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Michael Posner

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Human Rights in the Post-September 11 Environment

Michael Posner[1]

Sixty years is a brief interlude in human history. Yet in that space of time, the human rights movement—human rights organizations, other rights advocates, governments, and international organizations—have made incredible progress in norm-setting and in influencing how governments treat people. In 1945, there was no universal recognition, for example, of the "inalienable rights" of individuals to be free from torture or official cruelty. Under Eleanor Roosevelt's leadership, the United Nations (UN) adopted the Universal Declaration of Human Rights in 1948, providing universal rights standards on these and other fundamental subjects. Since then, there has been substantial international attention on human rights issues and a proliferation of treaties that spell out core human rights standards. Today, as part of their diplomatic portfolio, many governments recognize an obligation to ensure rights in their own societies and to work collectively with others to secure basic rights around the world.

In the last fifteen years, there also has been a corresponding evolution of an ambitious system of international enforcement systems. These include international criminal tribunals for Yugoslavia and Rwanda that were created in the 1990s, as well as more recent special courts in places like Sierra Leone and East Timor. In 1998, governments created the first International Criminal Court, based in The Hague, to which more than one hundred countries are now state parties.

On a parallel track, there has been an extraordinary proliferation of nongovernmental human rights organizations around the world. Twenty-five years ago, there were a very small number of human rights organizations outside of Western Europe and North America. But now the

creation of these local human rights groups—in almost every country in the world—has provided a powerful response to arguments by governments that demands for respect for human rights are an improper interference by outsiders in their domestic affairs. The world has come a long way toward creating international baseline standards for the protection of human rights. Yet today we face an unexpected challenge that threatens to undermine this progress. It is the assertion by the U.S. government and others that, after the September 11 attacks, the world has been engaged in a "global war against terrorism" where international human rights rules simply do not apply.

I will examine this premise and how the Bush Administration has applied it in practice. Specifically, I will examine how this premise applies to the detention and interrogation of so-called "unlawful enemy-combatants." I view the assertion of this new paradigm as a serious threat to the human rights standards and enforcement mechanisms that have developed over the last half-century. In response, I believe there is a pressing need to aggressively challenge this approach in order to "hold the line" on what has been accomplished since World War II.

I. THE NEW NORMAL

The September 11, 2001 attacks in New York and Washington D.C. led to a range of new security measures and changed the human rights debate in this country and around the world. The threats posed by groups like Al-Qaeda are real and significant. These groups are well-organized and well-financed. They intend to launch violent strikes aimed at civilians in the U.S. and elsewhere. Governments have an obligation to provide security. There are many things that the U.S. government has done well since September 2001 to enhance security through measures that do not jeopardize civil liberties and human rights. For example, protecting airports and nuclear plants; strengthening front-line defenders such as police, fire, and emergency medical people; creating a Director of National Intelligence;

and the work of the 9/11 Commission. A number of recommendations that the government has made in these and other areas are prudent, wise, and within the bounds of law. These are things that I would call "rights neutral," and in policy terms, they are essential to security.

Unfortunately, the U.S. government and the Bush administration has also engaged in a series of actions on a parallel track, and these actions have dramatically changed the relationship between the government and its people. The administration sometimes refers to these actions as the "new normalcy." Vice President Cheney used that term in late 2001, stating that it reflects "an understanding of the world as it is."[2] In his view, and in those of other senior administration officials, the idea is that: on one side there is war, on the other side there is the law. And when fighting the "global war on terrorism," they assert that law becomes a luxury, not a necessity, that socieities may no longer be able to afford. I will refer to these changes as the "new normal" and I will outline its four key elements:

1. Restriction on both openness of government and access to information;
2. Infringement on personal privacy;
3. Discriminatory treatment of immigrants, minorities, and noncitizens; and
4. New rules governing the treatment of security detainees.

The administration's "global war against terrorism" extends to the fifty states and throughout the world. It has no time limits. The enemy is vaguely defined. This is a radical framework that the administration justifies by asserting that we are fighting a war against a new kind of enemy, where the law is an impediment to the government's ability to do what needs to be done. They say, in essence, "trust us, we are doing the right thing, and our actions will keep Americans safe."

