

IMBALANCE OF POWERS

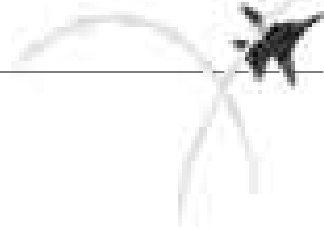
How Changes to U.S. Law & Policy Since
9/11 Erode Human Rights and Civil Liberties

September 2002 — March 2003

Imbalance of Powers is an update to Lawyers Committee's
*A Year of Loss: Re-examining Civil Liberties Since
September 11*, which was published in September 2002.



LAWYERS COMMITTEE
FOR HUMAN RIGHTS



Chapter 5

THE UNITED STATES AND INTERNATIONAL HUMAN RIGHTS PROTECTION

INTRODUCTION

The response in the United States to the September 11 attacks has had profound implications for the promotion and implementation of human rights standards around the world. A significant number of governments have attempted to co-opt the war on terrorism, expressing support for U.S. measures while simultaneously labeling domestic opponents members of al Qaeda or similar terrorist groups. Leaders who were once criticized and marginalized in the global community for human rights abuses have been rehabilitated as key U.S. allies in the war against terrorism. In still other countries, repressive new laws and detention practices have been introduced, broadly justified by the new international climate.

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PROSECUTING “NATIONAL SECURITY” CASES

In the summer of 2002, Liberian President Charles Taylor began to apply the term “unlawful combatants” to independent journalists and human rights activists who have been vocal critics of his policies. Hassan Bility, an internationally respected journalist, was arrested in Monrovia on June 24, 2002 and held as an “unlawful combatant.”²⁸⁴ At the time of his arrest, he was the editor of the *Analyst*, an independent weekly newspaper that had published articles criticizing Taylor’s regime. As an “unlawful

combatant” Bility was held incommunicado in an undisclosed location, without access to a lawyer. He was tortured under interrogation.²⁸⁵

On October 24, 2002, the Liberian Defense Department stated that a military tribunal set up by President Taylor had determined that Bility was a “prisoner of war.”²⁸⁶ The Defense Department did not explain how the military tribunal had come to this decision. Then, on October 28, 2002, President Taylor announced that Bility would be released if he signed a statement “acknowledging” that he would be rearrested “in the event of violations.”²⁸⁷ Taylor did not specify what “violations” would trigger a rearrest, and the requirement was widely seen as an attempt to intimidate Bility from further criticizing the government.²⁸⁸

On December 7, 2002, the Liberian government released Bility into the custody of U.S. officials on the strict condition that he be escorted immediately from the country.²⁸⁹ According to John Blaney, the U.S. ambassador to Liberia, the United States considered “the removal of Hassan Bility’s case from the civilian system and the denial of due process as very worrisome for the future of the rule of law in Liberia.”²⁹⁰

Blaney’s comment was particularly noteworthy considering the Liberian government had explicitly invoked U.S. precedent to justify its treatment of Bility. During an interview with an American journalist, the Liberian Minister of Information, Reginald Goodridge, defended the “unlawful combatant” label, saying, “It was you guys [the U.S. government] who coined the phrase. We are using the phrase you coined.”²⁹¹ President Taylor also emphasized that Bility was being treated “in the same manner in which the U.S. treats terrorists.”²⁹²

Although Bility is now free, other journalists and human rights activists are still being held — including Sheikh K.M. Sackor, the Executive Director of Humanist Watch Liberia. Sackor was arrested in July 2002 and has been held in incommunicado detention without charge.²⁹³ In September 2002, a Liberian court held that Sackor could be tried in a military tribunal, which operates under the discretion of President Taylor.²⁹⁴

In Uganda, meanwhile, the government raided the offices of the country’s main independent daily newspaper on October 10, 2002. The *Monitor* was shut down for a week. According to security officials, the government launched the raid in response to an article reporting that the rebel Lord’s Resistance Army (LRA) had shot down an army helicopter in northern Uganda. The government denied the story and accused the *Monitor* of supporting “terrorists” by publishing “false news that alarmed the public.”²⁹⁵ On October 15, 2002, three editors at the *Monitor* were charged with “publishing articles that are contrary

to national security and that give comfort to the enemy.”²⁹⁶ The trial in their case is scheduled to begin on March 31, 2003.²⁹⁷

In making these arrests, the Ugandan government relied on a new antiterrorism law that came into effect in May 2002.²⁹⁸ Under the act, terrorism is defined very broadly as the “use of violence or threat of violence with intent to promote or achieve political, religious, economic, and cultural or social ends in an unlawful manner, and includes the use or threat to use, violence to put the public in fear or alarm.”²⁹⁹ Under this law, publishing news “likely to promote terrorism” is punishable by death.³⁰⁰

Since then, the Ugandan government has refused to back down. John Nagenda, the Presidential Advisor on the Media, insisted on November 15, 2002 that his government would offer no apologies for its response to the helicopter article.³⁰¹ “We shall get the people concerned, turn their places upside down and get the information — get where these lies come from...,” Nagenda said. “The laws will deal with people who give succor to the enemy fighting government during a war.”³⁰²

Independent journalists have also come under attack in Eritrea, along with human rights and democracy activists. On September 18, 2001, as world attention was diverted by the September 11 attacks, the Eritrean government arrested 11 former high-ranking officials and held them in incommunicado detention.³⁰³ Those arrested were part of a dissident group of ruling party members that had publicly criticized President Isaias Afewerki and pushed for peaceful democratic reform.³⁰⁴ The day of the arrests, the government also suspended all independent and privately owned newspapers in Eritrea for “threatening state security” and “jeopardizing national unity.”³⁰⁵

In the ensuing days, the government also arrested ten prominent journalists who had formally protested the government crackdown, including Yohannes Fesshaye, the noted Eritrean playwright. Fesshaye is the founding editor of the independent weekly *Setit*, which had been the largest-circulation newspaper in Eritrea before the suspensions were announced. The journalists continue to be held in incommunicado detention without charge, well over a year after their arrest. The government refuses to reveal the location or conditions of their detention.

In a recent interview with the *Washington Post*, Girma Asmerom, Eritrea’s Ambassador to the United States, insisted that locking up journalists like Fesshaye is “perfectly consistent” with democratic practice.³⁰⁶ As proof of this, according to the *Washington Post*, he “cited America’s roundup of material witnesses and suspected aliens.”³⁰⁷

Ambassador Asmerom has also claimed that the 11 former officials are being detained for “breaching national security,” and not for advocating democratic reforms.³⁰⁸ Spokesmen for the Eritrean government have suggested that the officials were agents of Osama Bin Laden.³⁰⁹

In the months following September 11, the U.S. administration kept its distance from Eritrea. This was in part because the Eritrean government had arrested two local employees of the U.S. Embassy in Asmara, hours after the U.S. Ambassador protested the government's actions.³¹⁰ In recent months, however, the Horn of Africa has assumed new importance in the war on terrorism, given its proximity to Yemen and Saudi Arabia. In December 2002, Defense Secretary Donald Rumsfeld visited Eritrea for the first time to show appreciation for Eritrea's cooperation with U.S. anti-terrorism efforts.³¹¹ When asked about the detainees during a stop in Asmara, Rumsfeld responded that a “country is a sovereign nation and they arrange themselves and deal with their problems in ways that they feel are appropriate to them.”³¹²

REVISED STANDARDS FOR NEW ALLIES

The “war on terrorism” has had far-ranging repercussions for U.S. foreign policy in many other areas around the globe. In the wake of September 11, the administration naturally had to rethink its strategic relationships with a variety of other countries. The nations surrounding Afghanistan soon assumed new significance, and the administration moved quickly to solidify existing relationships. American aid flowed into the region — to countries such as Pakistan, Uzbekistan, Kazakhstan, and Kyrgyzstan — despite widespread criticism of their individual human rights records.

