

**THE RULE OF LAW: AN ESSENTIAL  
COMPONENT OF THE FINANCIAL WAR  
AGAINST ORGANIZED CRIME AND TERRORISM  
IN THE AMERICAS**

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## INTRODUCTION

The world is his who can see through its pretension. What deafness, what stone-blind custom, what overgrown error you behold, is there only by sufferance—by your sufferance. See it to be a lie, and you have already dealt it its mortal blow.

-Ralph Waldo Emerson  
The American Scholar; An Oration  
Delivered before the Phi Beta Kappa Society,  
at Cambridge, August, 1831

The observations of this paper are an expansion of earlier efforts analyzing the Rule of Law post 9/11 including The USA Patriot Act and similar legislation adopted in the European Union and in the Americas.<sup>1</sup> In revisiting and expanding upon portions of these earlier works, this paper addresses the issue of whether nations are adhering to international and customary law when faced with realistic terrorist threats or merely acting unilaterally outside of these legal constructs with complete impunity. It is the thesis of this paper that terrorism cannot be successfully repelled unless the legitimacy of international and domestic law is understood and adhered to by states out of a sense of reciprocal obligation in accordance with the principle of *pacta sunt servanda* (pacts shall be respected).

The Middle East in general, and Iraq in particular, has been the focus of the United States' "war on terror." But what has been the response of the United States to the terrorist threat in Americas? Have the United States post 9/11 national security priorities been unnecessarily diverted from the Americas where much needed support, (via revenue, training and resources), is lacking and instead refocused upon extraordinary complexities far beyond domestic and international norms? If both assumptions prove

correct, there can be nothing but tragic consequences for the domestic and international rules of law, unless, the present course is reversed. As Thomas Paine warned,

An avidity to punish is always dangerous to liberty. It leads men to stretch, to misinterpret, and to misapply even the best of laws. He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself.<sup>2</sup>

Part I of this paper examines the erosion of the Rule of Law vis-à-vis the United States derogation from both international law and democratic constitutional principles in its pursuit of “defending freedom” within the context of its unilateralist approach to the “war on terror.”

Part II discusses how these unilateralist-doctrinal approaches that are fixated on “regime-change” in the Middle-East are geostrategically counter-productive in combating global terrorism. The nexus of organized crime and the presence of terrorist organizations in the Americas are illustrative of how the United States has diverted its post 9/11 national security priorities and resources from regional terrorist threats.

Part III concludes that democratic principles, human rights, the Rule of Law, and combatting terrorism are not mutually exclusive. To the contrary, democratic principles, human rights, and the Rule of Law are elements essential to winning the “war on terror.”

## I

### THE RULE OF LAW

The alien was to be protected not because he was a member of one's family, clan, or religious community, but because he was a human being. In the alien, therefore, man discovered the idea of humanity.<sup>3</sup>

By its actions at a meeting to celebrate the Rule of Law on 9/11, the Organization of American States (OAS) acknowledged that one of the many collateral victims of the September 11, 2001 terrorist attack could be the Rule of Law. The consequence was the June 3, 2002, Inter American Convention on Terrorism. The Convention reaffirms the rule of law and rejects the rule by law. What does it all mean?

We learn in law school that the Rule of Law is representation coupled with the nuances of relationships, customs, opinions, beliefs, and rules. In order for the Rule of Law to serve a legitimate function within society, it must reflect that society's perceptions and beliefs in tandem with their willingness to acquiesce to it. If the Rule of Law is to be accepted as legitimate and representative, it must in turn lend itself to the will of the people, including its advocacy for change, overthrow, or rebellion. Both formal and informal obligations and agreements within a democracy facilitate order through expectations, which are necessary in order that the society organize itself in a predictable, peaceful, and secure fashion.<sup>4</sup>

We further learn in law school that international agreements serve a similar function. International agreements establish procedures and rules intended to facilitate peace and security among states. For the most part, international laws deal directly with state entities. However, international laws may, and often do, have a direct and indirect effect upon individuals, groups, and cross-border transnational governmental exchanges

that operate within and between states.<sup>5</sup>

Terrorism by its very nature disrupts international peace and security through premeditated, political violence.<sup>6</sup> The September 11th attacks on the Pentagon and the World Trade Center disrupted not only the global economy,<sup>7</sup> but also the global rule of law. The attacks spawned and facilitated widespread fear, panic, and economic dislocation.<sup>8</sup> As interpreted, the United Nations Security Resolution 1373 rejects one of the objectives of the terrorists, which was to create a state of global anarchy by means of influencing the conduct of governments through intimidation and coercion. It follows logically, therefore, that adhering to the Rule of Law is the antitheses of the terrorist objective, a rule by law. Unfortunately, current United States policies in the “war on terror” in general, including non-judicially approved wiretaps upon United States citizens, tends to subvert the Rule of Law and the democratic principles flowing therefrom.<sup>9</sup>

While nation states recognize that law is a necessary and important component of social control, such social control is to be employed with the understanding that its legitimacy is intricately linked with the concept of governance. Therefore, on balance, one would ask: how does the doctrine of proportionality operate within the context of laws designed to destabilize organized terrorist activities? Terrorists intend to accomplish social and economic disintegration by disrupting lawful control and muting the notion of governance. As the United Nations Security Council Resolution 1373 noted, a nation state has the legitimate right of self-defense when threatened by acts of terrorism since such acts can lead to the destabilization and eventual collapse of legitimate governance. With this in mind, in what manner can the rule of law become *the*

collateral victim?

While it is conceded that one of the primary duties of any government is to ensure the survival of its legitimate governing regime and the physical safety of its citizens, an equally important duty is to preserve democracy and civil liberties and to fulfill obligations mandated under national constitutions, as well as international and humanitarian conventions. The late United States Chief Justice Earl Warren eloquently illustrated this delicate balancing of national security interests and democratic principles in his majority opinion in *United States v. Robel*:<sup>10</sup>

This concept of “national defense” cannot be deemed an end in itself, justifying any exercise...of power designed to promote such a goal. Implicit in the term “national defense” is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution...It would indeed be ironic if, in the name of national defense, we would sanction the subversion...of those liberties...which make the defense of the nation worth while.<sup>11</sup>

Are Chief Justice Warren’s words applicable to the “war on terrorism”? Obviously, there is no international government or an international law enforcement agency strong enough at present to enforce international law principles upon powerful, defiant states. However, the international community does exist. Laws, institutions, structures, and procedures exist where the international “society” seeks to regulate states’ activities, conduct, and “...their relations intersect, as well as with some of their relations with persons, whether natural or juridical with each other.”<sup>12</sup>

Thus, the primary purpose of international law is to maintain international order so that states may pursue national interests within a predictable legal framework. This framework depends upon agreed assumptions, practices, commitments, expectations, and

reliance by which the international society asserts its shared values, rights and obligations.<sup>13</sup> Hence, the legitimacy of state conduct depends upon states executing their international relations through foreign policy in accordance with these laws, customs, and usages via reciprocity. If states act unilaterally and outside of these legal constructs with complete impunity, the legitimacy of the entire international system is rightfully called into question.

There are still those who would argue, and claim to believe, that international law is not really law. It is not law they argue because governments comply with its rules and norms as a matter of convenience and reject its mandates when those rules no longer suit their individual state interests. The absence of an international police force and, until recently, the absence of a world court, facilitated the reinforcement of this view. However, it has been argued that the existence of international law is not predicated upon whether the law is observed or even effectively enforced; rather, that the true test is whether states' behaviors are reflective of stability and order.<sup>14</sup>

Judging from the current record of the United States, perhaps Benjamin Franklin's words are prophetic, "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."<sup>15</sup>

## II

### REGIONAL TERRORISM, ORGANIZED CRIME AND TRANSNATIONAL TERRORISM

The point is that presently citizens in a constitutional democracy are urged to give up many of their constitutional and civil rights in order to fight a “war against terrorism.” Are citizens prepared to give up their civil rights if giving up their rights would aid government in its fight against terrorism? Should citizens of any country be prepared to vote power police into state principles and vote out human rights? The record of exporting a do as I say, not as I do brand of democracy by the United States is rather poor:

[T]he Carnegie Endowment for International Peace found that out of our eighteen force regime changes to which American ground troops were committed, only five resulted in sustained democratic rule. These countries include: Germany, Japan, and Italy, in which pre-existing democratic governments prevailed that are lacking elsewhere. The reasons for the exceptional success in these countries are explored below. Two other countries, listed as democratized, actually have yet to earn this title: Panama and Grenada.<sup>16</sup>

The difficulties that the United States and its allies experienced in democratizing Afghanistan and Iraq are but the most recent examples in a long list of failures, which include Bosnia, Cambodia, Cuba, the Dominican Republic, Kosovo, Somalia, and South Vietnam. United States nation building attempts in Panama, Haiti, Nicaragua, and Cuba all took more than 19 years and Panama’s engagement lasted 33 years; today, none of these countries can be considered a successful democracy. As Thomas Carothers put it, “the idea that there is a small democracy inside every society waiting to be released just isn’t true.”<sup>17</sup>

To date, even after their elections, Iraq does not appear to be fairing much better.<sup>18</sup> Ayad Allawi, Iraq’s first Prime Minister after the fall of Saddam’s regime,<sup>19</sup> warned that “Iraq



is the centerpiece of this region. If things go wrong, neither Europe nor the United States will be safe.”<sup>20</sup> Could the political election victories by Hamas in Palestine be a first step?

The resulting impact of the failed attempts at exporting democratization in the Middle East is two-fold. First, there is the possibility of a new ‘safe haven’ for radical Islamist terrorists where no “safe haven” previously existed. The “Safe haven” is presently spilling over Iraq’s borders, the spill over could potentially destabilize the entire region.<sup>21</sup> Secondly, there are the opportunity costs associated with the United States’ diverting its national security priorities to Iraq at the expense of adequately combating al Qaeda in the Americas.<sup>22</sup>

In the approximately ten years prior to 9/11 the United States Department of Justice, Federal Bureau of Investigation (FBI), and the Terrorist Research and Analytical Center, reiterated, identified, and reviewed trends and issues pertaining to domestic and international problems of terrorism.<sup>23</sup> After 9/11, the United States redirected efforts from the Americas and instead tailored threats to Middle East area in general, and Iraq in particular.

Unfortunately, post 9/11 responses seemed to undermine the existence of past threats in the Americas, clearly displaying the dramatic differences in emphasis and recognition of the existence of terrorist threats toward the Middle East versus the Americas as well as the Caribbean.<sup>24</sup> The United States’ military relationship within the Americas has increasingly evolved post 9/11. The upward trend owes little to post 9/11 counter-terrorism efforts in the region or to initiatives designed to protect the United States from regional terrorist threats.<sup>25</sup> Any post 9/11 increases in anti-terrorism funding

from the United States to other American states, reflects “ongoing Colombia, counter-narcotics and military-training programs that largely resemble the military assistance the United States has offered for decades.”<sup>26</sup>

Efforts to eradicate the presence of terrorists in the Americas in general and in the Tri-Border Area in particular, have been negligible at best.<sup>27</sup> One year after the 9/11 attacks, the United States Anti-Terrorism Assistance (ATA) to the Americas actually decreased by nearly 50% from \$4.7 million in fiscal year (FY) 2001, to \$2.5 million in FY2002.<sup>28</sup> Appearances of an increase in ATA appropriated through FY2002 supplemental appropriations compared with FY2001 is explicable by the \$27.5 million appropriated for an anti-kidnapping program in Columbia.<sup>29</sup> In fact, ATA for the Americas in general continued to decrease. Three point three million dollars (\$3.3 million) out of three point six million dollars (\$3.6 million) was specifically earmarked for Columbia. A mere three-hundred thousand (\$300,000) total U.S. dollars for ATA were earmarked to the other Americas in FY2003.<sup>30</sup>

Anti Terrorism Assistance to the Americas dipped to \$300,000 in FY2003 due to a radical diversion of funds. The United States invaded and occupied Iraq at a cost (then of) in excess of \$4 billion<sup>31</sup> per month. Annual ATA appropriations did not equal or exceed 2001 levels until FY2004 after substantial media attention was focused on the presence of Hezbollah and al Qaeda terrorists in the Tri-Border Region of South America in 2003.<sup>32</sup>

There are, for all practical purposes, two types of terrorists operating in Americas. First there are “traditional” terrorists that governments have yet to undermine. These would include drug traffickers, the twenty-five thousand members of urban crime gangs

in Central America, and guerilla and paramilitary groups tied to drug trafficking in Columbia. Second there are emerging terrorists such as al-Qaeda franchises—radical populists who tap into deep-seated frustrations at the failure of democratic reforms to deliver expected goods and services. These terrorists pose an additional risk in that they are ripe for the taking.