In a speech to the American Bar Association, Attorney General Alberto Gonzales said that in the "war against terrorism," criminal charges and trials

are "neither necessary nor appropriate."[3] Mr. Gonzales has also stated that as commander in chief, the president has the authority to override the laws passed by Congress if he is acting in the name of national security. Secretary of Defense Rumsfeld has said that "different rules have to apply" to the "enemy-combatants and terrorists who are being detained for acts of war against our country."[4] Most recently, at the administration's urging, Congress established a military trial system that largely abandons the time-tested military justice standards for fair trials.

II. HOW DOES THIS PLAY OUT IN PRACTICE?

A. Openness in Government

Historically, a central premise of the U.S. system has been a presumption that an informed citizenry needs information from government to make the best decisions. Madison said that "popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both."[5]

This administration has turned that presumption on its head. The administration believes that most actions bearing any relation to national security must be kept secret. Governor Thomas Kean, who headed the 9/11 Commission, said that three-quarters of the classified documents that he read in preparation for the Commission's report should not have been classified.[6] A National Archives audit found that one-third of the records re-classified by the CIA and other agencies in 2005 were wrongly kept secret.[7] The Government Accountability Office has criticized Department of Defense classification procedures as being inconsistent and lacking oversight.[8] Former Senate leader Trent Lott has urged an independent board to overhaul the current classification system.[9] This administration is not only keeping information from the public, it is keeping information from people whose job it is to make the law.

B. Personal Privacy

The law regulating the executive branch's authority to pry into Americans' private lives has changed dramatically since September 11. These changes have raised fears that bedrock principles of personal privacy and presumptive innocence (e.g., the Fourth Amendment) have been replaced with a new normal of widespread surveillance and generalized suspicion.

In 2001, Congress passed the USA PATRIOT Act. It allows broad federal police power for wire taps, access to information, library records, and the like.[10] And the administration has exceeded this broad surveillance authority provided by Congress. It has used electronic surveillance to record the conversations of persons within the United States[11] and has collected potentially millions of domestic phone records without obtaining the court order required by law.[12] In September 2006, the House of Representatives approved a bill that, if passed into law, would not only permit unrestricted retention and use of communications of U.S. citizens obtained without a warrant, it would also grant new authority for warrantless surveillance of a wide range of domestic and international calls involving U.S. citizens.[13]

C. Treatment of Foreigners, Minorities, and Noncitizens

In times of crisis or war, the first groups targeted are usually foreigners, noncitizens, and minorities. This has been true throughout U.S. history, beginning with the Alien and Sedition Acts in 1798. It was true in the 1850s, when the Know Nothing Party attacked Catholics, Jews, refugees, and foreigners. It was true after World War I, when the Mitchell Palmer raids focused on foreigners. It was true during World War II, with the Japanese internments. And it is true today, when Muslim Americans and individuals from the Middle East and South Asia are targeted, officially and unofficially.

Initially, after the September 11 attacks, the Justice Department detained more than twelve hundred people without charge and without a rational basis.[14] A two hundred-page Justice Department internal study written by the inspector general strongly condemned both the abusive treatment of these groups of people and the basis for their arrests.[15]

In 2002, the administration announced a re-registration program through which young Muslim men—men from twenty-five different countries who were living in the United States—were forced to be fingerprinted and questioned by U.S. immigration officials. Many were detained. Eighty-three thousand people went through this re-registration process.[16] The government has not reported a single bit of intelligence that came to light as a result of this—a program intended to help protect American national security.[17] Eventually, after much controversy, the program was disbanded.[18] But it caused enormous upset and distrust within the affected communities.