Uzbekistan emerged as one of America's most important new allies given its southern border with Afghanistan. On October 12, 2001, the United States and Uzbekistan jointly announced that they “ha[d] decided to establish a qualitatively new relationship based on a long-term commitment to advance security and regional stability.”³¹³ Uzbekistan allowed the United States to use its military bases and deploy troops within its territory, and in return, the United States tripled its aid to Uzbekistan, to a total of \$160 million a year.³¹⁴ The Bush administration also encouraged the World Bank and the International Monetary Fund to increase assistance to the country.³¹⁵

The United States decided to increase military and economic aid to Uzbekistan, notwithstanding its longstanding criticism of the government's human rights record. The U.S. Department of State has been

particularly critical of the use of torture in Uzbek prisons as well as the repression of its independent Muslim population. According to the State Department's most recent Country Report on Human Rights Practices, for example, the government treats Islamic activity outside state-sponsored mosques as "an extremist security threat";³¹⁶ the arbitrary arrest and detention of Muslim believers remains common; and the security forces frequently plant "narcotics, weapons, or banned literature" on those arrested.³¹⁷ Furthermore, according to the State Department, "Both the police and the NSS [National Security Service] routinely tortured, beat, and otherwise mistreated detainees to obtain confessions, which they then used to incriminate the detainees. Police also used suffocation, electric shock, rape, and other sexual abuse."³¹⁸

Although U.S. officials have continued to emphasize the importance of reform (and Congress has required periodic updates on progress), the situation remains extremely precarious. Human rights activists in Uzbekistan have criticized the United States for failing to adequately pressure their government on human rights issues. Talib Yakubov, a member of the Human Rights Society of Uzbekistan, recently told a journalist, "The attitude of ... the whole U.S. administration shows that they have traded human rights in Uzbekistan for airfields."³¹⁹

The United States has also developed relationships with other countries newly-minted as "strategic" allies. In December 2002 U.S. Assistant Secretary of State William Burns announced that the United States would renew weapons sales and other security assistance to Algeria.³²⁰ Burns' announcement lifted a ban on U.S. aid that had been in effect since 1992, as a direct consequence of the government's abuse of human rights.³²¹ During much of this period, the Algerian government has been engaged in a violent conflict against militant Islamist groups, with atrocities committed on all sides. More than 100,000 people have been killed since the government cancelled the parliamentary elections in 1992.³²²

In announcing the renewed aid, Burns declared that "Washington has much to learn from Algeria on ways to fight terrorism."³²³ Over the last decade, Algeria has committed many egregious abuses in the name of fighting terrorism. Its security forces have been implicated in the systematic use of torture, forced "disappearances," arbitrary killings, and extrajudicial executions.³²⁴ Amnesty International has reported that Algeria's expansive anti-terrorism laws have led to the imprisonment of human rights lawyers who have been accused of "encouraging terrorist activities" when they represent clients with suspected links to armed groups.³²⁵

Long criticized for such abuses, the Algerian government is now trying to gloss over this history by heralding “an auspicious new era in international cooperation on counter-terrorism.”³²⁶ Indeed, in its first report to the Security Council’s Counter-Terrorism Committee in December 2001, Algeria welcomed the “present international team effort” as “corroborating its own consistently argued position on the nature of terrorism.”³²⁷ The government emphasized that Algeria had “long suffered the ravages of terrorism, often in the face of indifference and occasional complaisance” from the international community.³²⁸ It hoped that the new international climate would promise “clearer recognition and support” of its own anti-terrorism efforts.³²⁹

GROWING TREND TOWARD DRACONIAN ANTI-TERRORISM LAWS

More and more countries are adopting harsh new emergency laws, with explicit reference to the current climate of no-holds barred anti-terrorism. In Tanzania the parliament passed a sweeping new anti-terrorism law on November 5, 2002. The law gives the police and immigration officials the power to arrest suspected illegal immigrants or anyone thought to have links with terrorists, without first obtaining arrest warrants.³³⁰

In Indonesia, President Megawati Sukarnoputri signed two anti-terrorism regulations on October 18, 2002, in response to intense pressure from the United States and other countries.³³¹ Pressure on Indonesia had intensified after two car bombs exploded in Bali on October 12, 2002, killing nearly 200 people. Under the new regulations, people suspected of terrorism can be detained without trial for up to six months, and reports from intelligence agencies can be used as legal evidence.³³²

These kinds of security laws are especially controversial in Indonesia, given a history of abuses committed by the military and security services.³³³ The country is struggling to shore up its fledgling democracy after decades of authoritarian rule. Human rights activists have worried that the military might use the new climate as cover to reassert a more political role.³³⁴

Israel, meanwhile, has also adopted more stringent detention policies in the wake of September 11.³³⁵ On April 5, 2002, the Commander of the Israeli Army in the West Bank issued Military Order 1500.³³⁶ Under this order, “an IDF [Israeli Defense Force] officer of the rank of at least captain or a police officer of equivalent rank” could order a person to be held in incommunicado detention for up to 18 days, without access

to an attorney or to a court. The person could be detained in these conditions if “from the circumstances of his arrest arose a suspicion that he endangers or could potentially endanger the security of the region, of IDF forces, or of the public.”³³⁷ As of January 2003, the IDF was holding more than 1,000 Palestinians in administrative detention, up from 36 administrative detainees a year earlier.³³⁸

Seven human rights groups, including B’Tselem, Physicians for Human Rights, and Adalah, challenged the legality of Military Order 1500 in a petition to the Israeli High Court of Justice.³³⁹ After the petition was filed, the IDF reduced the maximum period of detention without access to a judge to 12 days, and changed the period without access to a lawyer to two days (with a possible 15-30 day extension).³⁴⁰ On February 6, 2003, the Israeli High Court upheld the clause preventing detainees from meeting with their lawyers, but found that the detainees could not lawfully be held for 12 days without access to a judge.³⁴¹ The Court gave the IDF six months to adapt the order to the requirements of Israeli and international law.³⁴²

Pakistan has also adopted a more stringent detention policy. In November 2002, the government promulgated a new Anti-Terrorism Ordinance, which allows the police to arrest terrorism suspects and detain them for a year without charge.³⁴³ Under the previous law, the authorities could detain suspects for up to three months.³⁴⁴ The new ordinance was approved by President Pervez Musharraf’s military-led cabinet, rather than by Pakistan’s newly elected legislature.³⁴⁵

The Pakistan People’s Party, the party of former Prime Minister Benazir Bhutto, condemned the ordinance, expressing fears that it would be used to silence members of the political opposition.³⁴⁶ Zia Ahmed Awan, president of the Karachi-based Lawyers for Human Rights and Legal Aid (LHRLA), also criticized the ordinance. Awan said that the order “will only increase the victimization of ordinary people at the hands of the police and other law enforcement agencies.”³⁴⁷

CONCLUSION

Nations around the world have had to grapple with difficult questions of national security in the wake of September 11. In determining how to respond, many governments have followed the U.S. lead, adopting expansive new anti-terrorism laws and practices. Other governments have seized upon the rhetoric of the “war on terrorism” to justify their own repressive policies — insisting that domestic opponents pose a similar terrorist threat.

The actions of the U.S. government are being closely followed and emulated by other governments around the world. The United States must address security concerns in a manner consistent with the fundamental principles of human rights. By turning its back on these principles, the United States forfeits the very values for which it claims to be fighting.

RECOMMENDATIONS

1. The United States government should speak in a unified voice about the importance of upholding international human rights standards. The Department of Defense should not be allowed to undermine efforts by the Department of State to criticize human rights abuses in other countries, for example, no matter how strategically important those countries might be for the “war on terrorism.”
2. The United States should repeatedly and publicly condemn attempts by other governments to use the war on terrorism as a cover to repress independent journalists, human rights activists, or other domestic critics.
3. As a signal to the rest of the world that it takes its human rights obligations seriously, the United States should submit a report to the U.N. Human Rights Committee on the current state of U.S. compliance with the International Covenant on Civil and Political Rights (ICCPR). The United States ratified the ICCPR in 1992, but has not reported to the Human Rights Committee since 1994.

Endnotes

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⁴ 5 U.S.C. Appendix 2.

⁵ See Attorney General John Ashcroft, "Memorandum for Heads of All Federal Departments and Agencies," October 12, 2001, available at <http://www.doi.gov/foia/foia.pdf> (accessed March 2, 2003).

⁶ See Attorney General Janet Reno, "Attorney General Reno's FOIA Memoranda," October 4, 1993, available at http://www.usdoj.gov/oip/foia_updates/Vol_XIV_3/page3.htm (accessed March 2, 2003).

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⁸ See The Homeland Security Act of 2002, available at <http://news.findlaw.com/wp/docs/terrorism/hsa2002.pdf> (accessed March 2, 2003).

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¹⁴ See 5 U.S.C. § 552(b)(1)(A).

