water Boarding is a technique whereby a prisoner is bound to an inclined board, feet raised and head slightly below the feet, has cellophane wrapped over his face and water poured over him to cause the perception of drowning. *Id.*

97. Memorandum from William J. Haynes II, General Counsel for the Dept. of Defense (Nov. 27, 2005) (transcript available at <http://www.washingtonpost.com/wp-srv/nation/documents/dodmemos.pdf>) (Defense Department Memo, page 6, subsection (f), concluding that creation of scenarios “designed to convince the detainee that death or severely painful consequences are imminent,” are legal, including, specifically, the “use of a wet towel to induce the misperception of suffocation.”).

98. Salon.com, *Standard Operating Procedure*, http://www.salon.com/news/abu_ghraib/2006/03/14/chapter_1/index.html (last visited Apr. 10, 2006).

99. Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

100. Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel (Aug. 1, 2002) (available at <http://www.washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf>).

101. See *id.* In the view expressed by the Bybee/Justice Department memo, physical torture “must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.” For a cruel or inhuman psychological technique to rise to the level of mental torture, the Justice Department argued, the psychological harm must last “months or even years.” *Id.*

102. See *id.*; Memorandum from Alberto Gonzales for President Bush (Jan. 25, 2002) (available at http://msnbc.com/modules/newsweek/pdf/gonzales_memo.pdf) (referring to the Geneva Conventions as “quaint” and “obsolete” in light of the new paradigm of war against terror).

103. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2795 (2006).

military commissions violated the Uniform Code of Military Justice.¹⁰⁴ Apparently the Court failed to appreciate that denying the executive branch the power to detain enemy combatants indefinitely without having to level or prove criminal charges would allow presumably innocent persons, such as Maher Arar and Khalid El-Masri, to be subjected to the inconvenience and expense associated with defending oneself against a criminal charge. Thanks to the practice of secret, summary arrest and detention, Maher Arar¹⁰⁵ and Khalid El-Masri¹⁰⁶ were both detained in secret prisons and, according to their accounts, tortured, without having been charged with any crime. If their claims are to be believed, the United States government eventually determined that it had made a mistake in detaining them and released them both after months of incarceration without ever having leveled any charges against them.¹⁰⁷ By a conservative estimate, bypassing due process for Maher Arar and Khalid El-Masri spared taxpayers at least a few thousand dollars in prosecution costs.

After the Supreme Court ruled that the protections of Common Article Three of the Geneva Conventions also apply to enemy combatants (at least American citizens detained as enemy combatants), the executive branch sought legislative support for the CIA's aggressive new program of interrogation for persons deemed unlawful enemy combatants.¹⁰⁸ President Bush lobbied Congress for passage of the Military Commissions Act of 2006 (the MC Act), which was signed into law on October 17, 2006.¹⁰⁹

The MC Act fits in well with a program of intelligence gathering that relies on tough interrogation techniques because, under the right circumstances, it allows statements coerced from detainees by means of torture to be used as evidence before the military commission.¹¹⁰ Although the MC Act

104. *Id.*

105. CBSNews.com, *His Year in Hell, Canadian Tells Vicki Mabrey that He Was Deported to Syria* (Jan. 21, 2004), <http://www.cbsnews.com/stories/2004/01/21/60II/main594974.shtml>.

106. Scott Pelley, *CIA Flying Suspects to Torture?* (Mar. 6, 2005), <http://www.cbsnews.com/stories/2005/03/04/60minutes/main678155.shtml>.

107. See *supra* notes 104 and 106. As illustrated by the plight of Maher Arar and Khalid El-Masri, if taken as true, allowing the government to skip the tediousness of due process may occasionally result in injury to innocent persons, but it spares detainees the bureaucratic hassles and the stigma associated with defending against unwarranted criminal charges—a happy thought that such persons can hang on to during those otherwise bleak moments when they are being suffocated with a wet towel.

108. Press Release, White House, Fact Sheet: Military Commissions Act of 2006 (Oct. 17, 2006) (available at <http://www.whitehouse.gov/news/releases/2006/10/20061017.html>). As defined by the MC Act, an unlawful enemy combatant is “a person who has engaged in hostilities or who has purposely and materially supported hostilities against the United States or its co-belligerents who is not a lawful combatant.” 10 U.S.C. § 948a (2006).