In spring of 2006, Congress considered a number of wide-ranging immigration proposals as part of a "comprehensive reform" initiative.[19] The House of Representatives approved a bill that, if passed into law, would expand the executive branch's authority to detain noncitizens; would give government officials power to make secret immigration determinations; would criminalize individuals present in the United States who lack proper documentation; and would authorize local law enforcement personnel to enforce federal immigration law.[20]

Overseas refugee admissions into the United States have decreased significantly. Almost fifty-four thousand people were admitted as refugees last year,[21] compared with over one hundred thousand in 1990,[22] and as many as two hundred thousand in the early 1980s.[23] As of October 2005, only 32,900 people applied for asylum,[24] compared to 63,230 applications four years ago.[25] One important reason is that asylum seekers are being detained and face the prospect of months, or even years, in jail before their cases are resolved. In addition, in May 2005, Congress also passed the Real

ID Act, which, among other things, makes it more difficult for people to seek political asylum in this country.[26] It creates a series of new restrictions that are justified by national security concerns.

D. Security Detentions and Interrogations

A fourth broad category of the "new normal" is security detentions and interrogation practices. There have been two important cases involving security detainees who are American citizens—Yasser Hamdi and Jose Padilla. Each was held in military detention in the United States as enemy-combatants—without a lawyer, without charge, and without trial. The Supreme Court essentially overthrew Hamdi's detention, and eventually he was allowed to go to Saudi Arabia after more than two years in detention.[27] Padilla, an American citizen arrested at O'Hare airport, was held in detention for more than three years without being charged or tried. For two years he had no lawyer. In November 2005, before the Supreme Court had the opportunity to review the legality of his military detention, the federal government indicted Padilla on crimes unrelated to terrorist plots within the United States and transferred him to civilian custody.[28]

Ali Saleh Kahlah Al-Marri, a Qatar student, is now the lone enemy-combatant on U.S. soil. The FBI arrested him on fraud charges in December 2002. In June 2003, just weeks before his planned trial, the administration declared Al-Marri an "enemy-combatant" in the war on terror. Al-Marri is still being held in military custody, without charge or trial, and has had limited access to his attorneys. Al-Marri's petition for writ of habeas corpus is now proceeding.[29]

Outside of the continental United States, there are more than fourteen thousand people being held by Americans in detention centers[30]—approximately 450 at Guantanamo,[31] and approximately 500 in Afghanistan.[32] There are fourteen thousand detainees in Iraq.[33]

Over the last five years, some senior administration officials have been unwilling to accept the application of international legal standards

prohibiting cruel, inhuman, and degrading treatment of these detainees. A 2002 memo from the White House said that the Geneva Conventions did not apply in Afghanistan, including Common Article 3 of the Geneva Conventions, which requires humane treatment.[34] The memo then extended that same blanket exception to foreign fighters in Iraq. Pursuant to a presidential order, the military began trying detainees at Guantanamo Bay in military commissions that failed to protect the accused's right to a fair trial.

In 2002, officials in the Office of Legal Counsel at the Justice Department, including John Yoo and Jay Bybee, wrote memos that essentially redefined the term torture to mean the equivalence of organ failure, serious bodily injury, or even death.[35] They defined torture not to include cruel, inhuman, or degrading treatment, which meant that abusive interrogation techniques would be legally used and acceptable in Guantanamo.

At the end of 2002, Secretary of Defense Rumsfeld decided to change military rules on interrogation.[36] A Pentagon working group proposed thirty-five methods of coercive interrogations. Secretary Rumsfeld endorsed twenty-four of them.[37] His modified rules for interrogations at Guantanamo later migrated to Afghanistan and Iraq. These new rules allow interrogators to subject detainees to sleep deprivation, use of dogs, stress positions, and the like.

Not surprisingly, the combination of illegal detention and interrogation practices has led to serious abuses. The Pentagon has initiated approximately eight hundred investigations into these abuses.[38] According to a report by Human Rights First, close to one hundred people have died in U.S. custody; the Pentagon classifies thirty-four of those cases as criminal homicides.[39] At least eight of these people were literally tortured to death. Only twelve deaths resulted in any kind of punishment for those perpetrating the abuse.[40] Of the thirty-four cases being investigated as criminal homicides, none occurred at Guantanamo, and only one at Abu

Ghraib. These numbers reflect a serious crisis, and many of the architects of these policies are still in senior positions in government.

