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THE ROLE OF THE MEDIA, LAW, AND NATIONAL RESOLVE IN THE WAR ON TERROR

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I. INTRODUCTION

In the aftermath of the terrorist attacks of September 11, 2001, the government of the United States took unprecedented steps to protect American lives and property.¹ Measures imposed included tightened security at nuclear power plants,² airports,³ and numerous other government and private installations around the United States.⁴

Debate over an appropriate U.S. response centered on whether there was proof of a foreign state's complicity in the attacks. On September 15, 2001, a *New York Times/CBS News* poll revealed that eighty-five percent of Americans would

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1. See, e.g., Michael R. Gordon, *After the Attacks: An Assessment; U.S. Force vs. Terrorists: From Reactive to Active*, N.Y. TIMES, Sept. 14, 2001, at A16. ("The analogy between this week's terrorist attacks and Pearl Harbor is apt in one sense. The attacks have shaken the American public and the Pentagon leadership. Strategies and tactics that seemed unthinkable just weeks ago are thinkable now.")

2. See AAP Information Services, *Bush Administration Orders Tighter Nuclear Plant Security*, Feb. 15, 2002, available at 2002 WL 5749902 (declaring that the Bush administration "ordered all 103 U.S. nuclear power plants to tighten anti-terrorism measures" as evidence of "the Federal Aviation administration banning flights within 19 km of most U.S. nuclear plants."). See also Raymond McCaffrey & Monte Reel, *Terror Attacks' Fallout Reaches Southern Md.: Security Alerts, Road Snarls, Grief Grip Counties*, WASH. POST, Sept. 13, 2001, at T1 (stating that security increased drastically at the Calvert Cliffs Nuclear Power Plant in Lusby, Maryland as a result of the terrorist attacks). See also Mark Barabak & Beth Shuster, *America Attacked*, L.A. TIMES, Sept. 12, 2001, at A29 ("As the first reports of terror arrived from the East early Tuesday, the California Highway Patrol scrambled its aircraft to secure the skies above the state Capital, the California Aqueduct, and state's electricity grid, nuclear power plants, and other critical locations.")

3. See Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (allowing the federal government to have control of the security of airports) ("The Under Secretary shall (1) be responsible for day-to-day Federal security screening operations for passenger air transportation and intrastate air transportation under sections 44901 and 44935; (2) develop standards for the hiring and retention of security screening personnel; (3) train and test security screening personnel; and (4) be responsible for hiring and training personnel to provide security screening at all airports in the United States where screening is required under section 44901, in consultation with the Secretary of Transportation and the heads of other appropriate Federal agencies and departments.") *Id.* § 101(e).

4. Press release, Office of the Press Secretary, White House, *Strengthening Homeland Security Since 9/11* (Apr. 11, 2002), available at http://www.whitehouse.gov/homeland/six_month_update.html. (discussing measures to increase safety in response to the September 11, 2001, including the establishment of terrorism task forces, increased border patrols and INS regulations, increased screening at airports and employee background checks, increased funding to eliminate viruses and possible chemical weapon attacks, increased security at major dams, reservoirs, and nuclear power plants, and the institution of more civic groups to aid with community protection).

support military action against whoever was responsible for the attacks, while only six percent would oppose any military retaliation.⁵ To a large degree, therefore, the debate over U.S. policy in Iraq may be reduced to the simple question of whether Iraq was in fact involved in the 9/11 attacks.

While official investigations were immediately begun, it was not until May 7, 2003, that a federal court, considering all the evidence and applying the strict Federal Rules of Evidence (F.R.E.), made specific findings that Iraq, Saddam Hussein, and al Qaeda were jointly responsible for the 9/11 attacks.⁶ In *Smith v. Islamic Emirate of Afghanistan*,⁷ families of 9/11 victims brought a tort case against Hussein and the Republic of Iraq pursuant to the Antiterrorism Act of 1991, which specifically provides that victims of terrorism may sue for damages in an appropriate federal district court.⁸

Since neither Iraq nor Hussein appeared in court to defend the allegations and thus, failed to provide discovery materials required, the plaintiffs argued that a lower standard of evidentiary proof should be imposed in establishing Iraq's complicity in 9/11.⁹ However, the Court rejected this argument, citing 28 U.S.C. 1608(e), which states that no judgment by default may be entered against a foreign state unless the "claimant establishes his claim or right to relief by evidence satisfactory to the court."¹⁰

In other words, the court insisted that, even though neither Iraq nor Hussein appeared, the plaintiffs would nevertheless have to submit evidence sufficient to meet the higher burden of proof required by the statute despite having been disadvantaged by lack of access to discovery.¹¹ Even more disadvantageous to the plaintiffs, the court ruled that strict rules of evidence, including the very technical hearsay rules imposed by the F.R.E, would have to be strictly complied with in presenting the plaintiff's case.¹²

At the evidentiary hearing, Robert Woolsey, CIA Director under President Clinton, testified that according to information available, "*I believe it definitely more likely than not that some degree of common effort in the sense of aiding and abetting or conspiracy was involved here between Iraq and al Qaeda.*"¹³

5. CBS News.com, *Poll: Revenge and Return* (Sept. 15, 2001), available at <http://cbsnews.com/stories/2001/09/15/opinion/main311417.shtml>.

6. *Smith v. The Islamic Emirate of Afghanistan*, 262 F. Supp. 2d 217 (S.D.N.Y. 2003).

7. *Id.*

8. Anti-Terrorism Act of 1991 § 2333, 18 U.S.C. § 2333 (2005)

9. *Smith*, 262 F. Supp. 2d at 222-23.

10. *Id.* at 222-24 (emphasis added); see also 28 U.S.C. § 1608(e) (2004) ("No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.")

11. *Smith*, 262 F. Supp. 2d at 224-25.

12. *Id.* at 223.

13. *Id.* at 232 (emphasis added); see also generally, Interview by PBS Frontline with R. James Woolsey, attorney and former Director of the CIA, (Oct. 2001), available at <http://www.pbs.org/wgbh/pages/frontline/shows/gunning/interviews/woolsey.html>.

Expert on Iraq and a former Clinton advisor, Dr. Laurie Mylroie of Harvard, after examining the evidence concluded that, "Iraq . . . provide[d] support and resources for the September 11 attacks . . . al Qaeda acts as a front for Iraqi intelligence. Al Qaeda provides the ideology, the foot soldiers, and the cover . . . [a]nd Iraq provides the direction, the training, and the expertise."¹⁴

In a previous study, Dr. Mylroie noted that Iraq had made little effort to hide its intent to attack the United States;¹⁵ she cited the following threats published by Iraq in its official news organ prior to the events of 9/11:

1. Does the United States realize the meaning of every Iraqi becoming a missile that can cross countries and cities.¹⁶

2. The crime of annihilating the Iraqis will trigger crises whose nature and consequences are known only to God.¹⁷

3. When one realizes that death is one's inexorable fate, there remains nothing to deter one from taking the most risky steps to influence the course of events.¹⁸

4. When peoples reach the verge of collective death, they will be able to spread death to all.¹⁹

Similar direct threats of violence against the United States were published by Iraq on an almost daily basis.²⁰

However, the court declared certain items of otherwise persuasive evidence of Iraqi complicity in the 9/11 inadmissible on narrow technical grounds under the F.R.E.²¹ Thus, the court did not consider a compendium of evidence presented, including a litany of contacts between al Qaeda and Iraqi intelligence, as well as the testimony of defectors concerning Hussein's training camp for al Qaeda terrorists at Salman Pak in Iraq (which included among other props, a full-scale mock up of an airliner with no runway nearby).²² Other evidence presented, but excluded

14. *Smith*, 262 F. Supp. 2d at 229.

15. Laurie Mylroie, *The World Trade Center Bomb: Who is Ramzi Yousef? And Why it Matters*, NAT'L INT., Winter 1995/1996, at 12-14.

16. *Id.* at 12, (quoting *Babil*, the official Iraqi newspaper, Sept. 29, 1994).

17. *Id.* at 13 (citing *al-Jumhuriyah*, an Iraqi daily newspaper Oct. 8 1994).

18. *Id.* (quoting *al-Jumhuriyah*, Oct. 5, 1994).

19. *Id.* at 12 (quoting *al-Jumhuriyah*, Oct. 4 1994).

20. *Id.*

21. *Smith*, 262 F. Supp. 2d, at 224-25.

22. For a review of the evidence presented, see *id.* at 228-32.

Dr. Laurie Mylroie, an expert on Iraq and its involvement . . . in the bombing of the World Trade Center in 1993 . . . described Iraq's covert involvement in acts of terrorism against the United States in the past, including the bombing of the World Trade Center in 1993. Dr. Mylroie testified to at least four events that served as the basis for her conclusion that Iraq played a role in the September 11 tragedy . . . Specifically, Abdul Rashman Yasin returned to Baghdad after the bombing and Iraq has provided him safe haven ever since. Also, Ramsey Yusef arrived in the United States on an Iraqi passport in his own name but left on false documentation—a passport of a Pakistani who was living in Kuwait and whom the Kuwaiti government kept on file on at the time that Iraq invaded Kuwait. Second, she noted bin Laden's *fatwah* against the U.S., which was motivated by the presence of U.S. forces in Saudi Arabia to fight the Gulf War against Iraq. Third, she noted that

by the court, included an assertion in an official Iraqi newspaper in July 2001, just two months before the 9/11 attacks, that "bin Laden will try to bomb the Pentagon after he destroys the White House."²³ It is widely believed that the intended target of the hijacked airliner which crashed in Pennsylvania was the White House.²⁴

Even after throwing out this mass of evidence, the court concluded on the basis of the remaining evidence, and pursuant to the legal standard of "evidence satisfactory to the court," that "Iraq provided material support to bin Laden and al Qaeda."²⁵ A judgment in the amount of sixty million dollars was entered against Hussein and Iraq for its involvement in the 9/11 attacks.²⁶

One interesting question is why there has been so little media coverage of this very important federal case. One possible, though perhaps unduly cynical, explanation is that those who seek peace at any price are not eager for the public to become aware of a specific U.S. federal court finding that Iraq was involved in 9/11 for fear that it might strengthen national resolve to support U.S. policy in Iraq and to enforce U.N. resolutions.

Although President Bush's reticence to rely on court precedent and evidence of Iraq's complicity has been severely criticized,²⁷ it is perhaps understandable in light of virulent anti-war skepticism, such as in France where a best-selling book asserts that no airliner ever attacked the Pentagon and that Bush and the Jews masterminded 9/11.²⁸ No amount of evidence is ever likely to convince those who op-

threats by bin Laden in late 1997 and early 1998 which led up to the bombing of the U.S. embassies (on August 7, 1998) were "in lockstep" with Hussein's threats about ousting the U.N. weapons inspectors . . . *Id.* at 228-29.

23. *Id.* at 231.

24. *Id.* at 231 n.23.