The failure to distinguish the popular “freedom fighter” from actual terrorists hinders government’s ability to effectively combat terrorism. It would appear that the United States has rationalized South America terrorists and Caribbean terrorists designating them into “Minor League Terror.” The threats posed in the Middle East are considered Major League Terror. The problem with this rationale is that the so called “Minor League” terrorists are quite capable of major damage, destruction, disarray and destabilization. For example, on November 27, 2004, President George W. Bush was targeted for assassination by Marxist rebels when he visited the city of Cartagend.<sup>33</sup>

From the terrorist bombing of a Jewish Community Center in Buenos Aires, to Shining Path bombings in Peru, to guerilla bombings of both civilian and infrastructure targets in Columbia, there is substantial evidence of continuing upgrading of violence plaguing many South American and Caribbean countries.<sup>34</sup> The United States government claims that although there continue to be reports of an al-Qaeda presence in the Tri-Border Area (TBA—a predominately uncontrolled, porous region where the borders of Argentina, Brazil, and Paraguay meet), “these reports remain uncorroborated by intelligence and law-enforcement officials.”<sup>35</sup> A recent report from the United States Department of State regarding patterns of global terrorism concedes that while “no operational activities of terrorism” have been detected in the TBA, it acknowledges

“persons suspected with ties to terrorist groups” have been observed in this region.<sup>36</sup>

Additionally, there is general agreement among United States counterintelligence officials that Islamic terrorist groups do in fact have a presence in the TBA.<sup>37</sup> Questions remain as to whether these groups are cooperating with other known transnational terrorist organizations such as Hizballah. Ambassador Frances X. Taylor, former Department of State’s Coordinator for Counterterrorism, stated before Congress in October of 2001, that the TBA has

...the longstanding presence of Islamic extremist organizations, primarily Hizballah, and to a lesser extent, the Sunni extremist groups, such as the al-Gama’a al-Islamiyya (Egyptian Islamic Group) and Hamas.<sup>38</sup>

Both Taylor and the FBI share the view that these transnational terrorist organizations are actively engaged in “document forgery, money laundering, contraband smuggling, and weapons and drug trafficking” in the TBA.<sup>39</sup>

There are also various media reports of an al-Qaeda presence in the TBA region in spite of official denials from government officials.<sup>40</sup> It should also be noted, that it is common practice for countries to deny the existence of terrorists, terrorist cells, and/or the existence of terrorist training camps within their borders for various political reasons. For example, Indonesia emphatically denied it had an al-Qaeda linked radical Islamist presence within its borders in spite of vast media reports to the contrary, Indonesia remained in denial until the Bali bombing attack in 2002 when it could no longer do so.<sup>41</sup> A complicating factor in identifying and combating terrorism, promoting human rights, and maintaining democratic processes in parts of the Americas is a systemic corruption which acts as a facilitating nexus for money laundering, drug and arms trafficking, and

terrorism.<sup>42</sup>

The terrorist attacks of September 11, 2001, and the international responses that followed in many instances, intentionally or otherwise, place democracy on hold. Not only were the effects of the terrorist attacks felt on United States soil, its ripple effects manifested themselves in the subsequent “war on terror” through changes in the intelligence and counter-terrorism infrastructures in the United States. The changes, in turn, led many other countries to re-examine the role of terrorism, and in particular, the ancillary issue of money laundering and asset forfeiture in their respective regions.

The United Nations (UN), the Financial Action Task Force (FATF), the International Monetary Fund (IMF), and the Organization of American States (OAS), to name but a few, responded immediately to the threat. Various programs were implemented which attempted to address the many complex facets of human rights versus terrorism. In most responses two assumptions emerged within the public psyche: 1.) human rights protections must give way during the “war on terrorism;” and 2.) “major league” terrorism exists only in the Middle East while terrorism in the Southern cone was relegated to “minor league” status. These assumptions are counter-productive.

The reach of terrorism and its ancient roots became topics of conversation in many arenas post 9/11. Pre-9/11 the Irish Republican Army (IRA) enjoyed a reevaluation of support from a cross-section of Americans. Post 9/11, Sinn Fein (IRA) representative Gerry Adams declined to even accept an invitation to visit the United States. For a man whose organization had always received financial support from the Irish-American community in the United States, such a refusal placed within the context of 9/11 was not unusual. The invitation had come from United States House of

Representative Henry Hyde, who requested Adam's testimony before the Committee for International Relations.<sup>43</sup> On the Committee hearing's agenda (entitled "International Global Terrorism") was an investigation of the arrest of Provisional IRA militants detained in Columbia. The militants were accused by the Colombian government of providing training for leftist guerrillas of the Armed Forces of Columbia (FARC).<sup>44</sup> An investigation of the incident revealed:

[t]hat seven known IRA members, including two "significant" leaders, had trained drug-running terrorists in explosives and urban warfare. The Provisional IRA...had helped the FARC guerillas develop expertise in mortar, bombs, missiles and intelligence. [In addition...] the IRA had worked with Iranians, Cubans, and possibly, Basques in Columbia to hone their terrorism skills.<sup>45</sup>

The TBA and, in particular, the Paraguayan city of Ciudad del Este, has been linked with activity by the Islamic fundamentalist groups Hamas (now a successful political force in its own right) and Hizbollah. The latter has funded its terrorist activities by engaging in contraband smuggling, trafficking of narcotics, and money laundering. Islamic fundamentalist groups have also been linked to FARC activities involved in narco-trafficking in the Amazon region. In 2001, there were 194 major terrorist attacks committed in Latin America. The United States Department of State had identified other problematic areas in the region, including Ecuador's porous borders that serve as arms and narcotics corridors for the Columbia cartels and Argentina's past troubles with anti-Israeli terrorist attacks.<sup>46</sup>

It is important to note the significance of merged activities in narco-terrorism. The major differences between the two are their objectives and preferred profiles. Drug lords are driven by the enormous profit potential while terrorists are motivated by their

religious and or political aims. Drug lords prefer to keep a low profile so as to avoid the focus of law enforcement and potentially the forfeiture of their assets. Conversely, terrorists purposefully accept responsibility for their activities with the intent to further their political agendas. The entities are similar in that both operate transnationally, both benefit from the technological advances of globalization, and both thrive on the instability of regions where effective government control is absent or minimal at best. Additionally, both entities target civilians to serve as victims while a society's youth serve as recruits. Both entities exploit porous national borders, corrupt law enforcement and government officials, and seek loopholes in immigration controls.

The relationship between the drug cartels and the terrorist groups has become mutually parasitic. For the terrorists, trafficking drugs not only provides funding but also schooling in the tactics of illicit transfer and laundering of proceeds from drug transactions. The relationship provides drug cartels with military skills, weapons supplies, and access to clandestine organizations and complex forms of underground banking. Additionally, since both entities invariably control large areas of territory, the relationship provides them both access and protection through the other's territories.

Although the overlap of activities extends far and wide, the drug trafficking appears to have captured most of the attention in the Americas. Perhaps one reason why the United States does not focus more upon regional terrorism in the Americas might be that drug cartels usually engage in narco-terrorism that is confined to a geographic region where the cartels are headquartered, thus their actions do not directly or perceivably affect United States citizens. On the other hand, illegal drugs flow rampantly into the United States communities, and the financial returns are staggering.

The profits from the drug trade diminish terrorists' incentives for ending their activities. Furthermore, contrary to claims of non-financial goals of terrorists, terrorist organizations, which now share in profits, maintain financial infrastructures. In order to develop such an infrastructure it must have a source of funds, a means of laundering those funds, and a way to ensure that the funds can be used for the needs of the terrorist organization.

The FATF noted that terrorist financing comes from two primary sources: 1.) financial support provided by "user-friendly" states or NGOs such as charitable organizations that make funds available to terrorist organizations; and 2.) income from various revenue-generating activities such as criminal enterprises. Diplomatic, economic, and political pressure has had limited success in reducing state sponsorship of terrorist activities. It should be noted, however, that while nations disavow sponsoring terrorism, there are nevertheless a number of nations that are still "user-friendly" for terrorist organizations and various criminal enterprises in spite of diplomatic, economic, and political pressure.

When state support was not available, terrorist groups traditionally turned to sources such as kidnapping for ransom, extortion of "protection money" from businesses, smuggling, credit card or charity fraud, and thefts or robbery.<sup>47</sup> For example, the IRA, now considered the largest organized crime syndicate in Europe, funded itself through bank robberies, while the Kurdistan Worker's Party (PKK) extorted "protection money" from workers and businessmen.

Fundraising through charitable organizations is an effective means of raising funds. In such cases most members of the charitable organizations are not aware that a



portion of the funds raised by the charity is being diverted to terrorist causes. Such charitable organizations may raise funds through the collection of membership dues or subscriptions, sale of publications, speaking tours, cultural and social events, door-to-door solicitation within the community, appeals to wealthy members of the community, and donations of a portion of their personal earnings.<sup>48</sup>

“Charitable” organizations and other terrorist fronts have come under increased scrutiny by the international community as of late. In many cases these front organizations have been dissolved or shut down.<sup>49</sup> The disappearance of funding from these front organizations and the need for more profitable fundraising sources have made it necessary for some terrorist groups to engage in crimes that are not directly related to their cause.<sup>50</sup>

Into the fundraising void left by the disappearance of some traditional fundraising sources has come the highly profitable world of illegal drug production and drug trafficking. Drug trafficking has become the most profitable terrorist fundraising activity. According to the Office of National Drug Control Policy (ONDCP), Americans spend an estimated \$64 billion on drugs each year.<sup>51</sup> The drugs sold in the United States are sold with a significant built-in margin of profit. While some terrorist groups are involved in all aspects of the drug trade, from cultivation, production, transportation and wholesale distribution to money laundering, other groups merely provide security from drug traffickers transporting their product. Regardless of the amount of activity terrorist organizations are involved in, the fact is that a large number of terrorist organizations are to some extent funding their violent activities through the use of drug money. Twelve of the eighteen international terrorist groups listed by the United States Department of State

are believed to be involved in some degree of drug trafficking.<sup>52</sup> In Columbia, for example, all three of the major terrorist groups in the country are involved to some degree in the drug trade as a source of operational funding.<sup>53</sup>

There are other reasons that terrorist organizations have become increasingly involved in drug trafficking, in addition to the fact of diminishing funding sources such as charitable contributions. Raphael Perl, a specialist in international affairs at the Congressional Research Service, stated, “as a result of globalization, the distinction between drug trafficking, terrorism, and other forms of criminal activity is becoming increasingly blurred.”<sup>54</sup> It would seem that the symbiotic relationship between drug trafficking, terrorism, and their organized criminal activities is becoming a growth industry in the Americas.<sup>55</sup>

In addition to the fundraising motive for engaging in drug trafficking, terrorist organizations may have an ulterior motive. Certain terrorist groups believe that they can weaken their enemies by flooding their societies with addictive drugs.<sup>56</sup> Osama bin Laden was one of the most outspoken advocates of drug trafficking as a means of weakening the western world.<sup>57</sup>

The United States Drug Enforcement Administration (DEA) defines narco-terrorism as “a subset of terrorism, in which groups or associated individuals participate directly or indirectly in the cultivation, manufacture, transportation, or distribution of controlled substances and the monies derived from these activities.”<sup>58</sup> Narco-terrorism may also be characterized by the participation of groups or associated individuals in taxing, providing security for or otherwise aiding or abetting drug trafficking endeavors in an effort to further or fund terrorist activities.<sup>59</sup> Narco-terrorists used the proceeds

from the drug activities to fund numerous assassinations of politicians, presidential candidates, Supreme Court justices, police officers, and civilians. Narco-terrorists have been linked to bombings including the bombing of an Avianca commercial airliner in 1989.<sup>60</sup>

It should be noted that there is a difference between narco-terrorism and mere drug-related violence. By definition, terrorism is premeditated, politically motivated violence perpetrated against noncombatant, while drug-related violence is financially motivated and perpetrated against those who interfere with or compete with a drug trafficking organization.<sup>61</sup>

Narco-terrorist organizations breakdown into two general categories: 1.) politically motivated organizations that use drug proceeds to support terrorist activities with which they hope to achieve political goals;<sup>62</sup> and 2.) organizations that continually pursue ideological goals while participating in aspects of the drug trade.<sup>63</sup> The following are a few examples of narco-terrorist organizations operating throughout Latin America: al-Qaeda; Hizballah, Revolutionary Armed Forces of Columbia (FARC); Kurdistan Workers' Party (PKK); Liberation Tigers of Tamil Eelam (LTTEJ); Al-Jihad (Egyptian Islamic Jihad; al-Muqawama; and Sendero Luminoso (Shining Path).

