

*LatCritical Perspectives: Individual Liberties,  
State Security, and the War on Terrorism*

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## Glocalizing Terror

The events of September 11, 2001, had a transformative effect on life and society in the United States. On that day, nineteen men, whose presence within U.S. territorial borders ranged from the illegal to the mysterious, armed themselves with box-cutters and hijacked four civilian aircraft—two American Airlines and two United Airlines planes—and turned them into human-controlled jet-fueled missiles of mass destruction by flying two into the twin towers of the World Trade Center in New York City and one into the Pentagon, outside of Washington, D.C.<sup>1</sup> The perpetrators were not state actors; rather, they were members of al Qaeda, a group that apparently worked with the Taliban, a rebel group that was seeking to take control of Afghanistan. Significantly, the Taliban was not recognized by the global community except for Saudi Arabia, the United Arab Emirates, and Pakistan, as the representative of that State. These criminals, some of whom trained as pilots in U.S. flight schools, were immediately and universally labeled as terrorists for their heinous acts.

Thousands of innocent persons, including the passengers and crews of the four aircraft, workers in the World Trade Center and

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<sup>1</sup> Although the hijacking of the fourth plane was successful, passengers thwarted the hijackers' efforts and that plane crashed in Pennsylvania without taking casualties beyond the persons aboard. Berta Esperanza Hernández-Truyol & Christy Gleason, *Introduction*, in *MORAL IMPERIALISM: A CRITICAL ANTHOLOGY 1* (Berta Esperanza Hernández-Truyol ed., 2002).

the Pentagon, rescue workers, and bystanders, were killed or injured. The deceased included citizens of the United States as well as citizens of sixty other nations.<sup>2</sup> Hundreds of millions of dollars worth of property was damaged or destroyed. With these occurrences, the United States, at present the sole surviving superpower in the twenty-first century, was transmogrified from a safe state to a besieged one—from a state where security and even invulnerability was presumed to one permeated by fright, uncertainty, and anxiety.

Yet, while the popular narrative is that September 11 transfigured life as we knew it in the United States, the reaction to those events reflects historical patterns. For example, the domestic legal response to these heinous acts has been, and continues to be, to target immigrants based on their national, racial, religious, ethnic, and even political identities—specifically Muslim men of Middle Eastern descent. This targeting is much like that of the U.S. Alien and Sedition Acts which, respectively, gave the President the power to deport non-citizens deemed a threat to national security without recourse to the courts or rights of habeas corpus and made it a crime to criticize government officials.<sup>3</sup> Similarly, the Alien Enemies Act,<sup>4</sup> which authorizes the President during a declared war to detain, expel, and impose other restrictions on the freedom of any citizen (fourteen years or older) of the country with which the United States is at war, paved the way for the internment of persons of Japanese descent, including U.S. citizens, during the Second World War.<sup>5</sup> Anti-immigrant sentiments also surfaced during the “Red Scare” which led Congress to pass immigration laws prohibiting entry into the United States to persons who advocated “the overthrow by force or violence of the government of the United States or of all gov-

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<sup>2</sup> *Id.*

<sup>3</sup> The Alien Act (July 6, 1798), reprinted in *An Act Respecting Alien Enemies*, at <http://www.yale.edu/lawweb/avalon/statutes/alien.htm> (last visited Jan. 10, 2003); The Sedition Act—An Act in Addition to the Act, Entitled *An Act for the Punishment of Certain Crimes Against the United States* (July 14, 1798), at <http://www.yale.edu/lawweb/avalon/statutes/sedact.htm> (last visited Jan. 10, 2003).

<sup>4</sup> 50 U.S.C. §§ 21-24 (1994).

<sup>5</sup> *Korematsu v. United States*, 323 U.S. 214 (1944). See generally David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002); Eric L. Muller, *12/7 and 9/11: War, Liberties, and the Lessons of History*, Social Science Research Network, UNC Public Law Research Paper No. 02-23, at [http://ssrn.com/abstract\\_id=354761](http://ssrn.com/abstract_id=354761) (date posted Dec. 6, 2002).

ernment or all forms of law.”<sup>6</sup> During this time, it was not much of a leap from targeting immigrants for exclusion based on their political beliefs to targeting citizens during the McCarthy Era when federal, state, and local governments passed laws against communists and the House Committee on Un-American Activities compiled dossiers on thousands of U.S. citizens.<sup>7</sup> Today, we see these anti-immigrant and anti-dissident patterns repeated in the responses to September 11. For example, like the Enemy Alien Act, the PATRIOT Act<sup>8</sup>—the centerpiece of post-9/11 federal antiterrorism legislation—does not require a proceeding to decide whether an individual is suspicious, disloyal, or dangerous.

The United States, promptly joined by the global community, labeled the events of September 11 as an act of war. Such designation elides al Qaeda’s criminal acts with (possibly legally justifiable) acts of war—an identification that may carry legally problematic consequences. To explore these perhaps unintended outcomes, Part I of this Essay sets out the September 11 timeline and Part II comments on the four essays that constitute this cluster in light of those facts. Part III engages the legal issues—both domestic and international—of U.S. (and global) reactions to the attacks. In Part IV, this work concludes that the domestic and international norms that existed at the time of the September 11 assaults were sufficient to identify and punish the heinous conduct and that there was no need to pass laws that sacrificed personal liberties in order to protect the national security.

## I

### THE FACTS<sup>9</sup>

On September 11, 2001, at 7:59 a.m., American Airlines Flight 11 left Boston’s Logan International Airport en route to Los Angeles, carrying ninety-two people. At 8:45 a.m., this flight, with

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<sup>6</sup> Immigration Act of March 3, 1903, ch. 1012, § 2, 32 Stat. 1213, 1214, *repealed by* Immigration Act of February 5, 1917, ch. 29, § 38, 39 Stat. 874, 897. *See also* Cole, *supra* note 5, at 994-96.

<sup>7</sup> Cole, *supra* note 5, at 996; Muller, *supra* note 5.

<sup>8</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter USA PATRIOT Act].

<sup>9</sup> These facts are taken from numerous accounts about September 11, mainly those *available at* <http://www.cnn.com>; <http://www.crimesofwar.org/sept-mag/sept-home.html>; and <http://www.pbs.org>.

five hijackers on board, crashed into One World Trade Center, the north tower of New York's World Trade Center.<sup>10</sup> Eighteen minutes later, United Airlines Flight 93, which at 8:01 a.m. had left New Jersey's Newark International Airport en route to San Francisco carrying forty-five people, crashed into Two World Trade Center.<sup>11</sup> Around that time, police and firefighters responded to the emergency at the towers.

At 9:43 a.m., almost one hour after the first crash, American Airlines Flight 77, with five hijackers on board,<sup>12</sup> crashed into the Pentagon. At that time, trading on Wall Street stopped. Fifteen minutes later, a passenger aboard United Airlines Flight 175, which had left Boston en route to Los Angeles carrying sixty-five people, placed a call to an emergency dispatcher in Pennsylvania saying, "We are being hijacked, we are being hijacked!" At 10:10 a.m., this flight, with five hijackers on board,<sup>13</sup> crashed eighty miles southeast of Pittsburgh with its assumed target somewhere in Washington, D.C. At that time, President Bush was en route to Louisiana and put America's military on high alert status.

President George W. Bush's first remarks to the nation called the crashes an "apparent terrorist attack on our country."<sup>14</sup> He later called the attacks an act of war.

Shortly after the crash into the Pentagon, the Federal Aviation Administration barred aircraft takeoffs across the United States and instructed international flights in progress to land in Canada. Reagan Airport in Washington, D.C., did not reopen until October 4.

By midmorning, government buildings across the nation were evacuated, the United Nations closed, and the Securities and Exchange Commission closed all U.S. financial markets for the day. New York's Mayor Rudolph Giuliani evacuated lower Manhattan. By that afternoon, the U.S. military was on high alert world-

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<sup>10</sup> The five hijackers were Abdulaziz Alomari, Satam al Suqami, Waleed M. Alshehri, Wail Alshehri, and Mohammed Atta, the mastermind of the attacks who was thought to have piloted the plane. This tower collapsed at 10:28 a.m.

<sup>11</sup> There were four hijackers onboard this flight: Saeed Alghamdi, Ahmed Al Haznawi, Ahmed Alnami, and Ziad Jarrahi. This tower collapsed at 9:55 a.m.

<sup>12</sup> The five hijackers were Khalid al-Midhar, Majed Moqed, Nawaf Alhamzi, Salem Alhamzi, and Hani Hanjuor. This plane was carrying sixty-four people from Washington Dulles to Los Angeles.

<sup>13</sup> The five hijackers were Marwan al-Shehhi, Fayez Banihammad, Ahmed Alghamdi, Hamza Alghamdi, and Mohand Alshehri.

<sup>14</sup> *Terrorism Hits the U.S.*, L.A. TIMES, Sept. 11, 2001, at 52.

wide and the Navy had dispatched missile destroyers and other equipment to New York and Washington.

During the evening of September 11, Four, Five, Six and Seven World Trade Center and the Pedestrian Bridge collapsed. An estimated 6333 people were missing and, eventually, almost 3000 were declared dead, including approximately 300 firefighters, 40 police officers, and foreign citizens from 65 countries.

Global response to the attacks was fast. For example, on September 12, the North Atlantic Treaty Organization (NATO) invoked Article 5 of its founding treaty, a mutual defense clause stating that an armed attack against any of the allied nations in Europe or North America shall be considered an attack against all of them.<sup>15</sup> The day after the attack, many governments of the world, including President Vladimir Putin of Russia, German Chancellor Gerhard Schröder, French President Jacques Chirac, British Prime Minister Tony Blair, Italian Prime Minister Silvio Berlusconi, and the European Union's Security Chief Javier Solana, expressed both solidarity with the United States and support against terrorism.

Given such positive response, the Bush administration began an effort to form a coalition against terrorism. This endeavor received overwhelming support including some from such surprising sources as Pakistan's ruler General Pervez Musharraf, Saudi Arabia's King Fahd, North Korea, Egypt's President Hosni Mubarak, and President Nursultan Nazarbayev of Kazakhstan.

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<sup>15</sup> North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246 (1949). While the political consensus is important, the NATO alliance has little to offer the U.S. militarily. Specifically, Article 5 provides as follows:

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

*Id.* The definition of the territories to which Article 5 applies was subsequently revised. Protocol to the North Atlantic Treaty on the Accession of Greece and Turkey, Oct. 22, 1951, art. 2, at <http://www.hri.org/docs/NATO/grturk.html> (Aug. 17, 1996).

“Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.” North Atlantic Treaty, *supra*, at art. 5.

Moreover, the States that had recognized the Taliban as Afghanistan's government quickly severed their ties, ending recognition.

China, at first, offered mixed support. It pledged to join the United States in a global war against terrorism, but was restrained by its opposition to intervention in the affairs of other nations and the ties it has with countries the United States has named as "state sponsors of terrorism." But by the end of September, the Chinese government expressed strong support for the U.S. war on terrorism and even for limited military strikes. The fruits of international cooperation were evident by this time, when arrests of those with suspected terrorist links were made in nations including the Netherlands, Spain, Belgium, the United Kingdom, and the United Arab Emirates.

However, cooperation did not come without a price. Many Middle-Eastern countries wanted the United States to become more deeply involved in ending violence in the region. Pakistan wanted an agreement to end an eleven-year sanction, restore the flow of American arms, and reduce a punishing debt load in exchange for use of its bases or rights to fly in its air space. Russia had grievances over NATO expansion towards its borders and criticism of its military campaign in Chechnya. The United States, in order to obtain its support, agreed to ignore Russia's massive human rights violations in Chechnya, including its armed incursions into territory that sought to be independent.