25. *Id.* at 232; see also Richard Willing, *Lawsuit Ruling Finds Iraq Partly Responsible for 9/11*, USA TODAY, May 7, 2003, available at http://www.usatoday.com/news/nation/2003-05-07-911-judge-awards_x.htm; Douglas Jehl, *More Proof of Iraq-Qaeda Link, or Not?*, N.Y. TIMES, Nov. 20, 2003, at A18. An Oct. 27, 2003 memorandum from Pentagon official Douglas J. Feith outlined "50 points of raw intelligence" between Iraq and Al Qaeda. The memo supports Bush administration officials' arguments that former ties between Al Qaeda and Iraq were the primary justification for the invasion of Iraq, as a direct response to the 9/11 attacks. Among other intelligence, the leaked memo included a report stating that "the Sept. 11 hijacker Muhammed Atta met several times in Prague with a former Iraqi intelligence chief, who in 2000 is said to have requested a transfer of funds to Mr. Atta." The memo added that the CIA had not confirmed the meetings. Although C.I.A. spokespersons declined to comment on the memo, they stated that the letter delivered to the Senate Intelligence Committee from former CIA director George Tenet remained the best measurement of the government's knowledge of the links between Al Qaeda and Iraq. The October 2002 letter from Tenet stated that "there was 'credible reporting' that Al Qaeda leaders sought contacts in Iraq that could help them acquire the capability to use weapons of mass destruction, and that 'Iraq has provided training to Al Qaeda members in the areas of poisons and gases and making conventional bombs.'"

26. See *Smith*, 262 F. Supp. 2d at 233, 240-41. For an explanation of the exception to the general rule that foreign states are immune from U.S. jurisdictions see generally, Kristine Cordier Karnezis, Annotation, *Award of Damages Under State-Sponsored Terrorism Exception to Foreign Sovereign Immunities Act* (28 U.S.C.A. § 1605(A)), 182 A.L.R. FED. 1 (2002).

27. See, e.g., Deroy Murdock, *Saddam's Terror Ties*, NAT'L REV. ONLINE, Oct. 21, 2003, at <http://www.nationalreview.com/murdock/murdock200310210934.asp>.

28. See THIERRY MEYSSAN, 9/11: THE BIG LIE (2003).

pose the war on terror, especially when vested business interests may be at stake.

On October 26, 2001, Congress overwhelmingly passed, and the President signed, an act entitled, *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism* (sometimes misleadingly referred to as "The Patriot Act").²⁹ In addition to condemning discrimination against Arab and Muslim Americans,³⁰ providing for victims of terrorism,³¹ and providing for the sharing of information between government agencies (i.e., establishing an infrastructure for "connecting the dots"),³² this Act extended current constitutionally tested procedures for investigating organized crime to investigations of terrorist activity.³³

In 2002, the U.S. Congress overwhelmingly authorized the use of military force against Iraq,³⁴ and on November 8, 2002, a unanimous U.N. Security Council adopted Resolution 1441,³⁵ which found that Iraq had not "provided an accurate, full, final, and complete disclosure, as required by Resolution 687 (1991), of all aspects of its programmes to develop weapons of mass destruction,"³⁶ and held further that Iraq "has been and remains in material breach of its obligations under relevant resolutions."³⁷ Finally, a unanimous Security Council authorized "serious

29. *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001*, H.R. 3162 RDS 107th Cong. (1st Sess. 2001). The acronym of this act, which if spelled out to delete certain words, spells USAPATRIOT, is misleading in the sense that it conveys the impression to those unfamiliar with the act that the act has something to do with patriotism per se.

30. *Id.* § 102. Section 102(a)(2) states: "The acts of violence that have been taken against Arab and Muslim Americans since the September 11, 2001, attacks against the United States should be and are condemned by all Americans who value freedom."

31. *Id.* §§ 611-14, 621-24. Section 611(a) in general provides for expedited payment to beneficiaries of public safety officers killed or permanently disabled as a result of a personal injury sustained in the line of duty "in connection with prevention, investigation, rescue, or recovery efforts related to a terrorist attack." The Act also sets up various victim's and emergency funds, for example, § 621 Crime Victims Fund, 621(d) Antiterrorism Emergency Reserve, 621(e) Victims of Sept. 11, 2001, § 622 Crime Victim Compensation, § 623 Crime Victim Assistance, § 624 Victims of Terrorism.

32. *Id.* § 203. In relation to law enforcement, section 203(b)(1) states: "Any investigative or law enforcement officer, or attorney for the Government, who by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents to any other Federal law enforcement, intelligence, protective, immigration, national defense, or national security official to the extent that such contents include foreign intelligence or counterintelligence . . . to assist the official who is to receive that information in the performance of his official duties."

33. *Id.* §§ 201-02, 204-25. The constitutionally protected procedures referred to include the interception of terrorist communications through the use of wire taps, audio and video surveillance, physical searches, and the use of foreign intelligence.

34. H.J. Res. 114, 107th Cong., 2nd Sess. (2002). The House of Representatives on Oct. 10 passed the resolution by a vote of 296-133. Senate approval came in a late-night vote of 77-23.

35. S.C. Res. 1441, U.N. SCOR, 45th Sess., 4644th mtg., U.N. Doc. S/RES/1441 (2002) [hereinafter S.C. Res. 1441].

36. *Id.* at 1; S.C. Res. 687, U.N. SCOR, 45th Sess., 2981st mtg. at 11, U.N. Doc. S/RES/687 (1991); see also *Information on biological weapons programme reported hidden. (Iraq)*, U.N. CHRON. (Dec. 1, 1995), 1995 WL12598335.

37. S.C. Res 1441, *supra* note 35, at 3; see also Russell Taylor, 'Seize This Opportunity' Iraq Indicated it Will Comply, UN CHRON. (Dec. 1, 2002) 2002 WL 21468499.

consequences as a result of its continued violations of its obligations.”³⁸

In light of later claims by some journalists and pundits that the U.S. Congress and the President went to war in Iraq based on faulty intelligence that Iraq had weapons of mass destruction,³⁹ it is useful to note that a unanimous Security Council, including Syria, France, Germany, Russia, and China made a specific finding that Iraq was *already* in possession of weapons of mass destruction (having been found in previous U.N. inspections).⁴⁰ Thus, the imposition of “serious consequences” by Syria et al., against Iraq was authorized not on the basis of a possible discovery of weapons at some future time, but rather on the basis that Iraq had not *accounted* for weapons *previously discovered* by U.N. inspectors. In any case, U.N. inspector David Kay has since reported his discovery in Iraq of “dozens of WMD-related program activities . . . stains of organisms . . . used to produce biological agents . . . a clandestine network of laboratories . . . that contained (chemical-biological weapons) research . . . and unmanned aerial vehicles . . . in violation of UN resolutions.”⁴¹

After the unanimous adoption of Resolution 1441, the only question remaining was the import of the words “serious consequences.” Not surprisingly, an overwhelming majority of European leaders, including those in Italy, Spain, Great Britain, and a virtually unanimous block of Eastern European countries, interpreted this phrase as including military action,⁴² and supported the U.S. effort to enforce U.N. Resolution 1441 by the use of military force. In the end, the only significant European holdouts in supporting the U.S. effort to enforce Resolution 1441 were France, Germany, and Belgium.⁴³

Indeed, in light of the fact that severe economic sanctions had already been imposed on Iraq for a number of years, it is difficult to imagine any reasonable interpretation of the U.N. mandate to impose “serious consequences,” other than actual enforcement by armed force.

The U.N. mandate authorizing serious consequences was reinforced by a previous U.N. Resolution, which had acknowledged that the 9/11 terrorist attacks on the World Trade Center were a “threat to international peace and security,” and specifically “recognize(d)” the right of self-defense and a “readiness to take all necessary steps to respond to the terrorist attacks.”⁴⁴ This latter recognition by the Security Council was important in applying Article 51 of the U.N. Charter, which

38. S.C. Res 1441., *supra* note 35, at 5; Taylor, *supra* note 37.

39. See Robert Dreyfuss, *More Missing Intelligence*, THE NATION, June 19, 2003, available at <http://www.thenation.com/doc.mhtml?i=20030707&s=dreyfuss>.

40. See S.C. Res. 1441, *supra* note 35.

41. Colin Powell, *Powell Says Kay Report Confirms Iraq Defied UN Resolution 1441*, (Oct. 7, 2003), at <http://usinfo.state.gov/mena/Archive/2004/Feb/11-286155.html> (quoting the report of David Kay, a U.N. weapons inspector in Iraq).

42. See Harvey Sicherman, *Why France Gave the U.S. the Boot*, Hist. News Network, (Mar. 24, 2003), at <http://www.hnn.us/articles/1347.html>.

43. Edward I. Koch, *History is Now Repeating Itself – Why Don’t the American Bashers Gasp It?*, JEWISH WORLD REV., (Feb. 12, 2003), at <http://www.jewishworldreview.com/0203/koch021203.asp>.

44. S.C. Res. 1368, U.N. SCOR, 56th Sess., 4386th mtg., U.N. Doc. S/RES/1368 (2001).

specifically states, "Nothing in the present charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."⁴⁵

In light of the fact that the terrorist attacks on the World Trade Center and Pentagon were equal to or greater in scope than the attack on Pearl Harbor by the Japanese in 1941,⁴⁶ it is not surprising that the Security Council recognized the terrorist attacks as armed attacks, thus justifying the use of unilateral action by the United States even without prior U.N. authorization. However, the latter point has proved superfluous, as "serious consequences" against Iraq were indeed specifically authorized by a unanimous Security Council in Resolution 1441.⁴⁷

Despite the unanimous U.N. Security Council authorization of the imposition of serious consequences on Iraq, the once overwhelming support of the American people,⁴⁸ and the U.S. Congress' authorization of the use of force against Iraq, the effort by a coalition of forty-six nations⁴⁹ to enforce U.N. Resolution 1441 has been undermined by political and media opposition—not only by some Islamic countries, Germany, and France, but also by some Americans.⁵⁰

The tone for this opposition has been set by the "fringe" or alternative press. Examples of the latter include the much publicized statements by a Columbia University professor who told students at an anti-war "teach-in" that he hoped America would suffer "a million" deaths in the form of "a million Mogadishus."⁵¹ Others have suggested that President Bush and the Jews knew about the attacks before they happened.⁵²

45. U.N. CHARTER, art. 51.

46. See generally Mike Bursleson, *September 11 & Pearl Harbor*, Buzzle.com, (Dec. 5, 2002), at <http://www.buzzle.com/editorials/12-4-2002-31581.asp>.

47. S.C. Res. 1441, *supra* note 35, at 5.

48. See, e.g., Doyle McManus, *Public Still Backs Military Move on Iraq*, L.A. TIMES, Sep. 2, 2002 ("The poll found that 59% of Americans believe the U.S. should take military action to remove Hussein from power; 29% were opposed; and 12% were unsure.").