Since the early 1990s, law enforcement agencies in the Americas have recorded an increased level of cooperation between terrorist organizations and organized drug cartels<sup>64</sup> and that their cooperation continues. Two days before the September 11th attacks, the DEA seized 53 kilograms of Afghan heroin in New York that was being distributed by Columbians. Also in 2001, three member of the IRA were arrested in Columbia for collaborating with the FARC.<sup>65</sup> Additionally, evidence has surfaced over

the past few years that Hezbollah is cooperating with the PKK in order to export narcotics in Europe<sup>66</sup> and the LTTE is cooperating with Indian organized crime in an exchange of drugs for weapons.<sup>67</sup>

There are three crucial elements to attacking narco-terrorism: law enforcement, intelligence gathering, and international cooperation. International cooperation is vital. Terrorist group activities are rarely confined within state borders, they tend to have a more global view in both their activities and fundraising. Long before the events of September 11, 2001, the international community acknowledged the linkages between drug trafficking and terrorism. Acknowledgement came in the late 1980s with the establishment of the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988).<sup>68</sup> Paragraph five of the UN International Narcotics Control Board's (INCB) 1992 report notes that

illicit cultivation of narcotic plants and illicit trafficking in drugs continues to be a threat to the political, economic and social stability of several countries...Links appear to exist between illicit cultivation and drug trafficking and the activities of subversive organizations in some countries.<sup>69</sup>

The UN Declaration on Measures to Eliminate International Terrorism underlines the concern by the international community at the growing and dangerous links between terrorist groups, drug traffickers, and their paramilitary gangs which have resorted to all types of violence, thus endangering the constitutional order of states and violating basic human rights.<sup>70</sup> The Declaration also emphasized the desirability of closer cooperation and coordination among states in combating crimes closely connected with terrorism, including drug trafficking, unlawful arms trade, money laundering and smuggling of nuclear and other potentially deadly materials. Additionally, UN Security Council

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notes with concern the close connection between international terrorism and transnational organized crime, illicit drugs, money-laundering, illegal arms-trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials, and in this regard emphasizes the need to enhance coordination of efforts on national, sub-regional, regional, and international levels in order to strengthen a global response to this serious challenge and threat to international security.<sup>71</sup>

The International Convention for the Suppression of the Financing of Terrorism (1999) requires signatories “to take steps to prevent and counteract the financing of terrorists, whether directly or indirectly, through groups claiming to have charitable, social or cultural goals or which also engage in such illicit activities as drug trafficking or gun running.”<sup>72</sup>

Narco-terrorists in the Americas<sup>73</sup> have learned from the Taliban mistakes.<sup>74</sup> While in power, the Taliban collected an estimated 40 to 50 million dollars through the tax it imposed on the opium poppy crop.<sup>75</sup> At the same time the Taliban harbored known international terrorist organizations such as al-Qaeda. Much of these same activities, minus religious zeal, are now occurring in the Americas. Lebanon during Syrian rule was, and perhaps still is, directly involved with terrorism in the Americas as a result of its support of HAMAS and Hizballah<sup>76</sup> which operates primarily in the TBA.<sup>77</sup>

It should be noted that the drug trade facilitates the money-laundering process.<sup>78</sup> In 2002, it was estimated that the FARC received over \$300 million annually from illegal drug sales with the United States unwittingly being its largest contributor vis-à-vis consuming 90% of Colombian cocaine.<sup>79</sup> Narco-terrorists in the Americas are also involved in illegal arms trafficking using funds raised from the drug trade to purchase weapons such as shoulder-fired anti-aircraft missiles, rounds of ammunition, rifles,

rocket-propelled grenade launchers, and grenades.<sup>80</sup> The drugs-for-weapons-for-terrorists market<sup>81</sup> has become so prolific in Central America that the former assistant administrator for intelligence for the DEA noted that “[d]rugs are almost becoming the universal currency of organized crime.”<sup>82</sup>

Additionally problematic is the involvement of terrorist organizations illegally funneling \$600 billion annually through the legitimate banking systems creating the third largest business in the world behind the foreign exchange and oil industries while confiscation of terrorist financing post 9/11 is at best—abysmal.<sup>83</sup> For example, South American terrorist groups successfully exploit the Black Market Peso Exchange (BMPE) to launder illicit funds.<sup>84</sup> The United States’ financial investigative unit FinCen noted:

The “system” functions in the following manner: 1.) The Colombian drug cartels export drugs to the United States; 2.) Drugs are sold for dollars in the U.S.; 3.) A cartel in Colombia enters into a “contract” with the Colombian Black Market Peso Exchanger who is usually in Colombia; 4.) The cartel sells its U.S. dollars to the Exchanger’s U.S. Agent; 5.) Once the U.S. dollars are delivered, the peso exchanger in Colombia deposits the agreed upon equivalent (of U.S. dollars) in Colombia pesos into the cartel’s account in Colombia; (at this point, the cartel representative is out of the picture because he has successfully converted his drug dollars into pesos); 6.) The Colombia Black Market Peso Exchanger now assumes the risk for introducing the laundered drug dollars into the U.S. banking system; this is done through a variety of structured transactions; 7.) The Colombian Black Market Peso Exchanger now has a pool of laundered funds in U.S. dollars to sell to Colombian importers who use the dollars to purchase goods, either from the U.S. or from collateral markets; and 8.) Finally, these goods are transported to Colombia.<sup>85</sup>

The system is so effective that some major multi-national corporations have participated in the schemes by unwittingly co-operating with the smugglers.<sup>86</sup> Once the goods are successfully smuggled, the beneficiaries of the laundering process are themselves

cleansed.<sup>87</sup>

Although the exact figures vary widely, it is estimated that between 2000-2001, an average of \$12 billion per year was laundered through the TBA alone. The city of Foz do Iguacua served as the primary money laundering center, followed by Ciudad del Este, Paraguay.<sup>88</sup> Estimates show that \$6 billion is laundered through Ciudad del Este each year. This amounts to half of Paraguay's gross domestic product.<sup>89</sup> Money laundered in the TBA is generated by drug and arms trafficking, counterfeiting, document falsification, piracy, and other illicit activities.<sup>90</sup> It should also be noted that this money is often funneled and used to finance acts of terrorism by terrorist organizations in the Middle East.<sup>91</sup> David Meir-Levi expresses his concerns regarding the TBA:

[i]t does not require much imagination to foresee that the many current Arab terror sleeper cells scattered throughout the USA and Canada today are being re-enforced with the influx of Arab terrorists from South America.<sup>92</sup>

Shortly after the attacks on 9/11, the OAS adopted what would also be the position the United Nations Security Council Resolution 1373 (September 28, 2001).<sup>93</sup>

The OAS implemented a proportional response to the 9/11 terrorist attacks:

That these terrorist attacks against the United States of America are attacks against all American states in accordance with all the relevant provisions of the InterAmerican Treaty of Reciprocal Assistance (Rio Treaty) and the principle of continental solidarity, all State Parties to the Rio Treaty shall provide effective reciprocal assistance to address such attacks and the threat of any similar attacks against any American state, and to maintain the peace and security of the continent.<sup>94</sup>

The OAS' involvement with terrorism included the 1998 establishment of the Inter-American Terrorism (CICTE) as part of the Commitment of the Mar de la Plata round of OAS meetings. The CICTE's functions include the establishment of an Inter-American

database on terrorism issues, the enhancement of border cooperation between member countries, the formulation of information sharing mechanism, and the development of training and crisis management teams.<sup>95</sup> This committee had been fairly inactive until the events of the al-Qaeda attacks on September 11, 2001. The attacks prompted an unprecedented sense of urgency and political will concerning terrorism.<sup>96</sup>

The various Ministers of Interior and Public Safety Officials met in Washington, D.C. on January 2002, to report on the progress of the RC 23 objectives.<sup>97</sup> Six months later, in a June 2002 meeting, the CICTE enacted the Inter-American Convention Against Terrorism. The Act required that the member states establish domestic banking supervisory agencies, reinvigorate their efforts to seize or freeze funds connected with terrorism, and establish predicate offenses for money laundering charges, among other measures.<sup>98</sup>

### ***Criminal Enterprises: Summary***

#### **1. Drug Trafficking**

From our research, there can be little doubt that a link has been forged between organized crime, and drug trafficking. That link now includes evidence of bin Laden's involvement. However, unclassified documents do not allow an accurate assessment of the extent of al-Qaeda involvement. Indeed, the 9/11 Commission Report concluded that there is no substantial evidence that al-Qaeda employs the drug trade as an important source of revenue either before or after 9/11.<sup>99</sup> The Commission recognized that, before 9/11, the drug trade was an importance source of funds for the Taliban, but claims that it did not, and does not, play the same role as al-Qaeda.<sup>100</sup> The Report relies on evidence that al-Qaeda leadership does not trust those who control the drug trade and has



encouraged its members to not get involved.<sup>101</sup> There may be individuals with a connection to al-Qaeda that are involved to drug trafficking, but these links, according to the 9/11 Commission Report, are insufficient to conclude that al-Qaeda relies on drug trafficking as a source of revenue.<sup>102</sup>

Others argue, however, that the drug trade operating in areas of Afghanistan and Pakistan is critical to al-Qaeda's maintenance in remote areas of Afghanistan and neighboring regions,<sup>103</sup> and that al-Qaeda's reliance on the drug trade world-wide is greater now than before given the strict regulations of charities.<sup>104</sup> Most agree, however, that the evidence supporting al-Qaeda's reliance on the drug trade is scarce.<sup>105</sup> Additionally, most experts suspect that even if bin Laden did not rely on drug trafficking for revenue, he did encourage it as a means of weakening the Western culture by way of increases drug addition.<sup>106</sup>

Despite the scarce evidence, there is still good reason to look closely at drug trade in Afghanistan and in other regions associated with terrorists. During the last decade, Afghanistan has been the most important opium producing country in the world.<sup>107</sup> Under the Taliban rule in 1999, opium production reached its peak at 4,581 tons, and at least one source predicts even higher production since the ouster of the Taliban.<sup>108</sup> There are a few cases that are the same cause of al-Qaeda's suspected reliance on drug money. In December 2003, two tons of hashish were seized from a ship in the Persian Gulf, three individuals with purported al-Qaeda links were aboard.<sup>109</sup> The Commission Report recognizes this case, but disregards the significance of the individuals' links with al-Qaeda.<sup>110</sup> In another case, the Kabul house of a drug trafficker was raided and a dozen satellite phones were found. The phones had been used to call numbers "linked to

suspected terrorists” in Turkey, the Balkans, and Western Europe were found.<sup>111</sup> Perhaps the most serious case involved a link between drug traffickers and terrorists in the suspected network of Haji Juma Khan, an Afghan national.<sup>112</sup> Khan is believed to be the leader of a heroin-trafficking organization that provides funds for the Taliban and al-Qaeda.<sup>113</sup> Some allege that Khan would send heroin from the Pakistani port of Karachi and the boats would return loaded with arms for al-Qaeda and the Taliban.<sup>114</sup> Mirwasis Yasini, the head of Afghanistan’s Counter Narcotics Directorate, claims there is a “central linkage” between Kahn, Mullah Omar, bin Laden and estimates that the Taliban and its allies obtained more than \$150 million from the drug trade in 2003.<sup>115</sup>

The Security Council has recognized the Taliban’s dealings with drug trafficking, and it responded by issuing 1214.<sup>116</sup> In resolution 1333, the Council went one step further and recognized the link between drug trafficking and terrorism, determining that proceeds from the trade of heroin and opium are used by the Taliban regime to “buy arms and materials and to finance the training of terrorist and support the operation of extremists in neighboring countries and beyond.”<sup>117</sup>

Antonio Maria Costa, Executive Director of the United Nations Office on Drugs and Crime, has recognized that there is increasing evidence of drug money being used to finance terrorism.<sup>118</sup> He states that in 2005, \$2.7 billion worth of heroin (over 400 tons) were exported from Afghanistan to regions of the world controlled by insurgents affiliated with the Talibans, al-Qaeda, and others.<sup>119</sup> According to Costa, Columbia also exported some 400 tons of cocaine, valued at several hundreds of millions of dollars.<sup>120</sup> He explains that the drug cargos pass through terrorist-infested territories where governance is weak.<sup>121</sup> In these territories, drugs are exchanged for arms, for other

drugs, and for support services.<sup>122</sup>

It has also been reported that Hezbollah benefits from the drug trade in the Americas.<sup>123</sup> The group trades poppy to Israeli-Arabs in exchange for intelligence on Israeli infrastructure and on the placement of Israeli soldiers.<sup>124</sup> In September 2002, a lieutenant colonel in the Israeli army was indicted by an Israeli military court for spying for Hezbollah.<sup>125</sup> The officer disclosed classified information to Hezbollah operatives including positions of troops and army maps, in exchange for money, hashish and heroin.<sup>126</sup> Hezbollah and other terrorist groups also traffic narcotics in North America to fund their activities in the Middle East.<sup>127</sup> The DEA investigated a pseudo ephedrine smuggling ring in the Midwest involving men with ties to Hezbollah and Hamas in Yeman, Lebanon, and other Middle Eastern countries; officials say that the smuggled pseudo ephedrine had been routed through Chicago and Detroit and a significant portion of the proceeds were sent to the Middle East.<sup>128</sup> The investigation led to a break up of several other major methamphetamine operations in the United States, resulting in charges against 136 people, the seizure of nearly 35 tons of pseudo ephedrine, \$4.5 million in case, 8 real estate properties and 160 cars.<sup>129</sup>

This paper, unfortunately, raises many questions that one cannot possibly answer without a security clearance. There are however significant issues that become part of a public diplomatic agenda 1) whether a non-unilateral economic war is necessary and a proportional response to the threat that organized terrorism poses to international peace and security; 2) whether a military response would be justified by principles of proportionality and humanitarian intervention; and 3) with what specific context would a response be justified?

**III**  
**THE RULE OF LAW: AN ESSENTIAL ELEMENT TO WINNING THE**  
**“WAR ON TERROR.”**

It is lamentable, that to be a good patriot one must become the  
enemy of the rest of mankind.

—Voltaire

America will never be destroyed from the outside. If we  
falter, and lose our freedoms, it will be because we destroyed  
ourselves.