These abuses prompted Congress to explicitly prohibit any cruel, inhuman, and degrading treatment of detainees in the form of the Detainee Treatment Act. Sponsored by Senator John McCain in 2005, it passed both Houses of Congress by overwhelming margins.[41] But when President Bush signed the bill into law, he included a signing statement that purports to leave open the possibility that members of the executive branch could still authorize cruel, inhuman, and degrading treatment of detainees.[42]

The U.S. courts have also been highly skeptical of the administration's broad assertions of executive power and its approach to detention and interrogation policies. In June 2006, in *Hamdan v. Rumsfeld*, the U.S. Supreme Court ruled that Common Article 3 of the Geneva Conventions, which requires humane treatment, applies to all individuals in U.S. detention, regardless of their status. The Court also held that the president lacked the authority to establish military commissions without Congressional authorization and that the commissions he had created in late 2001 violated the law of war.[43]

Following the Court's decision in *Hamdan*, the U.S. military took a number of good faith steps to implement the ruling. In September 2006, the army issued its new field manual on interrogations, a document that is largely consistent with international law principles and that embraces the Geneva Conventions standards. The adoption of this new field manual represents a victory for those in the military who have struggled to return to the rule of law.[44]

More troubling was the administration's broader response to the *Hamdan* decision. At the urging of the administration, Congress passed the Military Commissions Act of 2006. It is a sweeping law that, among other things, creates a new system of military commissions to try some of those detained as illegal enemy-combatants in the "global war on terrorism."

On the plus side, Congress refused to grant the president authority to redefine the humane treatment requirements of Common Article 3 of the Geneva Conventions, despite intense executive-branch pressure. Those requirements—which provide both fair-trial protections and basic standards of humane treatment—remain intact, and all U.S. personnel must comply with them.

But the new law also contains a number of deeply disturbing provisions, such as the creation of a new legal definition of "unlawful enemy-combatant." This new definition blurs the most fundamental distinction between combatants and noncombatants. The definition of "unlawful enemy-combatant" is so broad and vague that it could encompass U.S. citizens picked up in the United States as well as people who have not engaged directly in any hostilities against the United States. The administration has long argued that the entire world is a battlefield in a new kind of war paradigm.

Additionally, the Military Commissions Act of 2006 seeks to strip away a key "check" on executive-branch compliance with U.S. and international law: the ability of the courts to hear challenges to detention via the writ of habeas corpus and through civil lawsuits. The Act also explicitly seeks to prevent courts from hearing claims of violations of the Geneva Conventions.

III. THE POLITICAL ENVIRONMENT

Throughout the five years of debate on these issues, some senior administration officials have created a hostile environment in which being critical of the administration's policies is unpatriotic. When John Ashcroft testified to the Senate Judiciary Committee in December 2001, he referred, in inflammatory terms, to persons engaged in debate regarding rights versus security:

> to those who pit Americans against immigrants, and citizens against non-citizens; to those who scare peace-loving people with

> phantoms of lost liberty; my message is this: Your tactics only aid terrorists—for they erode our national unity and diminish our resolve. They give ammunition to America's enemies, and pause to America's friends. They encourage people of good will to remain silent in the face of evil.[45]

Other senior administration officials and their allies also have sought to silence this debate by attacking the messengers. When the *New York Times* released information on the government's surveillance of bank records, the chairman of the House Homeland Security Committee, Peter King, called for criminal prosecution of the newspaper.[46] When critics of administration policies within the government leaked reports of the International Committee of the Red Cross (ICRC)—first on Abu Ghraib, then on Guantanamo—administration officials and their allies in the news media fiercely attacked the credibility of the ICRC. The *Wall Street Journal*, for example, called the ICRC "an ideological organization unable to distinguish between good guys and bad . . . no longer careful, scrupulous and neutral."[47] And within an hour of Senator Debbie Stabenow's (D-MI) vote in favor of the Specter Amendment, which maintained detainees' rights to challenge their detention in U.S. courts (through a writ of habeas corpus), the National Republican Senatorial Committee issued a statement declaring she had "sided with trial lawyers and terrorists instead of common sense . . . Stabenow's continued incompetence when it comes to keeping America safe is staggering."[48]

IV. THE WAY FORWARD

A. Working with New Allies

These issues of national security are part of a much larger and very polarized political debate in the United States. In order to change this

dynamic, those of us who seek to restore basic human rights norms need to go beyond traditional lines of alliance. We and others have begun this process by enlisting those we call "unlikely allies" or "strange bedfellows."

