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## BLOWBACK: THE UNINTENDED CONSEQUENCES OF MILITARY TRIBUNALS

CHARLES V. PEÑA\*

In CIA or “spook” parlance, “blowback” is the unintended consequences of covert operations. In the 1980s, the United States supported the Afghan rebels against the Soviet invasion and occupation because our exclusive focus was the threat of expansionist Soviet Communism. The CIA took the lead in arming the Afghans and on the surface the operation was a success. The Soviet Union—a super power—was expelled, much the same as the Afghans had expelled the British nearly a century before. But the CIA aid was almost entirely funneled via Pakistan’s Inter Services Intelligence agency (ISI). In turn, the ISI disproportionately funneled hundreds of millions of dollars to the most Islamist (and pro-Pakistani) factions in Afghanistan, which turned out to also be the most anti-Western Afghan factions.<sup>1</sup> This gave rise to the Taliban and eventual safe haven for the training of militants to export *jihād* and terrorism around the world—including against the United States on September 11, 2001. Such is the fallout from blowback.

Blowback is almost as certain as death and taxes, and the United States needs to be cognizant of the potential downside consequences—beyond the constitutional and legal questions, albeit these are of paramount importance—of the special military tribunals as authorized by the military order signed by President George W. Bush on November 13, 2001.<sup>2</sup>

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1. For a more detailed discussion of CIA involvement in Afghanistan, see PETER L. BERGEN, *HOLY WAR, INC.: INSIDE THE SECRET WORLD OF OSAMA BIN LADEN* (2001).

2. See Press Release, White House Office of Press Sec’y, President Issues Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (Nov. 13, 2001), available at <http://www.whitehouse.gov>.

## EXTRADITION OF SUSPECTED TERRORISTS

The blowback to the special military tribunals was almost immediate from the United States' European allies over extradition of suspected al Qaeda terrorists. To be sure, the European nations would have concerns even without the prospect of military tribunals due to the death penalty in the United States. Article 1 of Protocol Number 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms states: "The death penalty shall be abolished. No one shall be condemned to such penalty or executed."<sup>3</sup> And even prior to September 11, the European Union declared its opposition to the death penalty in all cases and expressed its concern about the increased use of the death penalty in the United States, particularly during the 1990s.<sup>4</sup>

But even the European objections to the death penalty could likely be overcome. According to Francesca Klug of the Centre for the Study of Human Rights at the London School of Economics, European rules have not acted as an insurmountable obstacle to extradition to the United States if the U.S. Attorney General provides a written declaration that the Justice Department does not expect prosecutors to seek the death penalty. And no defendant sent to the United States under those terms has been executed.<sup>5</sup> For example, on July 19, 2001, France extradited U.S. fugitive Ira Einhorn after the Pennsylvania legislature passed a law granting him a new trial and assurances that he would not face the death penalty.<sup>6</sup>

However, the prospect of special military tribunals conducted in secret that appear to circumvent due process and a fair trial have created resistance to the possible extradition of dozens of suspects arrested in Europe since September 11. The original military order signed by President Bush stated: "[I]t is not practicable to apply in military commissions under this order the prin-

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gov/news/releases/2001/11/20011113-27.html (last visited Feb. 22, 2002) [hereinafter President Issues Military Order].

3. Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, E.T.S. 114, entered into force Mar. 1, 1985, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/114.htm> (last visited Feb. 22, 2002).

4. EUROPEAN UNION, EU MEMORANDUM ON THE DEATH PENALTY (2000), available at <http://www.eurunion.org/legislat/DeathPenalty/eumemorandum.htm> (last visited Feb. 22, 2002).