—Abraham Lincoln

At the moment there are two ongoing debates regarding The Rule of Law within the context of the war on terror. One is about fantasy, and the other about reality. On the one hand we have those who argue that the war on terror is a “new paradigm” that does not neatly lend itself to the rules and norms of international law or to our traditional democratic principles such as the right to due process, the right of privacy or freedom of association.<sup>130</sup> This side of the debate is summed up by United States Vice President Cheney who exclaimed that the United States “must be — willing to go to the ‘dark side’ to fight terrorism” and that “[a] lot of what needs to be done here will have to be done quietly, without any discussion.”<sup>131</sup>

In other words, the war on terror is summarily and singularly about overwhelming, supreme emergencies where there is no time for debate, deliberation, or choice. The “war” necessitates unprecedented governmental opaqueness, secrecy, intrusion, and renders “quaint”<sup>132</sup> the traditional rules of war and our democratic values of due process, privacy, and human dignity enshrined within our Constitution and within our international agreements.<sup>133</sup> However, reducing the war on terror to merely exigent circumstances is sheer fantasy—Alice in Wonderland, made for television, melodrama

style—fantasy. Attempts at limiting the entire debate on how best to combat global terrorism to a false premise based upon ticking time bombs and imminent attacks from terrorists and rogue states is a political red herring that unfortunately has nothing to do with reality in most cases. The result from such interference can be civil war.

In reality, the lion's share of combating global terrorism comprises a web of complexities from methodically and painstakingly acquiring bits of intelligence and piecing them together into a larger mosaic, to seizing and freezing assets of terrorists and terrorist organizations, to implementing foreign policies and employing diplomatic pressure on states to address issues such as the nexus between terrorism: corruption, organized crime, lack of human rights, and the lack of equitable economic opportunities. Many terrorist plots, including the attacks on the United States on 9/11, are not planned or carried out in minutes, hours, or even days. They are the product of patient and methodical planning by terrorists over the course of years, planning that often spans several continents.<sup>134</sup>

In all but the most extreme circumstances, combating global terrorism should be a deliberate, debatable, multilateral undertaking and our efforts should always operate within the parameters of the Rule of Law. The framers of the United States Constitution seemed to concede that the office of the chief executive needed to exercise a limited amount of secrecy,<sup>135</sup> speed, and dispatch to protect the national security of the United States.<sup>136</sup> The framers, having an aversion to unaccountable standing armies, also agreed that significant war powers would be vested in Article I, the legislative branch, as a means of establishing a check on the executive's powers as commander in chief.<sup>137</sup> The framers' fear of limitless power of the executive vis-à-vis as commander in chief of the

armed forces is evidenced in the Declaration of Independence and in the Bill of Rights, the latter serving as a further check on executive power. Thus, while it is fairly clear that the President has some powers under Article II §1 to the United States Constitution to preserve, protect, and defend the nation as commander in chief, it is also equally clear that those powers were never intended to be plenary.<sup>138</sup> If this were so, then we would have no need for little inconveniences such as having the Congress battling over whether or not certain provisions of the Patriot Act should be extended, made permanent, or scrapped entirely. The President, acting under Article II, could simply authorize the Patriot Act's mandates without Congressional or Judicial participation, thus a police state is born for them we would have a President functioning under the rule by law and no longer under the Constitutional rule of law.

Whenever the United States has been faced with a major crisis, powers exerted and/or claimed by the executive branch, particularly under the guise of national security, were at their greatest. However presidential powers in time of crisis are typically at their lowest ebb where the actions of the President are incompatible with the will of Congress.<sup>139</sup> Congress and the Judiciary have during times of war or national crisis historically acquiesced to expanded presidential powers exerted under Article II. It is equally true that Congress and the courts eventually reassert themselves whenever the executive is guilty of overreaching its authority at the expense of civil liberties or when the executive was usurping the authority of the other two branches of government by blurring the lines of separation of powers.<sup>140</sup>

For example, in 1977, Congress enacted the Foreign Intelligence Surveillance Act (FISA).<sup>141</sup> The act was in response to successive presidential administrations' claims to

inherent, plenary powers under Article II, to issue memorandum authorizing the electronic surveillance where “grave matters involving defense of the nation” were involved. Such claims of presidential power under Article II began with President Franklin D. Roosevelt in 1940 when he directed the Attorney General

to secure information by listening devices [directed at] the conversations of persons suspected of subversive activities against the Government of the United States, including suspected spies” and such claims of presidential authority continued during the 1950s with a broad memorandum issued by Attorney General Herbert Brownell directing FBI Director Herbert Hoover to conduct surveillance regardless of surreptitious entry if the Bureau concluded that such surveillance and/or entry was necessary for the “national interest.”<sup>142</sup>

Overreaching and abuse of power by the executive branch regarding intelligence gathering under the guise of national security has a long history. The history continued well beyond the 1950s, Congress sought to address these “widespread abuses within the intelligence community”<sup>143</sup> and the executive branch (i.e. Watergate) through reform Acts such as FISA.

Post 9/11, we are again witnessing the executive branch claiming inherent, plenary powers under Article II to the United States Constitution. Under the guise of national security, the executive branch usurped power and blur the lines between the separation of powers of the three branches of government.<sup>144</sup> President Bush admitted during his December 17, 2005, Saturday radio address that he signed an executive order in 2002 directing the National Security Agency to conduct warrantless electronic surveillance on the e-mail and telephone conversations between U.S. citizens and persons overseas.<sup>145</sup>

Although this type of surveillance violates FISA,<sup>146</sup> the President claims he has

the inherent authority to authorize such warrantless surveillance under Article II to the U.S. Constitution and via the joint resolution by Congress which 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 further acts of international terrorism against the United States by such nations, organizations or persons.<sup>147</sup>

Under FISA, the president may seek a warrant from a FISA Court (FISC) for the purpose of conducting electronic surveillance in the United States of a “United States person” (i.e. citizen, permanent resident alien, or U.S. corporation)<sup>148</sup> if the Attorney General finds that:

- 1.) there is probable cause<sup>149</sup> that the target of the surveillance is a “foreign power” or an “agent of a foreign power;”<sup>150</sup>
- 2.) the information sought is necessary for national security<sup>151</sup>;
- 3.) that the intelligence cannot be obtained by less intrusive means;<sup>152</sup>
- 4.) the agency collecting the intelligence takes measures to minimize the likelihood of the acquisition, retention, and dissemination of information about U.S. persons who have not consented to the surveillance<sup>153</sup> and
- 5.) the certifications submitted to the FISA Judge are not clearly erroneous on the basis of the data before him.<sup>154</sup>

A specially appointed FISA judge then makes a determination as to the merits of the government’s request for the surveillance warrant.<sup>155</sup> Historically, the FISA court has denied very few requests for surveillance warrants out of the thousands requested. The Act also provides for exigent circumstances so that in times of emergency, the executive,



through the Attorney General, may proceed with a warrantless surveillance so long as a warrant is sought through the FISA Court within 72 hours from the time the surveillance was authorized.<sup>156</sup> Nothing in the FISA statute permits the executive to completely bypass FISA procedures, in fact, in 1988 Congress amended Title III expressly eliminating the §2511(3) disclaimer that was central to the Supreme Court's decision in United States v. United States District Court (Keith). FISA and TITLE III were intended to be "the exclusive means" by which the government may conduct electronic surveillance.<sup>157</sup> Clearly, the Congress intended to limit the executive's use of electronic surveillance so as to preclude abuses of the past and to protect Fourth Amendment rights. It is the author's contention that Congress is empowered to restrict the President's conduct of national security surveillance.

As to the claim that Congressional authorization to use "all necessary and appropriate force" against those who attacked the United States on 9/11/2001, we must turn first to the actual language of the Authorization for Use of Military Force, Pub.L. No 107-40, §2(a), 115 Stat. 224, 224 (2001)(AUMF) and then to the intent of Congress. The AUMF extends to "nations, organizations, or persons" whom the President determines has certain connections with the September 11<sup>th</sup> attacks. According to the Democratic Chief Counsel to the House Committee on International Relations, the President initially asked Congress to approve the following language:

That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, harbored [sic], committed, or aided in the planning or commission of the attacks committed against the United States on September 11, 2001, and to *deter* and *preempt* and *future* acts of terrorism or aggression against the United States.<sup>158</sup> (emphasis added).

The President wanted this broader language so that he would have the authority to deter and preempt *future* acts of terrorism regardless as to the entities involved and regardless of their connection with the 9/11 attacks. Congress refused to authorize such sweeping language, thereby limiting the scope of the President's authority in the war on terror.<sup>159</sup> According to several members of Congress, the AUMF was designed to limit whom may be targeted in the war on terror to those persons or entities connected with the 9/11 attacks, not those who *may* want to attack the U.S. in the *future* and not those who had no connection to 9/11.<sup>160</sup> The purpose of the limitation was to avoid past mistakes by Congress where their authorization for the use of force was mistakenly perceived by the executive to be open-ended and plenary.<sup>161</sup> By examining the legislative history, statements of Congress, and rulings by the Supreme Court, it is clear that authorization of these types of warrantless searches by the President were neither expressed nor implied by AUMF. Did the President have the inherent Constitutional power to authorize the NSA to conduct such a program?<sup>162</sup>

This would not be the first time that the current administration has either overreached its executive powers or stretched the law to the point of the absurd by claiming that the President's powers under Art. II are plenary and as such, he can override the law. Whether it's from declaring captured suspected terrorists as "enemy combatants," to rendering suspected terrorists to countries that are known to engage in torture, to defining torture, inhumane or degrading treatment of prisoners so as to have little or no meaning, to domestic spying, the President has either misapplied the law, ignored legislative history and/or congressional intent, or simply claimed to be above the law under the guise of national security.<sup>163</sup>

What relevance does the subversion of the Rule of Law have within the context of winning the “war on terror” and combating terror and organized crime in the Americas? First, in an environment where the world’s sole superpower is actually, or perceived as being, beyond accountability regarding its international agreements and the leader of that sole superpower is above its own laws, weaker states and private citizens of those weaker states will resort to whatever means they have available at their disposal, including acts of terrorism, in order to have their interests heard, protected or accomplished. These violent acts are perceived by terrorists and state sponsors of terrorists as a means of ensuring survival. This is not to suggest that resorting to the killing of innocent civilians by terrorists is legitimized by the failures of powerful states or their respective leaders to adhere to the Rule of Law. What it does suggest, however, is that when stronger states and their respective leaders fail to adhere to the Rule of Law, the strong states fall prey to the objectives of their stated terrorist enemies—namely tyranny and lawlessness—and lose both domestic and international legitimacy as the world’s promoter and defender of freedom and liberty.

Secondly, one can not legitimately go about the world claiming to be the promoter of democracy, freedom, and liberty—expressing hypocritical horror of acts of torture, arbitrary arrest and detentions and the general lack of fundamental freedoms—while simultaneously subverting ones own Rule of Law and democratic principles in the name of national defense. Survival can not be the justification for the subversion of the Rule of Law, if the Rule of Law is subverted, what have we survived to become? What have we defeated if the objective is to conquer the tyranny and lawlessness of radical, fundamentalist terrorism? If fear, lawlessness, anarchy, and tyranny are the tools of

terrorism, then its cure must be our steadfast adherence to the Rule of Law and to our democratic principles. If we do not, then the tyranny of lawless violence has already won.

#### IV

#### CONCLUSION

In real terms it would seem that international co-operation has, to date, had little impact upon the growth of international terrorism, notwithstanding the fact that governments now have extraordinary governmental and police powers at their disposal to conduct a “war” against terrorism. This “new power paradigm” is designed to support law enforcement in addressing the complexities of terrorist activities and financing. The people are assured by governments that these new laws, whether they be international or domestic, are not intended to, nor do they, implement or encourage a non-traditional due process model.

Unfortunately, that is exactly what has happened, notwithstanding a few exceptions. Indeed the judicial branch of the United States government has more or less abstained from implementing constitutional values during the present crisis even though the federal courts are open and operating.<sup>164</sup> We now have a judicially created crime control model of governance firmly in place.<sup>165</sup> The President and Attorney General speak in terms of a “war on terror,” however this is a war that is both undeclared and unending. At least since *Marbury v. Madison*, judicial review has been constitutionally mandated where constitutional issues emerge.<sup>166</sup>

No one should object to a society seeking to protect itself and its institutions from assault, regardless whether the threat comes from within or without. However, within a

constitutional democracy model, to be protected includes democratic values which are enshrined within ones constitution. It is unacceptable to infringe upon and subvert human rights unless a tested, factual basis for infringement emerges.<sup>167</sup> That is supposed to be the goal of judicial review. It is not adequate to simply formalize into law through speeches to selected receptive audiences or a cowering press, numerous alterations to human rights and democratic values. Governmental intervention must be constitutionally tested within the context of compelling credentials.<sup>168</sup>

New York Times editorial writer Anthony Lewis articulated this more succinctly in the inaugural of The Joseph M. Reck, Distinguished Lecture Series at Emory University on March 19, 2003. Summarizing the nature of the present administration's policy towards enemy combatants he stated:<sup>169</sup>

This is the crux of the *Padilla* case. Jose Padilla is not a person with a sympathetic record. But what matters is not his person, but the breadth of the claim made by Ascroft and his lawyers. It is that they can keep any American citizen—any of us—in prison for the rest of our lives, in solitary confinement on the say so of government officials, with no check except the rather slim possibility of a judge finding that the government did not have any evidence.

The administration argues that requiring it to treat Padilla with constitutional fairness would “significantly hamper the nation's defense.” But if there is anything about which the press should be skeptical, it is such assertions that the national security would be at risk if courts applied the Constitution. For those claims have turned out to be wrong again and again.