One of the most important developments for Human Rights First has been our growing relationships with retired senior U.S. military leaders. These senior military leaders are as upset about the administration's detention and interrogation policies as any group in this country. They understand the corrosive effect of these policies, perhaps better than any of us. The military lives by discipline and a chain of command. When senior Pentagon officials essentially tell the military to "take the gloves off," the result is that it makes it impossible for good commanders and leaders in the military to ensure discipline and respect for rules and law that are essential to the military's effectiveness.

Human Rights First has now identified and is working closely with more than forty former senior military officers—retired admirals and generals—who have joined us in challenging various aspects of the administration's policies. In the summer of 2003, when Human Rights First issued a report on secret detentions that identified about twenty-five U.S. run facilities where representatives of the ICRC have no access,[49] we helped coordinate the drafting of a public letter by eight retired U.S. admirals and generals denouncing the use of such facilities.

When Alberto Gonzales was nominated as Attorney General, thirteen flag and field officers, including General John Shalikashvili, a former head of the Joint Chiefs of Staff, expressed grave concerns about Mr. Gonzales' views on the Geneva Conventions and coercive interrogations; those officers articulated their concerns in an open letter to the Senate Judiciary Committee in January 2005.[50] In October 2005, when the McCain Amendment—banning the use of torture and other cruel, inhuman, or degrading treatment by any U.S. personnel anywhere in the world—was being debated, we coordinated a letter to Senator McCain in support of his amendment, and that letter was signed by twenty-nine retired military

leaders. A few months later, in January 2006, when President Bush signed the McCain Amendment into law, twenty-two retired military leaders signed a letter to the president urging commitment to its implementation. In September 2006, we coordinated a letter from almost fifty admirals and generals, including five former heads of the Joint Chiefs of Staff, urging the Senate Armed Services Committee not to adopt the proposed legislation redefining Common Article 3 in a way that violated the core principles of the Geneva Conventions.[51] The final legislation adopted by the Senate and House rejected the administration's proposal to redefine the humane treatment standards of Common Article 3, making it clear that subjecting detainees to treatment that involves serious physical or mental pain or suffering is a war crime.[52]

In our view, in order for these and related efforts to be successful, it is important to engage and involve people who have been strong supporters of President Bush's Iraq war policies. Some of our critics charge that the concerns about Abu Ghraib, detention practices, and Guantanamo are only coming from people who are opposed to the war in Iraq—it is very important for us to separate these two issues. It is possible to be a supporter of the president's policies on Iraq, and other foreign policy issues, and yet strongly oppose the torture and mistreatment of prisoners.

B. Reinforcing International Norms

In addressing these issues going forward, it also is critical that we reinforce international human rights norms. The administration has challenged international law on a number of issues. The international community needs to respond forcefully to the administration's violations to ensure that core international human rights protections are maintained.

One area where these principles are being tested relates to the extraterritorial application of U.S. treaty law. Another area of concern relates to detention. This is an area where international law is less clear and one where we have to find common language and a common strategy.

Another grey area is minimum due process standards in security cases. What are these standards in criminal cases? And what is the applicability of the Geneva Conventions, particularly in places like the detention centers in Afghanistan and Guantanamo, where the administration has declared everyone an "enemy-combatant"? The administration's view is that the Geneva Conventions are irrelevant in these cases, but in *Hamdan* the Supreme Court has held that Common Article 3 applies. We need to address all of these issues and reinforce the importance of adhering to international law and institutions.