5. T.R. Reid, *Europeans Reluctant to Send Terror Suspects to U.S.*, WASH. POST, Nov. 29, 2001, at A23.

6. Jacqueline Soteropoulos, *Einhorn Lawyer Says Extradition Likely to Happen*, PHIL. INQUIRER, July 14, 2001, at A7.

principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.”<sup>7</sup> Therefore, foreign nationals extradited to the United States could be tried—solely at the discretion of the President—by a special military tribunal appointed by the Secretary of Defense—who would set “the rules . . . , including how many members will be on the panel, what qualifications they must meet, what standard of proof will be needed to convict, and what type of evidence can be considered.”<sup>8</sup> The tribunals could be held in secret.<sup>9</sup> Hearsay could be used as evidence.<sup>10</sup> The defendant would not have the absolute right to challenge the evidence nor the right to hear it.<sup>11</sup> The defendant may not have access to legal counsel of his or her choice.<sup>12</sup> Guilt need not be proved beyond a reasonable doubt. The verdict—even for the death penalty—need not be unanimous.<sup>13</sup> And there would be no provision for judicial review<sup>14</sup>—only the President or the Secretary of Defense could overturn a decision.<sup>15</sup>

The most immediate case highlighting the problems posed by the tribunals involved eight alleged al Qaeda terrorists being held in Spain. Although the United States has not yet asked for extradition of any of the suspects, a Spanish foreign ministry spokesman stated that European Union (EU) agreements prevented Spain from extraditing suspects to countries with judicial norms below those of the EU. Furthermore, Spain would need to receive assurances that any suspects would not be subject to capital punishment or military tribunals.<sup>16</sup> Spanish Prime Minister José María Aznar was more vague about the issue, stating after a meeting with President Bush that “[i]f and when the United States requests that extradition, we will study it” and that any

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7. President Issues Military Order, *supra* note 2, at § 1(f).

8. Robert A. Levy, *Don't Shred the Constitution to Fight Terror*, WALL ST. J., Nov. 20, 2001, at A18.

9. See President Issues Military Order, *supra* note 2, at § 4(c)(1).

10. See *id.* at § 4(c)(3).

11. See *id.* at § 7(a)(1).

12. See *id.* at § 4(c)(5).

13. See *id.* at § 4(c)(6).

14. *Id.* at § 7(b)(2).

15. *Id.* at §§ 4(c)(8), 7(a)(2).

16. *Spain Concern Over Terror Suspects*, CNN.COM, Nov. 24, 2001, at <http://www.cnn.com/2001/WORLD/europe/11/23/inv.spain.extradite/index.html>. (last visited Feb. 28, 2002).

action on extradition would be taken “with full respect of Spanish and United States law.”<sup>17</sup>

Subsequently, a more blunt statement was issued by the European Parliament, which represents the fifteen nations in the EU: “In adopting this resolution, Parliament emphatically declared that extradition from the EU to the [United States] cannot be allowed for people who could be sentenced to death or who are to be tried by military tribunals.”<sup>18</sup>

Thus, the prospect of military tribunals simply adds an unnecessary potential impediment to the complex process of extradition, which is already difficult enough. For example, only after three years of legal delays did Britain’s highest court rule that Khaled al Fawwaz, an alleged al Qaeda leader, and his two assistants (Ibrahim Eidarus and Adel Abdelbari) could be extradited to the United States on charges that he helped plan the 1998 bombings of two U.S. embassies in Tanzania and Kenya.<sup>19</sup> But even with the British ruling that the three al Qaeda suspects can be extradited, they can still challenge the extradition at the European Court of Human Rights in Strasbourg, which could add another year or more to the process.

According to the military order, President Bush “determined that an extraordinary emergency exists for national defense purposes, that this emergency constitutes an urgent and compelling government interest, and that issuance of this order is necessary to meet the emergency.”<sup>20</sup> But ultimately, military tribunals were seen by the Bush Administration as a means to expedite the war on terrorism by avoiding potential delays associated with the civil criminal justice system. According to Bush: “In a court of law, there would be all kinds of questions that might compromise our ability to gather incredibly important intelligence to prevent the next attack from happening to America.”<sup>21</sup> Defending the use of military tribunals, Attorney General John Ashcroft said: “Can you imagine the spectacle of capturing a sol-

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17. *Spain: No Rift Over Terror Suspects*, CNN.COM, Nov. 28, 2001, at <http://www.cnn.com/2001/US/11/28/ret.aznar.bush/index.html>. (last visited Feb. 28, 2002).

18. European Parliament, European Parliament Daily Notebook, EU Judicial Cooperation with the United States in Combating Terrorism (Dec. 13, 2001), available at <http://www2.europarl.eu.int/omk/OM-Europarl?PROGFC PRESS-DAILYNB&L&PUBREF//EP//TEXT+PRESS-DAILYNB&N-20011213-1+0†OC+SGML+V0//EN&LEVEL=2&NAV=S> (last visited Feb. 25, 2002).