On September 14, Congress, by joint resolution, authorized the President to:

use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.<sup>16</sup>

President Bush created the Office of Homeland Security, now elevated to a Cabinet-level office,<sup>17</sup> and named Gov. Tom Ridge of Pennsylvania as its head. On September 18, the Bush administration advised a joint session of Congress that al Qaeda was responsible for the attacks. The administration also announced a

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<sup>16</sup> Sense of Congress Regarding Terrorist Attacks, Pub. L. No. 107-40, § 2, 115 Stat. 224, 224 (2001). S.J. Res. 23, 107th Cong., 1st Sess. (2001) (enacted).

<sup>17</sup> Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002) (codified at 6 U.S.C. § 101).

major expansion of its power to detain immigrants who are suspected of crimes which was followed, two days later, by the issuance by the Department of Justice of an interim rule providing that non-citizens can be detained for forty-eight hours without charge and, in “emergenc[ies] or other extraordinary circumstance[s] . . . [for] an additional reasonable period of time.”<sup>18</sup> Three days later, the Chief Immigration Judge sent a memo to immigration judges to let them know that deportation hearings for persons suspected of terrorism should be secret and not public.<sup>19</sup>

On September 24, in an effort to stop the source of funding to terrorist cells, President Bush ordered an immediate freeze of all assets of twenty-seven suspected terrorist entities (thirteen terrorist groups, eleven individuals, and three charities)<sup>20</sup> with identified links to al Qaeda—a list that was later expanded to include two dozen more charities and other organizations, including charities in Saudi Arabia and Chicago and an Arab bank. President Bush went beyond the U.S. borders and declared that foreign banks that did not cooperate with U.S. investigators would be unable to operate in the United States.

On October 1, the Bush administration released the names of nineteen countries that had agreed to freeze the assets of Osama

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<sup>18</sup> Disposition of Cases of Aliens Arrested Without Warrant, 66 Fed. Reg. 48,334, 48,335 (Sept. 20, 2001) (codified at 8 C.F.R. § 287.3(d)).

<sup>19</sup> Cesar Muñoz Acebes, *United States: Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees*, HUMAN RTS. WATCH, Aug. 2002, at 24 (2002), available at <http://www.hrw.org/reports/2002/US911> (quoting Michael Creppy, *Cases Requiring Special Procedure, Internal Memorandum—Executive Office for Immigration Review*, Sept. 21, 2001 (directive by Chief Immigration Judge Michael Creppy requiring closure of all special interest cases, meaning those that the Attorney General determines might be connected to the September 11 events)). This document is known as the “Creppy Directive.”

<sup>20</sup> Following September 11, President Bush issued an executive order in which he declared a national emergency and authorized the Secretary of the Treasury to freeze assets of entities that “assist in, sponsor, or provide financial, material or technological support for, or financial or other services to or in support of, such acts of terrorism.” Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001), at <http://www.treas.gov/offices/enforcement/ofac/sanctions/terrorism.html> (last visited Jan. 8, 2003). The Seventh Circuit has now found that the government acted within legal bounds in freezing the assets of Global Relief Foundation, Inc. (GRF)—a U.S. charity which is an Illinois corporation—that is being investigated for terrorist links although the court did not inquire into whether the charity in fact had links to terrorism. Specifically, in affirming the District Court’s denial of GRF’s request for an injunction, the court concluded that the freezing of assets violated neither the Constitution nor the International Emergency Economic Powers Act. *Global Relief Found., Inc. v. O’Neill*, 315 F.3d 748 (7th Cir. 2002).

bin Laden and his associates. For example, Germany froze accounts linked to the Taliban or bin Laden and Britain froze \$68 million in accounts of entities on the original list of twenty-seven.<sup>21</sup> At that time, other countries cooperating in the financial freezings included China, Colombia, Costa Rica, and the Czech Republic. However, bin Laden's money was thought to be scattered in as many as fifty-five countries. U.S. officials later said that sixty-six other nations had frozen accounts on the suspect list and 110 others had pledged to move in that direction.<sup>22</sup>

In October, the coalition against terrorism continued to grow with Uzbekistan, Turkmenistan, and Tjikistan, three of the world's worst violators of human rights, becoming U.S. allies against Afghanistan. Throughout the effort to form a coalition against terrorism, British Prime Minister Tony Blair was at the forefront of foreign relations declaring that he had seen "incontrovertible evidence" linking bin Laden to the terrorist attacks and promising that military actions would be against bin Laden and perhaps the Taliban, but not Afghans or the Islamic faith.<sup>23</sup>

On October 7, the war against terrorism took a significant turn when U.S. military forces launched Operation Enduring Freedom against Kabul, Afghanistan, consisting of U.S.-led air strikes in which the British also participated, which targeted forces associated with both al Qaeda and the Taliban leadership under Mullah Muhammad Omar. The next day, the United States informed the U.N. Security Council that inquiry into the terrorist attacks could lead beyond Afghanistan and later elaborated that U.S. officials believed terrorists tied to Osama bin Laden were based in the Asian countries of the Philippines, Indonesia, and Malaysia, and those countries were likely targets of future covert and overt U.S. actions.

On the second day of the attacks, the Philippine government gave the United States full support for its air strikes on Afghanistan, granting U.S. fighter jets and warships full access to all ports in the Philippines and allowing U.S. troops and weapons to re-

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<sup>21</sup> See William Drozdiak & T.R. Reid, *Money Laundering Targeted in Europe, Mideast; Steps Likely to Exceed Bush's Call for Freeze*, WASH. POST, Oct. 2, 2001, at A12.

<sup>22</sup> *Disrupting Terrorist Financing Globally*, FED. NEWS SERVICE, Oct. 12, 2001.

<sup>23</sup> Alan Cowell, *A Nation Challenged: The British; Blair Says He's Seen Proof of bin Laden's Role*, N.Y. TIMES, Oct. 1, 2001, at B4.



main in the Philippines for as long as needed.<sup>24</sup> Also on the second day of the attacks, Spain, Italy, Germany, and France pledged to send troops if necessary, and NATO agreed to send five AWACS (Airborn Warning and Control System) early warning planes and crews to the United States to free up American surveillance aircraft for use in the campaign. The fifteen foreign ministers of the European Union again declared their support, as did leaders in Hungary, Poland, and Slovakia. Later, China pledged support in the war against terrorism and Asian leaders at the annual Asia Pacific Economic Cooperation (APEC) summit signed a statement against terrorism. After the attacks began, Iran and Iraq issued statements condemning the U.S. and British military strikes in Afghanistan.

Other domestic and international measures taken in response to the terrorist attacks are noteworthy. On October 26, President Bush signed into law the USA PATRIOT Act,<sup>25</sup> legislation that grants the Attorney General unprecedented powers, including the ability to detain non-citizens “if the Attorney General has reasonable grounds to believe” they are “engaged in any . . . activity that endangers the national security of the United States”<sup>26</sup> and to deport or refuse entry to persons who “endorse or espouse terrorist activity,” who persuade others to support terrorist activity or a terrorist organization, or raise money for a terrorist group.<sup>27</sup> Several days later, the Department of Justice issued an interim rule allowing prison authorities to monitor communications between inmates and their counsel in instances in which the Attorney General certifies that there is “reasonable suspicion” that the inmate is using such communications to facilitate acts of violence or terrorism.<sup>28</sup> Domestically, airport security was tightened and municipalities were put on highest alert. In late October, the United States released a “most wanted” list of twenty-two suspected terrorists, including Osama bin Laden and some of his top allies, whom President Bush called “the leaders, key supporters, planners and strategists.”<sup>29</sup>

<sup>24</sup> *Most of Asia Backs U.S. Actions*, THE STRAITS TIMES (SINGAPORE), Oct. 9, 2001, at 4.

<sup>25</sup> USA PATRIOT Act, *supra* note 8.

<sup>26</sup> *Id.* § 236A(a)(3)(B) (codified at 8 U.S.C. § 1226(a)).

<sup>27</sup> *Id.* § 411(a)(1)(A)(iii) (codified at 8 U.S.C. § 1182(a)(3)).

<sup>28</sup> National Security: Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55,062 (Oct. 31, 2001) (codified at 28 C.F.R. §§ 500 & 501 (2001)).

<sup>29</sup> Eric Lichtblau & Josh Meyer, *U.S. Strikes Back; The Investigation; U.S. Unveils 'Most Wanted' Terrorist List*, L.A. TIMES, Oct. 11, 2001, at A12.

In November, Attorney General John Ashcroft announced that in order to identify potential terrorists, the United States would require non-citizen young men from Arab and Muslim nations to register with the government.<sup>30</sup> The process requires men over the age of sixteen from twenty-two nations to be interviewed, photographed, and fingerprinted.<sup>31</sup> Their information is checked against databases maintained by the FBI and other U.S. government entities.<sup>32</sup> The program is not applicable to permanent residents, those who obtained asylum before November 6, 2002, or diplomats and their families.

On November 13, President Bush issued a military order on the trial of terrorists by military commission<sup>33</sup> which has been interpreted effectively to suspend the writ of habeas corpus. The same day President Bush issued the military order, the Taliban withdrew from Kabul and Afghan opposition fighters took over the city. The following day, the U.N. Security Council unanimously adopted Resolution 1378 and “[a]ffirm[ed] that the United Nations should play a central role in supporting the efforts of the Afghan people to establish urgently such a new and transitional administration leading to the formation of a new government.”<sup>34</sup>

Numerous cases related to the attacks are now pending. On

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<sup>30</sup> 67 Fed. Reg. 67,766 (Nov. 6, 2002). The countries included Afghanistan, Algeria, Armenia, Bahrain, Eritrea, Iran, Iraq, Lebanon, Libya, Morocco, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, the United Arab Emirates, and Yemen.

<sup>31</sup> *Id.* at 67,766-67.

<sup>32</sup> See John M. Broder & Susan Sachs, *Threats and Responses: The Tightening Border: Facing Registry Deadline, Men From Muslim Nations Swamp Immigration Office*, N.Y. TIMES, Dec. 17, 2002, available at <http://www.nytimes.com/2002/12/17/politics/17IMMI.html>.

<sup>33</sup> Military Order of November 13, 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,831 (Nov. 16, 2001), available at <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>. The only precedent on this matter is *Ex parte Quirin*, 317 U.S. 1 (1942), and *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). In *Milligan*, the Court did not allow a civilian, unconnected with the rebellion in the southern states, to be tried by a military commission so long as the civilian courts were open and martial law had not been declared. In contrast, *Quirin* upheld trial by military commission of German soldiers who had landed in the United States, discarded their uniforms, and sought to sabotage war facilities. They were charged with violating the laws of war.

<sup>34</sup> Sec. C. Res. 1378, U.N. Doc. S/RES/1378 (2001), available at <http://www.un.org/documents/scres.htm>. The resolution expresses support for the Secretary-General's special representative in Afghanistan, Lakhdar Brahimi, in the accomplishment of his mandate which included overall authority for the humanitarian, human rights, and political endeavors of the United Nations in Afghanistan.

December 11, 2001, the Justice Department announced the indictment of Zacarias Moussaoui—the suspected twentieth hijacker—charging him with conspiring with Osama bin Laden and al Qaeda to commit acts of terrorism “transcending national boundaries” among other offenses, including the commission of the terrorist acts that were perpetrated on September 11.<sup>35</sup>

On January 15, 2002, the Justice Department announced the filing of criminal charges against John Walker Lindh, a U.S. citizen who was taken prisoner while fighting with the Taliban forces. Lindh, called the “American Taliban,” was charged with conspiracy to kill members of the U.S. military in Afghanistan and with providing material supportive resources to foreign terrorist organizations, including al Qaeda. He pleaded guilty to supplying services to the Taliban and to a criminal charge of carrying an explosive during the commission of a felony. On October 4, 2002, he was sentenced to twenty years in prison.<sup>36</sup>

In June, Attorney General John Ashcroft announced that another U.S. citizen was in custody for being involved in planning terrorist attacks. Jose Padilla, now known as Abdulla Al-Muhajir, was arrested in Chicago for having a “dirty bomb” that he planned to explode in the United States. Ashcroft announced that Al-Muhajir would be transferred to military authorities to be held as an enemy combatant. On December 4, 2002, Judge Mukasey of the Southern District of New York denied the government’s motion to dismiss a habeas petition filed by Al-Muhajir’s counsel. The District Court ruled that it has jurisdiction to hear the case and that the prisoner could consult with counsel while pursuing habeas relief. The court also noted that the President could lawfully order the prisoner’s detention as an enemy combatant even if the prisoner holds U.S. citizenship and that the standard for lawful detention in this case would be the existence of “some evidence” to justify such detention.<sup>37</sup>

On January 11, 2002, the United States transferred the first group of captives from Afghanistan to the U.S. naval base in Guantánamo Bay, Cuba. Pictures of the transferred Taliban-al Qaeda captives in shackles, either hooded or wearing black-out

<sup>35</sup> United States v. Moussaoui, Criminal No. 01-455-A, 2002 WL 1987964 (E.D. Va. Aug. 23, 2002).