109. *Id.*

110. Military Commissions Act of 2006, 10 U.S.C. § 948r.

generally excludes statements made as the result of torture from being entered as evidence before a military commission, such statements may be admitted as evidence if (1) the government disputes the degree of coercion employed; and (2) if the military judge finds that “the totality of the circumstances renders the statement reliable and possessing sufficient probative value” and that “the interests of justice would best be served by admission of the statement into evidence.”¹¹¹ However, if a statement was coerced on or after December 30, 2005 (the date of the enactment of the Detainee Treatment Act of 2005), then it is flatly inadmissible if it is determined that the interrogation methods used to obtain the statement amounted to “cruel, inhuman, or degrading treatment prohibited by section 1003 of the Detainee Treatment Act of 2005.”¹¹²

Regardless of any qualms they may have about the MC Act making allowances for the admissibility of coerced testimony, even critics of military tribunals would probably agree that the MC Act is a model of efficiency.¹¹³ The MC Act eliminates the need for government agents to waste time trying to figure out what rights their wards may claim under the Geneva Conventions when dealing with an “alien unlawful enemy combatant” because Section 948b(G) of the MC Act provides that “[n]o alien unlawful enemy combatant subject to trial by military commission under [the MC Act] may invoke the Geneva Conventions as a source of rights.”¹¹⁴ Furthermore, the MC Act eliminates the opportunity for enemy combatants to squander judicial resources by requesting habeas corpus review because the MC Act now formally cuts them off from habeas corpus relief.¹¹⁵ This apparently represents a post facto codification of what the de facto policy of the executive branch seems to have been towards enemy combatants all along.

The MC Act also minimizes cumbersome checks and balances by consolidating certain judicial functions within the executive branch. For example, in the MC Act, the United States Congress generously gives the Presi-

111. *Id.*

112. *Id.* § 948r(d).

113. See Richard J. Wilson, *Military Commissions in Guantanamo Bay: Giving “Full and Fair Trial” A Bad Name*, 10 GONZ. J. INT’L L. 63, 65 (2006–2007). Professor Richard J. Wilson contends that “[t]he true reason for the choice of military commissions is the administration’s misguided belief and a historical reading of the use of these tribunals as a shortcut; a quick and dirty way to curtail and eliminate due process and fair trial norms that have been carefully crafted for use in courts-martial and criminal trials. And the sole true purpose of commission law is, in my view, to convict.”

114. Military Commissions Act of 2006, 109th Cong. (2006), available at http://frwebgate.access.gpo.gov/cgiin/getdoc.cgi?dbname=109_cong_bills&docid=f:s3930enr.txt.

115. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. § 948 (2006)).

dent the power to interpret law¹¹⁶—a judicial power that Congress itself does not possess.¹¹⁷ In this regard, the administrative efficiency possible under the MC Act is a marvel, rivaled in recent history perhaps only by the Enabling Act of 1933 and the Reichstag Fire Decree, which suspended the right of habeas corpus and gave the Chancellor of Germany the power of summary arrest and imprisonment.¹¹⁸ Fortunately, as noted by President Bush in the opening paragraph of the National Security Strategy of the United States of America, the great struggle against totalitarianism is over, and we can put such memories behind us.

VI. REDEFINING THE PROBLEM, RETHINKING THE POLICY

How have the policies identified in the National Security Strategy of the United States along with the acts committed and laws enacted in furtherance of them served our nation as a means of reducing the threat of global terrorism and advancing our national security? Our nation finds itself facing its greatest deficits ever¹¹⁹ and dramatically high levels of Anti-American sentiment internationally.¹²⁰ Our military personnel and our national coffers are being bled daily in a war that was purportedly commenced to destroy Iraq's nuclear program and to disarm it of weapons of mass destruction—weapons we have since learned Iraq did not possess. The Iraq war has turned into a bloody occupation that has cost more American lives than the attacks of 9/11 and that has left over 150,000 veterans disabled.¹²¹ After

116. Section 6(a)(3) of the MC Act provides that “the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions.” *Id.*

117. See, e.g., *Kinne v. United States*, 21 Cl. Ct. 104 (1990) (“Congress may not abrogate and the courts may not abdicate judicial branch’s responsibility to interpret the law.”).

