

# AMERICAN EXCEPTIONALISM, THE WAR ON TERROR, AND THE RULE OF LAW IN THE ISLAMIC WORLD

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When some New York Law School students first decided to organize a Federalist Society chapter many years ago, they actually asked me to be their faculty advisor. Some will say that this shows how hard it is to find a conservative law professor. But what it really shows is that these New York Law School students were honoring this organization's libertarian founding principles. Those principles are reflected in the opening words of the Federalist Society's mission statement: "The Federalist Society . . . is founded on the principle[] that the state exists to preserve freedom . . . . The Society seeks . . . [to reorder] priorities within the legal system to place a premium on individual liberty . . ." <sup>1</sup> Also relevant to this Essay's topic, the mission statement declares that "the separation of governmental powers is central to our Constitution." <sup>2</sup> Unfortunately, the "War on Terror" <sup>3</sup> has violated these fundamental precepts of the Federalist Society in numerous ways, with devastating consequences for liberty, democracy, and national security alike.

For details, refer to the website of a certain organization that has been promoting the libertarian aspect of the Federalist So-

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1. The Federalist Society for Law and Public Policy Studies, About Us, <http://www.fed-soc.org/aboutus> (last visited Nov. 2, 2008).

2. *Id.*

3. Address to a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 2 PUB. PAPERS 1140, 1141 (Sept. 20, 2001) ("Our war on terror begins with Al Qaida . . .").

ciety's agenda for almost ninety years now. The American Civil Liberties Union has been working closely with many national security experts and other diverse allies in our campaign to keep our great country both "Safe and Free."<sup>4</sup>

In contrast, many post-9/11 measures have been the worst of both worlds: They undermine human rights, both at home and around the world, and they do not help the United States counter terrorism. Lifelong military and intelligence officials have said that a fatal flaw in the "War on Terror" is that the United States is losing the moral authority and credibility that is essential in a war of ideas and values.

Let me cite just two examples. General Charles Krulak, Commandant of the U.S. Marine Corps, and Joseph Hoar, a former Commander-in-Chief of U.S. Central Command, recently wrote:

This war will be won or lost not on the battlefield but in the minds of potential supporters who have not yet thrown in their lot with the enemy. If we forfeit our values by signaling that they are negotiable in situations of grave or imminent danger, we drive those undecideds into the arms of the enemy. This way lies defeat, and we are well down the road to it.<sup>5</sup>

These two military leaders strongly denounced, among other policies, secret CIA interrogation programs that use "torture techniques euphemistically called 'water-boarding,' 'sensory deprivation,' 'sleep deprivation' and 'stress positions'—conduct we used to call war crimes."<sup>6</sup> As we learned in October 2007, the Justice Department has continued to use secret memos to authorize painful physical and psychological tactics,<sup>7</sup> carrying out policies that had already triggered courageous internal criticism by even committed conservative Republicans who otherwise support the Administration's policies, including Professor Jack Goldsmith.<sup>8</sup> This is just the latest in a series of revelations

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4. ACLU, *Safe and Free: Restore Our Constitutional Rights*, <http://www.aclu.org/safefree/index.html> (last visited Nov. 2, 2008).

5. Charles C. Krulak & Joseph P. Hoar, *It's Our Cage, Too: Torture Betrays Us and Breeds New Enemies*, WASH. POST, May 17, 2007, at A17.

6. *Id.*

7. See Scott Shane et al., *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, at A1.

8. Jeffrey Rosen, *Conscience of a Conservative*, N.Y. TIMES, Sept. 9, 2007, § 6 (Magazine), at 40, 44 ("After the leak, there was a lot of pressure on me within the administration to stand by the opinion," Goldsmith told me, "and the problem was that I had decided six months earlier that I couldn't stand by the opinion.").

about various secret programs allegedly justified by President Bush's apparently limitless conception of his "Commander-in-Chief" power.<sup>9</sup>

Let me remind you of some earlier revelations in this vein, about which we learned thanks to intrepid investigative reporters and courageous and principled whistleblowers inside the government and military. The earlier revelations include the CIA secretly detaining and "rendering" prisoners to countries where they were tortured;<sup>10</sup> the FBI and Department of Defense spying on individuals and groups who were peacefully expressing their views on issues including the war in Iraq, the environment, and animals' rights;<sup>11</sup> the misuse of the intrusive National Security Letter power, as critiqued by the Justice Department's own Inspector General;<sup>12</sup> and the National Security Agency's surveillance of the phone and online communications of innocent American citizens right here in the United States without court-approved warrants.<sup>13</sup> To put that last policy in perspective, let us not forget that Attorney General John Ashcroft, while in his hospital bed, was reluctant to reauthorize this program,<sup>14</sup> to his everlasting credit. Then Assistant Attorney General Jack Goldsmith also played a role in putting an end to that development.<sup>15</sup>

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9. See, e.g., Joseph W. Dellapenna, *Presidential Authority and the War on Terror*, 13 ILSA J. INT'L & COMP. L. 25 (2006); Peter Margulies, *Judging Terror in the "Zone of Twilight": Exigency, Institutional Equity, and Procedure After September 11*, 84 B.U. L. REV. 383 (2004); Leila Nadya Sadat, *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200 (2007); Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 UCLA L. REV. 309 (2006).