<sup>36</sup> United States v. Lindh, 227 F. Supp. 2d 565 (E.D. Va. 2002); *see also* United States v. Lindh, 212 F. Supp. 2d 541 (E.D. Va. 2002).

<sup>37</sup> Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002).

goggles, and prison jumpsuits, and sometimes brought to their knees, generated protests from around the world and from within the United States as well. One source of contention was the treatment of the captives. Another source of contention was President Bush's announcement on the status of the prisoners who include over 150 citizens of over twenty states including three from Great Britain and one from Australia.<sup>38</sup> President Bush, ignoring established procedure, unilaterally declared that the Third Geneva Convention would apply to the Taliban but not to the al Qaeda detainees. Moreover, the President declared that neither group would be granted prisoner of war status, designating the captives instead as "unlawful combatants"—a classification unknown in the international humanitarian law field.<sup>39</sup> The United States ignored the global demands for the captives to be treated according to accepted international norms, but said that it would treat the captives humanely.

In March, 2002, the Department of Defense announced the guidelines for the military commissions created to try suspected terrorists. Following this announcement, Defense Secretary Donald Rumsfeld, tracking the guidelines, asserted that the United States was entitled to hold the detainees without trial, even after acquittal—until the end of the war against terrorism, as is a standard with enemy combatants captured during the course of a war.

Not surprisingly, numerous challenges to U.S. practices and policies with respect to the captives have been lodged. In August, Judge Gladys Kessler of the District of Columbia ordered the U.S. government to release the names of all the people detained in the United States during the anti-terrorism investigation, saying that it is the judiciary's duty "to ensure that our Government always operates within the statutory and constitutional constraints which distinguish a democracy from a dictatorship."<sup>40</sup> Later that month, Judge Robert G. Doumar of Virginia

<sup>38</sup> Eric Lichtblau, *Attorneys for British and Australian Citizens Held at Camp X-Ray Say International Laws are Being Violated*, L.A. TIMES, Feb. 20, 2002, at A12.

<sup>39</sup> The prisoner of war status would require certain treatment under the Geneva Conventions and would also impede trial in the military tribunals set up by President Bush. See *infra* notes 139, 151-53, and accompanying text. One obstacle to designating these captives "prisoners of war" is that such status requires the captive to have been acting on behalf of a state, whereas the captives, as well as the actors in the September 11 attacks, were acting on behalf of the Taliban or al Qaeda, neither of which is a recognized state.

<sup>40</sup> *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 215 F. Supp. 2d 94, 96

ordered the U.S. government to provide evidence in support of the designation of U.S.-born Yaser Hamdi, who had been picked up by United States forces in Afghanistan and is being held in a navy brig in Virginia, as an unlawful enemy combatant.<sup>41</sup> The circuit court reversed that order, however, ruling that the declaration by a special advisor setting forth the circumstances of Hamdi's capture was alone sufficient to justify his detention, noting that his U.S. citizenship did not preclude his detention as an enemy combatant captured "during a combat operation undertaken in a foreign country and a determination by the executive that [he] was allied with enemy forces."<sup>42</sup> Also in August, the Sixth Circuit Court of Appeals ruled that the deportation hearings for people detained during the anti-terrorism investigation had to be open to the public.<sup>43</sup> However, in October, the Third Circuit held that newspapers do not have a right of access to cases designated as "special interest" cases by the Attorney General due to national security concerns.<sup>44</sup>

One case in U.S. courts that is noteworthy particularly in light of the Ali Abbasi case discussed below is *Rasul v. Bush*.<sup>45</sup> This case involved a challenge by two British, one Australian, and twelve Kuwaiti nationals who were captured in Afghanistan to their Guantánamo detention.<sup>46</sup> The court dismissed the detainees' petition for habeas corpus, ruling that foreigners held by the

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(D.D.C. 2002) (ruling that Department had to disclose names of detainees under Freedom of Information Act; Department did not have to disclose date and location of arrest, detention and release; Department could not withhold the identity of counsel representing detainees; Department did not properly respond to request regarding detainees or immigration proceedings).

<sup>41</sup> Hamdi v. Rumsfeld, No. 2:02cv439 (E.D. Va. Aug. 16, 2002) (order filed requesting government to produce more information), available at <http://news.findlaw.com/hdocs/docs/terrorism/hamdirums81602ord.pdf>.

<sup>42</sup> Hamdi v. Rumsfeld, 316 F.3d 450, 465 (4th Cir. 2003); see also Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002) (reversing and remanding district court order mandating government to allow counsel unmonitored access to detainee because order failed to give proper deference to Executive and Congressional decisions concerning foreign policy, national security or military affairs and because the order failed to address status as enemy combatant); Hamdi v. Rumsfeld, 294 F.3d 598 (4th Cir. 2002) (reversing district court ruling that public defender and private citizen had standing to file next of friend habeas petition on behalf of detainee with status of enemy combatant).

<sup>43</sup> Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002) (ruling that there is a First Amendment right of access to deportation cases and the directive requiring secret hearings infringes on that right).

<sup>44</sup> N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002).

<sup>45</sup> 215 F. Supp. 2d 55 (D.D.C. 2002).

<sup>46</sup> The action by the twelve Kuwaiti detainees and their family members, *Odah v.*

United States outside of its sovereign territory could not seek habeas relief in U.S. courts.<sup>47</sup>

Two foreign cases are worthy of mention. In Germany, prosecutors charged Moroccan-born Mounir El-Motassadeq with supporting the work of the al Qaeda cell in Hamburg that planned the September 11 attacks.<sup>48</sup> Prosecutors claim that El-Motassadeq managed the bank account of some of the al Qaeda members taking flight school lessons in the United States.

In Britain, the family of a British national, Feroz Ali Abbasi, who was captured by U.S. forces in Afghanistan and was transported to Guantánamo Bay, initiated proceedings based on the claim that one of his fundamental human rights, the right not to be arbitrarily detained, is being violated.<sup>49</sup> At the time of hearing in the England and Wales Court of Appeal, Abbasi had been a captive in Guantánamo “for eight months without access to a court or any other form of tribunal or even a lawyer.”<sup>50</sup> The English court, while refusing to examine whether a foreign state, in this instance the United States, was in breach of treaty obligations or in breach of public international law, concluded that “in apparent contravention of fundamental principles recognized by both jurisdictions and by international law, Mr. Abbasi is at present arbitrarily detained in a ‘legal black-hole’.”<sup>51</sup>

Finally, it is noteworthy that the Inter-American Commission on Human Rights, an organ of the Organization of American States of which the United States is a member, by letter dated March 12, 2002, requested that the United States “take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent Tribunal.”<sup>52</sup> The United States responded by claiming that “the legal status of the detainees is clear, that the Commission does not have jurisdictional competence to apply international humanitarian law, that the precautionary measures are neither necessary nor appropriate in this case, and that the Commission lacks authority to

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United States, No. A. 02-828 (D.D.C. 2002), was brought separately but is decided together with *Rasul*. 215 F. Supp. 2d 55.

<sup>47</sup> *Rasul*, 215 F. Supp. 2d at 72-73.

<sup>48</sup> Susan Schmidt & Dan Eggen, *Suspected Planner of 9/11 Attacks Captured in Pakistan After Gunfight; Two Other Al Qaeda Members Killed, Several More Arrested*, WASH. POST, Sept. 14, 2002, at A1.

<sup>49</sup> Rv. Sec. of State, [2002] EWCA Civ 1598.

<sup>50</sup> *Id.* ¶ 1.

<sup>51</sup> *Id.* ¶ 64.

<sup>52</sup> *Id.* ¶ 21 (quoting Commission letter).

request precautionary measures of the United States.”<sup>53</sup> In reply, the Commission reasserted its authority to request precautionary measures citing to Article 5 of the Third Geneva Convention and Article XVIII of the American Declaration. The Commission claimed the right of

human rights supervisory bodies such as this Commission [to] raise doubts concerning the status of persons detained in the course of an armed conflict, as it has in the present matter, and require that such [a] status be clarified to the extent that such clarification is essential to determine whether their human rights are being respected. In light of the principle of efficacy, it is not sufficient for a detaining power to simply assert its view as to the status of a detainee to the exclusion of any proper or effectual procedure for verifying that status.<sup>54</sup>

This overview of the events of September 11 and the series of domestic and international responses thereto—legal, military, and political—intertwine the global and the local, effectively glocalizing terror. Foreign forces united to effect a military strike against the Taliban and al Qaeda in Afghanistan. Captives from numerous countries are held by the U.S. military on a base in Cuba. Assets have been frozen in financial institutions around the world. The global and local lines are blurred or trespassed, depending on one’s point of view, by collective enforcement against terror as well as by unilateral actions that, while seeking to bring justice against terrorism within one state’s borders, threaten the (international) human and (domestic) civil rights and liberties of citizens and non-citizens alike, both at home and abroad.

## II

### NATIONAL SECURITY VERSUS INDIVIDUAL LIBERTIES—THE ESSAYS

This section’s four authors grapple with the tensions caused by the September 11 events, particularly with respect to the opposing demands, on the one hand, to protect the nation’s and its peoples’ national security interests in the fight against terrorism and, on the other hand, to protect the individual rights and liberties of those apprehended and detained as suspects who may have committed or supported the commission of terrorist acts.

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<sup>53</sup> *Id.* (quoting U.S. letter of April 11, 2002).

<sup>54</sup> *Id.* (quoting Commission letter of July 23, 2002).

Raquel Aldana-Pindell, in her piece entitled *The 9/11 "National Security Cases": Three Principles Guiding Judges' Decision Making*, focuses on the "three factual or legal distinctions that have (or should have) guided the outcome in the post-September 11 litigation."<sup>55</sup> Her first assertion is that, historically, "the scope of judicial deference to the executive has depended on whether the courts have considered the president's actions to implicate greater concerns with national security than domestic affairs."<sup>56</sup> This national security/domestic concerns dichotomy that she sets up is grounded in the U.S. Supreme Court decisions in *United States v. Curtiss-Wright Corp.*<sup>57</sup> and *Youngstown Sheet & Tube Co. v. Sawyer.*<sup>58</sup> Aldana-Pindell posits that "[t]his precedent holds that the president's national security inherent powers are greater the more his actions affect national security affairs (*Curtiss-Wright*) and less the more his actions affect domestic affairs (*Youngstown*)."<sup>59</sup> Significantly, however, she realistically recognizes that it is increasingly difficult to designate any action in the September 11 events as purely domestic or purely national security and that this creates difficulty for the courts in ascertaining which precedent governs and results in the "mixed" judicial response to the executive actions.<sup>60</sup> The split in the circuits concerning the legal validity of the Creppy Directive authorizing secret immigration hearings confirms this difficulty.

The second principle that Aldana-Pindell proposes is that:

[C]ourts have not deferred to the executive, even in cases that implicate national security, when the president is exercising a power the Constitution clearly reserves for Congress. In the post-September 11 litigation, this issue has arisen in the president's decision to bar those detained as "enemy combatants" from pursuing habeas petitions and to prescribe federal court jurisdiction over the military tribunals.<sup>61</sup>

Although the courts have not directly addressed whether the president has congressional approval to deny judicial review, the author argues that "the president has acted unilaterally to do so and, therefore, that courts have incorrectly ignored significant

<sup>55</sup> Raquel Aldana-Pindell, *The 9-11 'National Security' Cases: Three Principles Guiding Judges' Decision Making*, 81 OR. L. REV. 985 (2003).