The Pentagon Papers case was an outstanding example. If the New York Times were allowed to publish its series on the origins of the Vietnam War, the government said, national security would be gravely damaged. On the fourth day of publication of the Times' lawyer, [the late Professor] Alexander Bickel, observed drily to the judge:

**“Your Honor, the republic still stands.”**<sup>170</sup>

## ENDNOTES

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<sup>1</sup> F. Baldwin, The Rule of Law, Terrorism and Countermeasures including the USA Patriot Act 2001, 16 Fla. Jo Intl. Law 1 (2003); F. Baldwin, The Rule of Law, Human Rights and Proportionality As Components of the War Against Terrorism: Is the U.S. Judiciary in Self-Imposed Exile? 7 Jo. of Money Laundering 218 (2004) (London, Henry Stewart Publ.); and F. Baldwin, Money Laundering Countermeasures With Primary Focus on Terrorism and the USA Patriot Act of 2001 in 3 Current Developments in Monetary and Financial Law Vol. 18, p. 301 (2005) (International Monetary Fund).

<sup>2</sup> Thomas Paine, *Dissertation on First Principles of Government, The Writings of Thomas Paine*, ed. Moncure D. Conway, vol. 3, p. 277 (1895), originally published in 1795.

<sup>3</sup> 5 J.H. Hertz, *Commentary to the Pentateuch* 313 (1980 2nd ed.) explicating H. Cohen, *Religion der Vernunft aus den Quellen des Judentums*, translated as *Religion of Reason, Out of the Sources of Judaism* Chs. 5, 8 and 9 esp. at 125 et seq. (explaining that the early Sages, all aliens in one sense or another, explicate the religious variant to this idea in their rendition of Leviticus 19.34; “But the stranger that dwelleth with you shall be unto you as one born among you, and thou shalt love him as thyself; for ye were strangers in the land of Egypt: I am the Lord your God”).

<sup>4</sup> See e.g., Lon Fuller, *Anatomy of Law* (Mentor 1968); Eugene Walter, *Terror and Resistance* (Oxford 1969); Peter Bergen, *Holy War, Inc.* (The Free Press 2001). See also Karma Nabulsi, *Just and Unjust War in Crimes of War: What the Public Should Know*, 224 (Roy Gutman, et.al., eds., 1999).

<sup>5</sup> *Id.* See also, *How Did This Happen? Terrorism and the New War* (James Hoge and Gideon Rose ed., Public Affairs 2001); and Roland Jacquard, *In the Name of Osama bin Laden* (Duke 2002). Justice A Kennedy, in *Roper v. Simmons* \_\_\_ U.S. \_\_\_, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) said: “[T]he United States now stands alone in a world that has turned its face against the juvenile death penalty.” *Id.* at 125, S.Ct. 1199.

<sup>6</sup> Eugene Walter, *supra* note 4, and Peter Bergen *supra* note 4.

<sup>7</sup> See e.g., *How Did This Happen? Terrorism and the New War*, *supra* note 5. See also Roland Jacquard, *supra* note 5.

<sup>8</sup> Ron Guanaratna, *Inside al-Qaeda Global Network of Terror* (Columbia 2002). Consider also Jean-Charles Brisard and Guillaume Dasquir, *Forbidden Truth* (Avalon Publ. 2002).

<sup>9</sup> Consider Amitai Etzioni. *How Patriotic is the Patriot Act?* (Routledge 2004). See also Walter Pincus, *Fruit of Eavesdropping Was Processed and Cross-Checked with Databases*, Sunday, 01 January 2006, Washington Post.

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<sup>10</sup> 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed. 2d 508 (1967).

<sup>11</sup> *Id.* at 389 U.S. 264.

<sup>12</sup> See generally, Richard Falk, *The Status of Law in International Society* (Princeton Univ. Press 1970); American Law Institute's Restatement of Foreign Relations Law, Sec. 101-102 (1986).

<sup>13</sup> L. Henkin, *How Nations Behave*, 13-27 (2d ed. 1979) in, *International Law*, 31-38 (Barry E. Carter, et.al, eds., 1999).

<sup>14</sup> *Id.* at 38. Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, The Washington Post, November 2, 2005 at A01; Douglas Jehl, *Senate Is Set To Require White House to Account for Secret Prisons*, The New York Times, December 15, 2005, available at <http://www.nytimes.com/2005/12/15/politics/15intel.html>; The Associate Press, *Inquiry Details Claims of C.I.A. Prisons in Europe*, The New York Times, December 13, 2005, available at <http://www.nytimes.com/aponline./international/AP-CIA-Secret-Prisons.html>; Jean-Marcel Bouguereau, *Where Is the Democracy?* Le Nouvel Observateur, December 9, 2005, available at: <http://permanent.nouvelobs.com/etranger/20051209.OBS8185.html>; The Associated Press, *Poland to Probe Reports of CIA Prisons*, The Washing Post, December 11, 2005 at A28. Hughes-Ryan amendment to the Foreign Assistance Act of 1974, Pub. L. No. 95-559, §32, 88 Stat. 1804 (1974), (prohibiting the expenditure of appropriated funds by or on behalf of the Central Intelligence Agency for intelligence activities “unless and until the President finds that each such operation is important to the national security of the United States and reports, in a timely fashion, a description and scope of such operation to the appropriate committees of Congress.” This was intended to ensure that clear responsibility for such action was attributable to the President and that Congress was always made aware of such activities. Due to the sensitivity of their content, presidential findings are almost always classified). D. Priest, *infra*.

<sup>15</sup> Benjamin Franklin, *Historical Review of Pennsylvania*, 1759. U.N. General Assembly, *Declaration on the Protection of All Persons from Enforced Disappearance*, (New York: United Nations, 1992), A/RES/47/133, (stating that “No circumstances whatsoever, whether a threat of war, a state of war . . . may be invoked to justify enforced disappearances”); Restatement (Third) of Foreign Relations Law of the United States, Section 702 (Customary International Law of Human Rights), (providing that a state violates international law if, as a matter of state policy, it practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights); See also ICCPR, art. 10(1), (explaining that “all prisoners” are to be treated “with humanity and with respect for the inherent dignity of the human person”); ICCPR General Comment 20 (Forty-fourth Session, 1992): Article 7: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment,”

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A/47/40 (1992) 193, para. 11 (espousing that the time and place of all interrogations should be recorded, together with the names of all those present and this information should also be available for purposes of judicial or administrative proceedings and that provisions should also be made against incommunicado detention); Hamdi, et al. v. Rumsfeld, Secretary of Defense, et al., U.S. Court of Appeals, 4<sup>th</sup> Circuit, 73 22 U.S.C. 2304 (d)(1), No. 03-6696, decided: June 2004, p. 13. (Speaking for the plurality of the Court, Justice Sandra Day O'Connor said, "Certainly, we agree that indefinite detention for the purposed of interrogation is not authorized").

<sup>16</sup> Amitai Etzioni, *How Patriotic is the Patriot Act* 136 (2004).

<sup>17</sup> *Id.* at 137.

<sup>18</sup> Peter Beaumont, *Abuse worse than under Saddam, says Iraqi leader*, Guardian Unlimited, November 27, 2005, available at <http://observer.guardian.co.uk/international/story/0,6903,1651789,00.html>

<sup>19</sup> *Id.*

<sup>20</sup> Peter Beaumont, *supra* note 18.

<sup>21</sup> See Craig Whitlock, *Amman Bombings Reflect Zarqawi's Growing Reach*, The Washington Post, November 13, 2005, at A01 (describing how Iraq's terrorist leader has succeeded in making a breakthrough in his plans of expanding the Iraqi insurgency into a regional conflict); See also *Iraq al Qaeda claims missile attack on Israel – Web*, Reuters, December 29, 2005, available at <http://uk.news.yahoo.com/29122005/325/iraq-al-qaeda-claims-missile-attack-israel-web.html>; *Al Qaeda claims Israel attack link*, CNN, December 29, 2005, available at <http://www.cnn.com/2005/WORLD/meast/12/29/mideast.alqaeda.claim/>.

<sup>22</sup> See Sara Daniel and Sami Yousafzay, *Terrorism: The Return of the Taliban*, Le Nouvel Observateur, November 3, 2005, available at [http://www.truthout.org/docs\\_2005/110705A.shtml](http://www.truthout.org/docs_2005/110705A.shtml) (reporting that the Taliban is not hiding in caves but operating openly and freely in the tribal regions between Afghanistan and Pakistan in the general location where American journalist Daniel Pearle was abducted and decapitated. In Darra Adam Khel, a Pakistani town south of Peshawar, there are 2,600 weapons stores, and 3,000 craftsmen who "reproduce on average 400 weapons per day" supplying Waziristan, the rear base for Arab, Taliban, and perhaps Al Qaeda fighters. Reportedly, one can find almost any type of weapon in Darra ranging from Berettas to grenades to anti-aircraft missiles all with the blessing of the Pakistani government. Many Taliban fighters live openly on the other side of the border in Afghanistan and travel freely across the Pakistani border. Taliban and Arab fighters from this region travel to and from Iraq to newly opened bin Laden training camps in the Sunni triangle because the successes of the Iraqi insurgency has given "new life" to Afghan jihad where its members travel to Iraq, learn the Iraqi insurgents' methods of attack and then return to Afghanistan and employ them against U.S. forces there).



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<sup>23</sup> See Marco Cepik, *Terrorismo e Contra-Terrorismo: Respostas Norte Americanas e Suas Implicacoes para o Brazil*, Center for Hemispheric Defense Studies, August 7, 2002, available at <http://www.3.ndu.edu/chds/redes2002/Documents/Papers/Tract%.201%20International%20Security/3.Country%20Case%20Studies-Terrorism/CepikMP.rtf>.

<sup>24</sup> See e.g., P. Williams, *Al Qaeda, Brotherhood of Terror* (alpha Publ. 2002) and J.C. Brisard and G. Dasquie, *Forbidden Truth* (Avalon Publ. 2002); See also Sebastian Junger, *Terrorism's New Geography*, Vanity Fair, December 2002 Issue.

<sup>25</sup> See *Blurring the Lines; Trends in U.S. military programs with Latin America*, Latin American Working Group, et. al, October 2004, available at <http://64.233.161.104/search?q=cache:xVVHM4RffNMJ:ciponline.org/facts/0410btl.htm+%22Anti-terrorism+assistance+for+latin+America%22+&hl=en>; See also Rex Hudson, *Terrorist and Organized Crime Groups In The Tri-Border Area (TBA) of South America*, A Report Prepared by the Federal Research Division, Library of Congress, July 2003, available at [http://www.loc.gov/rr/frd/pdf-files/TerrOrgCrime\\_TBA.pdf](http://www.loc.gov/rr/frd/pdf-files/TerrOrgCrime_TBA.pdf)

<sup>26</sup> *Blurring the Lines; Trends in U.S. military programs with Latin America*, supra note 52.

<sup>27</sup> See Sebastian Junger, *Terrorism's New Geography*, supra note 51 at 196 (quoting Magnus Ranstorp, director of the Centre for the Study of Terrorism and Political Violence at the University of St. Andrews in Fife, Scotland, "For me the Tri-Border area is the Hilton of Islamic extremism. It's one of the most lucrative safe havens in the world. It's been on the radar since the early 90s, and no one has done anything about it" and quoting ex-CIA officer Robert Baer, "I was personally involved in tracking terrorists to Triple Border... We were aware it was a platform for them to go after the U.S.").

<sup>28</sup> Mark P. Sullivan, et. al, *Latin America: Terrorism Issues*, Congressional Research Service Report for Congress (RS21049), March 29, 2005, available at <http://www.fas.org/irp/crs/RS21049.pdf>.

<sup>29</sup> *Id.* at CRS-4.

<sup>30</sup> *Id.*

<sup>31</sup> Christopher Dickey, *\$1 Billion a Week: And that's on the low side. So much for 'self-sustaining' reconstruction. Parsing the real cost for U.S. taxpayers*, Newsweek, July 21, 2003, available at <http://www.msnbc.com/news/938233.asp>.

<sup>32</sup> Henry David Thoreau, *Journal*, November 11, 1850.

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- <sup>33</sup> *IRA Sent No One to Columbia*, The Irish News, April 25, 2005, Lexis, Nexis Library, URL File.
- <sup>34</sup> *IRA Columbia Links Shape New US Terrorism Policy*, The Belfast Telegraph, May 2, 2002, Lexis, Nexis Library, URL File.
- <sup>35</sup> Mark P. Sullivan, et. al, *supra* note 28; *But See* Sebastian Junger, *Terrorism's New Geography*, *supra* note 27.
- <sup>36</sup> U.S. Department of State, Office of the Coordinator for Counterterrorism, *Country Reports on Terrorism 2004*, April 2005 at 84.
- <sup>37</sup> *See* Sebastian Junger, *supra* note 27
- <sup>38</sup> Anthony Faiola, *U.S. Terrorist Search Reaches Paraguay; Black Market Border Hub Called Key Finance Center for Middle East Extremists*, Washington Post, October 31, 2001, at A21.
- <sup>39</sup> Rex Hudson, *supra* note 25 at 14-15.
- <sup>40</sup> Mauro Marcelo de Lima e Silva, *9/11, Terrorism and Brazil: Facts About The Tri-Border Region*, Hispanic American Center for Economic Research, November 11, 2005, available at <http://www.hacer.org/current/LASED16.php> (denying that any radical groups are supported by Arab-Palestinian communities in South America and also denying that terrorism exists in Brazil); *But see e.g.*, Rex Hudson, *supra* note 25 at 20 (explaining that neither Argentina nor Brazil have been forthcoming about the existence of terrorist sleeper cells in the TBA); *See also* Toby Westerman, *Terrorists active in U.S. 'backyard: Latin America hotbed for both al-Qaeda, Hezbollah*, WorldNetDaily, May 7, 2002, available at [http://www.worldnetdaily.com/news/article.asp?ARTICLE\\_ID=27521](http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=27521).
- <sup>41</sup> *SE Asia still at 'risk of terrorism,'* CNN, January 30, 2002, available at <http://207.25.71.245/2002/WORLD/asiapcf/southeast/01/29/ret.seast.terror/index.html>.
- <sup>42</sup> *See e.g.*, Rex Hudson, *supra* note 25 at 37-60.
- <sup>43</sup> "IRA Sent No One to Columbia," The Irish News, 25<sup>th</sup> April 2002.
- <sup>44</sup> "IRA Columbia Links Shape New US Territory Policy," The Belfast Telegraph, 2<sup>nd</sup> May 2002.
- <sup>45</sup> International Terrorism: The Western Hemisphere Connection; *Revista Interforum 2002* at [www.revistainterforum.com](http://www.revistainterforum.com). *See also*, F. Baldwin, *The Rule of Law*, *supra* note 1.