10. See Sadat, *supra* note 9, at 1201.

11. See Eric Lichtblau, *F.B.I. Watched Activist Groups, New Files Show*, N.Y. TIMES, Dec. 20, 2005, at A1.

12. U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, SPECIAL REPORT: REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF NATIONAL SECURITY LETTERS (2007); see also David Johnston & Eric Lipton, *U.S. Report to Fault Wide Use Of Special Subpoenas by F.B.I.*, N.Y. TIMES, Mar. 9, 2007, at A1.

13. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts: Secret Order to Widen Domestic Monitoring*, N.Y. TIMES, Dec. 16, 2005, at A1.

14. Eric Lichtblau & James Risen, *Justice Deputy Resisted Parts Of Spy Program: Bush Aides Then Asked Ashcroft's Approval*, N.Y. TIMES, Jan. 1, 2006, at A1.

15. Neil A. Lewis, *Panel Is Told of 'Mess' Over Eavesdropping*, N.Y. TIMES, Oct. 3, 2007, at A21 (quoting Goldsmith as stating, "[i]t was the biggest legal mess I had ever encountered," and noting that he had "raised his objections to the program").

When our own country violates our core principles, we not only bolster our enemies' recruiting efforts, but we also undermine intelligence gathering about terrorist threats. The best sources of such intelligence come from the communities in which terrorists hide.<sup>16</sup> For example, a tip from a member of London's Muslim community<sup>17</sup> allowed British investigators to foil a plot to bomb transatlantic flights in 2007.<sup>18</sup> Such community members are much less likely to come forward if they think that the people they identify are likely to be abused or held for years in a legal black hole.

Intelligence experts have observed that tortured prisoners will try to end their suffering by saying whatever they think their interrogators want to hear, even if it is false.<sup>19</sup> Torture therefore undermines both human rights and national security. The very same double flaw infects every post-9/11 tactic that has violated civil liberties, while concentrating unilateral, unchecked power in the Executive Branch. These abuses alienate our allies, invigorate al Qaeda, and divert resources from the essential anti-terrorism efforts that national security experts do advocate.<sup>20</sup> For example, no less of a military authority than General Colin Powell has said that Guantánamo is "causing us far more damage than any good."<sup>21</sup> Guantánamo, along with our government's other extra-legal tactics—including the military commissions that Professor Neal Katyal has successfully challenged in court—have been strongly condemned by some

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16. See Martin Innes, *Policing Uncertainty: Countering Terror Through Community Intelligence and Democratic Policing*, 605 ANNALS AM. ACAD. POL. & SOC. SCI. 222, 230–32 (2006).

17. Craig Whitlock & Dafna Linzer, *Tip Followed '05 Attacks on London Transit*, WASH. POST, Aug. 11, 2006, at A1.

18. Peter Spiegel et al., *Terror Attacks Were 'Very Near': British Arrest 24 in Alleged Plot to Bomb as Many as 10 U.S. Jets*, L.A. TIMES, Aug. 11, 2006, at A1.

19. *On the CIA Secret Detention, Rendition, and Interrogation Program: Hearing Before the S. Foreign Relations Comm.*, 110th Cong. (2007) [hereinafter *CIA Hearing*] (statement of Tom Malinowski, Wash. Advocacy Director, Human Rights Watch).

20. Robert Parry, *Bush's 'Big Brother' Blunder*, CONSORTIUMNEWS, May 13, 2006, <http://www.consortiumnews.com/2006/051206.html>.

21. *The Legal Rights of Guantánamo Detainees: What Are They, Should They Be Changed, and Is an End in Sight?: Hearing Before the Subcomm. on Terrorism, Tech., and Homeland Sec. of the S. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Sen. Richard J. Durbin, Member, S. Comm. on the Judiciary); *Colin Powell says Guantánamo should be closed*, REUTERS, June 10, 2007, <http://www.reuters.com/article/newsOne/idUSN1043646920070610>.

of our other top military leaders and lawyers, and many of our brave, dedicated service members and veterans; they fear that when members of the U.S. armed forces are captured they will be subject to the same mistreatment, now that the United States has subverted the law of war.<sup>22</sup>