<sup>56</sup> *Id.*

<sup>57</sup> 299 U.S. 304 (1936).

<sup>58</sup> 343 U.S. 579 (1952).

<sup>59</sup> Aldana-Pindell, *supra* note 55, at 996.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 997.



separation of powers concerns.”<sup>62</sup> Lastly, the author notes that in some post-September 11 cases the judiciary has respected the claimants’ Bill of Rights concerns, although courts in the past have ignored some concerns over such individual liberties. However, she reconciles these ostensible tensions by noting that, one, courts often distinguish between substantive and procedural individual rights in deferring to the political branches in national security matters and, two, that courts have sometimes limited the president’s discretion in keeping national security secrets to guarantee the public’s ability to hold the government accountable to the rule of law.<sup>63</sup>

Aldana-Pindell discusses the numerous cases pending in courts and ultimately suggests that the national security/domestic dichotomy explains the different approaches courts have taken to detainees abroad—at Camp Xray in Guantánamo Bay—as contrasted to those who are held within the United States. She suggests that the inherent national security powers allow the executive to detain “enemy combatants” and thus courts will tend to defer to the executive on these matters. Yet, the constitutional question of whether the enemy combatants, even if properly detained, may be denied the right to judicial review, including habeas petitions, has been answered as to allow United States unilateral actions. The author, however, challenges this outcome on grounds of separation of powers as well as on international law.

Natsu Taylor Saito’s piece, *Whose Liberty? Whose Security? The USA PATRIOT Act in the Context of COINTELPRO and the Unlawful Repression of Political Dissent in the United States*,<sup>64</sup> also challenges the national security versus individual liberties dichotomy that Aldana-Pindell suggests. In this work, however, Saito sets out the history of the U.S. government acting not only against non-citizens but also against U.S. citizens when they participate in unpopular causes. She describes the targeted populations as ranging from war resisters to labor activists, from indigenous people to non-citizens, from civil rights activists to other subversives. Specifically, she focuses on the activities of COINTELPRO, which employs tactics of surveillance and infil-

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 999.

<sup>64</sup> Natsu Taylor Saito, *Whose Liberty? Whose Security? The USA PATRIOT Act in the Context of COINTELPRO and the Unlawful Repression of Political Dissent in the United States*, 81 OR. L. REV. 1051 (2003).

tration, dissemination of false information, creation of intra- and inter-group conflict, abuse of the criminal justice system, and collaboration in assaults and assassinations to discredit unpopular peoples and causes. Significantly, she details the specific targeting of communist and socialist organizations, the civil right movement, the Klan and other white hate groups, the new left and the anti-war movement, black national organizations and the Black Panther Party, and the American Indian movement to show the breadth of the government's activities over what it deems unpopular causes.

Saito then analyzes more recent anti-terrorist legislation and governmental policy as well as the USA PATRIOT Act of 2001 to suggest that these initiatives simply reflect the continuation of these historically undesirable governmental intrusions into people's lives. Specifically, she points to the enhanced surveillance powers, the criminalization of protest, the enhanced restrictions on immigrants, and enhanced funding and interagency communication to show that individual liberties and rights are being sacrificed in the war against terrorism without any concomitant assurances for greater security.

In conclusion, she interrogates "how much 'liberty' are we willing to sacrifice for the sake of 'security'?"<sup>65</sup> She suggests that her historical review urges a more skeptical and critical analysis about the government's intentions in its denial of liberties with the goal of increasing national security. She exhorts that "the federal government has consistently used its powers, legally and illegally, to suppress social and political movements which it sees as threatening the status quo. It is in this context that we must examine the expanded powers currently being exercised by the executive branch and legitimized by Congress."<sup>66</sup>

She adds, much like Aldana-Pindell suggests, that "the current expansion of executive powers and the concomitant restrictions on civil rights are not simply a response to a national emergency sparked by recent acts of terrorism, but a move toward legitimating powers that have a long history of being used consciously and deliberately to suppress political dissent."<sup>67</sup>

Recognizing that the United States is the sole global superpower—political, economic, and military—she urges that such

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<sup>65</sup> *Id.* at 1128.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

status carries with it a responsibility to ensure that all people realize fundamental human rights—rights that she implies are being denied by the initiatives enacted pursuant to the existing war against terrorism. She concludes as follows:

To the extent that governmental practices violate the Constitution and basic principles of international law, the fact that they are being “legalized” by Congress cannot give us comfort. Again, this was one of the basic principles articulated by no less than Supreme Court Justice Robert Jackson at the Nuremberg Tribunals—the existence of national laws legitimizing particular practices does not render those practices lawful in the larger sense of the term.<sup>68</sup>

The other two papers focus more on the consequences of the war against terrorism for local communities. Peggy Nagae, in *Justice and Equity for Whom? A Personal Journey and Local Perspective on Community Justice and Struggles for Dignity*,<sup>69</sup> recounts the evolution of her understanding of *Korematsu v. United States*<sup>70</sup> to admonish against the current trends. In *Korematsu*, the Supreme Court, while finding that distinctions between citizens solely because of their ancestry or by their nature are odious to a free people, nevertheless concluded that military necessity rendered both the exclusion of Japanese and the internment of Japanese Americans constitutionally permissible.<sup>71</sup> This case both challenged her sense of justice and sparked a desire to pursue justice and equity for all. As a Japanese American, she decided to attend law school and dedicate her life to such pursuits, joining civil rights organizations that focus on the protection of civil rights and liberties as well as being an advocate. Specifically, she represented one of the claimants in the reopening of the cases of Japanese American incarceration and was successful in having her client’s conviction erased.

Her concerns with the post-September 11 events are grounded in this personal history. She sees that, like with the *Korematsu* “military necessity internment,” today national security is being used as a basis to target persons on the basis of race.

Today the term “military necessity” has given way to “national

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<sup>68</sup> *Id.* at 1130.

<sup>69</sup> Peggy Nagae, *Justice and Equity for Whom? A Personal Journey and Local Perspective on Community Justice and Struggles for Dignity*, 81 OR. L. REV. — (2003).

<sup>70</sup> 323 U.S. 214 (1944).

<sup>71</sup> Nagae, *supra* note 69, at 1135.

security,” but the impact is the same; just as it was four decades ago, race is still used as an indicator of loyalty (now called patriotism) and is still justified because of stereotypes and prejudices that lead to discrimination. As happened with Japanese Americans in World War II, the current government has arrested and detained more than a thousand “suspected” terrorists and has imprisoned U.S. citizens indefinitely without bail, criminal charges, or access to attorneys. In addition, the government has proposed the creation of detention camps for U.S. citizens deemed “enemy combatants,” without judicial review. The government believes that, in the name of safety, racial profiling is justified now as it was then.<sup>72</sup>

The author condemns these actions noting that now, like in Korematsu’s experience, “in times of war, distress, and military necessity . . . we need to be the most vigilant about protecting rights and abhorring racial profiling.”<sup>73</sup>

Like Nagae’s work, Steven Bender’s *Sight, Sound, and Stereotype: The War on Terrorism and Its Consequences for Latinas/os*<sup>74</sup> looks at the post-September 11 consequences of “hate crimes, discrimination, and profiling directed at Arab Americans, Arabs, and Muslims in the United States.”<sup>75</sup> He then links this anti-Arab/Muslim backlash to the discriminations that Latinas/os and other subordinated groups suffer within the United States. Like Saito, Bender engages in a historical analysis. His analysis, however, concerns the position of Latinas/os within U.S. society and culture and notes that they, like Arab immigrants are now, have been the subject of negative sentiments.

Given [the] societal construction [of Latinas/os] as violent, foreign, criminal-minded, disloyal, and as overrunning the border, there are numerous grounds by which Americans might similarly construct Latinas/os as a terrorist threat. Because undocumented immigrants are now seen as a national security threat, as would-be terrorists, the longstanding association of Latinas/os with “illegal aliens” may cause Americans to view Latinas/os with suspicion.<sup>76</sup>

Significantly, Bender notes that the leap to such a terrorist labeling is not a huge one in light of “the societal association of Latinas/os with drugs [which] could shape a conception of Latinas/

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<sup>72</sup> *Id.* at 1136.

<sup>73</sup> *Id.* at 1150 (citing Judge Marilyn Hall Patel’s opinion vacating Korematsu’s conviction, *Korematsu v. United States*, 584 F.Supp. 1406, 1416 (N.D. Cal. 1984)).

<sup>74</sup> Steven Bender, *Sight, Sound, and Stereotype: The War on Terrorism and Its Consequences for Latinas/os*, 81 OR. L. REV. 1153 (2003).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 1154 (citation omitted).

os as ‘narco-terrorists’.”<sup>77</sup> Furthermore, he analogizes the current war on terrorism to President Richard Nixon’s war on drugs which resulted in the deployment of some agents at the Mexican border as part of the initiative to curtail drug smuggling, a position that President Reagan followed by issuing a security directive that classified drugs as a national security threat.<sup>78</sup> Bender proceeds to provide examples of instances in the Latinas/os history in the United States that could support the linkage of terrorism with the Latina/o identity, including the Mexican and Puerto Rican struggles for independence and self-determination.

In the wake of September 11, Latinas/os were also directly affected by the anti-immigrant sentiments that emerged, with many in the majority questioning the patriotism of Latinas/os, particularly the undocumented immigrants.<sup>79</sup> Bender notes that this questioning of patriotism was reflected in Congress’ imposition of a citizenship requirement on airport screeners which resulted in many Latinas/os losing their jobs.<sup>80</sup> However, the consequences do not stop at non-citizen Latinas/os, because the racial profiling that has been embraced by the government and the country can then extend to citizens who are Latinas/os.<sup>81</sup> Bender notes that racial profiling has been in use by the government to target Latinas/os in immigrant enforcement and the war against drugs. With the current climate, it can be extended in unpredictable ways.

Finally, Bender also looks at the possible assimilation pressures that may result from the post-September 11 events, including hostility against Spanish language speakers which would simply build on the English-only movement that has been in play for some time. Bender concludes by urging that the post-September 11 society not be one imbued with anti-immigrant sentiments, which have “forged a narrow Eurocentric vision of nationhood based on commonalities of history and heritage that viewed immigrants as disruptive anti-nation forces.”<sup>82</sup> To the

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<sup>77</sup> *Id.* at 1155 (citations omitted).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 1162.

<sup>81</sup> See also Cole, *supra* note 5, at 959 (discussing how infringements on rights of non-citizens can become the pathway to the infringement on rights of citizens); and as the most recent decision in *Hamdi* makes evident. *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003).

<sup>82</sup> Bender, *supra* note 74, at 1177.

contrary, he adds his

voice to the faint chorus of those seeking to articulate a new expansive vision of nationhood—one of cultural diversity. . . . Consistent with such a vision, Americans must forge a humanist unity marked by the respect of different cultures and their contribution to America, a recognition of human rights, and an acknowledgment of the invigorating effects of immigration. This multicultural vision of nationhood would regard racial profiling with great suspicion, would consider the human consequences of militarizing and securing borders on immigrants drawn to the United States by employment opportunities rather than by evil intent, and would resist the pressures of assimilation that purport to pronounce one culture and language as superior and the rest as anti-American and subversive.<sup>83</sup>

These essays demonstrate how the national norms that have historically existed and those that have been enacted specifically in response to September 11 can constitute a misuse or abuse of governmental power that can target “others” and deny them constitutional rights. However, in seeking how to balance the need to protect a population in a society with the protection of individual liberties, international norms may be of great assistance. Thus, in the following section, this Essay will look at international protections that may be useful in the analysis in this war against terrorism.