49. The following forty-six nations publicly committed themselves to the coalition effort in Iraq: Afghanistan, Albania, Australia, Azerbaijan, Bulgaria, Columbia, Costa Rica, Czech Republic, Denmark, Dominican Republic, El Salvador, Eritrea, Estonia, Ethiopia, Georgia, Honduras, Hungary, Iceland, Italy, Japan, Kuwait, Latvia, Lithuania, Macedonia, Marshall Islands, Micronesia, Mongolia, Netherlands, Nicaragua, Palau, Panama, Philippines, Poland, Portugal, Romania, Rwanda, Singapore, Slovakia, Solomon Islands, South Korea, Spain, Turkey, Uganda, United Kingdom, United States, Uzbekistan. The White House, *Operation Iraqi Freedom: Coalition Members*, (Mar. 21, 2003), at <http://www.whitehouse.gov/news/releases/2003/03/20030321-4.html>.

50. *Arab Opposition to War Against Iraq Escalated*, Arabic News.com, (Feb. 11, 2003), at <http://www.arabicnews.com/ansub/Daily/Day/030211/2003021101.html>. See e.g., Veterans Against the Iraq War, at <http://www.vaiv.org/vet/index.php>.

51. Jonah Goldberg, *Columbia Prof's Comments Anti-American*, (Apr. 2, 2003), available at <http://www.freerepublic.com/focus/f-news/882520/posts>. Professor Nicholas De Genova was quoted as stating that he wished America would suffer "a million Mogadishus", in apparent reference to the "Black Hawk Down" incident in which 18 Americans were killed. A "million" Mogadishu's would therefore actually translate into 18 million American deaths.

52. See generally John King, *Bush Briefed on hijacking threat before September 11*, CNN.com, May 16, 2002, at <http://www.cnn.com/2002/US/05/15/bush.sept.11/>; David Duke, *How Israeli Terror-*

Although pundits such as Paul Krugman of the *New York Times* (*Times*) have not been quite so candid,⁵³ any misfortune which befalls American troops in Iraq is used as ammunition with which to undermine the allied effort in Iraq, creating a kind of symbiotic, though surely unintended, relationship between anti-war politicians in the United States and Iraqi terrorists. The terrorists kill innocent people in Iraq, thereby giving U.S. politicians grounds for asserting that the war is a quagmire, and therefore Bush should be removed from office; in return, the terrorists are rewarded with support in the form of demands by U.S. politicians to withdraw and leave Iraq to the tender mercies of al Qaeda.

Indeed, political opposition has continued even after a unanimous U.N. Resolution was passed in mid-2004 affirming the U.S. policy and timetable for handing over political power to a freely elected Iraqi government.⁵⁴

It is now apparent that the media will play a large role in both defining and influencing the national will in the war on terror, and more specifically the effort to transfer full sovereignty to the people of Iraq. Considerations of international law, as well as domestic constitutional law will also have a significant impact on the conduct of this war.

Part II will examine the role of the media in influencing this first major war of the twenty-first century. Part III will review current considerations of international and domestic constitutional law, and Part IV will consider the effect of national will and resolve. Part V concludes that: 1) the coalition effort to enforce U.N. Resolution 1441 has been in accordance with international law; 2) domestic anti-terrorism laws and policies comply with U.S. Supreme Court precedent; and 3) the thrust of current media coverage is undermining both the war against terror and the coalition effort to stabilize Iraq and transfer full sovereignty.

II. MEDIA COVERAGE OF THE WAR AGAINST TERROR

Unlike dictatorships in which one leader can make the decision to go to war, democracies require the broad support of the citizenry. The media, represented by

ism and American Treason Caused the September 11 Attacks, David Duke Online, Sept. 11, 2002, at <http://www.duke.org/writings/howisraelcaused911.pdf>.

53. Paul Krugman, *Who Lost Iraq?*, N.Y. TIMES, June 29, 2004, at 27. Krugman writes:

The Iraq venture may have been doomed from the start—but we'll never know for sure because the Bush administration made such a mess of the occupation. Future historians will view it as a case study of how not to run a country. Up to a point, the numbers in the Brookings Institution's invaluable Iraq Index tell the tale. Figures on the electricity supply and oil production show a pattern of fitful recovery and frequent reversals; figures on insurgent attacks and civilian casualties show a security situation that got progressively worse, not better; public opinion polls show an occupation that squandered the initial good will. What the figures don't describe is the toxic mix of ideological obsession and cronyism that lie behind that dismal performance.

Id. See also Paul Krugman, *What About Iraq?*, N.Y. TIMES, Aug. 6, 2004, at A19. Again Krugman: One thing is clear: calls to 'stay the course' are fatuous. The course we're on leads downhill. American soldiers keep winning battles, but we're losing the war: our military is under severe strain; we're creating more terrorists than we're killing; our reputation, including our moral authority, is damaged each month this goes on.

54. S.C. Res. 1546, U.N. SCOR, 59th Sess., 4987th mtg., U.N. Doc. S/RES/1546 (2004).

films, television, newspapers, magazines, and in recent years the internet, plays a pivotal role in shaping that opinion.

For this reason, it has been rare in human history that a true democracy initiates aggressive war. Thus, it is a Hitler's Germany that attacks Poland, or an Italy's Mussolini that attacks Ethiopia. It is rarer still for a democratic nation to engage in successful war without the overwhelming support of the electorate.

In World War II, public support for the allied war effort was nurtured and promoted by the western media in films, newspapers, and magazines.⁵⁵ It has now become fashionable in journalistic circles to denigrate the uncritical coverage of World War II by the Western media as "cheerleading" and war-mongering; it is suggested that the Western media should have been more neutral in its coverage, giving the pro-Nazi view alongside the anti-Nazi view.⁵⁶

Balance in journalism goes far beyond simply reporting facts accurately. Emphasis, punctuation, and selection of visual images often speak louder and more effectively in shaping opinions than editorial expressions.

Even aside from assertions coming from the "fringe" and alternative press, most Americans can recognize propaganda in its crudest form (just as they took the rants of "Baghdad Bob" with a generous dose of salt.⁵⁷ Far more insidious, however, are the more disguised forms of propaganda camouflaged as news.

For example, in the aftermath of the *Times* scandal in which reporter Jayson Blair's fabrications corrupted literally hundreds of "mainstream" media stories,⁵⁸ there has been a closer examination of the abusive methods and practices that the *Times* has employed to present opinion in the guise of news—methods which include omission, distortion, emphasis, and outright falsification.⁵⁹ When the *Times* deliberately distorted the views of former Secretary of State Henry Kissinger as the basis for publishing a headline that "Republicans Break With Bush on Iraq,"⁶⁰ the *Washington Post* published an article by Pulitzer Prize-winning columnist Charles Krauthammer decrying the *Times*' unscrupulous journalistic tactics:

Not since William Randolph Hearst famously cabled his correspondent in Cuba, "You furnish the pictures, and I'll furnish the war," has a newspaper so blatantly

55. JORDAN BRAVERMAN, *TO HASTEN THE HOMECOMING: HOW AMERICANS FOUGHT WORLD WAR II THROUGH THE MEDIA* (1995).

56. Noam Chomsky, *What Makes Mainstream Media Mainstream*, ZMAGAZINE, June 1997, available at <http://www.zmag.org/chomsky/articles/z9710-mainstream-media.html>.

57. Center for Individual Freedom, *The Collected Quotations of "Baghdad Bob," Mohammed Saeed al-Sahaf: The Iraqi Minister of Disinformation, at* http://www.cfif.org/htdocs/freedomline/current/in_our_opinion/baghdad_bob.htm.

58. See BOB KOHN, *JOURNALISTIC FRAUD: HOW THE NEW YORK TIMES DISTORTS THE NEWS AND WHY IT CAN NO LONGER BE TRUSTED* 2-3, (2003).

59. *Id.*; see also Bob Kohn, *Bad Times: The Decline and Fall of the New York Times*, THE WKLY STANDARD May 24, 2004, at Books & Arts Section (reviewing Jayson Blair's book, *Burning Down My Masters' House My Life at the New York Times*); see e.g., Christopher Caldwell, *The New York Times's Meltdown: What explains it?*, THE WKLY. STANDARD, May 26, 2003.

60. Todd S. Purdum & Patrick E. Tyler, *Top Republicans Break with Bush on Iraq Strategy*, N. Y. TIMES, Aug. 16, 2002, at A1.

devoted its front pages to editorializing about a coming American war as has Howard Raines' New York Times. Hearst was for the Spanish American war. Raines (for those who have been incommunicado for the last year) opposes war with Iraq.⁶¹

Although an unabashed *Times* later printed a retraction (buried on a back page), and *Times* Editor Harold Raines responded to Krauthammer's with an ad hominem attack on Krauthammer,⁶² it was apparent that both Raines and the *Times* had missed the point: it is well and fine to slant, editorialize, and even propagandize on the *editorial* page, but it is dishonest and unprincipled—akin to the use of subliminal messages—to disguise opinion as objective news.

A review of *Times* practices by prize-winning essayist and attorney, Bob Kohn, has revealed a litany of journalistic abuses;⁶³ a few examples are illustrative. Perhaps most notorious is the deliberate manipulation of polls—a tactic often used by totalitarian regimes.⁶⁴ In addition to laying the groundwork for a selected poll by running a series of editorials disguised as objective news stories and then selectively commissioning and timing polls on issues it has been advocating, the *Times* either declines to publish results it deems unsatisfactory or distorts the poll results in huge headlines.⁶⁵

For example, when a *New York Times/CBS News* Poll revealed that 88 percent of Americans supported Bush's military action against Afghanistan, the *Times* "objective" analysis of the results was: "Survey Shows Doubts Stirring on Terror War."⁶⁶

Satisfied that its own distortions and selective reporting must have had an adverse effect on public opinion, a confident *Times* commissioned a poll on public opinion about the war in Iraq. When the results revealed that 67 percent of the American people supported going to war against Iraq but that a smaller majority of Americans agreed that the President was spending his time "about right" on the war, the *Times* was faced with the problem of spinning these results in a negative way. It finally came up with the blaring headline: "Public Says Bush Needs to Pay More Heed to Economy, Less to Iraq."⁶⁷

61. E.g., Charles Krauthammer, *Kidnapped by the Times*, WASH. POST, Aug. 18, 2002 at B7, available at <http://www.washingtonpost.com/wp-dyn/articles/A31321-2002Aug17.html>; accord Education for Peace in Iraq Center, *Understanding the New Debate on Iraq*, Aug. 19, 2004, at <http://www.epic-usa.org/Default.aspx?tabid=92>; Cynthia Cotts, *Howellin' Wolf: 'Times' Hounds Bush Over War Plan*, VILLAGE VOICE, Sept. 3, 2002, available at <http://www.villagevoice.com/issues/0235/cotts.php>.