19. T.R. Reid, *Britain Approves Suspects’ Extradition*, WASH. POST, Dec. 18, 2001, at A14.

20. President Issues Military Order, *supra* note 2, at § 1(g).

21. Elizabeth Bumiller with Katharine Q. Seelye, *Bush Defends Wartime Call for Tribunals*, N.Y. TIMES, Dec. 5, 2001, at A1.

dier-terrorist in Afghanistan, bringing them back with a publicly paid, high profile, flamboyant defense lawyer on television, making it the Osama network, sending signals to the terrorists around the country?"<sup>22</sup> But Bush Administration officials may have miscalculated or underestimated the fallout from the tribunals with the various countries that comprise the coalition in the war on terrorism. And with al Qaeda cells suspected to be operating in more than sixty countries, the cooperation of those countries will be critical to a successful prosecution of the war on terrorism. In the end, the military tribunals could have the reverse effect by making it more difficult and time consuming to extradite suspected terrorists from foreign countries.

#### MILITARY TRIBUNALS FOR U.S. CITIZENS IN FOREIGN COUNTRIES

If the United States decides to use military tribunals for suspected terrorists, then another possible form of blowback would be the use of similar tribunals against American citizens in foreign countries. Indeed, it would be seemingly hypocritical for the United States to expect American citizens to be treated "fairly" abroad (especially by governments with which the United States has less than friendly relations) if the perception is that foreign nationals accused of terrorism are being denied due process and other basic tenets of a fair trial. This concern is not unfounded. The U.S. State Department has repeatedly criticized the use of military tribunals (and similar limitations on due process) to try civilians in a number of countries around the world. Some of the examples cited in the State Department's *Country Reports on Human Rights Practices 2000*<sup>23</sup> include:

- *Burma.* Burma is ruled by a highly authoritarian military regime and the judiciary is not independent of the military junta.<sup>24</sup> Trials for political cases are not open to the public and the verdicts are dictated by senior military authorities.<sup>25</sup> Such trials are justified by citing threats to unity and security<sup>26</sup>—in other words, much the same rea-

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22. *Ashcroft Defends Use of Military Tribunals to Try Terrorists*, CNN.COM, Nov. 21, 2001, at <http://www.cnn.com/2001/LAW/11/20/ashcroft.terrorism/index.html>.

23. BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, U.S. DEP'T OF STATE, *COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2000* (Feb. 23, 2001), available at <http://www.state.gov/g/drl/rls/hrrpt/2000/> (last visited Feb. 22, 2002).

24. See *id.* at BURMA, available at <http://www.state.gov/g/drl/rls/hrrpt/2000/eap/678pf.htm> (last visited Feb. 22, 2002).

25. *Id.* at § 1(e).

26. *Id.*

sons President Bush has given for the use of special military tribunals.

- *Egypt*. In 1992, as a result of extremist violence and under the auspices of the Emergency Law, Egypt began trying accused terrorists (and persons accused of belonging to terrorists groups) in military tribunals.<sup>27</sup> The following year, the Supreme Constitutional Court ruled that any crime could be referred to a military tribunal.<sup>28</sup> These tribunals do not ensure civilian defendants due process before an independent judiciary.<sup>29</sup> The Egyptian government defends the use of military tribunals as necessary in terrorism cases, arguing that civilian court trials are protracted and that judges and their families are vulnerable to terrorist threats<sup>30</sup>—again, much the same arguments made by the Bush Administration.
- *Sudan*. Sudan is ruled by a military regime that overthrew the democratically-elected government in 1989.<sup>31</sup> The judiciary is not independent and is largely subservient to the military regime.<sup>32</sup> Although the 1999 Constitution provides for fair and prompt trials, in practice, military trials can be secret and brief, do not provide procedural safeguards, can take place with no advocate or counsel permitted and do not provide an effective appeal from a death sentence.<sup>33</sup> The military tribunals proposed by the Bush administration share some of the same shortcomings as the tribunals in Sudan that the State Department has been critical of.
- *Peru*. Peru uses special military tribunals (established in 1992) to try civilians accused of treason and terrorism.<sup>34</sup> Proceedings in these tribunals (and those for terrorism in civilian courts) do not meet internationally accepted standards of openness, fairness and due process.<sup>35</sup> Trials can

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27. *Id.* at EGYPT § 1(e), available at <http://www.state.gov/g/drl/rls/hrrpt/2000/nea/784pf.htm> (last visited Feb. 22, 2002).