### III

#### POST-9/11 LEGAL ISSUES

In the wake of the September 11 tragedy, both the United States and the international legal community were quick to act. In this section, first the domestic response and then the international concerns with respect to these events are presented. The first part on domestic initiatives looks at three separate undertakings: immigration detentions, the USA PATRIOT Act, and ethnic profiling. The section on the international issues analyzes the definitions of war and terrorism, the applicability of the laws of armed conflict to the “War on Terrorism,” the U.S. designation of the status of the terrorists in the context of international law, and the legality of the military commissions created by President Bush to try enemy combatants. To be sure, as Aldana-Pindell noted in her work, the difficulty of creating demarcations be-

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<sup>83</sup> *Id.* at 1177-78.

tween executive actions taken in the domestic interest as juxtaposed to executive actions taken to protect national security, given the nature of the September 11 events, makes it impossible to create a clear divide between local and global acts.<sup>84</sup> Indeed, virtually every action and response can be said to have a “glocal” character—partly global and partly local. Thus, this section’s separation into parts A and B—domestic and international considerations, respectively—is a planned organizational artifice. A perfect example of this is the U.S. executive order creating military commissions with which this section deals in the international section because of its close nexus to the international legal status of the detainees.

#### A. *Domestic Initiatives*

One of the initial responses to the September 11 attacks was the U.S. government’s effort to detain non-citizens as a preventive measure. Although the actual number of persons detained is unknown, it is likely to be over 1000.<sup>85</sup> Notwithstanding these numbers, however, only one person—Zaccarias Moussaoui—has been charged with any criminal offense. Significantly, he was arrested before September 11.<sup>86</sup> Moreover, the government has only claimed that ten or eleven of the detainees might be members of al Qaeda.<sup>87</sup> Persons held in these secret detentions are mostly charged with immigration offenses, although some are held on federal criminal charges and a small number are being held as material witnesses. The government has refused to provide the identity of or charges against the persons held in connection with the September 11 investigation.<sup>88</sup>

Until the Sixth Circuit ruled that secret proceedings are in violation of First Amendment rights of the public and the press to observe trials, immigration detainees were tried in proceedings that were closed to the public pursuant to the Creppy Directive.<sup>89</sup> Some still are, however, as the circuits are now split with the Third Circuit’s October ruling that newspapers lack a First

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<sup>84</sup> Aldana-Pindell, *supra* note 55.

<sup>85</sup> See Cole, *supra* note 5, at 960 (noting that in November 2001 the government ceased informing the public about the number of detainees).

<sup>86</sup> See, e.g., *In Defence of U.S. Freedoms*, FINANCIAL TIMES (LONDON), June 3, 2002, at 16.

<sup>87</sup> See Cole, *supra* note 5.

<sup>88</sup> *Id.* at 961.

<sup>89</sup> *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002).

Amendment right of access to deportation proceedings that the Attorney General determines present significant national security concerns.<sup>90</sup>

Significantly, many of those detained have been held for extended periods of time without charges. Existing rules have been amended to extend the time available to file charges and, in times of emergency, for a “reasonable” period without being charged.<sup>91</sup> One commentator notes “that 317 detainees were held for more than 48 hours before being charged, 36 detainees were held for more than four weeks without charges, and nine were held for more than 50 days without charges.”<sup>92</sup> This reality reinforces the concerns expressed by Saito<sup>93</sup> and Aldana-Pindell<sup>94</sup> concerning the abrogation of personal liberties for the sake of national security.

Congress enacted the second initiative, the USA PATRIOT Act, only six weeks after the September 11 events. This law grants broad powers to the Attorney General to detain individuals suspected of aiding terrorism.<sup>95</sup> The Act has been criticized because of its vague definition of terrorism, the absence of a close nexus between the activities that can result in detention and the commission of a crime, and the absence of judicial oversight of detentions.<sup>96</sup> The PATRIOT Act also enlarges the information gathering and sharing abilities of law enforcement and intelligence agencies. It allows “wiretaps and physical searches without probable cause in criminal investigations so long as ‘a significant purpose’ of the intrusion is to collect foreign intelligence.”<sup>97</sup>

The PATRIOT Act also gives the Attorney General the ability to detain non-citizens without a hearing and without a showing that they pose a threat to national security; rather, the Attorney General only needs to certify that he has “reasonable grounds to believe” that the alien is “described” in any of a number of anti-

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<sup>90</sup> N. Jersey Media Group v. Ashcroft, 308 F.3d 198 (3d Cir. 2002).

<sup>91</sup> See Custody Procedures, 66 Fed. Reg. 48,334 (Sept. 20, 2001) (codified at 8 C.F.R. pt. 287).

<sup>92</sup> Cole, *supra* note 5, at 962.

<sup>93</sup> Saito, *supra* note 64.

<sup>94</sup> Aldana-Pindell, *supra* note 55.

<sup>95</sup> USA PATRIOT Act, *supra* note 8.

<sup>96</sup> For a review of significant PATRIOT Act provisions, as well as some of the chief criticisms of the Act, see, e.g., Michael T. McCarthy, *Recent Development: USA Patriot Act*, 39 HARV. J. ON LEGIS. 435 (2002).

<sup>97</sup> Cole, *supra* note 5, at 974.



terrorism provisions of the Immigration and Naturalization Act<sup>98</sup> for such non-citizen to be subject to indefinite mandatory detention.<sup>99</sup> It is not surprising that with these unprecedented powers, Attorney General Ashcroft, in the same month as the USA PATRIOT Act was passed, unilaterally announced that the Justice Department would eavesdrop on conversations between defendants and their lawyers in order to protect the country from the terrorist threat.<sup>100</sup>

The third and last initiative considered here is one both Bender<sup>101</sup> and Saito<sup>102</sup> addressed—ethnic profiling. In November following the attacks, the Justice Department announced that it was singling out immigrant men over the age of sixteen and from over twenty nations—mostly Arab or Muslim states—in order to continue with the war against terrorism.<sup>103</sup> Given the recent outcry against racial profiling, this practice has been challenged as violating the equal protection clause, because it is likely to be “a terribly inaccurate proxy” for terrorism, and because “the use of ethnic stereotypes, far from being ‘necessary’ for effective law enforcement, is likely to be ineffective.”<sup>104</sup>

In closing, it is significant to note that domestic laws protect basic rights being eroded by these initiatives. Rights at risk include political freedoms and liberties, due process, and equal protection of the laws—rights that are not limited to citizens but rather, according to the Constitution, apply to all “persons” subject to U.S. laws.<sup>105</sup>

### *B. International Concerns*

That the war against terrorism implicates international norms is immediately apparent by the name itself. The notion of war is defined as “a condition of armed hostility between States”<sup>106</sup> or

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<sup>98</sup> USA PATRIOT Act, *supra* note 8, § 412(a)(3).

<sup>99</sup> *Id.*; *see also* Cole, *supra* note 5, at 971.

<sup>100</sup> *See* Broder & Sachs, *supra* note 32.

<sup>101</sup> Bender, *supra* note 74.

<sup>102</sup> Saito, *supra* note 64.

<sup>103</sup> *See* Broder & Sachs, *supra* note 32.

<sup>104</sup> Cole, *supra* note 5, at 976.

<sup>105</sup> *See* U.S. CONST. amend. I, IV & V.

<sup>106</sup> David M. Ackerman, *Response to Terrorism: Legal Aspects of the Use of Military Force*, CRS REPORT FOR CONGRESS, RS21009 (Sept. 13, 2001), available at <http://www.au.af.mil/au/awc/awcgate/crs/rs21009.pdf> (quoting CHARLES CHENEY HYDE, 3 INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 1686 (1945)); *see also* DEP'T OF THE ARMY, THE LAW OF LAND

as a “state or condition of governments contending by force.”<sup>107</sup> In this regard, an act of war “involves the threat or use of force of some kind by one state against another.”<sup>108</sup> Thus, whether a particular threat or use of force constitutes an act of war will depend upon how the parties choose to characterize it. It is this subjectivity that has given the United States the window to call these attacks “acts of war” notwithstanding the absence of state parties. This is significant because the United States itself has noted that “war may be defined as a legal condition of armed hostility between states.”<sup>109</sup> In this context, an “‘act of war’ means any act occurring in the course of (a) a declared war; (b) armed conflict whether or not war has been declared between two or more nations; or (c) armed conflict between military forces of any origin[.]”<sup>110</sup>

In international law, *jus ad bellum* is the law that defines the legitimate reasons for which a state may engage in war which renders legal the use of force under international law.<sup>111</sup> In modern times, Articles 2 and 51 of the U.N. Charter set out the norms of *jus ad bellum*. On the other hand, *jus in bello* encompasses norms that govern conduct once force has been used, regardless of whether the recourse to force was lawful, and regulates how wars are fought notwithstanding why or how they started.<sup>112</sup> Both customary law<sup>113</sup> and treaty law<sup>114</sup> govern *jus in*

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WARFARE: FM 27-10 ¶ 8(a) (July 18, 1956), available at <http://www.doctrine.usmc.mil/mcrp/view/mcr5121a/mcr5121a.pdf>.

<sup>107</sup> Ackerman, *supra* note 106 (quoting Hyde, *supra* note 106, at 1686 n.1. (citing Grotius, one of the original theorists of international law)).

<sup>108</sup> *Id.*

<sup>109</sup> DEP’T OF THE ARMY, *supra* note 106.

<sup>110</sup> 18 U.S.C. § 2331(4) (1994).

<sup>111</sup> Mark A. Drumbl, *Judging Terrorist Crime, Taliban Guilt, Self-Defense and Western Innocence*, JURIST: THE LEGAL EDUCATION NETWORK § II, ¶ 5, at <http://www.jurist.law.pitt.edu/terrorismdrumbl.htm> (last visited Dec. 30, 2002); see Helen Duffy, *Responding to September 11: The Framework of International Law*, INTERIGHTS § 1, at 6 (Oct. 2001) at <http://www.spc-consilio.com/Sept11.pdf> (last visited Feb. 3, 2003); Karma Nabulsi, *Jus ad Bellum—Jus in Bello*, in CRIMES OF WAR: THE BOOK, available at <http://www.crimesofwar.org/thebook/book.html> (last visited Jan. 10, 2003).

<sup>112</sup> Duffy, *supra* note 111.

<sup>113</sup> Steven Ratner, *New Democracies, Old Atrocities: An Inquiry in International Law*, 87 GEO. L.J. 707, 715 (1999) (“Customary law recognizes . . . individual accountability for certain acts . . . at least [as] insofar as it accepts the right of all states to criminalize them and prosecute anyone committing them (universal jurisdiction.)”); Duffy, *supra* note 111, § 1, at 36-37.

<sup>114</sup> See, e.g., the following four Geneva Conventions of 1949 and additional protocols: Geneva Convention for the Amelioration of the Condition of the Wounded

*bello*.

Interestingly, the term “war” is not used in the U.N. Charter, although it had been used in the League of Nations Covenant and in the Kellogg-Briand Pact of 1928.<sup>115</sup> Rather, the U.N. Charter uses the term “force” rather than the term “war.”<sup>116</sup> Significantly, the language of Art. 2(4) is both specific—with respect to the actors to whom it applies—and ambiguous with respect to the meaning of force.<sup>117</sup> By its terms, the article applies only to members of the United Nations, which can only be states.<sup>118</sup> The use of force also must be against a state.<sup>119</sup> On the other hand, the word “force” as used in the Charter could include not only physical and military force, but also other types of coercion—such as economic, political, or psychological force.<sup>120</sup> Thus, the U.N. Charter by Art. 2(4) obligates states to settle all disputes by peaceful means and to refrain from use or threat of force in conducting international relations. Article 51 of the U.N. Charter articulates one exception to the prohibition of the use of force: self defense when an armed attack occurs.<sup>121</sup> There is one other

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and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 31 [hereinafter Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 [hereinafter Convention IV]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977 [hereinafter Protocol II]. The four conventions are known collectively as the 1949 Geneva Conventions and the two protocols as the 1977 Protocols to the Geneva Conventions.