118. An unpatriotic soul might quip that the founding fathers came to the colonies to escape just this sort of justice system, but he or she would be wrong because even the English tyrants recognized the right to habeas corpus since at least 1215 A.D. Richard M. Ebeling, *Civil Liberty and the State: The Writ of Habeas Corpus*, <http://www.fff.org/freedom/fd0204c.asp> (last visited Apr. 2002).

119. The United States trade deficit set a record for the fifth straight year in 2006, rising to a record \$763.6 billion, which marks a 6.5 percent increase from the previous record of \$716.7 billion set in 2005. CBSNews.com, *United States Trade Deficit Sets Another Record*, http://www.cbsnews.com/stories/2007/02/13/business/main2469431.shtml?source=RSSattr=Business_2469431 (last visited Apr. 16, 2007). According to the United States Treasury, as of February 25, 2007, the United States Public Debt is equal to \$ 8,768,614,254,781.88. The Debt to the Penny and Who Holds It, <http://www.treasurydirect.gov/NP/BPDLogin?application=np> (last visited Apr. 16, 2007).

120. See America’s Image Slips, but Allies Share United States Concerns over Iran, Hamas, <http://pewglobal.org/reports/display.php?PageID=825>; MSNBC.com, China More Popular Than United States Overseas, June 23, 2005, at <http://www.msnbc.msn.com/id/8324290/>.

121. Aaron Glantz, *Iraq Vets Left in Mental and Physical Agony*, (Jan. 3, 2007) available at <http://ipsnews.net/news.asp?idnews=36056> (last visited Apr. 16, 2007) (“On New Year’s

factoring in the cost of long-term healthcare for wounded veterans, rebuilding a worn-down military, and accounting for other economic losses, the cost of the Iraq war could easily surpass two trillion dollars.¹²² According to the National Intelligence Estimate (NIE), the war in Iraq has actually caused the flame of hatred to burn brighter in the hearts and minds of many Muslims, apparently increasing the threat posed by global jihadism.¹²³ The 9/11 Commission Report and the NIE identifies jihadism as the most serious source of terrorist violence against the United States.¹²⁴ In sum, the war on terror as conceived and carried out by the current administration has cost our nation more in blood and treasure than the terrorist attacks of 9/11 and has made the United States a more attractive target for jihadist terrorism.

The failure of massive military force projection as a means of defeating terrorism should not come as a surprise to anyone familiar with modern military history. The Vietnam War, the Algerian War of Independence, and the Soviet War in Afghanistan all amply illustrate how difficult it is for a foreign military force, even with superior military capability, to outlast a well-armed, determined, and thoroughly entrenched guerilla force that enjoys popular support and is able to live among the local population. In addition to the home court advantage that comes from knowing local people, language, and terrain, another dynamic favoring local insurgents is that a small number of insurgents can inexpensively inflict a steady toll of asymmetrical damage on foreign military forces through the use of guerilla/terrorist tactics. Because occupying forces bear the cost of such attacks so disproportionately, simple economics favor an entrenched guerrilla insurgency over time. One can imagine that the cumulative cost of sustaining such damage

Eve, the number of United States soldiers killed in Iraq passed 3,000. By Tuesday, the death toll had reached 3,004—31 more than died in the Sep. 11 attacks on the World Trade Centre and the Pentagon.”); *United States Deaths in Iraq, War on Terror Surpass 9/11 Toll*, (Sept. 3, 2006), available at <http://edition.cnn.com/2006/WORLD/meast/09/03/death.toll/> (last visited Apr. 16, 2007). Al-Jazeera, citing a report by the Department of Veteran’s Affairs to Congress and a December 7, 2006 letter to President Bush from seven members of Congress, indicates the Pentagon count may be underreported by several multiples. *Still Lying About Real Iraq Deaths*, May 14, 2006, http://www.aljazeera.com/me.asp?service_ID=11372 (last visited Apr. 16, 2007).