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- <sup>46</sup> State Department Statistical Appendix, U.S. Department of State Report at: [www.state.gov/documents/organizations/10314.pdf](http://www.state.gov/documents/organizations/10314.pdf)
- <sup>47</sup> Financial Action Task Force on Money Laundering: Guidance for Financial Institutions in Detecting Terrorist Financing. Published April 24, 2002, *available at* <http://oecd.org/ppdf/M00025000/M00025449.pdf>.
- <sup>48</sup> Former CIA Director George Tenet has testified before Congress that Iran remains the most active state sponsor of terrorism. *See* Sheehan Testimony of Drugs, Crime and Terrorism, *available at* <http://usinfo.state.gov/topical/global/drugs/00121303.htm>.
- <sup>49</sup> Financial Action Task Force on Money Laundering: Guidance for Financial Institutions in Detecting Terrorist Financing, *supra* note 47.
- <sup>50</sup> Testimony before the Senate Committee on the Judiciary Subcommittee on Technology, Terrorism and Government Information by Rand Beers, Assistant Secretary for International Narcotics and Law Enforcement Affairs and Francis X. Taylor, Ambassador-At-Large for Counterterrorism. March 13, 2002, *available at* <http://www.state.gov/g/int.rls/rm/2002/8743pf.htm>.
- <sup>51</sup> 2002 U.S. National Drug Control Strategy. Published by the ONDCP. February 2002. *available at* <http://www.whitehousedrugpolicy.gov/publications/policy/03ndcs/index.html>.
- <sup>52</sup> *See generally* Rachel Ehrenfeld, Funding Evil (2005) (Bonus Books).
- <sup>53</sup> 2002 U.S. National Drug Control Strategy. Published by the ONDCP. February 2002, *available at* <http://www.whitehousedrugpolicy.gov/publications/policy/03ndcs/index.html>.
- <sup>54</sup> *Id.*
- <sup>55</sup> *Id.*
- <sup>56</sup> Statement of Raphael Perl, Specialist in International Affairs, Congressional Research Service, before the House Judiciary Committee, Subcommittee on Crime. December 13, 2000, *available at* <http://www.usinfo.state.gov/topical/global/drugs/00121305.htm>.
- <sup>57</sup> *Id.*
- <sup>58</sup> Statement of Rand Beers, Assistant Secretary for International Narcotics and Law Enforcement Affairs and Francis X. Taylor, Ambassador-At-Large for Counterterrorism, Terrorism and Government Information, before the Senate Committee on the Judiciary

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Subcommittee on Technology, March 13, 2002, *available at* <http://www.state.gov/g/inl/rls/rm/2002/8743pf.htm>.

<sup>59</sup> *See Id.*

<sup>60</sup> Statement of Asa Hutchinson, Administrator, DEA, before the Senate Judiciary Committee's Subcommittee on Technology, Terrorism and Government Information, March 13, 2002, *available at* <http://www.usdog.gov/dea/pubs/cngrtest/ct031302.htm>.

<sup>61</sup> Rex Hudson, *supra* note 25; Statement of Asa Hutchinson, Administrator, DEA, *supra* note 83; Statement of Raphael Perl, Specialist in International Affairs, *supra* note 79; *See also* CDI Primer: *Terrorist Finances*, *available at* [http://www.cdi.org/terrorism/finance\\_primer.cfm](http://www.cdi.org/terrorism/finance_primer.cfm).

<sup>62</sup> Drug Intelligence Brief: Drugs and Terrorism: A New Perspective, Report prepared by the DEA Intelligence Division, September 2002, *available at* <http://www.usdoj.gov/dea/pubs/intel/02039/02039.html>.

<sup>63</sup> *See Id.*

<sup>64</sup> Statement of Frank Cilluffo, Deputy Director, Global Organized Crime Program, Director, Counterterrorism Task Force, Center for Strategic and International Studies, before the U.S. House Committee on the Judiciary Subcommittee on Crime, December 13, 2000, *available at* <http://www.csis.org/hil/ts001213ciffuffo.html>; *See also* Rex Hudson, *supra* note 25.

<sup>65</sup> Statement of Asa Hutchinson, Administrator, DEA, *supra* note 60.

<sup>66</sup> Dave Eberhart, *HAMAS Touts Untouchable Secret Funding Sources*, NewsMax, December 5, 2001, *available at* <http://www.newsmax.com/archives/articles/2001/12/4/175008.shtml>; *See also* Rex Hudson, *supra* note 25 at 24-26.

<sup>67</sup> Statement of Asa Hutchinson, Administrator, DEA, *supra* note 60.

<sup>68</sup> Statement of Frank Cilluffo, *supra* note 64.

<sup>69</sup> *See Id.*

<sup>70</sup> Drug Trafficking and Terrorist Organizations, Republic of Turkey Ministry of Foreign Affairs, *available at* <http://www.mfa.gov.tr/grupe/eh/eh01/pkk6.htm>.

<sup>71</sup> Statement of Alan Larson, Under Secretary of State for Economic, Business and Agricultural Affairs, October 9, 2002, *available at* <http://usinfo.state.gov/topical/econ.mle/02100901.htm>.

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<sup>72</sup> Drug Trafficking and Terrorist Organizations, Republic of Turkey Ministry of Foreign Affairs, *available at* <http://www.mfa.gov.tr/grupe/eh/eh01/pkk6.htm>.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Charlene Porter, Drug Trade is Primary Income Source for Taliban, DEA says, State Department Information Programs, October 4, 2001.

<sup>76</sup> Patterns of Global Terrorism, Middle East Overview, April 29, 2004, *available at* <http://www.stat.gov/s/ct/rls/pgtrpt/2003/31638.htm>.

<sup>77</sup> Rex Hudson, *supra* note 25; UNOCD *Assistance in Alternative Development in Lebanon*, United Nations Office on Drugs and Crime, *available at* [http://www.unodc.org/egypt/lebanon\\_project\\_alternative\\_development.html](http://www.unodc.org/egypt/lebanon_project_alternative_development.html), (pointing to other terrorist organizations in the Americas).

<sup>78</sup> Rex Hudson, *supra* note 25; *See generally* John Ashcroft, *DEA/Drug Enforcement Rollout*, U.S. Department of Justice, March 19, 2002.

<sup>79</sup> *See supra* note 77.

<sup>80</sup> *See* Rex Hudson, *supra* note 25; *See also* Orrin Hatch, *Narco-Terrorism: International Drug Trafficking and Terrorism-A Dangerous Mix*, statement before the Senate Judiciary Committee, May 20, 2003 at 2.

<sup>81</sup> Major General Gary D. Speer, Posture statement before the 107<sup>th</sup> Congress, Senate Armed Services Committee, March 5, 2002, at 7.

<sup>82</sup> Steven W. Casteel, *Narco-Terrorism: International Drug Trafficking and Terrorism-A Dangerous Mix*, *supra* note 103 at 8.

<sup>83</sup> Jeffrey Robinson, *The Laundrymen* 13 (Arcade Publishing 1996); *See generally* J. Roth, D. Greenburgh and S. Willie, Staff Report to the Commission, Monograph on Terrorist Financing, National Commission on Terrorist Attacks Upon the United States (2004).

<sup>84</sup> FinCen Advisory, Subject: Colombia Black Market Peso Exchange. Issue 9, November 1997.

<sup>85</sup> *Id.* at 2.

<sup>86</sup> Marketplace Special Series: *Underground Economy: The Black Market Peso Exchange*, November 12, 2001, *available at* <http://marketplace.publicradio.org/features/underground/1112undergroundpm.html>.

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- <sup>87</sup> *Id.*, (explaining that San Adresitos is the name given by Colombians to the black markets where smuggled goods are sold).
- <sup>88</sup> Rex Hudson, *supra* note 25 at 51.
- <sup>89</sup> Lieutenant Colonel Phillip K. Abbott, *Terrorist Threat in the Tri-Border Region: Myth or Reality?* Combined Arts Center Military Review, September-October 2004 at 51.
- <sup>90</sup> *See generally* Rex Hudson, *supra* note 25; Steven W. Casteel, *supra* note 103 at 8.
- <sup>91</sup> Lieutenant Colonel Phillip K. Abbott, *supra* note 89.
- <sup>92</sup> David Meir-Levi, *Conneting the South American Terror Dots*, FrontPage magazine.com, August 9, 2004, available at <http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=14557>.
- <sup>93</sup> Alan Larson, *supra* note 71.
- <sup>94</sup> *Terrorist Threat to the Americas*, Organizations of the American States, September 2001, available at <http://www.state.gov/documents/organization/10313.pdf> (September 15, 2002).
- <sup>95</sup> Organization of American States, Inter-American Committee Against Terrorism, available at <http://www.oas.org> (September 29, 2002).
- <sup>96</sup> *Id.* (explaining that although the committee had met in 1999, the 2000 meeting was cancelled and no meeting was scheduled for 2001).
- <sup>97</sup> Organization of American States, *supra* note 95.
- <sup>98</sup> See Thomas L. Friedman, Foreign Affairs; *Smoking or Non-Smoking?* New York Times, September 14, 2001, available at <http://racematters.org/friedmansmokingornonsmoking.htm#hdfogffssmokgoosmokg>; Yorum Dinstein, *War, Aggression and Self Defense*, 188 (2d ed., Cambridge University Press, 1994); *See also* John Cochran, *Reason for War? White House Officials Say Privately the September 11 Attacks Changed Everything*, ABC News, April 25, 2003, available at [http://65.54.170.250/cgi-bin/linked\\_lang=EN&lah=d9bc4ce074e8dbb80d4680dfb4fc27b1&1at=1052589839&hmaction](http://65.54.170.250/cgi-bin/linked_lang=EN&lah=d9bc4ce074e8dbb80d4680dfb4fc27b1&1at=1052589839&hmaction); *Iraq War Planned for Years*, The Charleston Gazette, April 19, 2003 at A4 (detailing how the Bush Administration appointed neo-conservatives to top federal jobs and that 9/11/01 gave them a reason to adopt pre-emptive war as a new defense policy for the purpose of using American military power to enforce U.S. “interests” around the world and that Saddam Hussein was targeted prior to 9/11 because he was the “mortal enemy of Bush’s father” Commerce Secretary Don Evans and one of Bush’s closest friends described Bush as believing “the was called by God to do what he was doing”); Nightline: *Pay Attention to What Happened In Iraq; Ex-CIA Chief James Woolsey*

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*Discusses U.S. Reasons for War*, ABC News television broadcast, April 22, 2003, transcript on file at <http://www.ABCNEWS.com>; Tom Infield, *The Long Road from Gulf War I to the Brink of Gulf War II*, *The Mercury News* (Knight Rider Newspapers), March 16, 2003 available at <http://wwwldefenseink.mil/transcripts/2003/tr20030509-depsecdef0223.html>; *But see* Judge Richard Posner, *The Truth About Our Liberties*, 12 *The Responsive Community* 4 (2002).

<sup>99</sup> See National Commission on Terrorists Attacks Upon the United States Monograph on Terrorist Financing, Staff Report to the Commission [hereinafter Commission Report].

<sup>100</sup> *Id.* at 22-23.

<sup>101</sup> *Id.* at 23.

<sup>102</sup> *Id.*

<sup>103</sup> See Victor Comras, *al-Qaeda, Finances and Funding to Affiliated Groups* (referencing Testimony of Steven W. Casteel, Assistant Administrator for Intelligence, Drug Enforcement Administration, United States Senate Committee on the Judiciary, Hearings on *Narco-Terrorism: International Drug Trafficking and Terrorism – A Dangerous Mix*, May 20, 2003; Tim McGirk, *Terrorism’s Harvest, How al-Qaeda is Tapping into the Opium Trade to Finance its Operations and Destabilize Afghanistan*, *Time* (Asia Edition), Aug. 9, 2004; Mark Schneider, *Columbia in Kabul*, *Wash. Times*, Dec. 4, 2003; Mary McDonald, *Tajikistan at Crossroads of the Drug Trade, Desperately Poor, It Fights a Losing Battle*, *Detroit Free Press*, May 4, 2004.

<sup>104</sup> See *id.* (Admittedly, evidence linking al-Qaeda directly to the drug trade is scarce); Pierre-Arnaud Chouvy, *Drugs and the Financing of Terrorism*, *Terrorism Monitor*, Oct. 21, 2004 (“A few cases have been highlighted by the media as evidence of al-Qaeda tapping into the opium economy of Afghanistan, even though the claims themselves do not constitute an argument for the existence of any organized form of ‘narco-terrorism’”).