28. *Id.*

29. *Id.*

30. *Id.*

31. *See id.* at SUDAN, available at <http://www.state.gov/g/drl/rls/hrrpt/2000/af/822pf.htm> (last visited Feb. 22, 2002).

32. *Id.* at § 1(e).

33. *Id.*

34. *Id.* at PERU § 1(e), available at <http://www.state.gov/g/drl/rls/hrrpt/2000/wha/827pf.htm> (last visited Feb. 22, 2002).

35. *Id.*

be held in secret, defense attorneys cannot have access to the State's evidence files, and they may not question military or police witnesses.<sup>36</sup> Peru's use of military tribunals to try civilians is highlighted by the case of U.S. citizen Lori Berenson, who was tried and convicted of the terrorism-related crime of treason before a military tribunal in 1996 and sentenced to life imprisonment. The State Department characterized her trial as lacking sufficient guarantees of due process and having egregious flaws.<sup>37</sup> Berenson was subsequently re-tried, convicted and sentenced to twenty years in prison by a Peruvian civilian court in June 2001 (but even the re-trial was subject to criticism about being fair since the Peruvian justice system does not allow trial by jury and judges are allowed to cross-examine witnesses).<sup>38</sup>

Although they were not tried in a military tribunal, the case of Heather Mercer and Dana Curry in Afghanistan is worth noting. Mercer and Curry were two young American missionaries with Shelter Now International (a Christian aid group) in Afghanistan. They were arrested in August 2001 (along with six other Westerners—four Germans and two Australians—and sixteen Afghans who worked with the organization) and accused of promoting Christianity, a crime in the eyes of the ruling Islamic fundamentalist Taliban regime. They were ordered to stand trial and faced the death penalty. During the course of Operation Enduring Freedom—on November 15, 2001—Mercer, Curry, and the other Western aid workers were freed from a Taliban jail by a local commander and then ferried out of Afghanistan by U.S. special operations forces.<sup>39</sup>

In this particular instance, U.S. citizens were actually treated relatively well. Contrary to Western press reports that demonized the Taliban, Mercer and Curry claimed that they were treated with respect and allowed to pray and sing hymns while in jail.<sup>40</sup> But it is not impossible to imagine a different scenario where the Taliban could have accused Mercer and Curry of being spies or otherwise supporting the U.S.-led military operations in Afghani-

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36. *Id.*

37. *Id.*

38. *U.S. Woman Convicted in Peru Terror Trial*, CNN.COM, June 20, 2001, at <http://www.cnn.com/2001/LAW/06/20/berenson/> (last visited Feb. 28, 2002).

39. Rone Tempest & Megan Garvey, *Commander Frees Captives, Then U.S. Ferries Them Out*, L.A. TIMES, Nov. 15, 2001, at A1.

40. Douglas Frantz, *U.S. Relief Workers Tell of Fear and Faith*, N.Y. TIMES, Nov. 17, 2001, at B3.



stan<sup>41</sup> and applied the same standards to them as proposed for the military tribunals. In which case, instead of a successful rescue, the ending to the story could have been two dead American women.

The point here is very simple: by waving constitutional due process and other standards of fairness, the use of military tribunals to try accused terrorists in the United States would mean giving up the moral high ground. According to constitutional scholar Robert A. Levy at the Cato Institute, the Constitution “safeguards the personal liberties that sustain a free society, like the right to due process. The Bill of Rights, after all is more than scrap paper. And it applies to ‘persons,’ not just U.S. citizens.”<sup>42</sup> It would be difficult and hypocritical for the United States to accuse other countries of subjecting U.S. citizens to unfair trials if the United States is seen as doing exactly that. Furthermore, military tribunals might actually encourage or provide an incentive for other countries to do the same. To be sure, a U.S. decision not to use military tribunals is not a guarantee that other nations would follow the same example; however, the use of military tribunals in the United States would also certainly legitimize the use of similar proceedings against U.S. citizens overseas.