¹⁵ See 5 U.S.C. § 552(b)(7).

¹⁶ H.R. Rep. No. 107-609, p. 220 (2002).

¹⁷ *Ibid.*

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²¹ *Ibid.*; Homeland Security Act of 2002, § 214(f).

²² Homeland Security Act of 2002, § 214(a)(1)(C).

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- ²⁷ See The Homeland Security Act of 2002, § 871.
- ²⁸ See 5 U.S.C. App. 2 (1972).
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- ³⁰ See *Ibid.* (Noting that many agencies with homeland security missions, such as the DOJ and the FBI, operate under FACA without difficulty).
- ³¹ See John W. Dean, “GAO v. Cheney Is Big Time Stalling: The Vice President Can Win Only If We Have Another *Bush v. Gore*-like Ruling,” Part II, *FindLaw’s Legal Commentary*, February 1, 2002, available at <http://writ.news.findlaw.com/dean/20020201.html> (accessed March 2, 2003).
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- ³³ See Byron York, “GAO vs. Cheney: Coming Soon,” *National Review*, February 20, 2002, available at <http://www.nationalreview.com/york/york022002.shtml> (accessed February 2, 2003).
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- ³⁶ See Marcia Coyle, “GAO is Hit with Setback to Power,” *National Law Journal*, December 16, 2002.
- ³⁷ See Stuart Taylor, Jr., “A Victory Gone Too Far,” *Legal Times*, December 16, 2002.
- ³⁸ General Accounting Office, “GAO Statement Concerning Litigation,” February 22, 2002, available at <http://www.gao.gov/press/gaostatement0222.pdf> (accessed March 2, 2003).
- ³⁹ See “Biography of Judge John D. Bates,” available at <http://www.dcd.uscourts.gov/bates-bio.html> (accessed March 2, 2003).
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⁴⁴ *Ibid.*

⁴⁵ See “President Signs Anti-Terrorism Bill,” White House Press Release, October 26, 2002, available at <http://www.whitehouse.gov/news/releases/2001/10/20011026-5.html> (accessed March 2, 2003).

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⁴⁸ See Steve Schultze, “Sensenbrenner Wants Answers on Act,” *Journal Sentinel*, August 19, 2002; “Justice: From the Ashes of 9/11: Big Bad John,” *National Journal*, January 25, 2003.

⁴⁹ Letter of Daniel J. Bryant, Assistant Attorney General, to the Honorable F. James Sensenbrenner, Jr., July 26, 2002, enclosing “Questions Submitted by the House Judiciary Committee to the Attorney General on USA PATRIOT Act Implementation,” available on <http://www.house.gov/judiciary/patriotresponses101702.pdf> (accessed February 20, 2003).

⁵⁰ Senators Patrick Leahy, Charles Grassley, and Arlen Specter, “Interim Report: FBI Oversight in the 107th Congress by the Senate Judiciary Committee: FISA Implementation Failures,” p. 13, February 2003, available at <http://specter.senate.gov/files/specterspeaks/ACF6.pdf> (accessed March 5, 2003).

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⁵² See “ACLU Seeks Information on Government’s Use of Vast New Surveillance Powers,” August 21, 2002, available at http://archive.aclu.org/issues/privacy/USAPA_feature.html (accessed March 2, 2003).

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⁵⁵ Letter to David M. Walker, Comptroller General of the U.S., U.S. General Accounting Office, from U.S. House Representative John Conyers, Jr. and U.S. Senator Russell D. Feingold, dated January 28, 2002, available at http://www.house.gov/judiciary_democrats/gaoantiterrorltr12802.pdf (accessed December 10, 2002).

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⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ See, e.g., *Ibid.*; Jack Balkin, “A Dreadful Act II: Secret Proposals in Ashcroft’s Anti-Terror War Strike Yet Another Blow at Fundamental Rights,” *Los Angeles Times*, February 13, 2003.

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⁶³ *Ibid.*

⁶⁴ U.S. Supreme Court, *Afroyim v. Rusk*, 387 U.S. 253 (1967), BLACK, J., Opinion of the Court.

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⁶⁷ *Ibid.* Rule 6(e) of the Federal Rules of Criminal Procedure requires attorneys and grand jurors to refrain from publicly commenting on "matters occurring before the grand jury." The current rule does not apply to grand jury witnesses.

⁶⁸ See Chuck Grassley, "Grassley Seeks Whistleblower Protections for New Federal Employees Senator Says Public Safety and Security at Stake," Press Release, June 26, 2002, available at <http://www.senate.gov/~grassley/releases/2002/p02r6-26b.htm> (accessed January 19, 2003).

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⁷² *Ibid.*

⁷³ *Ibid.*, p. 1.

⁷⁴ *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976).

⁷⁵ *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting).

⁷⁶ John Ashcroft, "Welcoming Big Brother," *Washington Times*, August 12, 1997. Mr. Ashcroft wrote this op-ed as a U.S. senator, in response to a request by the Clinton administration for increased authority to survey high-tech communications.

⁷⁷ Electronic Privacy Information Center, EPIC Briefing on Total Information Awareness, available at http://www.epic.org/events/tia_briefing/ (accessed December 9, 2002).

⁷⁸ The American Library Association puts this simply on its website: "Libraries or librarians served with a search warrant issued under FISA rules may not disclose, under of penalty of law, the existence of the warrant or the fact that records were produced as a result of the warrant. A patron cannot be told that his or her records were given to the FBI or that he or she is the subject of an FBI investigation." Available at <http://www.ala.org/alaorg/oif/usapatriotlibrary.html> (accessed February 20, 2003).

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⁸⁴ *Ibid.*

⁸⁵ See 50 U.S.C. § 1801-1811, 1821-1829, 1841-1846, 1861-62.

⁸⁶ See, e.g., Senators Patrick Leahy, Charles Grassley, and Arlen Specter, "Interim Report: FBI Oversight in the 107th Congress by the Senate Judiciary Committee: FISA Implementation Failures," p. 5, February 2003, available at <http://specter.senate.gov/files/specterspeaks/ACF6.pdf> (accessed March 5, 2003).

⁸⁷ In determining whether there is probable cause to issue a traditional criminal warrant, the issuing judge makes "a practical common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

⁸⁸ See *In Re All Matters Submitted to the Foreign Intelligence Surveillance Court*, U.S. Foreign Intelligence Surveillance Court, May 17, 2002, p. 5, available at <http://www.fas.org/irp/agency/doj/fisa/fisc051702.html> (accessed March 4, 2003).

⁸⁹ See *In Re Sealed Case No. 02-001*, U.S. Foreign Intelligence Surveillance Court of Review, November 18, 2002, p. 34, available at <http://www.cadc.uscourts.gov/common/newsroom/02-001.pdf>. See also David Cole, "Secret Court Takes the Fourth," *CounterPunch*, November 22, 2002 (noting that FISA does not require probable cause of a crime), available at <http://www.counterpunch.org/cole1122.html> (accessed March 5, 2003).

⁹⁰ Anita Ramasastry, "The Foreign Intelligence Surveillance Court of Review Creates a Potential End Run Around Traditional Fourth Amendment Protections for Certain Criminal Law Enforcement Wiretaps," *FindLaw Legal Commentary*, November 26, 2002, available at <http://writ.news.findlaw.com/ramasastry/20021126.html> (accessed March 5, 2003).

⁹¹ For a discussion of the FBI's powers under FISA, see *In Re All Matters Submitted to the Foreign Intelligence Surveillance Court*, U.S. Foreign Intelligence Surveillance Court, May 17, 2002, pp. 5-6.

⁹² *Ibid.*, p. 9.

⁹³ See, e.g., Anita Ramasastry, "Why the Foreign Intelligence Surveillance Act Court Was Correct to Rebuke the Department of Justice," *FindLaw Legal Commentary*, September 4, 2002, available at <http://writ.news.findlaw.com/ramasastry/20020904.html> (accessed March 3, 2003).

⁹⁴ See *In Re All Matters Submitted to the Foreign Intelligence Surveillance Court*, U.S. Foreign Intelligence Surveillance Court, May 17, 2002.

⁹⁵ Section 208 of the USA Patriot Act called for the appointment of 11 federal judges to the Foreign Intelligence Surveillance Court. At the time the decision was issued, however, only seven federal judges sat on the court: (1) Honorable Royce C. Lamberth; (2) Honorable William H. Stafford, Jr.; (3) Honorable Stanley S. Brotman; (4) Honorable Harold A. Baker; (5) Honorable Michael J. Davis; (6) Honorable Claude M. Hilton; and (7) Honorable Nathaniel M. Gorton.