122. Linda Blimes & Joseph E. Stiglitz, *The Economic Costs of the Iraq War: An Appraisal Three Years After the Beginning of the Conflict*, (Jan. 2006), http://www2.gsb.columbia.edu/faculty/jstiglitz/cost_of_war_in_iraq.pdf. (last visited Apr. 16, 2007); James Sterngold, *Casualty of War: The United States Economy*, July 17, 2005, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2005/07/17/MNG5GDPEK31.DTL&type=printable> (last visited Apr. 16, 2007) (estimating the cost of the Iraq war to exceed seven trillion dollars).

123. See Declassified Key Judgments of the National Intelligence Estimate “Trends in Global Terrorism: Implications for the United States,” (April 2006) available at http://www.dni.gov/press_releases/Declassified_NIE_Key_Judgments.pdf.

124 *Id.*

over time eventually grows to gargantuan proportions and that the economic cost to the occupying force eventually becomes so great that there is no economic incentive to stay the course. Such a supposition can actually draw some support from the Counterinsurgency manual (the "Manual") published by the United States Department of Defense, which acknowledges that "maintaining security in an unstable environment requires vast resources, whether host nation, United States, or multinational. In contrast, a small number of highly motivated insurgents with simple weapons, good operations security, and even limited mobility can undermine security over a large area" and that "[p]rotracted conflicts favor insurgents, and no approach makes better use of that asymmetry than the protracted popular war."¹²⁵ The Manual also notes that "[p]rotracted urban terrorism waged by small, independent cells requires little or no popular support. It is difficult to counter."¹²⁶ This does not bode well for United States efforts to occupy and stabilize a country that is filled with various local factions vying for power and employing terrorist tactics.

Despite all of their rhetoric about the importance of adopting a post-9/11 mentality¹²⁷ and the need to win hearts and minds,¹²⁸ the architects of the war on terror have apparently resorted to conventional pre-9/11 military tactics that seem more appropriate for engaging a traditional nation-state and that seem very unlikely to win many hearts and minds.¹²⁹ Since the war on terror's inception, President Bush has employed rhetoric regarding the war

125. David H. Petraeus & James F. Amos, *FM-324, MCWP 3-33.5, Counterinsurgency*, (Dec. 15, 2006) ¶¶ 1.10, 1.30, <http://usacac.army.mil/cac/repository/materials/coin-fm3-24.pdf>.

126. *Id.* ¶ 1.29.

127. Press Release, White House, Press Gaggle with Scott McClellan (Oct. 1, 2004) (available at <http://www.whitehouse.gov/news/releases/2004/10/20041001-8.html>) (criticizing presidential candidate John Kerry's multi-front approach to winning the war on terrorism as exhibiting a pre-9/11 mentality).

128. Our National Strategy for Victory in Iraq: Helping the Iraqi People Defeat the Terrorists and Build an Inclusive Democratic State, http://www.whitehouse.gov/infocus/iraq/iraq_strategy_nov2005.html#part1 (last visited Apr. 16, 2007).

129. On a conceptual level, a global war on terror is tantamount to a worldwide war against terrorist violence or a war for world peace. There is a certain logical incongruity and oxymoronic quality to the idea of a war against violence or a war for world peace. The apparent incongruity between the means of war and peaceful ends suggests that it may be counter-productive to use war and the rhetoric of war as a means of eliminating ideologically motivated violence. At the very least it indicates that, to avoid the appearance of incongruity, government efforts to reduce violence and/or promote peace should not be characterized as a "war" on terror. Even where military intervention may be necessary to address certain terrorist threats, it seems that, from a public relations standpoint, the United States is likely to find a warmer international reception for its counter-terrorism efforts if it casts them in terms of a "global peace initiative" rather than a global war on terror.

that evinces a desire to equate it with traditional state-versus-state conflict.¹³⁰ As made painfully evident by the Iraq war, military tactics that are effective in traditional warfare against a nation-state may barely scratch the surface of a terrorist movement and can even serve to fuel anti-American sentiment and engender support for the jihadist cause in Muslim communities. Now jihadists throughout the world can point to civilian casualties caused by United States bombing raids in Iraq and Afghanistan¹³¹ as a rallying cry for Jihad¹³² and as justification for killing American civilians.¹³³ Considering that Osama Bin Laden cited the presence of a United States military forces in the holy land of Saudi Arabia as a primary justification for the 9/11 attacks,¹³⁴ it would seem that large scale military incursions into the middle east may not be the best means of diffusing the threat of jihadist terrorism. Rather than reducing the resentment that fuels the jihadist movement, military interventionism adds fuel to the fire.