#### A WIDESCREEN PERSPECTIVE

From the beginning, President Bush has gone to great lengths to emphasize that the war on terrorism is not a war against Islam or Muslims. In his address to Congress and the American people on September 20, 2001, President Bush said that the United States respected the Muslim faith and that “[t]he enemy of America is not our many Muslim friends. . . . Our enemy is a radical network of terrorists, and every government that supports them.”<sup>43</sup> To avoid the perception of a war against Islam, the administration initially focused the war on terrorism on three primary objectives:<sup>44</sup>

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41. Angus Donald & Imre Karacs, *Bundled Into a Van, We Lost All Hope. We Thought We Were Being Taken to be Killed by the Taliban*, INDEP., Nov. 16, 2001, at 3, available at <http://www.independent.co.uk/story.jsp?story=105222> (last visited Feb. 23, 2002). “But the biggest question remaining is: what was Shelter Now International, a charity supported financially by the United States government, really doing in Afghanistan?” *Id.*

42. Robert A. Levy, *Tribunals, Trials and Tribulations* (Nov. 27, 2001), at [www.cato.org/dailys/11-27-01.html](http://www.cato.org/dailys/11-27-01.html) (last visited Feb. 28, 2002).

43. President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html> (last visited Feb. 22, 2002).

44. *See id.*

- Bringing down the Taliban regime in Afghanistan
- Dismantling the al Qaeda terrorist network
- Bringing Osama bin Laden to justice

In the immediate aftermath of September 11, there were many who called the attacks an attack on the American way of life, on the very idea of the United States, on American culture, and on capitalism. In other words, there are those who think the war on terrorism fulfills Samuel Huntington's prediction of a "clash of civilizations."<sup>45</sup> But the reality is just the opposite. According to Peter L. Bergen, only one of a handful of Western journalists to have interviewed Osama bin Laden:

In all the tens of thousands of words that bin Laden has uttered on the public record there are some significant omissions: he does not rail against the pernicious effects of Hollywood movies, or against Madonna's midriff, or against the pornography protected by the U.S. Constitution. Nor does he inveigh against the drug and alcohol culture of the West, or its tolerance for homosexuals. He leaves that kind of material to the Christian fundamentalist Jerry Falwell, who opined that the September 11 attacks were God's vengeance on Americans for condoning feminism and homosexuality. If we may judge his silence, bin Laden cares little about such cultural issues. What he condemns the United States for is simple: its policies in the Middle East. Those are, to recap briefly: the continued U.S. military presence in Arabia; U.S. support for Israel; its continued bombing of Iraq; and its support for regimes such as Egypt and Saudi Arabia that bin Laden regards as apostates from Islam.<sup>46</sup>

Clearly, bin Laden would like to make his *political* war against the United States (which he justifies by his twisted interpretation and understanding of Islam) a larger *jihad* pitting the Muslim world against the West. But despite his numerous *fatwas* and the attacks on the World Trade Center and Pentagon, bin Laden has not been able to mobilize the over-one-billion Muslims in the Islamic world to take up arms in a global *jihad*. Indeed, his appeal is to a very small radical element in the Muslim world.

The real danger is that the United States—either deliberately or unintentionally—makes the war on terrorism a clash of

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45. See SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1998).

46. BERGEN, *supra* note 1, at 222.

civilizations between the Christian West and the Muslim world. If Peter Bergen is correct in stating that bin Laden makes the leap from opposing U.S. policies to killing thousands of innocent American civilians because “in [bin Laden’s] mind the United States has been equally violent in its treatment of Muslim civilians[,]”<sup>47</sup> then it is paramount not to provide needless fuel for bin Laden’s accusations that the United States is engaged in a crusade to kill, massacre, and eradicate Muslims. The use of military tribunals could give such views some resonance since any accused terrorists brought before the tribunals are likely to be Muslim. And if the tribunals are not seen as a fair trial—but simply as a way to convict and execute Muslims—then bin Laden could point to them as evidence of his claims against the United States. The risk to Americans would be that Muslims—moderate Muslims, Muslims who do not have extreme or radical views, Muslims who do not have bin Laden’s raging hatred of the United States; in other words, the vast majority of the over-one-billion Muslims in the world—might be willing to accept bin Laden’s radical views.<sup>48</sup>

While military tribunals in and of themselves are not likely to cause such a shift, they could be one of many pieces of the puzzle that tips the scales. It is important not to underestimate this possibility. Consider that:

- There are several reports of U.S. mistakes in Afghanistan that resulted in targeting villages and killing innocent civilians—all Muslims.<sup>49</sup> One of the alleged mistakes was a

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47. *Id.* at 99.