⁹⁶ See *In Re All Matters Submitted to the Foreign Intelligence Surveillance Court*, U.S. Foreign Intelligence Surveillance Court, May 17, 2002, p. 14.

⁹⁷ The judges on the Foreign Intelligence Surveillance Court of Review are: (1) Honorable Ralph Guy; (2) Honorable Edward Leavy; and (3) Honorable Laurence Silberman.

⁹⁸ See David Cole, "Secret Court Takes the Fourth," November 22, 2002, available at <http://www.counterpunch.org/cole1122.html> (accessed March 4, 2003).

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¹⁰⁰ See *Ibid.*, pp. 24-27.

¹⁰¹ See *Ibid.*, pp. 28-30.

¹⁰² See, e.g., Ramasastry, "The Foreign Intelligence Surveillance Court of Review," *FindLaw Legal Commentary*, November 26, 2002, (explaining that criminal law enforcement can now "legally direct, or at least heavily influence, FBI investigations related to foreign intelligence").

¹⁰³ See *In Re Sealed Case No. 02-001*, U.S. Foreign Intelligence Surveillance Court of Review., pp. 29-30.

¹⁰⁴ *Ibid.*, p. 30. See also Charles Lane, "In Terror War, 2nd Track for Suspects," *Washington Post*, December 1, 2002.

¹⁰⁵ See *In Re Sealed Case No. 02-001*, U.S. Foreign Intelligence Surveillance Court of Review., pp. 28-30.

¹⁰⁶ See Draft Domestic Security Enhancement Act of 2003, January 9, 2003, available at http://www.pulicintegrity.org/dtaweb/downloads/Story_01_020703_Doc_1.pdf (accessed March 5, 2003).

¹⁰⁷ See, e.g., Timothy Edgar, "Interested Persons Memo: Section-by-Section Analysis of Justice Department draft 'Domestic Security Enhancement Act of 2003,' February 14, 2003, p. 4, available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=11835&c=206> (accessed March 5, 2003).

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¹²⁹ See “IRSA Applauds Congress’ Appeal to President Bush for Increased Refugee Admissions,” September 27, 2002, available at <http://www.refugees.org/news/crisis/resettlement/092702.cfm> (accessed March 6, 2003). In a December 31, 2002 letter to Special Assistant to the President Elliot Abrams, Representative Smith again called for action “to ensure that our nation maintains its role as a beacon of freedom through maintaining a strong refugee program.” Letter, Representative Christopher H. Smith to Special Assistant to the President Elliot Abrams, December 31, 2002, available at http://www.refugeesusa.org/preview/help_ref/abrams_admissions.pdf (accessed March 6, 2003).

¹³⁰ On January 16, 2003, the Hebrew Immigrant Aid Society, writing on behalf of the Refugee Council USA, a coalition of faith-based and non-sectarian agencies (which includes the Lawyers Committee), wrote to Secretary of State Colin Powell to express concern about the attempted freeze on the admission of Iraqi refugees: “America’s founding father, George Washington, wrote that the United States gives bigotry no sanction and persecution no assistance. Racial and ethnic-based policies such as outright bans on certain nationalities irrespective of the merit of their refugee claims demonstrate a failure to heed Washington’s words.”

¹³¹ See 66 Fed. Reg. 54909-54912. See also Lawyers Committee for Human Rights, “A Year of Loss: Reexamining Civil Liberties since September 11,” p. 18, available at http://www.lchr.org/us_law/loss/loss_ch3a.htm (accessed March 6, 2003).

¹³² See Women’s Commission for Refugee Women & Children, *Refugee Policy Adrift: The United States and Dominican Republic Deny Haitians Protection*, January 2003, and *Innocents in Jail: INS Moves Refugee Women from Krome to Turner Guilford Knight Correction Center, Miami*, June 2001; Alfonso Chardy, “Activists Accused the INS of Mistreating Female Refugees at the TGK Center,” *Miami Herald*, February 8, 2001.

¹³³ The Lawyers Committee has filed two amicus briefs in this case, arguing that the detention policy — targeted specifically at Haitians — violates international law (on file with the Lawyers Committee for Human Rights).

¹³⁴ Women’s Commission for Refugee Women & Children, *Refugee Policy Adrift: The United States and Dominican Republic Deny Haitians Protection*, January 2003, p. 31, n. 229 (citing INS brief in bond hearing).

¹³⁵ *Ibid.* p. 31, n.233 (citing Declarations of Captain Kenneth Ward, U.S. Coast Guard; Memorandum to Stephen E. Biegun, National Security Council, from Maura Harty, Department of State; Declaration of Joseph J. Collins, Department of State).

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¹³⁸ Department of Justice, “Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act,” (Order No. 2243-02), November 13, 2002, available at <http://www.immigration.gov/graphics/lawsregs/fr111302.pdf> (accessed March 7, 2003).

¹³⁹ See Lawyers Committee for Human Rights, “Comments on INS No. 2243-02 Notice of Designation Expansion of Expedited Removal to Sea Arrivals,” (Order No. 2243-02, Fed. Reg. 68924-26, November 13, 2002), December 13, 2002, available at http://www.lchr.org/media/2002_alerts/1112.htm (accessed December 20, 2002). The Notice authorizes the INS to place in expedited removal individuals arriving in the United States by sea, boat, or other means, who have not been admitted or paroled, and who have not been physically present in the United States for a continuous period of two years.

¹⁴⁰ 67 Fed. Reg. at 68924.

¹⁴¹ *Ibid.*

¹⁴² See Marisa Taylor, “Background Check for Asylum Seekers,” *San Diego Union-Tribune*, August 15, 2002.

¹⁴³ Request by the International Human Rights Law Group, et. al., “Request for Precautionary Measures Under Article 25 of the Commission’s Regulations,” June 20, 2002, available at <http://www.hrlawgroup.org/resources/content/IACHRPrecautionaryMeasures.pdf> (accessed January 26, 2003).

¹⁴⁴ *Ibid.*

¹⁴⁵ See Letter from the Inter-American Commission on Human Rights to Gay McDougall, International Human Rights Law Group, dated September 26, 2002, available at http://www.hrlawgroup.org/resources/content/IACHR_Award.pdf (accessed December 2, 2002).

¹⁴⁶ *Ibid.*

¹⁴⁷ See Warren Richey, “Court to Clarify the Rights of Noncitizens,” *Christian Science Monitor*, January 14, 2003.

¹⁴⁸ U.S. Department of Justice, Office of the Inspector General, “Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act,” January 22, 2003, available at http://www.usdoj.gov/oig/special/2003_01a/final.pdf (accessed March 5, 2003).

¹⁴⁹ U.S. Department of Justice, Office of Inspector General, “Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act,” July 15, 2002, available at http://www.usdoj.gov/oig/special/patriot_act/index.htm (accessed December 11, 2002).

¹⁵⁰ USA PATRIOT Act, Section 1001

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¹⁵⁶ Adam Clymer, “Government Openness at Issue as Bush Holds Onto Records,” *New York Times*, January 3, 2003.

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¹⁷⁶ See United Nations Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, p. 197, U.N. Doc. A/RES/39/708 (1984); See also Foreign Affairs Reform and Restructuring Act (FARRA), Pub. L. No. 105-277, Div. G, October 21, 1998, Section 2242 (a).

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¹⁸³ Congress authorized in 1996 the creation of an entry-exit system, as part of the "Illegal Immigration Reform and Immigrant Responsibility Act of 1996," Immigration and Nationality Act, 110, 8 U.S.C. 1365a and the USA PATRIOT Act, 414. But the current registration program, as designed and implemented by the Justice Department, is dramatically flawed in carrying out this objective. Several members of Congress have objected to the manner in which their intent has been interpreted. See, e.g., Letter to Attorney General John Ashcroft from U.S. Senator Russell D. Feingold, U.S. Senator Edward M. Kennedy and U.S. Representative John Conyers, Jr., December 23, 2002, available at http://www.house.gov/judiciary_democrats/dojentryexittr122302.pdf (accessed January 23, 2003).