62. See Rem Rieder, *Asking the Tough Questions*, AM. JOURNALISM REV., Oct. 2002, available at <http://www.ajr.org/Article.asp?id=2633> (disagreeing with Krauthammer).

63. See generally KOHN, *supra* note 61.

64. *Id.*

65. *Id.*

66. Richard L. Berke & Janet Elder, *Survey Shows Doubts Stirring On Terror War*, N. Y. TIMES, Oct. 30, 2001, at A1. The apparent basis for the blaring headline was the response to a secondary question about whether the government was telling "everything" it knew about the anthrax attacks; a majority of 3% said no.

67. Adam Nagourney & Janet Elder, *Public Says Bush Needs to Pay Heed to Weak Economy*, Oct.

The latter distortion was too much to stomach even for a former political advisor to President Clinton, who observed that, “[t]he phrasing of the questions is so slanted and biased that it amounts to journalistic ‘push polling’—the use of ‘objective’ polling to generate a predetermined result, and so vindicate a specific point of view.”⁶⁸

When a *New York Times/CBS News* poll taken on March 21, 2003 revealed that 74 percent of Americans approved of military action against Iraq,⁶⁹ the *Times* analysis of the results was predictable: “there are deep-partisan divisions in the nation’s view of the conflict.”⁷⁰ *CBS News*, on the other hand, had no problem in reporting directly: “Poll: U.S. Backs Bush on War.”⁷¹ Indeed, it is difficult to imagine the *Times* publishing such a headline no matter what the poll results showed.

The war in Iraq has been fraught with difficulties and dangers to American soldiers. But one might think that on a celebrated day of success—the fall of Baghdad and the tumbling of Hussein’s statue by elated Iraqis—the *Times* might have softened just once to set aside its negative spinning. However, on the same day that *USA Today* reported the fall of Baghdad with a headline reading, “Baghdad Falls; Jubilant Troops Swarm Around U.S. Troops,”⁷² the *Times* could only mangle a grudging, “U.S. Forces Take Control In Baghdad; Bush Elated.”⁷³ In other words, what was important in the *Times* story was not the jubilation of the Iraqi people, but the fact that a presumably gloating Bush was “elated.”

Perhaps mindful of a 2001 *New York Times/CBS News* poll that only 6 percent of Americans would oppose military action against those responsible for the

7, 2002, N. Y. TIMES, at A1.

68. KOHN, *supra* note 58, at 217 citing Dick Morris, *The Times Push Poll*, N. Y. POST, Oct. 8, 2002.

69. Dick Meyer, *Polls, Powell and the Iraq Campaign*, CBS NEWS, Feb. 7, 2003, available at <http://www.cbsnews.com/stories/2003/02/07/opinion/meyer/main539846.shtml>.

70. KOHN, *supra* note 58, at 245 citing Adam Nagourney & Janet Elder, *Support for Bush Surges at Home, But Split Remains*, N. Y. TIMES, March 22, 2003, at A1.

71. *Id.*; see also Meyer, *supra* note 69 (“On Thursday, CBS News and The New York Times re-interviewed a sample of respondents first interviewed two weeks ago . . . 74% now approve of the U.S. taking military action against Iraq . . .”)

72. USA TODAY, April 10, 2003, at front page.

73. Anthony DePalma, *A Nation at War: An Overview: April 9, 2003: Joy in Baghdad, Arab Consternation and the Mystery of Saddam Hussein*, N. Y. TIMES, Apr. 10, 2003, at B1; see also Gallup Poll, ROCKY MOUNTAIN NEWS, Sept. 24, 2003, at A30; See also Nicholas Johnson, *Poll of Baghdad Residents Finds Optimism and Criticism*, THE PHILADELPHIA INQUIRER, Sept. 25, 2003, available at <http://www.philly.com/mld/inquirer/2003/09/25/news/nation/6853491.htm>. A 2003 Gallup poll revealed that “almost 2/3 of those polled in Baghdad said it was worth the hardships suffered since the U.S. led invasion ousted Saddam Hussein.” In addition, 67% of 1,178 Iraqi’s polled stated that “within five years, their lives would be better than before the American and British invasion.” *American Enterprise* magazine with Zogby International completed a poll of 600 Iraqis in August 2003 which showed that 37% of Iraqis polled stated that the United States government was the government they would most like to see their new government modeled after. Saudi Arabia came in second with 28%. Further, 60% stated that they would not want to see the formation of an Islamic government. *Data Reveal Inaccuracies in Portrayal of Iraqis*, Zogby International, available at <http://www.zogby.com/soundbites/Readclips.dbm?ID=5974>.

9/11 attacks,⁷⁴ the mainstream media has assiduously avoided reporting any evidence that might link Iraq to the 9/11 attacks. For example, when on May 7, 2003, a federal court in Manhattan found evidence sufficient under the F.R.E. to establish that "Iraq provided material support to bin Laden and al-Qaeda,"⁷⁵ and ordered Hussein to pay \$104 million to the families of two 9/11 victims,⁷⁶ one might have thought this an item worthy of reporting to the American public. However, projecting its anti-war views in the face of a nation united by an 88 percent support for retaliation should Iraqi involvement be revealed, was obviously something neither the *Times* nor any other mainstream media was prepared to confront, and so the legal findings of Iraqi complicity in the 9/11 attacks were neatly buried.

Evidence buried by the media includes the following: 1) a report in an official Iraqi newspaper, in which Hussein's son Uday ran a "List of Honor" which included the Iraqi intelligence officer responsible for coordinating activities with al-Qaeda;⁷⁷ 2) evidence that an al-Qaeda operative, Abu al-Zarqawi, opened a terrorist training camp in Iraq;⁷⁸ 3) the discovery of documents in Tikrit, Iraq, revealing that al-Qaeda operative, Abdul Yasin, was on Hussein's payroll (Yasin was later indicted for bombing the World Trade Center);⁷⁹ and 4) Hussein's Salman Pak terror camp trained hijackers on an actual passenger jet.⁸⁰

74. KOHN, *supra* note 58, at 213.

75. Smith v. Islamic Emirate of Afghanistan, 262 F. Supp. 2d 217, 232 (S.D.N.Y. 2003).

¹⁰³ *Id.*

77. *Id.*; see also, Gilbert S. Merritt, *Document Links Saddam, bin Laden*, THE TENNESSEAN, June 25, 2003, available at http://tennessean.com/nation-world/archives/03/06/34908297.shtml?Element_ID=34908297.

The list was reportedly published on the back page of the now-defunct Iraqi daily newspaper *Babil* on November 14, 2002. Uday Hussein was the publisher of *Babil* and the story was described a "List of Honor," purportedly a list of Saddam's regime members with their names and positions listed. Judge Merrit, who was in Iraq to help rebuild the judicial system, describes the list as "the 600 people closest to Saddam Hussein," and states:

Through an unusual set of circumstances, I have been given documentary evidence of the names and positions of the 600 closest people in Iraq to Saddam Hussein, as well as his ongoing relationship with Osama bin Laden . . . the list contained not only the names of the 55 "deck of cards" players . . . but also 550 others . . . The document shows that an Iraqi intelligence officer, Abid Al-Karim Muhamed Aswod, assigned to the Iraq embassy in Pakistan, is "responsible for the coordination of activities with the Osama bin Laden group."

78. *Id.*

79. Merrit, *supra* note 77; see also, John Diamond, *U.S. says Iraq sheltered suspect in '93 WTC Attack*, USA TODAY, Sept. 17, 2003, available at http://www.usatoday.com/news/world/iraq/2003-09-17-iraq-wtc_x.htm.

Military, intelligence, and law enforcement officials reported finding a large cache of Arabic-language documents in Tikrit, Saddam's political stronghold. A U.S. intelligence official, who spoke on condition of anonymity, said translators and analysts are busy "separating the gems from the junk." The official said some of the analysts have concluded that the documents show that Saddam's government provided monthly payments and a home for Yasin. Yasin is on the FBI's list of 22 most-wanted terrorist fugitives; there is a \$25 million reward for his capture. The bureau questioned and released him in New York shortly after the bombing in 1993. After Yasin had fled to Iraq, the FBI said it found evidence that he helped make the bomb, which killed six people and injured 1,000. Yasin is still at large.

80. *Id.*; see also, Deroy Murdock, *The 9/11 Connection: What Salman Pak Could Reveal*, NAT'L

Writing in the *Times*, columnist William Safire, on November 23, 2003, revealed government "evidence that Saddam's spy agency and top Qaeda operatives were in frequent contact for a decade."⁸¹ A sixteen page letter issued by the Defense Department in response to a Senate Intelligence Committee request for evidence of a Hussein link to 9/11 included a "classified annex of raw reports" of "the relationship between Iraq and al-Qaeda."⁸² Safire concluded that "with so much connective tissue exposed . . . the burden of proof has shifted to those still grimly in denial."⁸³

It is understandable that a journal unalterably committed to an agenda of peace at any price would be tempted to suppress evidence of a foreign country's attack on the United States for fear that such evidence might provide a basis for retaliation; it shows, however, a deep lack of respect for the right of the people to know.

Unscrupulous as such journalistic methods are, however, it would be naïve to pretend they are not effective. The daily, relentless diet of journalistic emphasis on the negative aspects of the effort to restore democracy in Iraq is having its desired effect, sapping the will of the American people to restore democracy and sovereignty to the people of Iraq.⁸⁴ In a self-fulfilling prophecy, support for U.S. policy in Iraq is indeed being undermined effectively, as support falls to a bare majority—insufficient to sustain a credible war on terror.⁸⁵

REV. ONLINE, Apr. 3, 2003, available at <http://www.nationalreview.com/murdock/murdock040303.asp>. See also, Interview with Sabah Khodada, former Iraqi Army Officer by PBS Frontline, (Oct. 14, 2001), available at <http://www.pbs.org/wgbh/pages/frontline/shows/gunning/interviews/khodada.html>. Khodada describes what went on at Salman Pak, including details on training hijackers. When asked about the relationship between the September 11 attacks and Salman Pak Khodada stated:

I assure you, this operation was conducted by people who were trained by Saddam. And I'm going to keep assuring the world this is what happened. Osama bin Laden has no such capabilities. Why? Because this [*sic*] kind of attacks must be, and has to be, organized by a capable state, such as Iraq; a state where they can provide high level of training, and they can provide high level of intelligence to do such training. How could Osama bin Laden—who's hiding in the middle of nowhere in Afghanistan in small caves and valleys—train people and gather information and send people to do such high-level operation? We all know this is a high-level operation. This cannot be done by a person who does not even own a plane in Afghanistan, who cannot offer such training in Afghanistan. This is definitely done by a mastermind like Saddam

81. William Safire, *Missing Links Found*, N.Y. TIMES, Nov. 24, 2003, at A23.

82. *Id.*

83. *Id.*; see also, William Safire, *Al Qaeda's Links to Saddam Emerge*, INT'L HERALD TRIB., Nov. 25, 2003, at 7; see also, Stephen F. Hayes, *Case Closed: The U.S. Government's Secret Memo Detailing Cooperation Between Saddam Hussein and Osama Bin Laden*, THE WKLY. STANDARD, Nov. 24, 2003; Stephen F. Hayes, *The Connection: Not So Long Ago, the Ties Between Iraq and Al Qaeda were Conventional Wisdom. The Conventional Wisdom was Right*, THE WKLY. STANDARD, June 7, 2004.