48. This hypothetical result is not far fetched. Very early on during the bombing campaign of Operation Enduring Freedom, when there was criticism of civilian casualties and uncertainty whether the United States would continue bombing such that civilian casualties would increase, Ayaz Amri, a columnist for the *Dawn* newspaper (Pakistan’s most widely circulated English language newspaper)—and someone speaking as a more moderate Pakistani who agreed with Pakistani President Pervez Musharraf’s decision to support the United States and who had little sympathy for bin Laden or the Taliban regime in Afghanistan—commented:

I’m getting a very uneasy feeling. I was convinced we had done a good thing, that only a minority favored the Taliban and good riddance. But now not just the religious extremists, but ordinary Pakistanis, even English-speaking liberals, are asking why this is happening. *Now the image is no longer the Taliban against everyone, but America mindlessly bombing a poor country. And the longer this campaign lasts, the stronger and wider that anger will become.*

Pamela Constable, *Anti-U.S. Sentiment Spreading in Pakistan*, WASH. POST, Oct. 15, 2001, at A1 (emphasis added).

49. Susan B. Glasser, “Afghans Live and Die with U.S. Mistakes,” WASH. POST, Feb. 20, 2002, at A1; Molly Moore, *Fleeing U.S. Bombs, Villagers Found No*

U.S. airstrike against a convoy that the Pentagon claimed to be al Qaeda or Taliban, but according to an Afghan official was tribal delegates coming to Kabul for the installation of the new interim government.<sup>50</sup>

- American troops are accused of beating Afghans captured in a night raid and mistakenly identified as al Qaeda or Taliban.<sup>51</sup>
- With military operations winding down, American forces are finding themselves caught between warring Afghan factions. Underscoring how the war in Afghanistan has changed from a campaign against al Qaeda and the Taliban, U.S. forces bombed tribal militias threatening the stability of the interim Karzai government.<sup>52</sup>
- The United States is participating in joint training exercises with the Philippine military to eradicate Abu Sayef, a militant separatist Islamic group. The U.S. claims that Abu Sayef is linked to al Qaeda, but any connections are tenuous and according to Philippine president Gloria Macapagal Arroyo evidence of al Qaeda in the Philippines is only up until 1995.<sup>53</sup>
- President Bush named two Muslim countries—Iraq and Iran—as part of an “axis of evil” that threatens the peace of the world and poses a grave and growing danger in his State of the Union address.<sup>54</sup>

So some of the seeds are already sown that could transform the war on terrorism to a war against Muslims or Islam. The irony and paradox, of course, would be that U.S. actions and policies

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*Place to Hide*, WASH. POST, Feb. 13, 2002, at A1; Doug Struck, *Casualties of U.S. Miscalculations*, WASH. POST, Feb. 11, 2002, at A1; Barry Bearak, *Uncertain Toll in the Fog of War: Civilian Deaths in Afghanistan*, N.Y. TIMES, Feb. 10, 2002, at 1; Steve Vogel & Vernon Loeb, *U.S. Frees 27 Afghans Held in Raid*, WASH. POST, Feb. 7, 2002, at A1.

50. *Afghan Official: U.S. Strike Hits Tribal Delegates*, CNN.COM, Dec. 22, 2001, at <http://www.cnn.com/2001/WORLD/asiapcf/central/12/22/ret.afghan.strikes.convoy/> (last visited Feb. 28, 2002).

51. Vernon Loeb, *Alleged Beating of Prisoners Sparks Inquiry*, WASH. POST, Feb. 12, 2002, at A12; Carlotta Gall, *Released Afghans Tell of Beatings*, N.Y. TIMES, Feb. 11, 2002, at A1; Molly Moore, *Villagers Released by American Troops Say They Were Beaten, Kept in “Cage,”* WASH. POST, Feb. 11, 2002, at A1.