Military invasion, forced regime change, and occupation are not the optimal tools for halting the rise of jihadist terrorism for a number of reasons. The very properties that distinguish terrorist organizations from nation-states, such as the lack of territorial boundaries, lack of political accountability to a population, and lack of a well-defined hierarchical government, make them difficult targets for conventional military operations. The decentralized, transnational nature of the jihadist movement makes it nearly impossible to find all of its members and sympathizers and renders the movement largely immune to efforts to cripple it by removing a few key prominent figures or leaders. Furthermore, because the jihadist ideology transcends its individual members, the jihadist movement can survive the death

130. For example, on June 2, 2004, President Bush declared that "like the Second World War, our present conflict began with a ruthless surprise attack on the United States." President George W. Bush, Speech at Air Force Academy Graduation (June 2, 2004) (transcript available at <http://www.whitehouse.gov/news/releases/2004/06/print/20040602.html>).

131. BBC News, *Afghanistan's Civilian Deaths Mount*, http://news.bbc.co.uk/1/hi/world/south_asia/1740538.stm (last visited Apr. 16, 2007) (stating that number of Afghan civilians killed by United States bombs has surpassed the death toll of the September 11 attacks); Press Release, Amnesty International, Iraq: Use of Cluster Bombs—Civilians Pay the Price (Apr. 2, 2003) (available at <http://web.amnesty.org/library/index/engmde140652003>) (stating that United States' use of cluster bombs kills Iraqi civilians).

132. "The Iraq conflict has become the *cause celebre* for jihadists, breeding a deep resentment of US involvement in the Muslim world and cultivating supporters for the global jihadist movement." NIE, http://www.dni.gov/press_releases/Declassified_NIE_Key_Judgments.pdf (last visited Apr. 16, 2007).

133. Letter from Osama Bin Laden to America (Nov. 24, 2002) (available at <http://observer.guardian.co.uk/worldview/story/0,11581,845725,00.html>) ("[W]hoever has killed our civilians, then we have the right to kill theirs.").

134. *Id.*

or capture of individual leaders; therefore, elimination of specific terrorist leaders may have little or no negative impact on the broader terrorist movement since terrorist cells can independently decide how to carry out the objectives of the movement with little need or no need for a formal, hierarchical organizational connection between every cell. In fact, when a prominent leader is captured or killed, other members of the movement can tout the individual as a martyr and use the incident as a recruiting opportunity.¹³⁵ In this regard, the jihadist terrorist movement is analogous to the Lernean hydra: If you cut off one of its heads, two new ones may shoot up in its place.

Based on the aforesaid, it seems that a shift away from the pre 9/11 paradigm that posits terrorism as analogous to a traditional, nation-state military opponent is in order. The military invasion of Iraq has not only proven to be an ineffective means of neutralizing anti-American sentiment and jihadist ideology, it has actually impaired our national security because (1) it has stretched our national resources thin, thereby reducing our capacity to respond to and rebound from natural disasters or other attacks; (2) it has saddled United States taxpayers with an astronomical debt burden because the wars in Iraq and Afghanistan are being financed with deficit spending; (3) the military strength of the United States ultimately depends on the nation's economic strength and the cost of the concurrent wars in Iraq and Afghanistan has been staggering, both monetarily and in terms of "human capital"; (4) forcing regime change destabilized Iraq and has strengthened Iran's position and influence in the region; and (5) forcing regime change in Iraq created a power vacuum that has drawn warring factions into a bloody power struggle and created an environment of anarchy that allows terrorists an ideal staging ground as well as an ample supply of disenchanting and/or displaced individuals who can more easily be recruited into terrorist organizations. Furthermore, our national commitment to the Iraq war has arguably diverted national resources and attention away from other important national issues, such as our dependence on foreign oil,¹³⁶ the rapidly rising cost of medical care and health insurance,¹³⁷ the continued decline in employment

135. See Charles J. Hanley, *Killing Terrorist Leaders Often Fuels Movement, Experts Say*, CHICAGO SUN-TIMES, Jan. 22, 2006, at A31.