C. An Affirmative Agenda

We also need to develop a stronger agenda for challenging extremist violence. It is incumbent upon the human rights movement not only to rally against government excesses; we must also find ways to combat these violent attacks against civilians as crimes. One way to do so is through the United Nations, which has been considering a draft Comprehensive Convention Against Terrorism for a number of years. There are thirteen derivative conventions dealing with terrorist acts, all of which refer back to the Comprehensive Convention.[53] The Comprehensive Convention is stalemated largely because governments cannot agree on a definition of terrorism.[54] Ultimately, it may not be possible to overcome this impasse. But as a starting point, any definition of terrorism should encompass actions that are intended to cause bodily harm to civilians for the purpose of intimidating a population or to force governments to act or not act.

I think it is important for the human rights community to help define acts of terrorism as crimes. We should encourage governments and international tribunals to prosecute terrorist acts, subject to an internationally agreed upon definition.

V. CONCLUSION

The erosion of core human rights standards in the United States is having profound and troubling effects around the world. Repressive governments in places like Zimbabwe, Egypt, China, and Russia increasingly cite the new "American model" of detention and interrogation in order to justify their own actions.[55] The world is closely watching to see how the United States responds to the challenges posed by this erosion of civil liberties in our own society.

Thirty years ago, Justice William Douglas wrote to a group of young lawyers in the State of Washington. Unfortunately, his comments seem particularly apt today. He wrote: "As nightfall does not all come at once, neither does oppression. In both instances, there is a twilight when everything remains seemingly unchanged. And it is in such twilight that we all must be most aware of change in the air—however slight—lest we become unwitting victims of the darkness."[56]

Today we find ourselves in the twilight, and it is incumbent upon all of us to respond in whatever ways we can to fend off the darkness. I am an optimist and believe that we can, and will, correct our course. But to do so, all of us must be ready to play an active role and challenge those who seek to fundamentally change our constitutional system—a system of which we are so rightfully proud.

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[1] Michael Posner is President of Human Rights First (formerly the Lawyers Committee for Human Rights). He has been at the forefront of the international human rights movement for more than 25 years. The text of this article has been adapted from remarks given by Mr. Posner to the American Constitution Society in Seattle, Washington in June 2005.

[2] *Target: Terrorism: Authorities Call Latest Terrorist Threat Credible*, CNN, Oct. 30, 2001, http://transcripts.cnn.com/transcripts/0110/30/ltm.01.html (last visited Nov. 6, 2006).

[3] Alberto R. Gonzales, Counsel to the President, Remarks Before the Am. Bar Ass'n Standing Comm. on Law and Nat'l Sec. (Feb. 24, 2004), *available at* http://www.pegc.us/ archive/White_House/gonzales_remarks_to_ABA_20040224.pdf.

[4] Donald Rumsfeld, U.S. Sec'y of Def., Remarks to Greater Miami Chamber of Commerce (Feb. 13, 2004), *available at* http://www.defenselink.mil/transcripts/2004/tr20040213-0445.html.

[5] James Madison, Letter to W.T. Barry (Aug. 4, 1822), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 690 (Philip B. Kurland & Ralph Lerner eds., 1987).

[6] Thomas Samoluk, *As You Were Saying . . . Feds Keep Too Many Secrets*, BOSTON HERALD, Nov. 19, 2005, at 20.

[7] *See* INFO. SECURITY OVERSIGHT OFFICE, THE NAT'L ARCHIVES, AUDIT OF THE WITHDRAWAL OF RECORDS FROM PUBLIC ACCESS AT THE NAT'L ARCHIVES AND RECORDS ADMIN. FOR CLASSIFICATION PURPOSES (2006), *available at* http://www.archives.gov/isoo/reports/2006-audit-report.html.

[8] U.S. GOV. ACCOUNTABILTY OFFICE, GAO-06-706, MANAGING SENSITIVE INFORMATION: DOD CAN MORE EFFECTIVELY REDUCE THE RISK OF CLASSIFICATION ERRORS 4 (2006).

[9] Trent Lott, *Bipartisan Intelligence Reform*, NEWS ROOM WEEKLY COLUMN, http://lott.senate.gov/index.cfm?FuseAction=Articles.Detail&Article_id=48 (Oct. 1, 2004).

[10] USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

[11] James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

[12] Leslie Cauley, *Data Cover Billions of Phone Calls*, USA TODAY, May 11, 2006, at 5A.