52. Vernon Loeb, *Afghan Factions Test U.S. Forces*, WASH. POST, Feb. 21, 2002, at A16; John F. Burns, *In a Shift, U.S. Uses Airstrikes to Help Kabul*, N.Y. TIMES, Feb. 19, 2002, at A1.

53. Lally Weymouth, *We Will Do The Fighting*, WASH. POST, Feb. 3, 2002, at B1.

54. Press Release, White House Office of Press Sec’y, President Delivers State of the Union Address (Jan. 29, 2002), available at <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html> (last visited Feb. 22, 2002).

cause a chain reaction of events that results in the objective bin Laden seeks but cannot accomplish on his own.

### CONCLUSION

While the initial storm of criticism about military tribunals cannot be undone,<sup>55</sup> the Bush administration appears to have backed away from its original stance. The first suspect who could have been tried by a military tribunal—Zacarias Moussaoui, a French-Moroccan who was arrested in August 2001—was instead arraigned in a federal district court in Alexandria, VA, where he will stand trial on six counts of conspiracy related to the terrorist attacks of September 11.<sup>56</sup> And none of the nearly 500 al Qaeda and Taliban prisoners being held either in Afghanistan or at Camp X-Ray in Guantanamo Bay, Cuba have been found by the Pentagon to be “suitable for the new military tribunals.”<sup>57</sup> Further evidence that the administration may be reconsidering its original positions on military tribunals is a draft proposal for anti-terrorism military tribunals leaked to the press at the end of 2001 that calls for imposition of the death penalty only by unanimous vote, operating largely in public rather than in secret and presumption of innocence unless proved guilty beyond a reasonable doubt<sup>58</sup>—in other words, much the same standards as a civilian criminal trial. Interestingly enough, the initial reaction by the administration to the leak was one of exasperation and to downplay the reports of the draft proposal,<sup>59</sup> even though the changes to the original November 13 proposal were being viewed in a

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55. Attorney General Ashcroft's remarks at a hearing of the Senate Judiciary Committee on December 6, 2001 were particularly contentious:

To those who pit Americans against immigrants, 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.

Ashcroft: Critics of New Terror Measures Undermine Effort, CNN.COM, Dec. 7, 2001, at <http://www.cnn.com/2001/US/12/06/inv.ashcroft.hearing/index.html> (last visited Feb. 28, 2002).

56. Brooke A. Masters, *Invoking Allah, Terror Suspect Enters No Plea*, WASH. POST, Jan. 3, 2002, at A1.

57. See Pauline Jelinek, *Pentagon: No Tribunal Candidates*, Yahoo! News, Feb. 26, 2002 at [http://story.news.yahoo.com/news?tmpl=story&u=/Ap/20020226/ap\\_on\\_go\\_ca\\_st\\_pe/afghan\\_us\\_tribunals\\_5&cid=533](http://story.news.yahoo.com/news?tmpl=story&u=/Ap/20020226/ap_on_go_ca_st_pe/afghan_us_tribunals_5&cid=533) (last visited Feb. 28, 2002).

58. Charles Lane, *Terrorism Tribunal Rights Are Expanded*, WASH. POST, Dec. 28, 2001, at A1.

59. Charles Lane, *Bush Calls Draft on Tribunals "Preliminary,"* WASH. POST, Dec. 29, 2001, at A8.

positive light and seen to blunt the initial criticisms of military tribunals.<sup>60</sup>

While there are certainly important constitutional and legal issues regarding military tribunals that cannot and should not be ignored, the tribunals must also be viewed in the broader context of whether, on balance, they help or hinder the war on terrorism. Therefore, the negative effects and consequences of blowback cannot be ignored. The initial damage caused by proposing military tribunals for suspected terrorists is already done and there will inevitably be some fallout even if a military tribunal is never convened. But if the administration persists in taking a "hard line" on the tribunals, there is likely to be greater blowback that will cause more harm than good. And the nature of blowback is that it usually comes at the worst time and in the worst way.

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60. Katharine Q. Seelye, *Draft Rules for Tribunals Ease Worries, But Not All*, N.Y. TIMES, Dec. 29, 2001, at B7.