136. Martin Feldstein, *Oil Dependence and National Security: A Market-Based System for Reducing United States Vulnerability*, <http://www.nber.org/feldstein/oil.html> (last visited Apr. 16, 2007).

137. Bureau of Labor Statistics, *Employment Situation Summary*, <http://www.bls.gov/news.release/cpi.nr0.htm> (last visited Apr. 16, 2007) (noting that, among some economists, rapidly rising health care spending is considered to lower the rate of growth in GDP and overall employment, while raising inflation). Relying on anecdotal experience alone, one may surmise that a larger number of Americans are more likely to suffer health problems than they are likely to experience a terrorist attack.

in the manufacturing sector,¹³⁸ inadequate emergency response services,¹³⁹ as well as social security and immigration reform. Whatever the final military outcome is in Iraq, it seems certain that the Iraq war will register as an economic loss on the national ledger.

Considering the undeniable cost and the apparent ineffectiveness of using military invasions as the primary means of eliminating or reducing the threat of global terrorism and the jihadist movement, what other law and policy options remain that might be more effective?¹⁴⁰ Since the policy of preemptive military aggression at the heart of the Bush doctrine has failed as strategy for reducing jihadist terrorism, then perhaps it should be replaced by a multifaceted, international antiterrorism campaign that seeks to win popular international support, especially among the populations from which the jihadist movement presently draws its recruits, through diplomacy, targeted social assistance, intercultural exchange, and social influence aimed at reducing the various grievances that feed and sustain jihadist terrorist groups.¹⁴¹ In other words, an international campaign of diplomacy and social engagement that does not seek to win hearts and minds through the force of

138. *Id.*

139. Press Release, Congressman Dave Reichert, Reichert Begins Series of Committee Hearings on Interoperability (Feb. 14, 2006) (available at <http://www.house.gov/reichert/press06/2.14.06.shtml>).

140. This is a question for us to consider collectively and is undoubtedly beyond the capacity of any one person to answer completely. Theoretically, increased control of individual access to destructive technology may be part of a national approach to reducing the threat of terrorism, but such an approach is unrealistic as a practical matter and is deficient in that elements outside of the controlled system could still come into the country and commit acts of terrorism. Increased sanctions for the commission of terrorist acts also remains an option, but the disturbing tendency of some terrorists to kill themselves raises the question of whether even the strictest sanctions are likely to have much, if any, deterrent effect. This, coupled with the magnitude of harm that can be inflicted by a completed terrorist act, suggests that the emphasis should lie on prevention of, rather than punishment for, acts of terrorism. To the extent stricter sanctions are employed as a deterrent, emphasis should be placed on penalizing conspiracy to commit acts of terrorism. Intelligence gathering is clearly essential to detecting and arresting terrorists at the conspiracy stage. This, however should not translate into a carte blanche for the government to gather intelligence in ways that violate civil rights and/or applicable laws. Changing our domestic criminal laws to increase penalties for conspiracy to commit terrorist acts, however, is unlikely to have much impact on foreign terrorists who conspire abroad and then come to the United States to execute their developed plan(s). This suggests that a broader, international effort is essential if we are to address the threat posed by international terrorism and the global jihadist movement.

141. See Yassin El-Ayouty, *International Terrorism Under the Law*, 5 ILSA J. INT'L & COMP. L. 485, 488 (1999) ("The eventual success of peace between the Palestinians and the Israelis would constitute an immense boost in the global campaign against terror. The world confrontation against terrorism should also take into account the socio-economic causes of terrorism where poverty, hopelessness, and the non-observance of human rights drive young people in the arms of terrorism where they find communal support, an identity and a cause through which they vent their anger through the heinous crime of terror.").

bullets, bombs, or bayonets, but through compassion.¹⁴² This is not to say that military force should not be employed in anti-terrorism efforts under any circumstance, only that our use of military force should be tempered by compassion.¹⁴³

142. See MARTHA C. NUSSBAUM, COMPASSION AND TERROR, in *TERRORISM AND INTERNATIONAL JUSTICE* 229, 231 (James P. Sterba ed., 2003). Although it may sound quaint, compassion is arguably the basis of law, without which the native principle of governance seems to be that might makes right. The principle of compassion has been articulated in various ways throughout the history of Western civilization, such as in the Golden Rule's "Do unto others as you would have others do unto you;" Jesus Christ's maxim "Therefore all things whatsoever ye would that men should do to you, do ye even so to them: for this is the law and the prophets, *Matthew* 7:12 (King James); and Immanuel Kant's Categorical Imperative, "I ought never to act except in such a way that I could also will that my maxim should become a universal law." Immanuel Kant, *Groundwork of the Metaphysics of Morals*, in *PRACTICAL PHILOSOPHY* 37, 57 (Mary J. Gregor trans. & ed., 1996).