<sup>115</sup> Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1624 (1984).

<sup>116</sup> See, e.g., U.N. CHARTER art. 2(4).

<sup>117</sup> “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” *Id.* By its terms, this Article applies only to members which are states. See *id.*

<sup>118</sup> *Id.*

<sup>119</sup> See U.N. CHARTER art. 3 (addressing original members) and art. 4(1) (addressing states to whom membership in the United Nations is open).

<sup>120</sup> Efforts made to give Art. 2(4) of the U.N. Charter this wider definition with respect to the prohibition on the use of force has been strongly resisted by Western states. See generally Schachter, *supra* note 115, at 1624.

<sup>121</sup> U.N. CHARTER art. 51:

Nothing in the present Charter shall impair the inherent right of individual

exception to the prohibition of the threat or use of force—armed action that is authorized by the United Nations Security Council as an enforcement measure.<sup>122</sup> A possible exception, currently being debated, is the use of force for humanitarian interventions in cases of large scale atrocities or acute deprivation of rights.<sup>123</sup>

Before considering the rules of war that may apply to the war against terrorism, it is important to examine the concept of terrorism itself. There is no universally accepted definition of terrorism, although common threads in the various definitions include the use of violence for a political or social aim, a desire to intimidate, and a targeting of civilian and other noncombatant populations<sup>124</sup>—elements that are reflected in both domestic and international definitions of terrorism. In the United States, international terrorism is defined as:

[A]ctivities that—(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States . . . ; (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, . . . , and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of . . . the locale in which their perpetrators operate or seek asylum.<sup>125</sup>

In the international realm, there is no precise, agreed-upon defi-

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or collective self-defence if an *armed attack* occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security (emphasis added).

Significantly, Article 51 allows the exercise of “the inherent right of individual or collective self defense if an armed attack occurs against a Member of the United Nations.” *Id.* It is noteworthy that while the self-defense right is triggered by an armed attack on a member, the armed attack does not have to be carried out by a member, thus opening the door for the self defense claim made by the United States pursuant to the September 11 attacks.

<sup>122</sup> See, e.g., U.N. CHARTER arts. 39 & 42.

<sup>123</sup> See Duffy, *supra* note 111, at 4-5.

<sup>124</sup> See Rich Mkhondo, *Terrorism*, CRIMES OF WAR: THE BOOK, available at <http://www.crimesofwar.org/thebook/book.html> (last visited Jan. 2, 2003) (“Terrorism is more than simple violence which requires only two parties, an aggressor and a victim. Terrorism needs a third party, who might be intimidated by what happened to the victim.”).

<sup>125</sup> 18 U.S.C. § 2331(1) (1994).

nition of terrorism, although there are at least nineteen conventions—treaties both on international humanitarian law and establishing international crimes, both international<sup>126</sup> and regional<sup>127</sup> in scope—and declarations<sup>128</sup> that address the concept of and prohibit terrorism. For example, the Fourth Geneva Convention of 1949 and its two additional protocols of 1977 banned terrorism during international and internal armed conflict, meaning they ban attacks directed against civilians.<sup>129</sup> Significantly, although commonly terrorism is understood to address acts by groups that are not part of a state, terrorist acts can include those that are carried out by or sponsored by a state either directly or indirectly, or implicitly sanctioned by a state.<sup>130</sup> However, one of the difficulties experienced in defining terrorism “reflects in part the hackneyed saying that one person’s terrorist is another’s freedom fighter. . . .”<sup>131</sup>

If indeed this current “war against terrorism” is a war, then it raises the issue of whether the laws of armed conflict are, or can be, applicable to such a conflict. As one commentator has noted, this designation poses a challenge to the traditional application of armed conflict as the actions of September 11 represent:

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<sup>126</sup> See, e.g., UNITED NATIONS PUBLICATION INTERNATIONAL INSTRUMENTS RELATED TO THE PREVENTION AND SUPPRESSION OF INTERNATIONAL TERRORISM pt. 1 (2001), [hereinafter INTERNATIONAL INSTRUMENTS] (listing twelve instruments related to suppression of terrorism); Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9 (Sept. 17, 1998); Convention for the Prevention and Punishment of Terrorism; Resolution 40 of 1985; International Convention for the Suppression of Terrorist Bombing, G.A. Res. 52/164, U.N. Doc. A/RES/52/164 (Dec. 15, 1997); International Convention for the Suppression of the Financing of Terrorism, G.A. 54/109, U.N. Doc. A/RES/54/109 (Dec. 9, 1999).

<sup>127</sup> See, e.g., INTERNATIONAL INSTRUMENTS, *supra* note 126, pt. II (listing seven instruments related to suppression of terrorism).

<sup>128</sup> See *id.* pt. III.

<sup>129</sup> See Convention IV, *supra* note 114; Protocol I, *supra* note 114; Protocol II, *supra* note 114.

<sup>130</sup> See INTERNATIONAL INSTRUMENTS, *supra* note 126, at 230 (Declaration on Measures to Eliminate International Terrorism, G.A. Res. 49/60 (Dec. 9, 1944) [hereinafter G.A. Res. 49/60] (“Deeply disturbed by the world-wide persistence of acts of international terrorism in all its forms and manifestations, including those in which States are directly or indirectly involved, which endanger or take innocent lives, have a deleterious effect on international relations and may jeopardize the security of states”)); *id.* at 237 (Declaration to Supplement the 1964 Declaration on Measures to Eliminate International Terrorism, G.A. Res. 51/210 (Dec. 17, 1966) [hereinafter G.A. Res. 51/210](same)).

<sup>131</sup> Duffy, *supra* note 111, at 33 (citing Special Rapporteur on Terrorism and Human Rights report of June 27, 2001); see also Mkhondo, *supra* note 124 (“One obvious difficulty with using the term within IHL is that, as has often been pointed out, one man’s terrorist is another man’s freedom fighter.”).

[S]omething of a hybrid between war and crime. The scale and scope of the assault of September 11 were clearly on the level of an act of war, but in traditional legal thinking, armed conflict has generally been seen as taking place only between states or (in the case of civil wars) between groups in control of part of a country's territory. Terrorists, by contrast, have tended to be seen as criminals, to be pursued through law-enforcement means and subjected to trial if captured.<sup>132</sup>

This reality raises the question of whether the September 11 attacks could be an act of war since al Qaeda, who is responsible for the attack, is not a state actor and bin Laden is not, and has never been, the leader of a member state or an insurgent<sup>133</sup> or belligerent,<sup>134</sup> although it may be questionable whether the Taliban had such status. Thus, some maintain that "any conflict between the United States and al Qaeda as such cannot amount to war or trigger application of the laws of war."<sup>135</sup> If the September 11 attacks could not attain the level of armed conflict,

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<sup>132</sup> Anthony Dworkin, *Law and the Campaign Against Terrorism: The View from the Pentagon*, CRIMES OF WAR PROJECT: ON THE NEWS, Dec., 2002, available at <http://www.crimesofwar.org/onnews/news-pentagon.html> (last visited Jan. 3, 2003).

<sup>133</sup> Insurgency is the lowest level of warfare or armed conflict to which the laws of war apply. For it to exist, the insurgent group would have to resemble a government, an organized military force, have control of significant portions of territory that they hold as their own, and a stable population or base of support within a broader population. See generally Jordan J. Paust, *There Is No Need to Revise the Laws of War in Light of September 11th*, THE AMERICAN SOCIETY OF INT'L LAW TASK FORCE ON TERRORISM, Nov. 2002, at <http://www.asil.org/taskforce/paust.pdf> (last visited Jan. 2, 2003); see Convention I, *supra* note 114, art. 3. Protocol II of the Geneva Conventions provides for applying the law of war to conflicts between the states' "armed forces and dissident armed forces or other organized armed groups which come under responsible command, exercise such control over part of its territory as to enable them to carry out sustained and concerted military operations and to implement this protocol." Protocol II, *supra* note 114.

<sup>134</sup> Belligerent status is based upon the same criteria for insurgency plus the outside recognition by one or more states as a belligerent or as a state. JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW 809, 812-13, 815-16, 819, 831-32 (2d ed. 2002). Belligerent status provides a rebel group legal standing similar to that accorded a government in bringing the law of international armed conflict in to play for both sides. Ewen Allison & Robert K. Goldman, *Belligerent Status*, CRIMES OF WAR: THE BOOK, available at <http://www.crimesofwar.org/thebook/book.html> (last visited Jan. 2, 2003) ("A rebel group gained 'belligerent status' when all of the following had occurred: it controlled territory in the State against which it was rebelling; it declared independence, if its goal was secession; it had well-organized armed forces; it began hostilities against the government; and, importantly, the government recognized it as a belligerent").

<sup>135</sup> Paust, *supra* note 133, at 2; see also *Pan American Airways, Inc. v. Aetna Cas. & Sur. Co.*, 505 F.2d 989, 1013-15 (2d Cir. 1974) (United States could not have been at war with the Popular Front for the Liberation of Palestine which had engaged in terrorists acts as a nonstate, nonbelligerent, noninsurgent actor).

then combatant status which is exclusive to members of the armed forces of a party to a conflict could not have attached to al Qaeda.<sup>136</sup>

While there can be debate as to whether the September 11 attacks constituted armed conflict, there can be no doubt that the October 7 use of military force against the Taliban in Afghanistan internationalized the up-until-then internal armed conflict between the Taliban and the Northern Alliance. The laws of war would apply to the conflict between the Taliban and the Northern Alliance as well as to the internationalized conflict between the United States and the Taliban once military force against the Taliban in Afghanistan was used by the United States on and after October 7, 2001.<sup>137</sup> Because laws of war apply, such norms govern the designation of the persons captured during, and detained pursuant to, that conflict.

Before analyzing the U.S. detention of al Qaeda and Taliban members, ascertaining what law applies to the detainees, and determining the validity of the established military commissions, it is important to note the danger of the elision of the concepts of crime and war effected by the U.S. insistence that laws of armed conflict apply to the war on terrorism.<sup>138</sup> An approach that blurs crime and war can render criminals subjects of international law entitled to protection by principles of *jus in bello* and grant captured terrorists prisoner of war status which may then legitimize

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<sup>136</sup> A.P.V. Rogers, *Combatant Status*, CRIMES OF WAR: THE BOOK, available at <http://www.crimesofwar.org/thebook/book.html> (last visited Jan. 2, 2003).

During an armed conflict, only 'combatants' are permitted to 'take a direct part in hostilities.' Noncombatants who do so commit a war crime and lose any protected status that they might have—that is, they are not entitled to be treated as prisoners of war, and any attacks on people or property may be prosecuted as common crime. Combatants . . . cannot be punished for their hostile acts and if captured can only be held as POWs until the end of hostilities.

*Id.*

<sup>137</sup> See Paust, *supra* note 133, at 3.

<sup>138</sup> Anthony Dworkin, *Excerpts from Interview with Charles Allen, Deputy General Counsel for International Affairs, U.S. Department of Defense*, CRIMES OF WAR PROJECT: ON THE NEWS, Dec. 16, 2002, available at <http://www.crimesofwar.org/onnews/news-pentagon-trans.html> (last visited Jan. 2, 2003).

With regard to the global war on terrorism, wherever it may reach, the law of armed conflict certainly does apply, not only in the sense that we've been focusing on (concerning the treatment of detainees), but also in the sense of the principle of distinction, in the sense of targeting decisions, and in the sense of how those who are removed from the combat are treated.

*Id.*

their acts as wartime hostilities which are not prohibited by *jus ad bellum*. As a British military historian stated, “To declare war on terrorists . . . is at once to accord them a status and a dignity that they seek and do not deserve.”<sup>139</sup> Indeed, if the terrorists were instead combatants, they would be immune from prosecution for attacks on military targets such as the Pentagon—an act that the United States would be loathe to view as a legitimate act of war rather than as a criminal terrorist act.<sup>140</sup>

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<sup>139</sup> Dworkin, *supra* note 132 (quoting British military historian Sir Michael Howard’s 2001 speech).