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- ¹⁹⁵ Edward Walsh, "Senate Votes to Halt INS Registration Program," *Washington Post*, January 25, 2003.
- ¹⁹⁶ The administration has used the term "unlawful combatant" to stress that the detainees are not considered "prisoners of war." A basis for this claim is the supposed failure of al Qaeda and the Taliban to comply with the laws of war. For similar reasons, and with similar intent, the government has also used the term "enemy combatant" to describe these individuals. As used by the administration, the two terms are interchangeable.
- ¹⁹⁷ Article 118 of the Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949 (the Third Geneva Convention), provides that "prisoners of war shall be released and repatriated without delay after the cessation of active hostilities." The Third Geneva Convention is available at <http://www.icrc.org/ihl.nsf/WebCONVFULL/OpenView> (accessed February 10, 2003).
- ¹⁹⁸ See, e.g., Complaint in the case of *Odah, et al., v. United States of America, et al.* (D. D.C., May 1, 2002) ("The Family Members believe that the Kuwaiti Detainees were in Afghanistan or Pakistan, some before and some after September 11, 2001, as volunteers for charitable purposes to provide humanitarian aid to the people of those countries...[and] that none of the Kuwaiti Detainees is or ever has been a member or supporter of al Qaida or the Taliban, or of any terrorist organization.")
- ¹⁹⁹ "Bosnia Suspects Handed to U.S.," CNN.com, January 18, 2002, available at <http://www.cnn.com/2002/WORLD/europe/01/18/inv.bosnia.cuba/> (accessed February 10, 2003).
- ²⁰⁰ The June 9, 2002 Order designating Padilla as an "enemy combatant" is available at <http://news.findlaw.com/hdocs/docs/terrorism/padillabush60902det.pdf> (accessed March 7, 2003).
- ²⁰¹ The entire opinion, *José Padilla v. George Bush, et al.*, and certain other documents relating to the case, are available at <http://news.findlaw.com/legalnews/us/terrorism/cases/index.html> (accessed January 27, 2003). Some other materials on the case, not available on the findlaw site, can be accessed through the National Institution of Military Justice website, available at <http://www.nimj.com>.
- ²⁰² Benjamin Weiser, "Lawyers Renew Plea to Meet Terror Suspect in Navy Brig," *New York Times*, January 14, 2003.
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- ²⁰⁴ The text of the statute is available at http://caselaw.lp.findlaw.com/scripts/ts_search.pl?title=18&sec=4001 (accessed January 27, 2003).

²⁰⁵ P.L. No. 107-40, § 2(a)(2001), available at <http://jurist.law.pitt.edu/terrorism/sjres23.htm> (accessed January 27, 2003). Section 4001(a), passed in 1971 “amid mounting public pressure during the Vietnam War... represented a legislative response to the outrage over the executive interment of Japanese Americans during World War II, detentions carried out pursuant only to a presidential order.” Stephen I. Vladeck, “A Small Problem of Precedent: 18 U.S.C. § 4001(a) and the Detention of U.S. Citizen ‘Enemy Combatants,’” 112 *Yale Law Journal* 961, January 2003.

²⁰⁶ *José Padilla v. George Bush, et al.*

²⁰⁷ *Ex Parte Quirin*, 317 U.S. 1 (1942), available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=317&invol=1> (accessed February 12, 2003). Due to the rushed pace of the proceedings (less than nine weeks from landing to execution of six of the saboteurs), the *Quirin* case has received much criticism from commentators. It is often mentioned together with another much criticized World War II Supreme Court case, *Korematsu v. United States*, 323 U.S. 214 (1944), which upheld President Roosevelt’s authority to order the internment of tens of thousands of citizens and non-citizens of Japanese extraction. *Korematsu* is available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=323&invol=214> (accessed February 12, 2003). A good analysis of the *Quirin* case is Louis Fisher, “Military Tribunals: The *Quirin* Precedent,” *Congressional Research Service Report for Congress*, RL31340, March 26, 2002, available at <http://www.au.af.mil/au/awc/awcgate/crs/rl31340.pdf> (accessed February 13, 2003).

²⁰⁸ The Memorandum of Law is available through the website of the National Institute of Military Justice, <http://www.nimj.com> (accessed February 11, 2003).

²⁰⁹ The Memorandum argues for the “clear and convincing” standard by analogy to the Bail Reform Act, 18 U.S.C. § 3142, which permits (in paragraph (f)) pre-trial detention of criminal defendants who may pose a danger to the community only when the government shows “that no condition or combination of conditions will reasonably assure the safety of any other person and the community... by clear and convincing evidence.” The Bail Reform Act can be found at http://caselaw.lp.findlaw.com/scripts/ts_search.pl?title=18&sec=3142 (accessed February 11, 2003). The Act was upheld by the Supreme Court in *United States v. Salerno*, 481 U.S. 739 (1987), available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=481&page=739> (accessed February 11, 2003).

²¹⁰ *See, e.g.*, Barak Dehghanpishen, John Barry and Roy Gutman, “The Death Convoy of Afghanistan,” *Newsweek*, August 26, 2002, describing the gruesome “death by container” inflicted by Dostum’s forces in November 2001 on hundreds of unarmed surrendered Taliban soldiers. The soldiers were locked into sealed shipping containers and left to suffocate. *See also* Michael Griffin, “A Gruesome Record,” *Guardian*, November 16, 2001, describing the capture of Kabul in 1992 by mujahadin forces including “Dostum’s mounted militia... who... fell upon the civilian population, leaving many dead in their wake.”

²¹¹ Order in the case of *Hamdi, et al., v. Rumsfeld, et al.* (E.D. Va., August 16, 2002).

²¹² *Ibid.*

²¹³ The Fourth Circuit begins its analysis by rejecting in short order the relevance of 18 U.S.C. § 4001 (a), on substantially the same grounds as Judge Mukasey in the *Padilla* ruling.

²¹⁴ The opinion, *Hamdi, et al. v. Rumsfeld, et al.* (4th Cir., January 8, 2003) is available at the National Institute of Military Justice website, <http://www.nimj.com> (accessed January 27, 2003). Other documents relating to the *Hamdi* case can be found at <http://news.findlaw.com/legalnews/us/terrorism/cases/> (accessed January 27, 2003). *See also* Neil A. Lewis, “Threats and Responses: The Courts; Detention Upheld in Combatant Case,” *New York Times*, January 9, 2003.

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- ²¹⁵ *Hamdi, et al. v. Rumsfeld, et al.* (4th Cir., January 8, 2003), available at the National Institute of Military Justice website, <http://www.nimj.com> (accessed January 27, 2003).
- ²¹⁶ This is the standard that Judge Mukasey appears to be considering in the *Padilla* case, as described above.
- ²¹⁷ 317 U.S. 1 (1942).
- ²¹⁸ *Hamdi, et al. v. Rumsfeld, et al.* (4th Cir., January 8, 2003) (quoting *Ex Parte Quirin*), available at the National Institute of Military Justice website, <http://www.nimj.com> (accessed January 27, 2003).
- ²¹⁹ *Ibid.*
- ²²⁰ *Ibid.*
- ²²¹ Hamdi's lawyer, Frank Dunham, insists that "Nobody knows what his version of the facts might be." Nat Hentoff, "Liberty's Court of Last Resort," *Village Voice Online*, January 24, 2003, available at <http://www.villagevoice.com/issues/0305/hentoff.php> (accessed January 27, 2003).
- ²²² *Hamdi, et al. v. Rumsfeld, et al.* (4th Cir., January 8, 2003), available at the National Institute of Military Justice website, <http://www.nimj.com> (accessed January 27, 2003).
- ²²³ *Ibid.*
- ²²⁴ *Ibid.*
- ²²⁵ See, e.g., David E. Sanger and Felicity Barringer, "President Readies U.S. for Prospect of Imminent War," *New York Times*, March 7, 2003: "Mr. Bush...said Sept. 11 'should say to the American people that we're now a battlefield.'" Earlier in its January 3 opinion, the Fourth Circuit quotes its own previous ruling in the same proceeding, noting that the "political branches are best positioned to comprehend this *global* war in its full context" (quoting *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002) (emphasis added)).
- ²²⁶ *Hamdi, et al., v. Rumsfeld, et al.* (4th Cir., January 8, 2003), available at the National Institute of Military Justice website, <http://www.nimj.com> (accessed January 27, 2003).
- ²²⁷ Henry Weinstein, "ABA Opposes Bush 'Enemy Combatants' Policy," *Los Angeles Times*, February 11, 2003.
- ²²⁸ See Attorney General Transcript News Conference regarding Zacarias Moussaoui, December 11, 2001, announcing the indictment of Moussaoui, available at http://www.fas.org/irp/world/para/docs/mous_indict.html (accessed February 12, 2003). The Transcript web page includes a link to the Indictment, issued that day. Other court documents in the Moussaoui case can be found at <http://news.findlaw.com/legalnews/us/terrorism/cases/index.html> (accessed February 12, 2003).
- ²²⁹ "Under interrogation, Bin al-Shibh has reportedly given the CIA some valuable information, but also one highly unwelcome tidbit: Al Qaeda thinks Moussaoui is as crazy as we do." Jonathan Turley, "Sanity and Justice Slipping Away," *Los Angeles Times*, February 10, 2003.
- ²³⁰ "Moussaoui Granted Access to Suspect," Reuters, February 1, 2003.
- ²³¹ Philip Shenon, "Judge Grants the Government a Delay of Moussaoui's Trial," *New York Times*, February 13, 2003. The original Order and the government's appeal have not been made public. The request for the stay is available at <http://news.findlaw.com/hdocs/docs/moussaoui/usmouss20703pmot.pdf> (accessed February 12, 2003).