143. Military action, where necessary, should only be one element of a much broader campaign of asset-tracing, counterintelligence, diplomatic coalition-building, and social influence. Rather than relying primarily on military force projection, the United States should target the ideological heart of the jihadist movement and endeavor to strip it of legitimacy or appeal among Muslim populations. This would seem to require a clear understanding of what the group's motivating ideology is and what makes it appealing or persuasive to its members and supporters, which will require familiarity with (1) the language in which the ideology is expressed; (2) the characteristics of the demographic group that the terrorist organization taps for recruits; (3) the cultural context that makes the ideology resonate with its members and potential recruits; and (4) how the ideology is disseminated and/or inculcated. A comprehensive campaign against jihadist ideology may include all or some of the following goals:

(A) **Advance moderate, culturally relevant, alternative ideologies in Muslim countries.** Such ideologies can be popularized through a variety of means, including (1) the establishment and funding of schools that offer free or inexpensive education to the potential recruit populace and which inculcate a moderate, pluralistic, worldview; (2) supporting a free press in Muslim countries such as Iran where state control of media outlets disallows criticism of the governing clerocracy; (3) promoting moderate Muslim scholarship; (4) popularizing moderate Imams and increasing their social influence through various means, such as directing some social assistance through such Imams and through increased favorable media exposure; and (5) indirect media campaigns, such as films and literature, espousing alternative moderate ideologies. One significant difficulty that the United States faces in carrying out an ideological campaign against jihadism, however, is that the restraints imposed by the First Amendment of the United States Constitution leave the United States government ill equipped to take sides in a war of ideas, especially religious ones.

(B) **Better Public Relations.** Efforts should be aimed at improving the image of the United States in Muslim countries by (1) openly working to address and remedy social conditions that the radical ideologues point to as *causae belli*; (2) acting through or with Muslim partners or agents where possible when engaging in military or police actions; and (3) avoiding violations (actual and/or apparent) of international law in the prosecution of the war on terror.

(C) **Cut off funding.** Efforts should be aimed at identifying schools, institutions, and community leaders that promote jihadism and, where possible, cutting them off from their funding sources. Where funding to such institutions can not be cut off outright, resources can be directed to marketing (and, if need be, creating) moderate competitors.

Tempering our use of military force with compassion would mean a return to the principles of proportionality and military necessity that are already presumably guiding principles of civilized nations engaged in war.¹⁴⁴ Compassionate principles seem to dictate that we use diplomacy, economic incentives, and other means of social and political influence to effect social changes in other nation-states in which there is no immediate or imminent military threat to our nation—persuasion¹⁴⁵ rather than invasion. However, military force clearly remains an option where it is necessary to deal with an imminent threat. A compassionate policy regarding the use of force would not stand in the way of using military force where military intervention will clearly save lives, and even dictates the use of force where it will save more lives than it takes. Compassion says yes to self-defense, but no to unneces-

(D) **Delegitimize the notion that violence is a valid means of effecting social, religious, or political change.** Concerted efforts should be made to popularize non-violent approaches to effecting social change, such as those espoused by Ghandi and Martin Luther King, and to stigmatize the use of violence to coerce change. The promotion of non-violence coincides with fostering democratic principles so that governments will be more responsive to non-violent means of influence.

(E) **Erode popular support for terrorist ideologies.** Various efforts can be directed towards achieving this end, including the following: (1) launching public information campaigns that educate the potential recruit pool and populace supporting militant Islamists about the abysmal track record of the militant Islamists in actually implementing *Sharia* (Afghanistan, Algeria, etc.) and questionable or demonstrably inaccurate interpretations of authoritative texts which are used in support of the radical Islamic movement; (2) exposing and discrediting propagators of terrorist ideology as hypocritical manipulators of religious sentiment; and (3) propagating counter arguments supported by respected Islamic authority, such as the Qu-ran, Qu-ranic scholars, etc.