<sup>140</sup> See generally *id.*; Georges Abi-Saab, *There Is No Need to Reinvent the Law*, CRIMES OF WAR PROJECT, available at <http://www.crimesofwar.org/sept-mag/sept-abi-printer.html> (last visited Jan. 3, 2003); Paust, *supra* note 133, at 3-4 (Noting that

[w]ith respect to the September 11th attacks as such, any attempt to expand the concept of war beyond the present minimal levels of belligerency and insurgency would be extremely dangerous because certain forms of non-state actor violence and targetings that otherwise remain criminal could become legitimate. Two such targetings would have been the September 11th attack on the Pentagon, a legitimate military target during armed conflict or war (except for the means used, an airliner with passengers and crew), and the previous attack on the U.S.S. Cole, another legitimate military target during armed conflict or war. Similarly, a radical extension of the status of war and the laws of war to terroristic attacks by groups like al Qaeda (and there are or predictably will be many such groups engaged in social violence) would legitimize al Qaeda attacks on the President (as Commander-in-Chief) and various U.S. “military personnel and facilities” in the U.S. and abroad—attacks of special concern to President Bush, as noted in his November 13th Military Order. Applying the status of war and the laws of war to armed violence below the level of an insurgency can have the unwanted consequence of legitimizing various other combatant acts and immunizing them from prosecution.)

Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure*, 23 MICH. J. INT’L L. 677, 683-85 (2002) (noting that

[t]he United States cannot be at ‘war’ with al Qaeda . . . [because the] threshold of ‘armed conflict’ under common article 2 of the Geneva Conventions, which triggers application of the detaining power’s competence under article 5 of the Geneva Civilian Convention to intern certain persons, cannot be met if the United States is merely fighting members of al Qaeda. Other problems with those seeking prosecution include the fact that (1) mere membership in an organization (like al Qaeda) is not a crime; (2) acts of warfare engaged in by members of the armed forces of a party to an international armed conflict (begun on October 7, 2001, in Afghanistan) are entitled to immunity from prosecution if their acts are not otherwise violative of international law and, thus, lawful combat training and actions of members of the armed forces of the Taliban (and perhaps members of al Qaeda units attached to the armed forces of the Taliban) during the armed conflict are privileged belligerent acts entitled to combat immunity and cannot properly be criminal, elements of domestic crime, or acts of an alleged conspiracy; and (3) al Qaeda attacks on the United States on September 11th (before the international armed conflict in Afghanistan began)



In light of international legal principles which confer significant immunities on combatants for taking part in hostilities, and which deny protected status for noncombatants who partake in hostilities that render them war criminals, it is important to classify the status of the captives.<sup>141</sup> During an international armed conflict, a party to the conflict may detain persons without trial if they are “suspected [of] or engaged in activities hostile to the security of the state.”<sup>142</sup> Such detention without trial can last for the duration of the hostilities.<sup>143</sup> During detention, “persons shall . . . be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by [applicable norms].”<sup>144</sup> Detainees must be released upon the end of hostilities but always “at the earliest date consistent with the security of the state or occupying power. . . .”<sup>145</sup> Based on customary human rights law, every detainee has a right to obtain judicial review about the circumstances and conditions of their detention.

Charles Allen, Deputy General Counsel for International Affairs at the United States Department of Defense, confirmed that “fundamental principles of the law of armed conflict have proven themselves to be applicable to this conflict.”<sup>146</sup> He noted that:

The authority to detain enemy combatants during hostilities is well settled under international law and certainly under the U.S. Constitution, and . . . we don’t foresee the end of the conflict at a particular date. But it is absolutely lawful to detain these enemy combatants until the end of the hostilities; therefore, it is by no means an indefinite detention in the sense that one might attribute to the lawless countries that

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cannot be privileged belligerent acts, but also cannot be prosecuted as war crimes because the United States and al Qaeda cannot be “at war” under international law.) (citations omitted).

<sup>141</sup> See Paust, *supra* note 133, at 6.

Enemy combatants are privileged to engage in lawful acts of war such as the targeting of military personnel and other legitimate military targets. Such acts are privileged belligerent acts or acts entitled to combat immunity if they are not otherwise violative of the laws of war or other international laws (e.g., those proscribing aircraft sabotage, aircraft hijacking, genocide or other crimes against humanity). Violations of the laws of war are war crimes, are not entitled to immunity, and are thus prosecutable.

*Id.*

<sup>142</sup> Convention IV, *supra* note 114, art. 5.

<sup>143</sup> *Id.* art. 6.

<sup>144</sup> *Id.* art. 5.

<sup>145</sup> *Id.*

<sup>146</sup> Dworkin, *supra* note 138.

have no process attaching to the detention of persons in their control.<sup>147</sup>

Having designated the detainees as enemy combatants,<sup>148</sup> Alen defines the enemy as “al-Qaeda and . . . other international terrorists and their supporters.”<sup>149</sup> He then invokes the right to self defense:

The world agrees that the U.S. was attacked and is in armed conflict with that stated enemy. Therefore, in exercising our right of self-defence [sic], we can target members of that enemy force and we certainly can detain such persons in accordance with the laws of armed conflict.<sup>150</sup>

Moreover, he specified that:

The regime of law that applies is the customary law of armed conflict. The determination has been made that al Qaeda is by no means a state party to the Geneva Conventions. It’s a foreign terrorist group, and clearly its members are not entitled to prisoner of war status under the Geneva Conventions. With regard to the Taliban, even though the United States did not recognize the Taliban as the legitimate Afghan government, Afghanistan is a party to the Geneva Conventions and was determined by the President to be covered by the Conventions. But under the terms of the Conventions the Taliban do not qualify as prisoners of war. Having said that, we apply existing law of armed conflict and treat the detainees—al Qaeda and Taliban alike—humanely and in a manner consistent with the principles of the Geneva Conventions, which we believe are part of the international law of armed conflict.<sup>151</sup>

The distinction between a prisoner of war and an unlawful combatant is being intensely debated precisely because the outcome signifies whether an individual would be entitled to the protections of the Geneva Conventions—a prisoner of war is en-

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.* Enemy combatant is defined as:

an individual who, under the laws and customs of war, may be detained for the duration of an armed conflict. In the current conflict with al Qaida and the Taliban, for example, the term includes a member, agent, or associate of al Qaida or the Taliban. . . . The authority to detain enemy combatants applies not just to armed soldiers engaged in battlefield combat, but extends to all belligerents, including any individuals who act in concert with enemy forces and aim to further their cause. An individual cannot immunize himself from treatment as an enemy combatant by attempting to extend the battle beyond the traditional battlefield.

*Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

titled to protections, while an unlawful combatant—one who was not following the rules of war—does not. Some insist that al Qaeda fighters do not qualify as prisoners of war under any circumstances because they do not meet the standard set forth by the Geneva Conventions for prisoner of war status for irregular militias.<sup>152</sup> On the other hand, while conceding that the question of whether Taliban members qualify for prisoner of war status “is more difficult,” some similarly conclude that the Taliban do not qualify because of their failure to wear a distinctive sign and to “carry arms openly.”<sup>153</sup>

The U.S. designation of detained individuals as “enemy combatants” and the claim that they may be detained indefinitely without right of judicial review with respect to their detention raises legal issues. The designation is not a term of art known in international law. Rather, it appeared in a U.S. Supreme Court decision of 1942, *Ex parte Quirin*,<sup>154</sup> a case in which German soldiers came into the country, hid their uniforms, and planned sabotage before being apprehended. They were arrested and tried for crimes of war in the U.S. courts and were convicted and sentenced.<sup>155</sup> The Court, which did not depart from the international legal principles set out earlier in this Essay, specifically stated:

By universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.<sup>156</sup>

Thus, with respect to the detainees, the United States has uni-

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<sup>152</sup> Michael C. Dorf, *What Is an “Unlawful Combatant” and Why It Matters: The Status of Detained Al Qaeda and Taliban Fighters*, FINDLAW, LEGAL COMMENTARY, Jan. 23, 2002, at <http://writ.news.findlaw.com/dorf/20020123.html> (citing Art. IV of the Geneva Conventions (noting that the criteria are “(a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; [and] (d) that of conducting their operations in accordance with the laws and customs of war” and that “[al] Qaeda does not satisfy these conditions.”).

<sup>153</sup> *Id.*

<sup>154</sup> 317 U.S. 1, 31 (1942).

<sup>155</sup> *See id.*

<sup>156</sup> *Id.* at 30-31 (citations omitted).

laterally decreed that they are not being held as prisoners of war but instead as so-called unlawful combatants. The reasons for concluding that they are not POWs differ, but what is indisputable is that, having made these unilateral designations, the United States has failed to hold hearings to determine the legal status of the detainees as required by Article 5 of the Third Geneva Convention<sup>157</sup>—a decision harshly criticized by the international community. It is precisely because it is not always clear what status designation a person captured during armed conflict deserves, and because there are different levels of protections for prisoners of war and for those captured who do not qualify for such status, that Article 5 of the Third Geneva Convention specifically provides that:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.<sup>158</sup>

Thus, it appears that the U.S. unilateral declaration of status of the prisoners is inappropriate based on existing law.

In addition, because the detainees are being held in Guantánamo Bay, Cuba, which at least one court has now determined is outside U.S. sovereign territory, they are beyond the reach of the U.S. Constitution.<sup>159</sup> This decision has been criticized as a “peculiar reading of the [habeas corpus] statute.”<sup>160</sup> One commentator argues that:

The district court seemed to strain against the ordinary meaning of the word “jurisdiction” and added a word that Congress had not chosen, i.e., the word “territorial,” as a limitation of “jurisdiction” or power. . . . The statutory language simply cannot support such a perverse reading. Indeed, the statute focuses on “jurisdiction” of courts, not territory or sovereignty of the United States, and the district court seemed to confuse the meaning of the statute with issues concerning the reach of the Constitution. As noted, the statute expressly reaches violations of laws other than the Constitution. . . . What the court failed to address is that sovereignty is a form of lawful govern-

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<sup>157</sup> Convention III, *supra* note 114, art. 5.

<sup>158</sup> *Id.*

<sup>159</sup> *Coalition of Clergy et al. v. Bush*, 189 F. Supp. 2d 1036 (C.D. Cal. 2002), *aff'd in part, rev'd in part*, 310 F.3d 1153 (9th Cir. 2002); *see also* *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002).

<sup>160</sup> Paust, *supra* note 140, at 691-92.

mental power and that wherever the United States detains individuals, it is exercising a form of sovereign power. Additionally, Guantanamo Bay is under the sovereign power and a form of territorial jurisdiction of the United States: under a treaty with Cuba that confers “complete jurisdiction and control over and within such areas”—and, thus, sovereignty—as an occupying power. . . . In any event, the statute’s word “jurisdiction” is met by the treaty (i.e., the United States has “complete jurisdiction and control” and is fully exercising it) as well as by the status of the United States as occupying power with jurisdiction and control.<sup>161</sup>

Having addressed the status of the detainees, the legality of their indefinite detention, and the applicability of the laws of war to the detainees, this section now reviews President Bush’s November 13, 2001, military order creating military commissions to try foreign nationals “for violations of the laws of war and other applicable laws” that were related to acts of international terrorism.<sup>162</sup> The Order covers acts that have “adverse effects on the United States, its citizens, national security, foreign policy, or economy,”<sup>163</sup> has no time limit,<sup>164</sup> and originally contemplated that under the “order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts” would not apply.<sup>165</sup>

As with other actions taken pursuant to the September 11 attacks, the legality of the military commissions is hotly debated. One commentator has noted that the “[o]rder reaches far beyond the congressional authorization given the President” in the wake of September 11 to prevent future acts of international terrorism against the United States,<sup>166</sup> and that “[i]n its present form and without appropriate congressional intervention, the Military Order will create military commissions that involve unavoidable violations of international law and raise serious constitutional challenges.”<sup>167</sup> One issue with respect to the military commissions is that the President’s power as commander-in-chief to set up such commissions is only applicable during “war within a war

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<sup>161</sup> *Id.* at 691-92 (citations omitted).