²³² See Philip Shenon and Eric Schmitt, "Threats and Responses: The 9/11 Suspect; White House Weighs Letting Military Tribunal Try Moussaoui, Officials Say," *New York Times*, November 10, 2002; See also Andrew Cohen, "A Secret Trial for Moussaoui?," *CBS News.com*, November 7, 2002, available at <http://www.cbsnews.com/stories/2002/11/07/news/opinion/courtwatch/main528515.shtml> (accessed January 27, 2003). See also Jonathan Turley, "Sanity and Justice Slipping Away," *Los Angeles Times*, February 10, 2003; "The Moussaoui Experiment," *Washington Post*, January 27, 2003.

²³³ See Greg Frost, "Shoe-Bomber Pleads Guilty, Admits Bin Laden Link," Reuters, October 4, 2002; Associated Press, "U.S. Prosecutors Submit Videos Simulating 'Shoe Bomb' Damage," *Wall Street Journal*, January 17, 2003.

²³⁴ "Shoe Bomber Leaves Behind A Legacy," CBS News.com, January 31, 2003, available at <http://www.cbsnews.com/stories/2002/10/04/attack/main524340.shtml> (accessed February 12, 2003).

²³⁵ Juliette Kayyem, "The Sentencing of 'Shoe Bomber' Richard Reid: Its Larger Significance for Terrorism Cases and the 'War on Terrorism' in General," Findlaw.com, available at http://writ.news.findlaw.com/commentary/20030203_kayyem.html (accessed February 12, 2003).

²³⁶ "Transfer of Detainees Completed," *Department of Defense News Release*, October 28, 2002, available at http://www.dod.mil/news/Oct2002/b10282002_bt550-02.html (accessed March 2, 2004); "Three Afghans Home from Guantanamo," Associated Press, October 28, 2002; Todd Pittman, "Former Detainees Recount Life at Guantanamo," Associated Press, October 29, 2002.

²³⁷ Paisley Dodds, "New Suspects Arrive at Guantanamo Bay," Associated Press, February 7, 2003; "U.S. Adds 30 Detainees to GITMO," Reuters, October 28, 2002.

²³⁸ Don van Natta Jr., "Questioning Terror Suspects in a Dark and Surreal World," *New York Times*, March 9, 2003. Authorities will be opening a special ward for detainees with mental problems. "U.S. Plans Mental Ward for Detainees," Associated Press, March 7, 2003.

²³⁹ Neil A. Lewis, "Judge Rebuffs Detainees at Guantanamo," *New York Times*, August 1, 2002.

²⁴⁰ See Neil A. Lewis, "Guantanamo Prisoners Seek to See Families and Lawyers," *New York Times*, December 3, 2002.

²⁴¹ The cases are *Rasul, et al. v. George Walker Bush, et al.*, and *Odah, et al. v. United States of America, et al.* Some of the filings in the *Rasul* case are available at <http://www.campxray.net/page2.html> (accessed March 7, 2003). United States Court of Appeals, for the District of Columbia Circuit, Argued December 2, 2002, decided March 11, 2003, No. 02-5251, *Khaled A.F. Al Odah, et. al., v. United States of America, et al.*

²⁴² *Abassi v. Secretary of State*, entire opinion available on the website of the National Institute of Military Justice, <http://nimj.com> (accessed January 27, 2003). See Neil A. Lewis, "British Judges Criticize U.S. on the Prisoners Held at Guantanamo," *New York Times*, November 8, 2002.

²⁴³ See Bill Gertz and Rowan Scarborough, "Notes from the Pentagon: GITMO Dispute," *Washington Times*, October 4, 2002, available at <http://www.washtimes.com/national/20021004-92332157.htm> (accessed January 27, 2003); "GITMO Camp Commander Relieved," *Washington Post*, October 14, 2002. Article 41 of the Third Geneva Convention provides that "[i]n every [prisoner of war] camp the text of the [Third Geneva] Convention... shall be posted, in the prisoners' own language, in places where all may read them."

²⁴⁴ Greg Miller, "Many Held at Guantanamo Not likely Terrorists," *Los Angeles Times*, December 22, 2002; John Mintz, "Detainees at Base in Cuba Yield Little Valuable Information," *Washington Post*, October 29, 2002.

²⁴⁵ Greg Miller, "Many Held at Guantanamo Not Likely Terrorists," *Los Angeles Times*, December 22, 2002. As an example of the inflexibility of the screening procedures, Miller quotes one interrogator in Afghanistan describing a restaurant worker picked up near the Pakistani border who "had the mental capacity to put flatbread in an oven and that was the extent of the intellect....He never got trained on a rifle, never got pressed into service. But he was Arab by birth so he was picked up and sent away."

²⁴⁶ John Mintz, "Detainees at Base in Cuba Yield Little Valuable Information," *Washington Post*, October 29, 2002.

²⁴⁷ Dana Priest and Barton Gellman, "U.S. Decries Abuse but Defends Interrogations," *Washington Post*, December 26, 2002.

²⁴⁸ Dana Priest and Barton Gellman, "U.S. Decries Abuse but Defends Interrogations," *Washington Post*, December 26, 2002. One U.S. official told reporters "in a deadpan voice, that 'pain control [in wounded patients] is a very subjective thing.'" In March, 2003, U.S. officials acknowledged to a reporter manipulating access to pain medication while interrogating Abu Zubaydah, a senior al Qaeda leader who was shot in the chest, groin and thigh when he was captured in March 2002 in Pakistan. "American questioners teased him with occasional painkillers to try to cull information." Erich Lichtblau and Adam Liptak, "Questioning of Accused Expected to Be Humane, Legal and Aggressive," *New York Times*, March 4, 2003. "American Taliban" John Lindh has alleged that he was stripped naked, blindfolded and bound to a stretcher "with heavy duct tape wrapped tightly around his chest, upper arms, ankles and the stretcher itself," and kept in this condition in a windowless metal shipping container for two days. Lindh also asserted that after being handed over to U.S. custody, he was interrogated while wounded with a bullet in his leg, and denied surgery for two weeks despite repeated requests to the U.S. agents questioning him." See Proffer of Facts in Support of Defendant's Suppression Motions, in the case of *United States v. John Phillip Walker Lindh* (E.D. Va., June 13, 2002).

²⁴⁹ See Country Reports on Human Rights Practices — 2001, Released by the Bureau of Democracy, Human Rights, and Labor, Department of State, March 4, 2002 ("DOS Human Rights Report"), available at <http://www.state.gov/g/drl/hr/c1470.htm> (accessed January 27, 2003). The DOS Human Rights Report characterizes as "abuses" prolonged standing (Palestinian Authority); shackling in contorted positions (Israel; Palestinian Authority); sleep deprivation (Israel; Palestinian Authority); and beatings (Israel; Palestinian Authority). The report characterizes as "torture" prolonged standing (Turkey); sleep deprivation (Jordan; Turkey); loud music (Turkey); and beatings (Egypt; Syria; Turkey).

²⁵⁰ Eric Lichtblau and Adam Liptak, "Questioning of Accused Expected to Be Humane, Legal and Aggressive," *New York Times*, March 4, 2003.