(F) **Foster cultural interchange of ideas between the United States and countries with Muslim majorities and with Muslim communities.** Domestically, efforts should be made to help Muslims in the United States feel appreciated and integrated so that they can aid in United States efforts at monitoring and responding to the Islamist movement. Internationally, the United States has deliberately cut off diplomatic ties with some countries with Muslim majorities, which has weakened the possibility of the United States exerting strong diplomatic influence; therefore, the United States should reestablish diplomatic ties as a means of increasing influence.

All of these are certainly easier said than done, but there is no reason to believe that some progress cannot be made with sustained effort.

144. See CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 105–06 (2000); 1 OPPENHEIM'S *INTERNATIONAL LAW* at 420 (Sir Robert Jennings & Sir Arthur Watts eds. 9th ed., 1992). Historically, the United States has been in the vanguard of efforts to promote the objective of giving the greatest possible protection to civilians during armed conflicts, consistent with legitimate military aims. William Bradford, *Barbarians at the Gates: A Post-September 11th Proposal to Rationalize the Laws of War*, 73 MISS. L.J. 639, 853 (2004). So such an ethos is actually part of our national military tradition and not foreign to it.

145. Although persuasion requires patience, rash use of force where there is no imminent threat can end up costing us time, money, and lives that would be better dedicated to other aims.

sary or disproportionate aggression.¹⁴⁶ Our extended, costly, and escalating involvement in Iraq may demonstrate the wisdom of this thinking.

With regard to torture, compassion-driven policies would, as a general rule, have us eschew using torture as an instrument of the State and reserve punishments for persons who have had a meaningful opportunity to challenge the charges against them. By the same token, a policy informed by compassion would generally discourage kidnapping and delivering suspected terrorists to countries known to torture prisoners. Although some academics suggest that compassion actually requires the use of torture where it is the only means to preserve innocent lives,¹⁴⁷ the converse is that compassion would not allow torture where there is no evidence that it will preserve any innocent lives, where the captive person may be innocent or lack relevant information, or where there are other alternative means of preserving those innocent lives.¹⁴⁸ Using torture and gaining a reputation for using torture is likely to erode the international goodwill that the United States will need if it is to obtain widespread and earnest cooperation in its anti-terrorism efforts. Accordingly, to the extent that the United States seeks international approval and support for its antiterrorism efforts, it would seem that both compassion and practical considerations of seeking international support require the United States to recognize international law and human rights as binding constraints on its own use of force.

VII. CONCLUSION

As a check to national hubris and imperial overreach, it may serve us well to recall that, even though we stand in the congregation of the mighty, we too may fall if we do not proceed justly and prudently. In light of the unfortunate fact that technological advances have increased the destructive capacity available to aggrieved individuals, our international relations should be governed by compassionate principles that reduce the reasonable basis that others have for feeling justified in engaging in terrorist violence against us. Ultimately it is in our own best interest, economically and otherwise, to refrain from causing unnecessary death and injury to innocent civi-

146. Compassion would require taking every reasonable effort to avoid targeting civilians and to avoid the use of highly destructive or indiscriminate weapons, such as cluster bombs, in civilian areas.

147. Mirko Bagaric & Julie Clarke, *Tortured Responses (A Reply to Our Critics): Physically Persuading Suspects Is Morally Preferable to Allowing the Innocent to Be Murdered*, 40 U.S.F.L. REV. 703, 707 (2006) ("We condone torture in only one circumstance: as a means to save innocent lives. We condone it only for one reason: compassion.").

148. The abuses at Abu Ghraib, for example, were not been reported to have preserved any innocent lives or to have positively advanced our national interest in any way, and so, there is no justification for such conduct as acts of compassion.

lians through full-scale military invasions in which non-military alternatives remain viable means of effecting social or political change, because the democratization of destructive power puts us in easy reach of reprisal. In a post-9/11 world where even a mighty nation can be injured by an embittered few, we should endeavor to strengthen and maintain friendly international relations so that we multiply the number of our allies rather than the number of our enemies.