84. See generally, Josh Bernstein, *Corzine Warns of Difficult Road Ahead in Iraq*, BURLINGTON COUNTY TIMES, Apr. 15, 2003, available at <http://corzine.senate.gov/clippings/iraqburlingtontimes%204.15.03.pdf>.

85. In an August 20, 2004 report titled, "U.S. Public Beliefs and Attitudes about Iraq," from The Program on International Policy Attitudes (PIPA/Knowledge Networks Poll) in the Center on Policy Attitudes and the Center for International and Security Studies at the University of Maryland, College Park, the researchers compiled polling information from a nationwide poll given August 5-11, 2004 to a

III. INTERNATIONAL AND DOMESTIC LAW

The legal aspects of the war on terror can be divided into three distinct categories: 1) international law relating to the law of war and the use of force, 2) domestic law relating to internal national security, and 3) international and domestic law relating to the legal rights of detainees captured in the war on terror. Each shall be addressed separately in this section.

A. *International Law Relating to the Law of War and the Use of Force*

It has already been noted that the primary legal basis for military action against Iraq was Security Council Resolution 1441,⁸⁶ which found Hussein's Iraq to be in possession of weapons of mass destruction and in violation of directives to account to the United Nations for those weapons previously discovered by U.N. inspectors.⁸⁷ In addition, it was noted that U.N. Resolution 1368 specifically recognized that the 9/11 attacks constituted an armed "threat to international peace and security," and that Article 51 of the U.N. Charter specifically provides for the unilateral use of armed force in self defense to such an armed attack.⁸⁸

random sample of 733 Americans. The polling data revealed that positive perceptions of the war in Iraq had steadily decreased and negative perceptions of the war effort had steadily increased since July of 2003. Among other questions, PIPA asked participants, "Do you think the US made the right decision or the wrong decision in going to war against Iraq?" In July of 2003, 63% thought that going to war was the right decision and in the August 2004 survey only 46% thought it was the right decision.

Furthermore, when asked "how confident are you that the US intervention in Iraq will succeed?" 36% were in the "confident" range (i.e. gave a 6-10 on a scale of 0-10), 17% were in the neutral range (5), and 46% were in the pessimistic range (0-4). The earlier polling that PIPA conducted in 2003 through early 2004 revealed that positive perceptions of the war in Iraq were based largely on the views that Iraq possessed weapons of mass destruction and that Iraq was linked to al Qaeda and the 9/11 attacks. The decrease in support is attributed to an increase in the opposing positions, namely that Iraq did not have WMD's, that Iraq did not support al Qaeda in any deep sense, and also that world public opinion was unfavorable to the Iraq war.

Similar polls that have been conducted show a decrease in public support of the war effort as well. A nationwide Pew Research Center/Council on Foreign Relations survey conducted by Princeton Survey Research Associates on August 5-10, 2004, revealed similar results to the PIPA survey, although the number of those who supported the war effort was slightly higher. Pew asked the following question. "Do you think the U.S. made the right decision or the wrong decision in using military force against Iraq?" 53% stated that military force was the right decision and 41% said it was they wrong decision. This is in contrast to the results from that same poll question in April of 2003 in which 74% answered that military action was the right decision and 19% answered that it was the wrong decision. A graph of the polling results from the Pew Research Center reveals a fairly steady decrease in support for the war effort from spring of 2003 to the present. This data is consistent with Newsweek and Gallup polls conducted from July 2003 to September 2004. *Eroding Respect for America Seen as Major Problem: Foreign Policy Attitudes Now Driven by 9/11 and Iraq*. The Pew Research Center for People and the Press (2004), available at <http://people-press.org/reports/pdf/222.pdf>; see also What Now? <http://www.pollingreport.com/iraq.htm>.

86. S.C. Res. 1441, *supra* note 35.

87. See *supra* notes 22-42 and accompanying text.

88. S.C. Res. 1368, U.N. SCOR, 4730th Mtg., U.N. Doc. S/Res/1368 (2001). In addition to recognizing that the 9/11 attacks were a "threat to international peace and security," Resolution 1368 stated that the U.N. is "determined to combat by all means threats to international peace and security caused by terrorist acts. . . and stresses that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable. . ." Articles 51 and 42 of the U.N.

Furthermore, it should be noted that terms of the 1991 Gulf War cease-fire agreement required Iraq to permit U.N. inspectors into the country.⁸⁹ When Iraq openly breached that agreement in 1998, it effectively abrogated the cease-fire agreement and thereby re-established the state of war in existence prior to the signing of the agreement.⁹⁰ President Bush even made a special trip to the United Nations to explain that the primary purpose of going to war in Iraq was the enforcement of these U.N. resolutions.⁹¹

Despite what might appear to be a clear statement of the grounds for taking military action in Iraq, there have been persistent claims in the media that the real reasons for going to war were "for oil,"⁹² or to find weapons of mass destruction.

Charter allows the Security Council to use force if economic sanctions or other methods prove inadequate, but article 51 maintains the right of each sovereign nation to defend itself. U.N. CHARTER art. 51.

Article 42 states, "Should the Security Council consider that measures provided for in Article 41 [economic sanctions etc.] would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security." U.N. CHARTER art. 42, para. 1.

89. S.C. Res. 687, U.N. SCOR, 2983d mtg., U.N. Doc. S/Res/687 (1991), para 9(a). ("Iraq shall submit to the Secretary-General, within fifteen days of the adoption of the present resolution, a declaration on the locations, amounts and types of all items specified in paragraph 8 [all chemical and biological weapons, including stocks of agents, related components, subsystems, research, development, support, and manufacturing facilities and all ballistic missiles with a greater range than 150 km including related parts, repair, and production facilities] and agree to urgent on-site inspection . . . [by United Nations Special Commission]").

90. S.C. Res. 1205, U.N. SCOR, 3939th mtg., U.N. Doc. S/Res/1205 (1998).

The Security Council, *Noting* with alarm the decision of Iraq on 31 October 1998 to cease cooperation with the United Nations Special Commission, and its continued restrictions on the work of the International Atomic Energy Agency (IAEA), . . . Acting under Chapter VII of the Charter of the United Nations; *Condemns* the decision by Iraq of 31 October 1998 to cease cooperation . . . as a flagrant violation of resolution 687 (1991); *Reaffirms* its intention to act in accordance with the relevant provisions of resolution 687 (1991) on the duration of the prohibitions referred to in that resolution, and *notes* that by its failure so to comply with its relevant obligations Iraq has delayed the moment when the council can do so. *Id.*

91. See U.N. GAOR, 57th Sess., 2d plen. mtg., U.N. Doc. A/57/PV.2 (2002). President Bush stated in his address to the General Assembly: "In order to suspend hostilities and to spare himself, Iraq's dictator accepted a series of commitments. The terms were clear to him, and to all. And he agreed to prove that he is complying with every one of those obligations . . ." *Id.* at 6.

All the world now faces a test and the United Nations a difficult and defining moment. Are Security Council resolutions to be honored and enforced or cast aside without consequence? We want the resolutions of the world's most important multilateral body to be enforced, and right now those resolutions are being unilaterally subverted by the Iraqi regime. *Id.* at 8.

See also, White House, *President's Remarks at the United Nations General Assembly*, Sept. 12, 2002, available at <http://www.whitehouse.gov/news/releases/2002/09/print/20020912-1.html>.

92. John le Carre, *The United States Has Gone Mad*, THE TIMES (LONDON), Jan. 15, 2003, at 20; Anthony F. Greco, Letter to the Editor, *Iraq and Oil, Still Inseparable*, N. Y. TIMES, Feb. 17, 2003, at A20 ("The Bush administration is committed to the forceful assertion of American primacy in the world. The maximization of American power and influence in the Middle East is critical to that end, and Saddam Hussein stands in our way."). See also *White House Continues to 'Spin' Reasons for Flawed Iraq War*, USA TODAY, June 23, 2004, at 12A.

Some commentators have even gone so far as to claim that the United States relied on the doctrine of “preemptive strike” to justify going to war,⁹³ despite the fact that Secretary of State Colin Powell specifically and publicly rejected this rationale, stating, “If you look at our National Security Strategy, you will see that there is no chapter that says ‘preemption.’ It talks about partnerships. It talks about alliances. It talks about human rights. It talks about trade. It talks about all those things that will make a better world for all people.”⁹⁴

Vice President Cheney has spoken of the preemption doctrine in very limited terms: “If the United States could have preempted 9/11, we would have; no question. Should we be able to prevent another, much more devastating attack, we will; no question.”⁹⁵ In other words, the United States reserves the right to shoot down aircraft attacking U.S. cities.

Thus, although the United States did not rely on the preemptive strike doctrine to justify going to war, it is clear that it could have done so. As international lawyer, Stephen Murdoch, has noted, preemption “is considered (by international lawyers) to be a legitimate use of force in international law.”⁹⁶ Indeed, few international lawyers today would deny that Israel did not have the right in 1967 to engage in a preemptive strike against the Arab countries that were threatening imminent invasion and expressing the intent, as stated by Iraq President Rashman Aref that “Our goal is clear—to wipe Israel off the map.”⁹⁷

B. Domestic Law Relating to Internal National Security

The primary federal statute relating to internal security is an act entitled, *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism*, often referred to by its acronym, the USA PATRIOT Act (Patriot Act).⁹⁸ The inch-thick act, which runs to some 342 printed pages, is a heavy read, and it is questionable how many commentators have taken the minimum twelve to sixteen hours it takes to read and fully analyze this act.

93. Mike Allen & Barton Gellman, *Preemptive Strikes Part of U.S. Strategic Doctrine: “All Options” Open for Countering Unconventional Arms*, WASH. POST, Dec. 11, 2002, at A1.

94. Interview by The Washington Post Editorial Board with Colin Powell, Secretary of State, (July 23, 2003), available at <http://www.hongkong.usconsulate.gov>.

95. Memorandum from Ivo Daalder to Members of the CFR/ASIL Roundtable on Old Rules/New Threats: Policy Implications of the Bush Doctrine on Preemption, Council on Foreign Relations (Oct. 11, 2003), available at <http://www.cfr.org/publication.php?id=5251>.