²⁵¹ Ibid. Military interrogators told the *Wall Street Journal*: "Interrogators can also play on their prisoners' phobias, such as fear of rats or dogs, or disguise themselves as interrogators from a country known to use torture or threaten to send the prisoners to such a place. Prisoners can be stripped, forcibly shaved and deprived of religious items and toiletries." Jess Bravin and Gary Fields, "How do Interrogators Make A Captured Terrorist Talk?," *Wall Street Journal*, March 4, 2003.

²⁵² Jess Bravin and Gary Fields, "How do Interrogators Make A Captured Terrorist Talk?," *Wall Street Journal*, March 4, 2003. One U.S. intelligence officer told the *Journal*: "U.S. officials overseeing interrogations of captured al Qaeda forces at Bagram and Guantanamo Bay Naval Base in Cuba can even authorize 'a little bit of smack-face.'" Ibid.

²⁵³ Carlotta Gall, "U.S. Military Investigating Death of Afghan in Custody," *New York Times*, March 4, 2003; "Prisoners 'Killed' at US Base," BBC News World Edition (March 6, 2003), available at http://news.bbc.co.uk/2/hi/south_asia/2825575.stm (accessed March 6, 2003). A U.S. spokesman denied mistreatment at the camp, and attributed the "homicide" determinations to "a limited choice when filling the military death certificate." *Ibid.* Two other Afghan former prisoners told the *New York Times* that while they were held in Bagram they were:

[M]ade to stand hooded, their arms raised and chained to the ceiling, their feet shackled, unable to move for hours at a time, day and night. . . . The prisoners. . . were freed from their standing position only to eat, pray and go to the bathroom. [One of them] said he had spent 16 days in the upstairs rooms, standing for 10 of them until his legs became so swollen that the shackles around his ankles tightened and stopped the blood flow. He said he was naked the entire time and allowed to dress only when he was taken for interrogation or to the bathroom. [He] said the cold kept him awake, as did the American guards, who kicked and shouted at him to stop him from falling asleep.

²⁵⁴ Carlotta Gall, "U.S. Military Investigating Death of Afghan in Custody," *New York Times*, March 4, 2003.

²⁵⁵ John Mintz, "Detainees at Base in Cuba Yield Little Valuable Information," *Washington Post*, October 29, 2002; Dana Priest and Barton Gellman, "U.S. Decries Abuse but Defends Interrogations," *Washington Post*, December 25, 2002.

²⁵⁶ The DOS Human Rights Report recounts allegations of torture in Jordan, including "sleep deprivation, beatings on the soles of the feet, prolonged suspension with ropes in contorted positions, and extended solitary confinement." With regard to Egypt, the DOS Human Rights Report states that "there were numerous, credible reports that security forces tortured and mistreated citizens," with victims reporting such "methods of torture. . . [as] being stripped and blindfolded; suspended from a ceiling or doorframe with feet just touching the floor, beaten with fists, whips, metal rods, or other objects; subjected to electrical shocks; and doused with cold water. . . . Some victims, male and female detainees, reported that they were sexually assaulted or threatened with the rape of themselves or family members." As for Morocco, while noting some improvement over the years, the DOS Human Rights Report relates that "some members of the security forces still tortured or otherwise abused detainees," and cited "concerns regarding the Government's commitment to resolving the problem." *See also* Eric Lichtblau and Adam Liptak, "Questioning of Accused Expected to Be Humane, Legal and Aggressive," *New York Times*, March 4, 2003, quoting a senior Moroccan intelligence official: "I am allowed to use all means in my possession [in interrogating a prisoner]. . . . You have to fight all his resistance at all levels and show him that he is wrong, that his ideology is wrong and is not connected to religion. We break them, yes. And when they are weakened, they realize that they are wrong."

²⁵⁷ Peter Finn, "Case of Al Qaeda Suspect Shows Underside of War on Terrorism," *Wall Street Journal*, January 30, 2003. *See also* Dana Priest and Barton Gellman, "U.S. Decries Abuse but Defends Interrogations," *Washington Post*, December 26, 2002; Faye Bowers and Philip Smucker, "US Ships Al Qaeda Suspects to Arab States," *Christian Science Monitor*, July 26, 2002. The United States has long considered Syria one of the world leaders in human rights violations and support for terrorism. The DOS Human Rights Report reports "credible evidence that security forces continued to use torture, although to a lesser extent than in previous years. Former prisoners and detainees report that torture methods

include administering electrical shocks; pulling out of fingernails; forcing objects into the rectum; beating, sometimes while the victim is suspended from the ceiling; hyperextending the spine; and using a chair that bends backwards to asphyxiate the victim or fracture the victim's spine."

²⁵⁸ Knut Royce, "Mixed Reviews From Experts," *Newday*, February 6, 2003.

²⁵⁹ *Ibid.*

²⁶⁰ The International Covenant on Civil and Political Rights is available at http://www.unhcr.ch/html/menu3/b/a_ccpr.htm (accessed January 27, 2003). The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is available at <http://www.hrweb.org/legal/cat.html> (accessed January 27, 2003). Article 1 of the Torture Convention defines "torture" as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

²⁶¹ 18 U.S.C. § 2340A, available at http://caselaw.lp.findlaw.com/cascode/uscodes/18/parts/i/chapters/113c/sections/section_2340a.html (accessed March 3, 2003). Section 2340 (available at http://caselaw.lp.findlaw.com/scripts/ts_search.pl?title=18&sec=2340 (accessed March 3, 2003)) provides the following definitions:

- (1) "Torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;
- (2) "Severe mental pain or suffering" means the prolonged mental harm caused by or resulting from —
 - (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
 - (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
 - (C) the threat of imminent death; or
 - (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality....

²⁶² Similarly, General Comment 20 (October 3, 1992) of the U.N. Human Rights Committee, which is the official body charged with interpreting the International Covenant on Civil and Political Rights, has stated its view that the Covenant's article 7 prohibition against torture and cruel, inhuman or degrading

treatment or punishment includes the principle that “States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.” General Comment 20 is available at [http://193.194.138.190/tbs/doc.nsf/\(symbol\)/CCPR+General+comment+20.En?OpenDocument](http://193.194.138.190/tbs/doc.nsf/(symbol)/CCPR+General+comment+20.En?OpenDocument) (accessed January 27, 2003).

²⁶³ See article 130 of the Third Geneva Convention; and article 147 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949, available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6756482d86146898c125641e004aa3c5?OpenDocument> (accessed February 10, 2003).

²⁶⁴ Article 16, Torture Convention (emphasis added). The European Court of Human Rights has stressed this point. “Even in the most difficult of circumstances, such as the fight against organized terrorism and crime, the [European Convention on Human Rights] prohibits in absolute terms torture *or* inhuman or degrading treatment or punishment” (emphasis added). *Aksoy v. Turkey*, Case No. 21987/93, Judgment of the European Court of Human Rights (December 18, 1996).

²⁶⁵ “[T]he United States considers itself bound by the obligation under article 16 to prevent cruel, inhuman or degrading treatment or punishment, only insofar as the term ‘cruel, inhuman or degrading treatment or punishment’ means the ‘cruel, unusual and inhumane treatment or punishment’ prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.” U.S. Reservations upon Ratification of the Torture Convention, available at: http://193.194.138.190/html/menu3/b/treaty12_asp.htm (accessed March 7, 2003).

²⁶⁶ Supreme Court of Israel, sitting as the High Court of Justice (September 6, 1999), available at <http://62.90.71.124/mishpat/html/en/system/index.html> (accessed March 5, 2003).