<sup>105</sup> *Id.*

<sup>106</sup> Commission Report, *supra* note 99 at 23; Donnie Marshall, *Narco-Terrorism: The New Discovery of an Old Connection*, 35 *Cornell Int’l. L. J.* 599, 602 (2002).

<sup>107</sup> Chouvy, *supra* note 104.

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

<sup>109</sup> Commission Report, *supra* note 99, at 23 n. 13; Chouvy, *supra* note 104.

<sup>110</sup> Commission Report, *supra* note 99, at 23 n. 13.

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<sup>111</sup> Chouvy, *supra* note 104

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*; Comras, *supra* note 103 (citing interview with Mr. Mirwais Yasini, Head of the Counter Narcotics Directorate (CND) Kabul, Irwin News Serv., Oct. 19, 2004).

<sup>116</sup> Ilias Bantekas, *The International Law of Internet Financing*, 97 Amer. J. I. L. 315, 318 (2003); S.C. Res. 1333, UN Doc.S/Res/1333 (Dec. 19, 2000).

<sup>117</sup> World Bank and International Monetary Fund, Reference Guide to Anti-Money Laundering (AML) and Combating the Financing of Terrorism (CFT), Ch. 1-4. [hereinafter World Bank Reference Guide to AML and CFT]. Terrorism is difficult to define because the term may have significant political, religious, and national implications that differ from country to country. *Id.* There is no universal definition of terrorism. In fact, there are twenty-two different definitions of terrorism in the federal statutes. *United States v. Youself*, 327 F.3d 56 (2d Cir. 2004). The definition proposed the UN Secretary General is as follows: “Any action constitutes terrorism if it is intended to cause death or serious bodily injury to civilians or non-combatants with the purpose of intimidating a population or compelling a government or an international organization to do or abstain from doing any act.” Antonio Maria Costa, Conference on Combating Terrorist Financing, Vienna, *Drugs, Crime and Terrorists Financing: Breaking the Links*, Nov. 9, 2005 at 2. The U. S. Department of State’s definition, codified at 22 U.S.C. 2656f(d)(2) is as follows: “The term ‘terrorism’ means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.” See also, World Bank Reference Guide to AML and CFT, Ch. I, I-I; Matthew Levitt, *Countering the Theological Case for “Economic Jihad” is Vital*, Rusi/Jane’s Homeland Security and Resilience Monitor, July 1, 2005.

<sup>118</sup> See generally, Costa *Id.* at 4.

<sup>119</sup> *Id.* at 5.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> See Matthew Levitt, Senior Fellow, Washington Institute for Near East Policy, Hearings on “*The Role of Charities and NGOs in the Financing of Terrorist Activities*,” U. S. Senate Committee on Banking, Housing, and Urban Affairs, Subcommittee on International Trade and Finance, Aug. 1, 2002 [hereinafter Levitt, *Role of Charities*]; Matthew Levitt, *Combating Terrorist Financing: Where the War on Terror Insects the*



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“Roadmap,” Jerusalem Issue Brief, Aug. 14, 2002; Matthew Levitt, Senior Fellow and Director of Terrorism Studies, Washington Institute for Near East Policy, *Hezbollah: Financing Terror Through Criminal Enterprise*, Committee on Homeland Security and Governmental Affairs, U.S. Senate, May 25, 2005, at 2 [hereinafter Levitt, *Hezbollah*].

<sup>123</sup> See Hezbollah, *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*, See also James Bennett, *Israeli Bedouin Colonel Is Formally Charged with Spying*, NY Times, Oct. 25, 2002.

<sup>128</sup> Levitt, *Hezbollah*, *supra* note 122 at 10.

<sup>129</sup> *U.S. Drug Ring Tied to Aid for Hezbollah*, NY Times, Sept. 3, 2002.

<sup>130</sup> Robert O. Boorstin, quoting former White House Council and current U.S. Attorney General Alberto Gonzales in Memorandum on the Geneva Conventions: *Tossing Aside the Geneva Conventions, Bush Decisions Place U.S. Troops in Greater Danger*, Center For American Progress, May 18, 2004, available at <http://www.americanprogress.org/site/pp.asp?c=biJRJ8OVF&b=%2079532>; United States Attorney General Alberto Gonzales, Memorandum for the President of the United States, Decision Regarding Application of the Geneva Conventions of War to the Conflict with Al Qaeda and the Taliban, January 25, 2002, available at <http://www.msnbc.msn.com/id/4999148/site/newsweek/>. See generally David Cole and James X. Dempsey, *Terrorism And The Constitution: Sacrificing Civil Liberties In The Name Of National Security*, (2d ed., The New Press, New York, 2002); See also David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism*, (The New Press, New York, 2003).

<sup>131</sup> Elisa Massimino, *Heading toward the 'dark side'*, The Los Angeles Times, November 21, 2005, available at <http://www.latimes.com/news/opinion/commentary/la-oe-massimino21nov21,0,4641939.story?coll=la-news-comment-opinions>; Dick Cheney, Vice President of the United States, MEET THE PRESS, NBC News television broadcast, September 16, 2001, transcript on file at <http://www.whitehouse.gov/vicepresident/news-speeches/speeches/vp20010916.html>.

<sup>132</sup> Attorney General Alberto Gonzales, Memorandum for the President of the United States, Decision Regarding Application of the Geneva Conventions of War to the Conflict with Al Qaeda and the Taliban *supra* note 122.

<sup>133</sup> See e.g., David E. Sanger and Eric Schmitt, *Bush 'Confident' of Agreement With McCain on Interrogation*, The New York Times, December 13, 2005, available at

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<http://www.nytimes.com/2005/12/13/politics/13detain.html> (describing how the White House “prefers, in background conversations, to talk about the ‘doomsday scenario’: What would happen if the president believed a nuclear device had been planted in an American city, and interrogators had just minutes to extract information about its location from a terror suspect...” and quoting William H. Taft IV, who served as the State Department's legal adviser during President Bush's first term, that Senator John McCain’s amendment to ban inhumane and degrading treatment of detainees “...calls for conduct to be consistent with the Army field manual, but doesn't presuppose what that is to be”).

<sup>134</sup> See Maria Ressa, *Ressa: Hambali the al Qaeda, Jemaah Islamiyah link*, CNN, August 14, 2003, available at <http://www.cnn.com/2003/WORLD/asiapcf/southeast/08/14/otsc.ressa/index.html> (describing how Riduan Isamuddin, a key al Qaeda figure in Asia who is also known as Hambali and one of the leaders of Jemaah Islamiyah, al Qaeda's arm in Southeast Asia, “organized a meeting of about half a dozen al Qaeda senior leaders in Malaysia in 2000, which basically was one of the first planning sessions of the 9/11 attacks...The meeting was also attended by the man who was believed to be the mastermind of the ‘USS Cole’ as well as the bombing operations within Southeast Asia. Three of the September 11 hijackers were also at that meeting”); See also CNN presents: *Seeds of Terror*, CNN television broadcast, aired June 15, 2003, (tracing the roots of Al Qaeda to Southeast Asia, based on a terrorist plot that occurred in that region in 1995, which was a blueprint for what happened on September 11, 2001).

<sup>135</sup> John Jay, *Federalist No.#64* at 394 (recognizing the need for “perfect secrecy and immediate dispatch” within the executive in order for him/her to execute treaties and for “the business of intelligence,” when “the most useful intelligence may be obtained if he persons possessing it ca be relieved of the apprehensions of discovery”); *But see* Bill of Rights, The United States Constitution, Articles I, III, IV, V, VI, IX, and XIV.

<sup>136</sup> See Art. II §2 to the United States Constitution (“The President shall be the Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States...”); See also Art. II §1 of the Constitution (stating the President has a fundamental duty to “preserve, protect, and defend the Constitution...”); United States v. United States District Court (Keith), S.Ct, (1972), 407 U.S. 297 (explicating that “Implicit in that duty is the power to protect our Government against those who would subvert or overthrow it by unlawful means. In the discharge of that duty, the President—through the Attorney General—may find it necessary to employ electronic surveillance to obtain intelligence information on the plans of those who plot unlawful acts against the Government); *but see Id.* at III “Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillance may be conducted solely within the discretion of the Executive Branch...The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech”).

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<sup>137</sup> *Id.* at Art. I §8 (Congress shall have power to...provide for the common defense...to declare War...to raise and support Armies...to provide and maintain a Navy...[and] to make Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution...).

<sup>138</sup> *See e.g., United States v. Ehrlichman*, 376 F. supp. 29, aff'd, 546 F.2d 910 (D.C. Cir. 1976), cert. denied, 429 U.S. 1120 (1977) (explicating at note 4 “The doctrine of the President’s inherent authority as ‘the sole organ of the nation in its external relations,’” 10 Annals of Cong. 613 (1800) (remarks of John Marshall), has been developed by a series of Supreme Court decisions dealing with the President’s power to enter into international agreements and to prohibit commercial contracts which impede foreign policy. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). None of these cases purport to deal with the constitutional rights of American citizens or with Presidential action in defiance of congressional legislation. When such issues have arisen, Executive assertions of inherent authority have been soundly rejected.” See *Kent v. Dulles*, 357 U.S. 116 (1958); *Youngstown Sheet & Tubing co. v. Sawyer*, 343 U.S. 579 (1952)); *See also* Art. II §3 to the United States Constitution (establishing that the president of the United States “...shall take Care that the Laws be faithfully executed...); Art. II §1 (affirming that the president shall “..preserve, protect, and defend the Constitution of the United States”).

<sup>139</sup> *See e.g., Gulf of Tonkin Resolution*, Pub. L. No. 88-408, 78 Stat. 384 (1964) (authorizing President Lyndon B. Johnson “...to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression” the resolution was passed with only 2 dissenting votes in the House of Representatives and unanimously in the Senate); *See generally* The War Powers Resolution, 50 U.S.C. §§1541-1548 (limiting the powers of the President to send armed forces into hostilities without the consent of Congress). *See also Youngstown Sheet and Tube, Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952).

<sup>140</sup> *See e.g., The War Powers Resolution*, *supra* note 130; *See also* Select Committee to Study Governmental Operations (Church Committee), S. Res. 21, 94<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1975) (determining “the extent, if any, to which illegal, improper, or unethical activities were engaged in by the intelligence agencies...” and finding that procedures for oversight of intelligence agencies by the executive branch were inadequate and at times completely circumvented).

<sup>141</sup> S. Rep. No. 604, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 9-12 (1977).

<sup>142</sup> Dycus, Berney, Banks, & Raven-Hansen, *National Security Law: Investigating Terrorism and Other National Security Threats*, (Aspen Law & Business, 3d. ed., 2002) at 614-615; *See also* Select Committee to Study Government Operations with Respect to Intelligence Activities, *Intelligence Activities and the Rights of Americans*, S. Rep. No. 755, Book III, 94<sup>th</sup> Cong., 2d Sess. 355 (1976), (describing how then FBI Director J. Edgar Hoover and his deputy, Clyde Tolson, authorized in writing over two hundred

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“black bag jobs” (i.e. warrantless and surreptitious entries carried out for intelligence purposes including physical searches and the photographing or seizing of documents. Hoover ordered that the records of these warrantless searches be destroyed and employed “Do Not File” procedures to avoid a paper trail of the FBI’s unconstitutional actions)).

<sup>143</sup> *Id.* at 627; *See also* David J. Garrow, *The Martin Luther King, Jr. FBI File*, Lexis-Nexis URL File, available at <http://www.lexisnexis.com/academic/2upa/Aaas/mlkFBI.asp> (illustrating that President Lyndon B. Johnson illegally authorized the FBI to conduct warrantless surveillance of Martin Luther King, Jr. via wire taps of his telephone conversations for the purpose of “harm[ing] King’s public reputation and destroy[ing] his political influence...” thus violating his Fourth Amendment protection against illegal searches and seizure, his right of privacy, as well as King’s First Amendment rights to free speech and Association); David J. Garrow, *The FBI and Martin Luther King*, *The Atlantic Monthly*, July/August 2002, available at <http://www.theatlantic.com/doc/prem/200207/garrow> (showing that the unlawful electronic surveillance of Martin Luther King, Jr. was also initiated by President John F. Kennedy, through his brother and Attorney General, Robert F. Kennedy); David G. Savage and Richard A. Serrano, *Alito memo on wiretaps may complicate confirmation: His 1984 memo voices support of warrantless wiretaps on grounds of national security*, *The Los Angeles Times*, December 24, 2005, available at <http://216.239.51.104/search?q=cache:FQwyNmaJ3-QJ:www.detnews.com/apps/pbcs.dll/article%3FAID%3D/20051224/POLITICS/512240427+%22warrantless+wiretaps%22+and+%22nixon%22&hl=en> (describing how President Nixon’s Attorney General, John Mitchell, violated the Fourth Amendment to the U.S. Constitution when he illegally authorized warrantless wiretaps of political activists and anti-Vietnam War Protestors); David Savage, *’78 Law Sought to Close Spy Loophole: Congress Acted to prohibit the kind of domestic surveillance that is now at issue*, *The Los Angeles Times*, December 17, 2005, available at <http://www.latimes.com/news/nationworld/nation/la-na-legal17dec17,1507282.story?ctrack=1&cset=true>.