96. Stephen Murdoch, *Preemptive War: Is It Legal?*, Jan. 2003, at <http://www.dcbarr.org>.

97. *Who Started the Six Day War?*, HASBARA FELLOWSHIPS, at http://www.israelactivism.com/resources/factsheets/factsheets/who_started_the_6.asp. (The full quote from President Abdel Rahman Muhammad Aref of Iraq was: “The existence of Israel is an error that must be rectified. This is our opportunity to wipe out the ignominy which has been with us since 1948. Our goal is clear—to wipe Israel off the face of the map.”) See also Michael B. Oren, *Did Israel Want The Six Day War?*, 5759 AZURE 1-37 (Spring 1999), available at <http://www.azure.org.il/7-Oren.html>; see generally 110-11 DAVID KIMCHE & DAN BAWLY, *THE SANDSTORM: THE ARAB-ISRAELI WAR OF JUNE 1967: PRELUDE AND AFTERMATH* (Stein and Day, 1968); see also Policy Statement, *Israel and the Occupied Territories: Statement made by The International Association of Jewish Lawyers and Jurists at the UN Commission on Human Rights*, INT’L ASS’N OF JEWISH LAW. & JURISTS, Apr. 2, 2002, available at http://www.intjewishlawyers.org/html/policy_statements/april_2.html.

98. HR 3162 RDS, 107th Cong. (2001) (enacted) (also known as “The Patriot Act”).

This daunting task has not kept a number of commentators from expressing their opinion of the Patriot Act's import. It has been asserted, for example, that the Patriot Act "gives . . . law enforcement the ability [to] monitor email and telephone conversations without probable cause."⁹⁹ The American Civil Liberties Union states that "the USA PATRIOT act gives the Attorney General and federal law enforcement unnecessary and permanent new powers to violate civil liberties that go far beyond the stated goal of fighting international terrorism."¹⁰⁰ The Electronic Frontier Foundation claims, "[t]he civil liberties of ordinary Americans have taken a tremendous blow with this law, especially the right to privacy in our online communications and activities."¹⁰¹

The notion that any surveillance in defense of national security and safety is suspect recalls the statement of the Secretary of War in 1941 when explaining why it was not appropriate to conduct the kind of electronic surveillance that could have alerted the United States to the impending attack on Pearl Harbor, "Gentlemen don't read other gentlemen's mail."¹⁰² Commendable and civil as such sentiments might be, they appear strangely naïve in the aftermath of attacks on Pearl Harbor, the World Trade Center, and the Pentagon.¹⁰³

In fact, however, the Patriot Act primarily extends to investigations of terrorist activity the surveillance and search procedures which had previously been applied (and constitutionally approved) in organized crime cases.¹⁰⁴ Where new procedures are provided, specific provisions are made for judicial review.¹⁰⁵ For example, Section 215¹⁰⁶ is often maligned as providing for unlimited warrantless searches of such tangible items as records and papers, and most notoriously it is

99. Catlin Gregg, *Patriot Act of 2001—Friend or Foe*, July 1, 2004, available at <http://www.home-inter.net/CaitlinGregg/finalproject.htm>.

100. Letter from Laura Murphy, Director, ACLU Washington Office to the U.S. Senate, (Oct. 23, 2001), available at <http://www.aclu.org/NationalSecurity.cfm?ID=922&C=n1>.

101. Electronic Frontier Foundation, *EFF Analysis of the Provisions of the USA PATRIOT Act*, Oct. 31, 2001, at http://www.eff.org/Privacy/Surveillance/20011031_eff_usa_patriot_analysis.html.

102. See, e.g., R. Emmett Tyrrell Jr., *CIA's Future*, WASH. TIMES, July 16, 2004, available at <http://www.washingtontimes.com/functions/print.php?StoryID=20040715-082643-4571r>.

103. See, e.g., DAVID KAHN, *THE READER OF GENTLEMEN'S MAIL: HERBERT O. YARDLEY AND THE BIRTH OF AMERICAN CODEBREAKING* (2004); accord Joseph C. Goulden, *A Brave Spy, Tracking Carlos, Code Work*, WASH. TIMES, Aug. 1, 2004, available at <http://www.washingtontimes.com/books/20040731-101353-6386r.htm>. Kahn reproduces a Stimson diary entry of June 3, 1931, in which he recounts halting funding for code work because diplomats 'are supposed to deal internationally on a gentlemen's basis.'; see also, RICHARD HOLM, *THE AMERICAN AGENT: MY LIFE IN THE C.I.A.* (2003); CONSTANTINE FITZGIBBON, *SECRET INTELLIGENCE IN THE TWENTIETH CENTURY* 158 (1976); Louis Kruh, *Stimson, the Black Chamber, and the 'Gentlemen's Mail' Quote*, *Cryptologia*, Apr. 1988, at 65-83; see generally, Mark G. Young, *What Big Eyes and Ears You Have! A New Regime for Covert Governmental Surveillance*, 70 *FORDHAM L. REV.* 1017 (2001) (examining the government's powers and citizens' liberties in the aftermath of 9/11).

104. Electronic Frontier Foundation, *EFF Analysis of the Provisions of the USA PATRIOT Act*, Oct. 31, 2001, at http://www.eff.org/Privacy/Surveillance/20011031_eff_usa_patriot_analysis.html.

105. *Id.*

106. This section amends Title V of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1861 (1978).

claimed, library books. As a result, it has been observed that “Section 215 is one of the surprising lightning rods of the Patriot Act, engendering more protest, lawsuits, and congressional amendments than any other. In part this is because this section authorizes the government to march into a library and demand a list of everyone who’s ever checked out a copy of *My Secret Garden* but also because those librarians are tough.”¹⁰⁷

In fact, Section 215 contains no such provisions; indeed it specifically states that an order requiring the production of tangible items may be issued only “if the judge finds that the application meets the requirements of this section”¹⁰⁸ requirements include that the item requested be shown to be for the purpose of protecting “against international terrorism or clandestine intelligence activities.”¹⁰⁹

Likewise, Section 215 of the Patriot Act is specifically entitled, “Seizure of Voice-Mail Message pursuant to *Warrants*.”

Interpretations of the Patriot Act appear to be undergoing a process of judicial interpretation comparable to that of the aviation security regulations and laws promulgated in the 1970’s after a rash of airline hijackings linked to Cuba. In 1972, a series of Federal Aviation Administration (FAA) directives ordered magnetometer screening and warrantless searches without probable cause of all airline passengers.¹¹⁰

The reactions of outrage by civil libertarians to these airline regulations were comparable to today’s reactions to the Patriot Act. It was claimed that these new regulations were a precursor to a government police state. Judge Goldberg, writing in the Fifth Circuit case of *U.S. v Legato*, wrote that “[s]eeking to prevent or deter crime, standing alone, has never justified eroding the right to privacy, and I continue to hope that we will soon return to the hallowed and halcyon days of the Fourth Amendment.”¹¹¹

Unfortunately, the civil libertarians’ notion of halcyon days were rudely interrupted with still more hijackings, prompting the government to justify its regulations authorizing warrantless searches of airline passengers on grounds that passengers wishing to travel impliedly “consented” to the magnetometer search by buying an airline ticket and attempting to board the aircraft.

Federal courts purporting to uphold civil libertarian principles were initially hostile to the “consent” theory as a basis for warrantless searches without probable

107. Dahlia Lithwick & Julia Turner, *A Guide to the Patriot Act, Part I: Should You Be Scared of the Patriot Act?*, JURISPRUDENCE, Sep. 8, 2003, available at <http://slate.msn.com/id/2087984>.

108. Title V of the Foreign Intelligence Surveillance Act of 1978 50 U.S.C. § 1861 (1978), § 501 (c)(1), as amended by the Patriot Act, § 215.

109. *Id.* § 501 (a)(1).

110. A list of these directives can be found in *U.S. v. Lopez-Pages*, 767 F.2d 776 (11th Cir. 1998); a summary of the development of FAA rules in this area can also be found at *U.S. v. Davis*, 482 F.2d 893 (9th Cir. 1973); see also 37 Fed. Reg. 4904-05 (Mar. 7, 1972); 37 Fed. Reg. 5689-91 (Mar. 18, 1972); 37 Fed. Reg. 7150 (Apr. 11, 1972). For a comprehensive discussion of FAA regulations in this area, see DEMPSEY et al., *AVIATION LAW AND REGULATION* (1992).

111. *U.S. v. Legato*, 480 F.2d 408, 414 (5th Cir. 1973) (concurring opinion).

cause.¹¹² In *U.S. v. Kroll*, for example, the Eighth Circuit suppressed evidence seized from an airline passenger during mandatory security screening, declaring that a defendant's attempt to board an aircraft did not constitute consent "in any meaningful sense."¹¹³

Compelling the defendant to choose between exercising Fourth Amendment rights and his right to travel constitutes coercion; the government cannot be said to have established that the defendant freely and voluntarily consented to search when to do otherwise would have meant foregoing the constitutional right to travel.¹¹⁴

Likewise, in *U.S. v. Albarado*, the Second Circuit declared that:

To make one choose between flying to one's destination and exercising one's constitutional rights appear to us, as to the Eighth Circuit, in many situations a form of coercion, however subtle. While it may be argued that there are often other forms of transportation available, it would work a considerable hardship on many air travelers to be forced to utilize an alternative form of transportation.¹¹⁵

In the aftermath of continued threats to the safety of passengers, however, it soon became clear that strict interpretations of the Fourth Amendment, must of necessity, give way to real concerns for the safety of passengers. However, it was not until Judge Friendly in *U.S. v. Edwards* adopted the "danger alone" test¹¹⁶ for upholding warrantless searches without probable cause at airport security checkpoints that the tide of federal court opinions shifted toward upholding magnetometer searches.

Although civil libertarians continue to express their abhorrence of warrantless searches at airports, such security searches are today recognized and accepted by the general public as a necessary precaution against hijacking; indeed one might question how many passengers today would be willing to embark on an aircraft knowing that a hijacker with deadly weapons could freely embark on the same aircraft without any search of his person or baggage.

Although perceptions might differ as to whether today's routine airport searches constitute the tyrannical police state envisioned by the civil libertarians, one airline executive has expressed surprise that such warrantless searches were so readily accepted by the traveling public:

It seems ironic that we find ourselves in a situation where each and every air traveler in the United States is treated as a suspect as soon as he enters an airline terminal. It would seem ironic to the citizen of 1937 that air travelers today not only submit willingly to searches of their person and carryon baggage, but actually laud the virtues of and need for such action.¹¹⁷

112. *U.S. v. Kroll*, 481 F.2d 884 (8th Cir. 1973).

113. *Id.*

114. *Id.*

115. *U.S. v. Albarado*, 495 F.2d 799, 806-07 (2d Cir. 1973).

116. *U.S. v. Edwards*, 498 F.2d 496 (2d Cir. 1974).