[13] Memorandum from the Ctr. for Democracy & Tech., CDT Analysis of Substitute to H.R. 5825, The Electronic Surveillance Modernization Act (Sept. 28, 2006) (on file with the author).

[14] U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., THE SEPTEMBER 11TH DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11TH ATTACKS 1 (2003), *available at* http://www.ccr-ny.org/v2/reports/docs/OIGReport.pdf.

[15] *Id.*

[16] Rachel L. Swarns, *Program's Value in Dispute As a Tool to Fight Terrorism*, N.Y. TIMES, Jan. 21, 2004, at A26.

[17] *Id*.

[18] *Id.*

[19] *See generally* Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006).

[20] The Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005).

[21] U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIG. STAT., 2005 YEARBOOK OF IMMIGRATION STATISTICS, REFUGEES & ASYLEES 1 (2006), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/Refugee_Asylee_5.pdf.

[22] U.S. DEP'T OF JUSTICE, IMMIG. AND NAT. SERVICE, 1998 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 98 (2000), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/1998/1998yb.pdf.

[23] 2005 YEARBOOK, *supra* note 21, at Table 13.

[24] U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIG. STAT., FISCAL YEAR 2005: IMMIGRATION MONTHLY STATISTICAL REPORT, SEPTEMBER 2005 YEAR END REPORT 7 (2005), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/msrnov05.pdf.
[25] U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIG. REVIEW, STATISTICAL YEARBOOK 2001, at 3 (2002), *available at* http://www.justice.gov/eoir/statspub/FY01syb.pdf.
[26] *See generally* Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005).
[27] Hamdi v. Rumsfeld, 542 U.S. 507 (2004).
[28] Hanft v. Padilla, 126 S.Ct. 978 (Mem) (2006).
[29] *See* Human Rights First, *In the Courts: Ali Saleh Kahlah al-Marri*, http://www.humanrightsfirst.org/us_law/inthecourts/supreme_court_al_marri.htm (last visited Nov. 6, 2006).
[30] *U.S. Overseas Detention System Numbers*, ASSOC. PRESS, Sept. 17, 2006, *available at* http://www.ap.org/pages/about/pressreleases/wn_091706d.html.
[31] *Id*.
[32] *Id*.
[33] *Id.*
[34] Draft Memorandum from Alberto R. Gonzales, White House Counsel, to George W. Bush, President, Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict With al Qaeda and the Taliban (Jan. 25, 2002), *available at* http://www.msnbc.com/id/4999148/site/newsweek/.
[35] Memorandum from John Yoo, Deputy Assistant U.S. Att'y Gen., to Alberto Gonzales, Counsel to the President (Aug. 1, 2002), *in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 218 (Karen J. Greenberg & Joshua L. Dratel eds., 2005); Memorandum from Jay S. Bybee, Assistant U.S. Att'y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), *in* THE TORTURE PAPERS, at 172.
[36] Action Memo from William J. Hynes II, Gen. Counsel, U.S. Dep't of Def., to Sec'y of Def. (Nov. 27, 2002), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.12.02.pdf.
[37] Dana Priest & Bradley Graham, *U.S. Struggled Over How Far to Push Tactics; Documents Show Back-and-Forth on Interrogation Policy*, WASH. POST, June 24, 2004, at A1.
[38] *State Dept.: U.S. Prohibits All Torture; 103 Troops Court-Martialed for Abuse*, U.S. FED. NEWS (Wash., D.C.), May 9, 2006, *available at* ProQuest, ID 1034521131.
[39] HINA SHAMSI, COMMAND'S RESPONSIBILITY: DETAINEE DEATHS IN U.S. CUSTODY IN IRAQ AND AFGHANISTAN 1 (Deborah Pearlstein ed., 2006), *available at* http://www.humanrightsfirst.info/pdf/06221-etn-hrf-dic-rep-web.pdf.
[40] *Id*.
[41] Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1003, 119 Stat. 2680, 2739 (2005).
[42] *See* Elisa Massimino & Avidan Cover, *While Congress Slept*, Winter 2006, HUM. RTS. 5, 7-8.
[43] President's Statement on Signing of H.R. 2863, The Department of Defense Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico and Pandemic Influenza Act, 2006 (Dec. 30, 2005), *available at*

http://www.whitehouse. gov/news/releases/2005/12/20051230-8.html; *see also* Letter from Michael Posner, President, Human Rights First, to George W. Bush, President of the U.S. (Jan. 11, 2006) (on file with author).