<sup>144</sup> *See* Barton Gellman and Dafna Linzer, *Pushing the Limits of Wartime Powers*, *The Washington Post*, December 25, 2005, at A01 (describing how the Bush administration has at times completely rejected the authority of the courts and Congress to act as a check on the executive’s authority as commander-in-chief claiming the President’s powers as “plenary” meaning “full,” “complete,” and “absolute”); *See also* Statement by David Rivkin, former Justice Department Official in both the Reagan and George H. W. Bush administrations, *Lou Dobbs Tonight*, CNN television broadcast, aired December 27, 2005, transcript available at <http://216.239.51.104/search?q=cache:qbqslKYZleYJ:transcripts.cnn.com/TRANSCRIPTS/0512/27/ldt.01.html+%22Executive+Branch%22+and+%22speed%22+and+%22dispatch%22&hl=en> (stating “This is the use of the commander-in-chief power...Let’s leave the law aside...The President has plenary power to engage in war and surveillance...”).

<sup>145</sup> President George W. Bush, President’s Radio Address, broadcast December 17,

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2005, transcript *available* at <http://www.whitehouse.gov/news/releases/2005/12/20051217.html> (exclaiming “I authorized the National Security Agency, consistent with U.S. law and the Constitution, to intercept the international communications of people with known links to al Qaeda and related terrorist organizations. Before we intercept these communications, the government must have information that establishes a clear link to these terrorist networks...The activities I authorized are reviewed approximately every 45 days. Each review is based on a fresh intelligence assessment of terrorist threats to the continuity of our government and the threat of catastrophic damage to our homeland. During each assessment, previous activities under the authorization are reviewed...The review includes approval by our nation's top legal officials, including the Attorney General and the Counsel to the President. I have reauthorized this program more than 30 times since the September the 11th attacks, and I intend to do so for as long as our nation faces a continuing threat from al Qaeda and related groups...The NSA's activities under this authorization are thoroughly reviewed by the Justice Department and NSA's top legal officials, including NSA's general counsel and inspector general. Leaders in Congress have been briefed more than a dozen times on this authorization and the activities conducted under it. Intelligence officials involved in this activity also receive extensive training to ensure they perform their duties consistent with the letter and intent of the authorization...The American people expect me to do everything in my power under our laws and Constitution to protect them and their civil liberties. And that is exactly what I will continue to do, so long as I'm the President of the United States”); James Risen and Eric Lichtblau, *Bush Secretly Lifted Some Limits on Spying in US after 9/11*, *Officials Say*, *The New York Times*, December 15, 2005, *available* at <http://www.nytimes.com/2005/12/15/politics/15cnd-program.html?ex=1135659600&en=9d2d9fe6cd2b9d3d&ei=5070>; Scott Shane, *Behind Power, One Principle as Bush Pushes Prerogatives*, *The New York Times*, December 17, 2005 at A page 1 (explaining how administration experts including David S. Addington, Vice President Cheney’s former counsel and currently his chief of staff and former deputy assistant attorney general in the Office of Legal Counsel of the Justice Department (2001-2003) John C. Yoo have both relied on Article II to the U.S. Constitution and the joint resolution as legal justification for unfettered executive powers under the guise of national security); Barton Gellman and Dafna Linzer, *supra* note 136.

<sup>146</sup> 50 U.S.C. §1801-1811 (Supp. V 1981) (explaining that FISA generally allows a federal officer, if authorized by the President of the United States acting through the Attorney General of the United States, to obtain from a judge of the specially created FISA Court, see 50 U.S.C. §1803, an order “approving electronic surveillance of a foreign power for the purpose of obtaining foreign intelligence information.” *Id.* at §1802(b). 50 U.S.C. §1805(f)(1-2) authorizes the executive, through the Attorney General, to conduct warrantless surveillance of foreign powers or an agent of a foreign power, *Id.* at §1805(a)(3)(A), if an “emergency situation exists with respect to the employment of electronic surveillance to obtain foreign intelligence information before an order authorizing such surveillance can with due diligence be obtained; and the factual basis for issuance of an order...to approve such surveillance exists...” *Id.* at §1805(f)(1-

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2); however, an application for a warrant must be sought with a FISA judge after-the-fact “as soon as practicable, but not more than 72 hours after the Attorney General authorizes such surveillance...” *Id.* at §1805(f)(2).

<sup>147</sup> Authorization for Use of Military Force, Pub.L. No 107-40, §2(a), 115 Stat. 224, 224 (2001).

<sup>148</sup> 50 U.S.C. §1801(i).

<sup>149</sup> 50 U.S.C. §1805(f)(1-2) (“factual basis” means the President has: 1.) probable cause (which may include “past activities of the target, facts and circumstances relating to current or future activities of the target”) to believe that the target of the surveillance is 2.) a foreign power or an agent of a foreign power, *Id.* at §1805(a)(3)(A) *supra* note 129; 3.) no U.S. person (citizens/legal resident aliens) can be considered a “foreign power” or an “agent of a foreign power” based “solely on activities protected by the First Amendment to the United States Constitution,” §1805(a)(3)(A); and 4.) the place or facility where the surveillance is targeted is about to be used or being used by a foreign power/agent” §1805(a)(3)(B).

<sup>150</sup> *Id.* at §1805(f)(1-2) & §1805(a)(3)(A) (defining “foreign powers” or an “agent of a foreign power” as a foreign government/nation or entity, faction, foreign-based political organization, “openly acknowledged” or “directed or controlled” by a foreign government,” or group “engaged in international terrorism or activities in preparation therefore”, not “substantially composed of United States persons” and includes “any other person other than a United States person” who acts under color of law of a foreign power whether it be via employment, clandestine intelligence activities in the U.S. or anyone who knowingly aids and abets such activities that are contrary to the U.S. or on behalf of a foreign power that violates or is about to violate U.S. law, engages in sabotage, terrorism, enters the U.S. under a false or fraudulent identity for or on behalf of a foreign power or knowingly “aids and abets any person” in the conduct of any of the activities mentioned herein and that no United States person may be considered a foreign power solely upon the basis of activities protected by the first amendment to the Constitution of the United States. *Id.* at §1805(a)(3).

<sup>151</sup> 50 U.S.C. §1801-1811 (Supp. V 1981) *supra* note 138 at §§1803, 1802(b).

<sup>152</sup> 50 U.S.C. §1801(h)(1) (requiring the government to follow procedures in conducting a search or surveillance that are “reasonably designed” to “minimize” the acquisition of nonpublic information concerning unconsenting U.S. persons “consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information” *Id.* at § 1821(4)(A)(5)).

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

<sup>154</sup> 50 U.S.C. §1805(a)(5).

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<sup>155</sup> 50 U.S.C. §§ 1803(a),1822(c).

<sup>156</sup> See *Id.* §1802(a)(1) (describing requirements for the President, through the Attorney General, to authorize electronic surveillance without a court order).

<sup>157</sup> 18 U.S.C. §2511(2)(f)(2000); See also United States v. United States District Court, (Keith), 407 U.S. 297 \_\_\_ S.Ct. \_\_\_, \_\_\_ L.Ed. \_\_\_ (1972) (holding that government surveillance conducted without prior judicial approval, violated the Fourth Amendment to the United States Constitution and that 18 U.S.C. §2511(3) language does not confer power on the President to conduct warrantless electronic surveillance without prior judicial review. To the contrary the Court explicitly stated “...These Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillance may be conducted solely within the discretion of the Executive Branch...The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech”).

<sup>158</sup> Curtis A. Bradley and Jack L. Goldsmith, *CONGRESSIONAL AUTHORIZATION AND THE WAR ON TERRORISM*, Harv. L. Rev., Vol. 18, No. 7, (2005) at fn.132 pg. 2079.

<sup>159</sup> *Id.* at 2079.

<sup>160</sup> *Id.*

<sup>161</sup> See *Id.* at fn 135 (stating that “...This Resolution limits...its authorization [of military force] to respond to the September 11, 2001 attacks on our nation...It does not contain a broad grant of powers, but is appropriately limited to those entities involved in the attacks on September 11<sup>th</sup>...”); See also Tom Daschle, *Power We Didn't Grant*, The Washington Post, December 23, 2005 at A12 (asserting that as the Senate Majority Leader who helped to negotiate AUMF, there was no intent by Congress to authorize the President to engage in warrantless surveillance. Senator Daschle stated, “Literally minutes before the Senate cast its vote, the administration sought to add the words "in the United States and" after "appropriate force" in the agreed-upon text. This last-minute change would have given the president broad authority to exercise expansive powers not just overseas -- where we all understood he wanted authority to act -- but right here in the United States, potentially against American citizens. I could see no justification for Congress to accede to this extraordinary request for additional authority. I refused”).

<sup>162</sup> See Associated Press, *Report: Spy court judge quits in protest: Bush's secret surveillance program said to be a concern*, CNN, December 21, 2005, available at <http://www.cnn.com/2005/LAW/12/21/spyjudge.resigns.ap/> (describing how FISA judge Judge James Robertson resigned from FISC to protest President Bush's secret authorization of a domestic spying program on people with suspected terrorist ties and because he was “concerned that information gained from the warrantless surveillance under Bush's program subsequently could have been used to obtain warrants under the



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FISA program”); Eric Lichtblau and James Risen, *Justice Deputy Resisted Parts of Spy Program*, The New York Times, January 1, 2006, available at <http://www.nytimes.com/2006/01/01/politics/01spy.html?hp&ex=1136178000=ec5c0349bec6bc6&ei=5094&partner=homepage> (explaining how Department of Justice Official, James B. Comey, (who was acting Attorney General in March 2004 while John Ashcroft was in the hospital for gallbladder surgery), refused to approve the NSA’s domestic spy program out of concerns over its legality and lack of oversight. Comey’s refusal to approve the President’s warrantless domestic surveillance program prompted President Bush’s Chief of Staff, Andrew Card and then White House counsel, Alberto Gonzales, to make an emergency visit to Ashcroft in the intensive care unit to get his approval for the NSA’s domestic spy program. Reportedly, Ashcroft was also reluctant to approve the NSA domestic spy program out of concerns over the program’s lack of oversight and the President’s lack of constitutional authority to conduct such a program); *See also* David Savage, *supra* note 135 (quoting Kenneth C. Bass III, who helped write FISA as an aide to President Carter, “This sounds like an extraordinarily broad exemption to FISA...This is well beyond the pale of what was anticipated back then”); Scott Shane, *Behind Power, One Principle as Bush Pushes Prerogatives*, The New York Times, December 17, 2005 at Section A, page 1 (quoting William C. Banks, Syracuse University National Law Professor’s response to NSA domestic spy program “I was frankly astonished by the story...My head is spinning...” and that the president’s powers under as commander in chief are “really limited to situations involving military force—anything needed to repel an attack. I don’t think the commander in chief power allows” warrantless eavesdropping.).

<sup>163</sup> *See e.g.*, Memorandum from Deputy Assistant Attorney General John Yoo To Alberto R. Gonzales, White House Counsel, August 1, 2002, available at <http://news.findlaw.com/hdocs/docs/doj/bybee80102ltr.html> (claiming the ban on “Cruel, inhumane, or degrading” treatment (CID) of prisoners under UNCAT does not apply overseas because the Senate added a reservation before ratification of the treaty so that CID means that which is forbidden by the U.S. Constitution, which does not apply outside of the United States, therefore pretty much anything goes except outright sadistic torture outside the territory of the U.S.) *But see* Letter from Abraham Sofaer, State Department’s legal advisor to President Reagan who signed UNCAT in 1988, to Senator Patrick Leahy, January 21 2005, available at [http://www.humanrightsfirst.org/us\\_law/etn/pdf/sofaer-leahy-cat-art16-093005.pdf](http://www.humanrightsfirst.org/us_law/etn/pdf/sofaer-leahy-cat-art16-093005.pdf) (explaining that the purpose of the Senate’s reservation to UNCAT was to ensure that the *same* standards for CID would apply *outside* the United States as they did *inside* the United States. This is the complete opposite conclusion of reached by Dep. Asst. John Yoo and Attorney General Alberto Gonzales in this memorandum).

<sup>164</sup> *Consider* Aharon Barak [President of the Supreme Court of Israel], *A Judge on Judging The Role of a Supreme Court in a Democracy*, 116 Harv. L. Rev. 19 (2002); *See also Ex Parte Yenger*, 75 U.S. [8Wall.] 85 19 L.Ed. 332 (1869).

<sup>165</sup> Aharon Barak, *Id.* at 27-46.



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<sup>166</sup> *Id.*

<sup>167</sup> See Fletcher Baldwin, *The United States Supreme Court: A Creative Check of Institutional Misdirection*, 45 Ind. L. Jo. 550 (1970); See also Bruce Zagaris, *supra* note 302 at 526; and *Zadvyas v. Davis*, 833 U.S. 678, 121 S.Ct. 2491, \_\_\_L.Ed.2<sup>d</sup>\_\_\_(2001).

<sup>168</sup> See generally, H.L.A. Hart, *The Concept of Law* (Oxford University Press 1961).

<sup>169</sup> See Bruce Zagaris, *U.S. District Court Reiterates U.S. Terror Suspect's Right To Counsel*, 19 Int'l. Enf. Law Rep. 183 (May 2003).

<sup>170</sup> Available at <http://www.acj.com/opinion/content/opinion/0503/11lewis.html>; Anthony Lewis, *Wake Up America*, The New York Times, November 30, 2001 available at <http://www.commondreams.org/views01/1130-05.htm>.