117. M.J. Fenello, *Individual Rights v. Skyjack Deterrence: An Airline Man's View*, 18 VILL. L.

In the same way that searches and security procedures which constitute modest inconveniences to the public were accepted in the aftermath of serious threats to the safety of airline passengers, the willingness of the public to accept similar inconveniences in order to provide security against attacks of the type initiated by enemy force on 9/11 is reflected in the overwhelming vote in Congress for the Patriot Act.¹¹⁸

C. International and Domestic Law Relating to the Rights of Detainees Captured in the War on Terror

Since 9/11, a number of new legal issues have arisen concerning the jurisdiction of military courts,¹¹⁹ material witness detentions,¹²⁰ access to counsel,¹²¹ and discovery of sensitive information.¹²²

The most contentious of these issues includes the rights of the detainees held at Guantanamo Bay, Cuba.¹²³ In particular, questions have been raised about the rights of prisoners detained outside the territory of the United States to invoke habeas corpus relief in the federal courts. This, in turn presents a narrow question of the subject matter jurisdiction of the federal courts.

The applicable statutory authority is 28 U.S.C. § 2241, which states, “Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit court judge *within their respective jurisdictions.*”¹²⁴ This statute also specifically provides that any “order of a circuit judge shall be entered in *the* district court of the district *where the restraint complained of is had.*”¹²⁵

In the case of the Guantanamo detainees, it is not disputed that detainees are being restrained in Guantanamo, Cuba, and a cursory look at any map shows that Cuba is not located within the territorial jurisdiction of any federal court of the United States. In addition, the U.S. Supreme Court has made it clear that

REV. 996 (1973).

118. Brian Wilson, *Ashcroft to Launch Patriot Tour*, FOX NEWS (Aug. 14, 2003), at <http://www.foxnews.com/story/0%2C2933%2C94668%2C00.html>. “Congress overwhelmingly passed the Patriot Act in the weeks following the Sept. 11, 2001, terror attacks. The Senate voted 98-1, the House 357-66. The new measures give law enforcement enhanced tools to fight the war against terrorism.” *Id.*

119. *E.g.*, *Coalition of Clergy v. Bush*, 189 F. Supp. 2d 1036 (C.D. Cal. 2002).

120. *E.g.*, *In re The Application of the U.S. for a Material Witness Warrant*, 213 F.Supp.2d 287 (S.D.N.Y. 2002).

121. *E.g.* *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002) *vacated by* 124 S. Ct. 2633 (2004)

122. *E.g.* *U.S. v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004).

123. *See The Prisoners at Guantanamo*, N.Y. TIMES, Jan. 22, 2002, at A18 (opining that disturbing reports have been given regarding the treatment of the prisoners at Guantanamo Bay and concern of the humane treatment of prisoners under military conditions.); *see also*, Gordon Tagge, Letter to the Editor, *The Conditions at Guantanamo*, N.Y. TIMES, Jan. 24, 2002, at A26 (describing reports of prisoners’ quarters being bug infested and horrible means); *see also* Katherine Q. Seelye, *On Defensive, General Says Prisoners Get Mats, Even Bagels*, N.Y. TIMES, Jan. 17, 2002, at A16 (stating that the amount of prisoners is growing faster than the ability to quarantine them from each other and facility development).

124. 28 U.S.C. § 2241 (a) (2004) (emphasis added).

125. *Id.* (emphasis added).

"[f]ederal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which *is not to be expanded by judicial decree*. It is to be *presumed* that a cause lies *outside* this limited jurisdiction" ¹²⁶

Although the meaning of these statutes appears plain on their face, the U.S. Supreme Court had occasion to interpret their meaning in three seminal cases: *Ahrens v. Clark*, ¹²⁷ *Johnson v. Eisentrager*, ¹²⁸ and *Braden v. 30th Judicial Circuit Court of Kentucky*. ¹²⁹

In *Ahrens*, the court dismissed the habeas petitions of detainees held on Ellis Island because the detainees filed their petitions in the District Court for the District of Columbia rather than the district in which they were being detained, ¹³⁰ a clear violation of 28 U.S.C. § 2241, ¹³¹ which states that a habeas petition must be filed in the district where the detainees are being held.

In *Eisentrager*, alien detainees imprisoned in a U.S.-controlled prison in Germany filed petitions for writs of habeas corpus in the District Court for the District of Columbia. ¹³² Again, the Supreme Court dismissed these petitions on grounds that Germany, where the prisoners were being detained, was not within the territorial jurisdiction of any federal court: ¹³³

Nothing in the text of the Constitution extends such a right, nor does anything in our statutes These prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all *beyond the territorial jurisdiction of the United States*. ¹³⁴

In *Braden*, a prisoner who was the subject of a detainer order in Kentucky, but actually held in physical custody in Alabama, filed a habeas corpus petition in Kentucky. ¹³⁵ The Supreme Court in that case modestly broadened the definition of "custody" under the statute to include a territory within the United States in which the prisoners had been the subject of a detainer order even though the detainee was not being physically held in that jurisdiction. ¹³⁶ This case did not even mention *Eisentrager*, since both Kentucky and Alabama are within the territorial jurisdiction of the United States.

126. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (emphasis added).

127. *Ahrens v. Clark*, 335 U.S. 188 (1948).

128. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

129. *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484 (1973).

130. *Ahrens*, 335 U.S. at 189.

131. In 1948, the statutory precursor of 28 U.S.C. § 2241 (2004) was 28 U.S.C. § 452 (1948).

132. *Johnson*, 339 U.S. at 765.

133. With regard to the extent of military court jurisdiction, see *Madsen v. Kinsella*, 343 U.S. 341 (1952); *In re Yamashita*, 327 U.S. 1 (1946); *Ex parte Quirin v. Cox*, 317 U.S. 1 (1942); *Ex parte Milligan*, 71 U.S. 2 (1866); *Ex parte Vallandigham*, 68 U.S. 243 (1863); *Hammond v. Squier*, 51 F. Supp. 227 (W.D. Wash. 1943); *In re Egan*, 8 F. Cas. 367 (N.D.N.Y. 1866) (No. 4303).

134. *Johnson*, 339 U.S. at 768, 777-778 (emphasis added).

135. *Braden*, 410 U.S. at 485.

136. *See Id.*

Finally, in *Rasul v. Bush*,¹³⁷ the U.S. Supreme Court considered a case virtually indistinguishable on its facts from the facts in *Eisentrager*—that is, a case involving habeas corpus petitions filed by alien detainees held in custody in a country outside the territorial jurisdiction of the United States.¹³⁸ Nevertheless, the court purported to find the following differences in the facts in *Rasul*: 1) the petitioners in *Rasul* were not nationals of countries at war with the United States, and 2) they were imprisoned in territory over which the United States exercises exclusive jurisdiction and control.¹³⁹ These purported significant distinctions are curious, since at the time the petitioners in *Eisentrager* filed their petitions, the United States was not at war with Germany, and the prison in which the petitioners were being held in Germany was, like Guantanamo, also within the exclusive control of U.S. authorities.¹⁴⁰

Certainly reasonable arguments might be made before Congress to amend 28 U.S.C. § 2241 to authorize the extension of U.S. judicial power beyond the boundaries of the United States. Although such a course might be questionable under applicable provisions of international law and serve to confirm suspicions by many around the world that the United States seeks to extend its hegemony and project its jurisdiction beyond its territorial limits, such an amendment by Congress would at least provide a domestic legislative basis for extending the subject matter jurisdiction of U.S. courts.

In *Rasul*, however, the court chose not to defer to the legislative branch of government in this regard but rather chose to do precisely what it had previously forbidden—namely, to expand the subject matter jurisdiction of the federal courts “by judicial decree.”¹⁴¹

Alarming, the Court even declined to overrule *Eisentrager*, presumably to avoid the task of having to justify taking the extraordinary step of disregarding its own clear legal precedent. Instead, it purported to find that since *Braden* modestly expanded the legal definition of “custody” to permit a petitioner in physical custody in one jurisdiction in the United States to file a habeas writ in another jurisdiction within the United States where the petitioner was under a legal order of detention,¹⁴² neither *Ahrens* nor *Eisentrager* can be viewed as establishing “an

137. *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

138. *Id.* at 2686-91.

139. *Id.* at 2693. The other two factual distinctions given by the court were that the petitioners in *Rasul* had not been afforded access to any tribunal, and that they denied being guilty of any grounds for detention. However, the court in *Rasul* never explained how the underlying merits of a case had any bearing on the underlying subject matter jurisdiction of the courts. Moreover, although it is true that the court in *Eisentrager* made no mention of what alternative courts were made available to German prisoners of war, it is highly unlikely that a significant percentage of the over one million prisoners of war in Germany were given trials in military courts. It may also be presumed that the petitioners in *Eisentrager* also would have claimed grounds which would entitle them to release; otherwise there would have been little point in filing their habeas petitions.

140. *Id.*

141. See *Kokkonen*, 511 U.S. at 377.

142. *Id.*

inflexible jurisdictional rule"¹⁴³ that precludes detainees *outside of the United States* from filing a habeas petition in U.S. courts.¹⁴⁴ This holding is all the more remarkable in that *Braden* never even *referred* to *Eisenstrager*.

The holding in *Rasul* is already raising some alarming questions. For example, if the power of the U.S. courts is determined not by territorial limits of sovereignty, but rather by the exercise of "complete jurisdiction and control over and within said areas,"¹⁴⁵ would this mean that an Osama bin Laden, cornered in a cave in an area of Afghanistan controlled by U.S. forces, would have a right under the Fourth Amendment of the U.S. Constitution to demand that U.S. forces first obtain a search warrant before entering his cave? What appeared to be a silly question under *Eisenstrager* suddenly becomes pointed after *Rasul*. As the Chief Justice noted, "since 'jurisdiction and control' obtained through a lease is no different in effect from 'jurisdiction and control' acquired by lawful force of arms, parts of Afghanistan and Iraq should logically be regarded as subject to our domestic laws,"¹⁴⁶ including presumably the Fourth Amendment of the U.S. Constitution.

In a vigorous dissenting opinion in *Rasul*,¹⁴⁷ Justice Scalia noted one of the dire warnings set forth by the court in *Eisenstrager*:

To grant the writ of these prisoners might mean our army must transport them across the seas for a hearing. This would require allocation for shipping space, guarding personnel billeting and rations The writ since it is held to be a matter of right would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his effort and attention from the military offensive abroad to the legal defensive at home.¹⁴⁸

The spectacle of a General Eisenhower having to return to the United States to defend a civil action brought against him by one of two million German prisoners of war in Germany, or that of an Osama bin Laden suing his military captors in a U.S. court in Washington D.C., is perhaps bizarre, but a very real possibility under the ill-considered majority opinion in *Rasul*.

Justice Scalia remarked on this omission in his dissenting opinion:

The consequence of holding, as applied to aliens outside the country, is breathtaking. It permits an alien capture in a foreign theater of active combat to bring a (28 U.S.C.) 2241 petition against the Secretary of Defense. Over the course of the last century, the United States has held millions of alien prisoners abroad. (In World War II) U.S. forces had in custody approximately two million enemy sol-

143. *Id.*

144. *Rasul*, 124 S. Ct. at 2691.