²⁶⁷ *Ibid.*

²⁶⁸ While accepting that the “suspect’s cuffing, for the purpose of preserving the investigators’ safety, is...within the investigator’s authority,” cuffing a person in a “distorted and unnatural position... [and] causing pain” is not required to preserve the investigators’ safety and is prohibited. *Ibid.*

²⁶⁹ Accepting the legitimacy of the security service’s asserted need to “prevent contact between the suspect under interrogation and other suspects and his investigators” (to preclude collusive communications among suspects, for example, or to safeguard the investigators’ security), the court nonetheless rejected the use of a “head covering...entirely opaque...reaching the suspect’s shoulders,” as outside the scope of lawful authority. “Less harmful means must be employed, such as letting the suspect wait in a detention cell...[for covering the suspect’s eyes] in a manner that does not cause him physical suffering.” *Ibid.*

²⁷⁰ The court was “prepared to assume that the authority to investigate an individual equally encompasses precluding him from hearing other suspects under investigation or voices and sounds that, if heard by the suspect, risk impeding the interrogation’s success.” But requiring the suspect to hear “powerfully loud music...causes the suspect suffering...[and so does not] fall within the scope of a fair and responsible interrogation.” *Ibid.*

²⁷¹ The court recognized that “[t]he interrogation of a person is likely to be lengthy...[and that t]he suspect...is at times exhausted...often [as] the inevitable result of an interrogation...part of the ‘discomfort’ inherent to an interrogation.” But the court insisted that the “situation is different [when]...sleep deprivation shifts from being a ‘side effect’...to an end in itself. If the suspect is intentionally deprived of sleep for a prolonged period of time, for the purpose of tiring him out or ‘breaking’ him — it shall not fall within the scope of a fair and reasonable investigation,” and is absolutely prohibited. *Ibid.*

²⁷² The particular position examined by the court involved seating the suspect for long hours on a very low chair, tilted forward facing the ground and tied in a contorted position. The court was willing to “suppose that the seating of the suspect on a chair lower than that of his investigator can potentially serve a legitimate investigation objective (for instance, to establish the ‘rules of the game’ in the contest of wills between the parties, or to emphasize the investigator’s superiority over the suspect),” but it found no defensible grounds to justify seating the suspect “in a manner that causes him real pain and suffering.” *Ibid.*

²⁷³ *Ibid.*

²⁷⁴ *Ireland v. United Kingdom*, Case No. 5310/71, Judgment of the European Court of Human Rights (January 18, 1978).

²⁷⁵ *Ibid.* Though the court determined this conduct to be “inhuman and degrading treatment,” the court was not able to agree that it “occasion[ed] suffering of the particular intensity and cruelty implied by the word torture as so understood.” The distinction did not in any way lessen the absolutely prohibited status of the five techniques, however. In previously hearing the case, the European Commission on Human Rights had unanimously considered the combined use of the five methods to amount to torture, on the grounds that (1) the intensity of the stress caused by techniques creating sensory deprivation “directly affects the personality physically and mentally”; and (2) “the systematic application of the techniques for the purpose of inducing a person to give information shows a clear resemblance to those methods of systematic torture which have been known over the ages... a modern system of torture falling into the same category as those systems... applied in previous times as a means of obtaining information and confessions.” 19 Yearbook of the European Conventions on Human Rights (1976) (language of the Commission as quoted in Nigel S. Rodley, *The Treatment of Prisoners under International Law* (Oxford 2000), pp. 91-92). Many commentators have found the Commission’s view to be more persuasive than the Court’s. See generally Rodley’s discussion, pp. 90-95.

²⁷⁶ *Selmouni v. France*, Case No. 25803/94, Judgment of the European Court of Human rights (July 28, 1999).

²⁷⁷ *Ibid.*

²⁷⁸ Supreme Court of Israel, sitting as the High Court of Justice (September 6, 1999), available at <http://62.90.71.124/mishpat/html/en/system/index.html> (accessed March 5, 2003).

²⁷⁹ White House, “President Issues Military Order,” November 13, 2001, available at <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html> (accessed February 27, 2003).

²⁸⁰ Proc. 7463, Declaration of National Emergency by Reason of Certain Terrorist Attacks (September 14, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010914-4.html> (accessed March 6, 2003); Authorization for Use of Military Force, P.L. No. 107-40, § 2(a)(2001) (September 18, 2002), available at <http://jurist.law.pitt.edu/terrorism/sjres23.htm> (accessed January 27, 2003).

²⁸¹ Proc. 7463, Declaration of National Emergency by Reason of Certain Terrorist Attacks (September 14, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010914-4.html> (accessed March 6, 2003).

²⁸² Jess Bravin, “War on Terror, List of War Crimes Qualifying for Military Tribunals Set,” *Wall Street Journal*, February 28, 2003. See also Jess Bravin, “U.S. Readies Tribunal System to Prosecute Terror Suspects,” *Wall Street Journal*, December 10, 2002; Neil A. Lewis, “Administration’s Position Shifts on Plans for Tribunals,” *New York Times*, November 2, 2002.

²⁸³ The document cites as its authority both the president's Military Order and Secretary of Defense Rumsfeld's Military Commission Order No. 1 (March 21, 2002), as well as sections 113(d) and 140(b) of Title 10 of the United States Code. The draft and a related U.S. Department of Defense press conference transcript are available at http://www.defenselink.mil/news/Feb2003/t02282003_t0228commission.html (accessed March 3, 2003).

²⁸⁴ Amnesty International Canada, "Liberia: Court Ruling in Human Rights Defender's Case is a Huge Disappointment," September 5, 2002, available at <http://www.amnesty.ca/library/news/afr3401402.htm> (accessed January 29, 2003); Charles Cobb, Jr., "Detained Journalist in Military Hands, Says Minister," July 3, 2002, available at <http://allafrica.com/stories/200207030780.html> (accessed January 29, 2003).

²⁸⁵ See "Journalist Tortured, Envoy Blaney Discloses, Wants Gov't to Honor Terms of Agreement," *The News* (Monrovia), January 3, 2003, available at <http://allafrica.com/stories/200301030436.html> (accessed February 6, 2003); See also A. Abbas Dulleh, "Journalist Bility Says He, Others, Were Subjected to Severe Torture," *New Democrat News*, December 9, 2002, available at <http://www.newdemocrat.org/Stories/JournalistTorture.htm> (accessed February 7, 2003).

²⁸⁶ See Jonathan Paye-Layleh, "Liberia Tribunal: Journalist is POW," Associated Press, October 24, 2002.

²⁸⁷ See "Liberia: Hassan Bility to be Freed," *Index*, October 30, 2002, available at http://www.indexonline.org/indexindex/20021030_liberia.shtml (accessed December 2, 2002).

²⁸⁸ See "Taylor Orders Release of Bility, et al," *Liberian Orbit*, October 28, 2002.

²⁸⁹ See "Journalist Tortured, Envoy Blaney Discloses, Wants Gov't to Honor Terms of Agreement," *News* (Monrovia), January 3, 2003, available at <http://allafrica.com/stories/200301030436.html> (accessed February 6, 2003).

²⁹⁰ *Ibid.*

²⁹¹ See Charles Cobb, Jr. "Detained Journalist in Military Hands, Says Minister," *AllAfrica.Com* (Washington, D.C.), July 3, 2002, available at <http://allafrica.com/stories/200207030780.html> (accessed February 7, 2003).

²⁹² Bill K. Jarkloh, "U.S. Against Government Failure to Produce Bility, Others," *The News* (Monrovia), July 10, 2002, available at <http://allafrica.com/stories/200207100274.html> (accessed February 6, 2003).

²⁹³ See "Liberia: Amnesty Calls for Release of Rights Activist," *Africa News*, February 17, 2003; "Liberia Releases Religious Leaders, Intensifies Repression," *This Day* (Nigeria), January 12, 2003, available at <http://allafrica.com/stories/200301140173.html> (accessed February 7, 2003); Amnesty International, "Liberia: Court Ruling in Human Rights Defender's Case is a Huge Disappointment," September 5, 2002, available at <http://www.amnesty.ca/library/news/afr3401402.htm> (accessed February 7, 2003).

²⁹⁴ Amnesty International, "Liberia: Court Ruling in Human Right Defender's Case Is a Huge Disappointment," Press Release, September 5, 2002, available at <http://web.amnesty.org/802568F7005C4453/0/80256AB9000584F680256C2B005B9704?Open&Highlight=2,liberia> (accessed March 7, 2003).

²⁹⁵ Committee to Protect Journalists, "CPJ Condemns Raid on Newspaper and Radio Station," October 15, 2002, available at <http://www.cpj.org/news/2002/Uganda15oct02na.html> (accessed December 3, 2002).

²⁹⁶ "Ugandan Paper Issues an Apology," BBC News, October 18, 2002, available at <http://news.bbc.co.uk/2/hi/africa/2339123.stm> (accessed December 4, 2002).

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- ²⁹⁷ Halima Abdallah, "Monitor Case for March 31," *News* (Kampala), February 1, 2003, available at <http://allafrica.com/stories/200302030397.html> (accessed February 7, 2003).
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