[44] Julian E. Barnes, *Army to Use Geneva Rules for Detainees; New Manual Eliminates Secret Tactics and Separate Standards for Questioning Captives*, L.A. TIMES, Sept. 6, 2006, at A1.

[45] *Anti-terrorism Policy Review: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (Dec. 6, 2001) (statement of John Ashcroft, Att'y Gen. of the U.S.), 2001 WL 1558164 (F.D.C.H).

[46] Bryan Bender, *Terrorist Funds-Tracking No Secret, Some Say; Cites White House Boasts of Tighter Monitoring System*, BOSTON GLOBE, June 28, 2006, at A1.

[47] Editorial, *Red Double Crossed Again*, WALL ST. J., Dec. 2, 2004, at A12.

[48] Press Release, Nat'l Republican Senatorial Comm., Stabenow Votes With Trial Lawyers and Guantanamo Detainees Over Common Sense Anti-Terror Policies (Sept. 28, 2006), *available at* http://www.nrsc.org/newsdesk/document.aspx?ID=3179.

[49] DEBORAH PEARLSTEIN, ENDING SECRET DETENTIONS 7, 9, 16-17 (Michael Posner ed., 2004), *available at* http://www.humanrightsfirst.org/us_law/PDF/EndingSecret Detentions _web.pdf.

[50] Letter from Gen. John Shalikashvili (Retired U.S. Army) et. al., to S. Comm. on the Judiciary (Jan. 4, 2005) (on file with Human Rights First), *available at* http://www. humanrightsfirst.org/us_law/etn/gonzales/statements/gonz_military_010405.pdf.

[51] For the collection of letters, see Human Rights First, U.S. Law & Security, End Torture Now, http://www.humanrightsfirst.org/us_law/etn/index.asp (last visited Nov. 6, 2006).

[52] Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 2631-33.

[53] The thirteen derivative conventions are: Convention on Offences and Certain Other Acts Committed On Board Aircraft, Sept. 14, 1963, 704 U.N.T.S. 219; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 860 U.N.T.S. 105; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 974 U.N.T.S. 178; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 1035 U.N.T.S. 167; International Convention Against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 205; Convention on the Physical Protection of Nuclear Material, Mar. 30, 1980, 1456 U.N.T.S. 124; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, 1589 U.N.T.S. 474; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S 221; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 1678 U.N.T.S. 304; Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, 30 I.L.M. 721; International Convention for the Suppression of Terrorist Bombing, Jan. 9, 1998, 37 I.L.M. 249; International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 39 I.L.M. 270; International Convention for the Suppression of Acts of Nuclear Terrorism, U.N. GAOR 59th Session, U.N. Doc. A/59/766 (Apr. 4, 2005). To view these conventions, see United

Nations Treaty Collection, Conventions on Terrorism, http://untreaty.un.org/English/Terrorism.asp.

[54] *NGO Reporting on the General Assembly First Committee on Disarmament and International Security*, FIRST COMM. MONITOR, Oct. 3, 2005, at 12, *available at* http://www.reachingcriticalwill.org/political/1com/FCM05/2005wk1.pdf.

[55] *See* Thomas M. Nichols, *Anarchy and Order in the New Age of Prevention*, 22 WORLD POL'Y J. 1, 2, 10-11 (2005); Aziz Z. Huq, *Extraordinary Rendition and the Wages of Hypocrisy*, 23 WORLD POL'Y J. 25, 32 (2006).

[56] Letter from William O. Douglas to the Young Lawyers Section of the Wash. State Bar Assoc. (Sept. 10, 1976), *in* THE DOUGLAS LETTERS 162 (Melvin I. Urofsky ed., 1987).