<sup>162</sup> Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (Nov. 13, 2001), 66 Fed. Reg. 57,833 § 1(e).

<sup>163</sup> *Id.* § 2(a)(1)(ii).

<sup>164</sup> *See generally id.*

<sup>165</sup> *Id.* § 1(f).

<sup>166</sup> Jordan Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT’L L. 1 (2001).

<sup>167</sup> *Id.* at 2.

zone or relevant occupied territory and apparently ends when peace is finalized.”<sup>168</sup> Thus, while there is a war in Afghanistan, the United States would be able to set up military commissions to try persons accused of war crimes and, if it were an occupying power in Afghanistan, it could set up

a military commission in the occupied territory to try individuals for terrorism in violation of international law, genocide, other crimes against humanity, and aircraft sabotage in addition to war crimes. However, outside of the occupied territory, . . . military commissions can only be constituted in an actual war zone and can only prosecute war crimes.<sup>169</sup>

Moreover, military commissions need to follow procedures as required by treaty and customary norms which guarantee due process of law, including the right of “all persons” to be treated as “equal before the courts and tribunals . . . entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law,”<sup>170</sup> “the right to be presumed innocent until proved guilty according to law,”<sup>171</sup> the right “[t]o be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him,”<sup>172</sup> the right “[t]o have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing,”<sup>173</sup> the right “[t]o be tried without undue delay,”<sup>174</sup> the right

To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any such case where the interests of justice so require, and without payment by him in such case if he does not have sufficient means to pay for it,<sup>175</sup> the right “[t]o examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses

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<sup>168</sup> *Id.* at 5.

<sup>169</sup> *Id.* at 9 (citation omitted).

<sup>170</sup> Int’l Covenant on Civil and Political Rights, Mar. 23, 1976, art. 14(1), 999 U.N.T.S. 171 [hereinafter ICCPR]. Significantly, “[t]he press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security.” *Id.*

<sup>171</sup> *Id.* art. 14(2).

<sup>172</sup> *Id.* art. 14(3)(a).

<sup>173</sup> *Id.* art. 14(3)(b).

<sup>174</sup> *Id.* art. 14(3)(c).

<sup>175</sup> *Id.* art. 14(3)(d).

against him,”<sup>176</sup> the right “[t]o have free assistance of an interpreter if he cannot understand or speak the language used in court,”<sup>177</sup> and the right “[n]ot to be compelled to testify against himself or confess guilt.”<sup>178</sup>

In addition, “[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.”<sup>179</sup> Plainly, the November 13 Military Order which provides only for review by the President or Secretary of State does not comport with this right of review. Moreover, given that the Military Order is addressed only to foreign nationals, it also violates the nondiscrimination provisions of international norms.<sup>180</sup>

Two other challenges to the Military Order interrogate the President’s authority, without approval by Congress, to suspend habeas corpus<sup>181</sup> and to “set up a military commission outside of occupied territory or an actual war zone during an armed conflict.”<sup>182</sup> Moreover, these infirmities with the Military Order are continued by the Department of Defense Ad Hoc Procedures implemented by order of March 21, 2002.<sup>183</sup> For example, the Department of Defense rules continue the discrimination on the basis of national or social origin, deny equal protection, and deny justice to foreigners.<sup>184</sup> However, it is the position of the United

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<sup>176</sup> *Id.* art. 14(3)(e).

<sup>177</sup> *Id.* art. 14(3)(f).

<sup>178</sup> *Id.* art. 14(3)(g).

<sup>179</sup> *Id.* art. 14(5).

<sup>180</sup> *See, e.g., id.* art. 2 which requires that:

Each State Party . . . undertake[ ] to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.

*See also id.* art. 26 providing that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.

<sup>181</sup> Paust, *supra* note 166, at 21.

<sup>182</sup> *Id.* at 26.

<sup>183</sup> Paust, *supra* note 140, at 677.

<sup>184</sup> *Id.* at 678.

Under the DOD Order, civilians may not be tried in civilian courts, the accused have been detained for months without charges, detainees do not enjoy the right to be brought promptly before a judge or to file habeas

States that:

The law of armed conflict makes no provision for judicial review of the detention of enemy combatants who are detained during hostilities solely to take them out of the fight. There is a recognition in the law of armed conflict that during hostilities, the military through its operations and intelligence-gathering has an unparalleled vantage point to learn about the enemy and make judgments as to whether those seized during a conflict are friend or foe.<sup>185</sup>

Moreover, a U.S. representative specifically notes the Supreme Court's finding in *Ex parte Quirin* to support trying the captive in a military tribunal.<sup>186</sup>

To be sure, there is constitutional authority for the creation of military commissions.<sup>187</sup> Indeed, Congress provided for military commissions in Article 21 of the Uniform Code of Military Justice.<sup>188</sup> Rather, the issue with respect to President Bush's mili-

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corpus petitions, defense attorneys will lack access to some witnesses, accused will not be able to cross-examine all witnesses against them, portions of trials can be held in secret, and accused lack the right of appeal to an independent and impartial tribunal.

*Id.* It should be noted, however, that during international armed conflicts there may be indefinite detentions without trial, which can last for the duration of the conflict. *See supra* notes 142-48 and accompanying text. Indeed, Article 118 of the Third Geneva Convention of 1949 specifically states that prisoners "shall be released and repatriated without delay after the cessation of active hostilities." Convention III, *supra* note 114, art. 118. This obligation is reiterated in the 1977 First Additional Protocol which notes that "[u]njustifiable delay in the repatriation of prisoners of war or civilians" constitutes a grave breach over which there is universal jurisdiction. Protocol I, *supra* note 114, art. 85(4)(b). Nonetheless, a belligerent is allowed to ensure that the enemy has ceased fighting and does not intend to resume the conflict before releasing the captives. Charles Allen, Deputy General Counsel for International Affairs of the U.S. Department of Defense, confirms the claim to authority to detain enemy combatants during hostilities although he does not "foresee the end of the conflict at a particular date." Dworkin, *supra* note 138. In fact, Allen notes that releasing the captives before the end of the hostilities "would probably result in that person rejoining the battle against the United States. That's the underlying basis for being able to detain enemy combatants during armed conflict." *Id.*

<sup>185</sup> Dworkin, *supra* note 138.

<sup>186</sup> *Id.* at 9 (citing *Quirin*, 317 U.S. at 31).

<sup>187</sup> *See Quirin*, 317 U.S. at 28 ("By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases."). *See* American Bar Ass'n Task Force on Terrorism and the Law Report and Recommendations on Military Commissions, Jan. 4, 2002, at [http://www.aba.net.org/poladv/letters/exec/militarycolm\\_report.pdf](http://www.aba.net.org/poladv/letters/exec/militarycolm_report.pdf) at p. 2 (last visited Dec. 17, 2002) [hereinafter ABA Task Force].

<sup>188</sup> 10 U.S.C. § 821 (1994) ("The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that



tary order is whether he, under the sole power as commander-in-chief, had the authority to establish such commission or whether the September 18, 2001, Congressional Joint Resolution<sup>189</sup> authorized the creation of such commission. While some argue that the “all necessary and appropriate force” language authorizes the President’s military order,<sup>190</sup> others argue that the military order is beyond the purview of the Joint Resolution.<sup>191</sup> In all cases, there seems to be agreement that the lack of judicial review is problematic.<sup>192</sup>

### CONCLUSION

The heinous attacks of September 11 have resulted, perhaps unnecessarily, in the adoption of a flurry of problematic domestic norms that target persons based on race or ethnicity, treat nationals and non-nationals differently, and unduly intrude into constitutionally protected rights. As this Essay has shown, the domestic legislation also potentially conflicts with established international norms.

Significantly, it appears that these legislative and executive activities are not only intrusive but perhaps also unnecessary because existing United States and international norms already address the heinous conduct. First, considering that al Qaeda and the Taliban are non-state actors, they could be held for violations such as piracy, war crimes, violations against the law of nations, violations of human rights, and other acts of hostility.<sup>193</sup> For example, those acting outside of the United States in connection with the September 11 attacks could be prosecuted by the

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by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals”).

<sup>189</sup> Authorization for Use of Military Force, Joint Resolution, Pub. L. No. 107-40, 115 Stat. 224. The president is authorized:

to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks 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.

*Id.*

<sup>190</sup> ABA Task Force, *supra* note 187, at 6.

<sup>191</sup> Paust, *supra* note 166.

<sup>192</sup> See *id.* at 12-16, 21-22, 27-28; ABA Task Force, *supra* note 187, at 10-11.

<sup>193</sup> See John Doe v. Unocal Corp., 2002 WL 31063976 (9th Cir. 2002). See generally Jordan J. Paust, *Sanctions Against Non-State Actors for Violations of International Law*, 8 ILSA J. INT’L & COMP. L. 417 (2002).

United States under the U.S. Antiterrorism Act.<sup>194</sup> Similarly, civil lawsuits are possible against non-state actors under the Antiterrorism Act which allows remedies to be brought by “national[s] of the United States injured in his or her person, property, or business by reason of an act of international terrorism . . . and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney’s fees.”<sup>195</sup> Foreign plaintiffs could sue non-state actors under the Alien Tort Claims Act<sup>196</sup> which allows a non-national to sue in the courts of the United States for a tort committed in violation of the law of nations. It is also possible that U.S. plaintiffs and foreign plaintiffs may have recourse under the Torture Victim Protection Act.<sup>197</sup> Because international terrorism and crimes against humanity are international wrongs over which there exists universal jurisdiction,<sup>198</sup> the United States could rightfully prosecute perpetrators for such crimes.

Beyond existing domestic legislation, ample international bases for prosecutions also exist. For example, the United States could prosecute both state and non-state actors under legislation implementing the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.<sup>199</sup> The enabling law is applicable to anyone who “willfully . . . destroys, disables, or wrecks any aircraft in the special aircraft jurisdiction of the United States . . . [and to whomever] performs an act of violence against or incapacitates any individual on any such aircraft. . . .”<sup>200</sup> There are also other conventions and declarations pursuant to which the wrongdoers could be held accountable for their terrorist acts including the International Convention Against the

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<sup>194</sup> 18 U.S.C. § 2331 *et seq.* (1994). *See generally* Paust, *supra* note 193, at 417-19.

<sup>195</sup> 18 U.S.C. § 2333(a) (1994).

<sup>196</sup> *See* 28 U.S.C. § 1350 (1994).

<sup>197</sup> *See* Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992).

<sup>198</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987) (“A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism. . . .”).

<sup>199</sup> Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, *opened for signature* Sept. 21, 1971, 974 U.N.T.S. 177 (*entered into force* Jan. 26, 1973).

<sup>200</sup> 18 U.S.C. § 32(a)(1)-(5) (1994).

Taking of Hostages,<sup>201</sup> the Geneva Conventions fully discussed in the Essay, the Declaration on Measures to Eliminate International Terrorism,<sup>202</sup> and the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism.<sup>203</sup> Finally, the laws of war as they currently exist are amply sufficient to prosecute the wrongdoers for the crimes committed against the United States and its populations.<sup>204</sup> Thus, given the broad and detailed protections under existing domestic and international law, there is no need for the United States to trample on the rights of citizens and non-citizens, immigrants, or detainees in pursuit of justice against these heinous attacks.

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<sup>201</sup> International Convention Against the Taking of Hostages, *opened for signature* Dec. 17, 1979, 1316 U.N.T.S 205 (*entered into force* June 3, 1983).

<sup>202</sup> See INTERNATIONAL INSTRUMENTS, *supra* note 126, at 230 (G.A. Res. 49/60).

<sup>203</sup> *Id.* at 237 (G.A. Res. 51/210).

<sup>204</sup> See generally Paust, *supra* note 133.