145. *Id.* (citing the terms of the U.S. lease of Guantanamo Naval Base in Cuba).

146. *Id.*

147. The dissenting opinion in *Rasul*, was written by Justice Scalia, with whom the Chief Justice and Justice Thomas joined.

148. *Rasul*, 124 S. Ct. at 2707 (Scalia, J., dissenting).

diers. A great many of these prisoners no doubt would have complained about the circumstances of their capture and the terms of their confinement.¹⁴⁹

It is difficult not to conclude that *Rasul* represents the exercise of raw judicial power for the purpose of usurping the legislative power of the people in direct violation of the principle of separation of powers. Journalists and media pundits may not understand the distinction between rights and jurisdiction, but surely the same cannot be said of members of the U.S. Supreme Court. Although the popular media no doubt placed pressure on the Supreme Court to rule the way it did, it is doubtful if *Rasul's* extraordinary judicial extension of U.S. judicial power, beyond the territory of the United States, will have any measurable effect on the ultimate rights of detainees; indeed, it may well serve to further confirm the suspicions of many around the world that the United States seeks to expand its hegemony and project its jurisdiction beyond its own territory into that of its neighbors.¹⁵⁰ Rather, Congress should by statute establish meaningful provision for the fair and civil treatment of all detainees in U.S. custody, including a requirement that any detainee's status be determined by a military court within a specific period of time.

D. *The Role of National Resolve*

When attacked, democratic nations are heavily dependent on the support and resolve of their people to mount a credible defense. A bare majority is rarely sufficient to enable a democratic nation to prosecute a war to a successful conclusion. Under rules of the U.S. Senate, a minority of senators can block spending bills through a variety of procedural tools, such as the filibuster; a yellow or sensationalist press can divulge information useful to an attacking enemy, encourage an enemy to press its attack on American soldiers more zealously, or vilify its own national leaders.

Although many think of World War II as a war fought with the overwhelming support of the American people, it should be recalled that until the attack on Pearl Harbor in 1941 there was considerable debate over whether to go to war with Germany¹⁵¹ and massive anti-war demonstrations were staged in such public ven-

149. *Id.* (Scalia J., dissenting).

150. The exercise of military jurisdiction as a necessary incident of the laws of war is widely recognized; the imposition of civil jurisdiction, on the other hand, suggests political hegemony which is recognized as a greater threat to the sovereignty of an occupied territory.

151. See, e.g., Adam J. Berinsky, *American public Opinion and World War II: A Research Agenda and some Preliminary Findings*, 6 (2004) (unpublished manuscript), available at <http://web.mit.edu/berinsky/www/APO.pdf>; see generally, WAYNE S. COLE, CHARLES A. LINDBERGH AND THE BATTLE AGAINST AMERICAN INTERVENTION IN WORLD WAR II (1974); CHARLES BEARD, *THE DEVIL THEORY OF WAR* 107-24 (1936); The Neutrality Act of 1937, 49 Stat. 1081; Franklin D. Roosevelt, *Four Freedoms speech*, The Public Papers of Franklin D. Roosevelt 663-73 (Jan. 6, 1941); Franklin D. Roosevelt, *Fireside Chat on National Defense*, The Public Papers of Franklin D. Roosevelt 384-89 (Sept. 11, 1941); *America First Committee Charges Roosevelt with Fighting a One-Man War*, Did You Know? (Am. First Comm.), Sept. 13, 1941, at 1, 5 (Lindbergh representing the majority of the nonintervention viewpoint); JUSTUS DOENECKE, *ANTI-INTERVENTION: A BIBLIOGRAPHICAL INTRODUCTION TO ISOLATIONISM AND PACIFISM FROM WORLD WAR I TO THE EARLY COLD WAR* (1987) (General bibliography at http://www.onpower.org/foreign_non_inter.html); but see Bear F. Braumoeller, *The Myth of American*

ues as Madison Square Gardens.¹⁵² Even after Pearl Harbor, there was opposition in Congress to declaring war on either Japan or Germany.¹⁵³

It must also be recalled that what appears to be massive public support for going to war can quickly dissolve once military setbacks and difficulties are encountered and the media can play a large role in undermining national resolve to prosecute a war to a successful conclusion. At the outset of the Civil War in 1861, for example, there was overwhelming support in the North to go to war with the South to preserve the Union. After several years of military setbacks at the hands of the Confederacy, however, much of the news media in the North began both to vilify the national leaders who were leading the war effort and to question the expenditure of lives and national treasure on a war to free slaves.¹⁵⁴ This vilification led President Lincoln to conclude that he could not be reelected in 1864.¹⁵⁵ Indeed, Lincoln resolved that he would have to win the war prior to the inauguration of a new president since he assumed that whoever beat him in the election would have done so on terms that would prevent the new president from winning the war

Isolationism (2003) (unpublished manuscript), available at <http://www.people.fas.harvard.edu/~bfbraum/MythOfUSIsol.pdf> (representing the counter argument to U.S. isolationism before Pearl Harbor).

152. See COLE, *supra* note 151; accord Charles Lindbergh, Speech Delivered in New York City (Apr. 23, 1941), available at <http://www.charleslindbergh.com/americanfirst/speech2.asp>; Charles Lindbergh, Election Promises Should Be Kept We Lack Leadership that Places America First, Delivered in New York City, Madison Square Garden (May 23 1941), available at <http://www.charleslindbergh.com/pdf/speech7.pdf>; see generally Douglas Charles, *Informing FDR: FBI Political Surveillance and the Isolationist-Interventionist Foreign Policy Debate, 1939-1945*, 24 *Diplomatic History* 211 (2000); cf. *Hartzel v. U.S.*, 322 U.S. 680 (1944) (reversing a conviction under the Espionage Act of June 15, 1917); but see *Schenck v. U.S.*, 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."); *U.S. v. Hartzel*, 138 F.2d 169 (7th Cir. 1943).

153. Charles Lutton, *Pearl Harbor: Fifty Years of Controversy*, 11 *J. OF HIST. REV.* 431, 467 (1991), available at http://www.ihr.org/jhr/v11/v11p431_Lutton.html. President Roosevelt commissioned an investigation into the Pearl Harbor attacks following the incident. The committee, led by Associate Supreme Court Justice Owen Roberts, submitted its report on January 23, 1942. See also S. REP. NO. 79-244, at 493 (1946), available at <http://www.ibiblio.org/pha/pha/congress/minority.html> (entire transcript of the minority report filed in opposition to the above committee's findings that further justified America's entering WWII against Japan and Germany).

154. Lincoln's Second Inaugural Address reiterates at length the purpose of the War and the need to overcome for the sake of blacks:

Neither party expected for the war the magnitude of the duration which it has already attained. Neither anticipated that the *cause* of the conflict might cease with or even before the conflict itself should cease.

With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in, to bind up the nation's wounds, to care for him who shall have borne the battle and for his widow and his orphan, to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations.

Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), reprinted in CHRISTOPHER WALDREP & LYNNE CURRY, *THE CONSTITUTION AND THE NATION: THE CIVIL WAR AND AMERICAN CONSTITUTIONALISM* 140-42 (2003). See also CARL SANDBURG, *ABRAHAM LINCOLN: THE PRARIE YEARS AND THE WAR YEARS* (1954).

155. JOHN C. WAUGH, *REFLECTING LINCOLN: THE BATTLE FOR THE 1864 PRESIDENCY* (2001).

thereafter.¹⁵⁶ Only a timely capture of Atlanta by General Sherman in the waning days of 1864 strengthened national resolve and secured President Lincoln's reelection.

One hundred and forty years later, President Bush has experienced similar circumstances. In September of 2002, the *Los Angeles Times* reported a poll that showed that "[b]y a margin of more than three to one (76 percent to 23 percent) Americans said they think the United States should take military action to remove Hussein from power Nearly eight in 10 say they believe Hussein has supported Al Qaeda's terrorist activities"¹⁵⁷ (a belief later confirmed by the findings of a federal court in *Smith v. Islamic Emirate of Afghanistan*).¹⁵⁸ By the eve of the 2004 Presidential election, a series of setbacks in Iraq and a relentless media barrage had reduced the margin of public support considerably.¹⁵⁹ It remains to be seen whether a success in Iraq comparable to Sherman's capture of Atlanta can re-establish public support to the point where the war on terror can be prosecuted to a successful conclusion.

IV. CONCLUSION

U.N. Resolution 1441 has provided a firm foundation for the prosecution of the allied war on terror in Iraq. Domestic terrorism laws, such as the Patriot Act, while yet to be fully tested in the courts, have their foundation in investigative procedures already tested by the courts. Although the overwhelming support for the war on terror and the war against Iraq has diminished considerably in the aftermath

156. *Id.* at 543 (quoting a letter written by President Lincoln in 1864):

This morning, as for some days past, it seems exceedingly probable that this Administration will not be re-elected. Then it will be my duty to co-operate with the President elect, as to save the Union between the election and the inauguration; as he will have secured his election on such ground that he can not possibly save it afterwards.

157. See e.g., Sonni Efron, *Across Nation, Critics of Bush Express Support for Iraq War*, L.A. TIMES, Sep. 15, 2002, at A14.

158. *Smith v. Islamic Emirate of Afghanistan*, 262 F. Supp. 2d 217 (S.D.N.Y. 2003).

159. "President George W. Bush's job performance rating has slipped to 53% positive, his lowest since the terrorist attacks in 2001, according to a poll of 1,004 likely U.S. voters by Zogby International. His negative rating reached 46%, just under his pre-9/11 unfavorable of 49%" Bush Job Performance, Zogby International, (July 18, 2003), available at <http://www.zogby.com/news/ReadNews.dbm?ID=721>; but see The Pew Research Center for the People and the Press, *Part Five: Opinion About the Bush Administration's Stewardship*, available at <http://people-press.org/reports/display.php3?PageID=867> (last visited Feb. 6, 2005) [hereinafter Pew Poll].

But Bush's handling of the situation in Iraq, and his foreign policy in general, continue to receive more negative reactions from the public. Just 42% approve of Bush's overall handling of foreign policy and roughly the same number (43%) approve of the way he is handling the war in Iraq. Bush's ratings on Iraq, like his measures on terrorism, have been fairly consistent over the past few months. And when it comes to how the president has handled international trade issues, just one-in-three approve, with 45% disapproving and a relatively high number (22%) declining to offer an opinion. Pew Poll, *supra* note 159.

"Forty-four percent (44%) of Americans now give the President good or excellent marks for his handling of the situation in Iraq. An identical number say he is doing a poor job in this area." Rasmussen Reports, *44% Rate Bush Good/Excellent on Iraq: Another 44% Give the President Poor Marks*, Dec. 8, 2004, available at <http://www.rasmussenreports.com/War%20with%20Iraq%20Bush%20Ratings.htm>.

of extensive and negative media coverage, national resolve in the face of setbacks can provide the foundation for securing the peace through enforcement of international law.