In addition, these extra-legal tactics have resulted in exactly zero prosecutions of anyone remotely connected to the 9/11 attacks. Only one man has been convicted through this extra-legal system: David Hicks, an Australian kangaroo skinner.<sup>23</sup> He was not even charged with actively engaging in terrorism.<sup>24</sup> To the contrary, his defense attorney, Major Michael Mori, described Mr. Hicks as being so “scared” that he quickly fled the front line in Afghanistan for the Pakistan border.<sup>25</sup> In contrast, numerous international terrorists have been successfully prosecuted in United States federal courts, and many are now serving long sentences in maximum-security prisons.<sup>26</sup>

In addition to putting terrorists behind bars, all of these lawful prosecutions share another feature that is at least as important for our ultimate success in the ongoing War on Terror: No one is complaining that these convicted terrorists were treated unjustly. Thus, al Qaeda cannot exploit their fate to recruit more terrorists. Experienced federal judges and prosecutors have strongly endorsed the traditional criminal justice approach—based on its successful track record—and they have opposed any system of administrative or preventive detention

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22. See, e.g., Jesselyn A. Radack, *You Say Defendant, I Say Combatant: Opportunistic Treatment of Terrorism Suspects Held in the United States and the Need for Due Process*, 29 N.Y.U. REV. L. & SOC. CHANGE 525 (2005).

23. William Glaberson, *Plea of Guilty from a Detainee in Guantanamo: First Public Proceeding*, N.Y. TIMES, Mar. 27, 2007, at A1.

24. Neil A. Lewis, *Australian Pleads Not Guilty to Terrorism Conspiracy*, N.Y. TIMES, Aug. 26, 2004, at A14.

25. Stefanie Balogh, *A tool for terrorism . . . Or a fool for the front line?*, HERALD-SUN (Melbourne), Apr. 2, 2007, at 10; see also Charles I. Lugini, *Mocking the Rule of Law: A Kangaroo Court for Australian David Hicks*, 14 TEMP. POL. & CIV. RTS. L. REV. 335, 340 (2005).

26. See, e.g., William Branigin, *High Court Affirms Terrorism Conviction: Ruling Upholds Federal Explosives Law*, WASH. POST, May 20, 2008, at A6; Jerry Markon, *Conviction Upheld in Terror Plot: Judge Sends Falls Church Man's Case Back for Resentencing*, WASH. POST, Jun. 7, 2008, at B3; *Three are Convicted in Terrorism Trial*, WASH. POST, Jun. 14, 2008, at A16; Benjamin Weiser, *Judge Upholds Conviction in Terror Case: But Marshals Service Draws Fire in Ruling*, N.Y. TIMES, Nov. 3, 2005, at B1.

or special courts,<sup>27</sup> such as the approach that Professors Jack Goldsmith and Neal Katyal have both advocated.<sup>28</sup>

Kelly Ann Moore, a prosecutor who headed the Violent Crimes and Terrorism Section of the United States Attorney's Office for the Eastern District of New York in Brooklyn, wrote:

Those who commit terrorist acts should be tried as the criminals they are, instead of the "warriors" they claim to be. If the Guantánamo detainees were prosecuted in federal courts instead of being designated as "combatants," most by now would be serving prison time as convicted terrorists, instead of being celebrated as victims or freedom fighters.<sup>29</sup>

Similarly, a federal judge who presided over a trial that led to the conviction of another terrorist wrote an opinion piece in which he noted another benefit of our tried-and-true criminal justice system. Judge John Coughenour, who sits in Seattle and was appointed by President Reagan, presided over the trial of Ahmed Ressay, the confessed Algerian terrorist, for his role in the plot to bomb Los Angeles International Airport. As Judge Coughenour wrote, "That experience only strengthened my conviction that American courts, guided by the principles of our Constitution, are fully capable of trying suspected terrorists . . . [and] can protect Americans from terrorism."<sup>30</sup> Judge Coughenour added, "For two years after his conviction, thanks in part to the fairness he was shown by the court, Mr. Ressay provided intelligence useful to terrorism investigations around the world as German, Italian, French and British authorities were willing to attest."<sup>31</sup>

American diplomats and human rights activists around the world have complained that American policies have emboldened dictators everywhere, including in countries where it is strategi-

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27. Hon. John C. Coughenour, Op-Ed., *How to Try a Terrorist*, N.Y. TIMES, Nov. 1, 2007, at A27; Neil A. Lewis, *Two Prosecutors Faulted Trials for Detainees: Debate at Pentagon on Guantánamo Cases*, N.Y. TIMES, Aug. 1, 2005, at A1; Don Van Natta Jr. & Benjamin Weiser, *Compromise Settles Debate Over Tribunal: Bush Administration Opts for Civilian Court*, N.Y. TIMES, Dec. 12, 2001, at B1.

28. Jack L. Goldsmith & Neal Katyal, Op-Ed., *The Terrorists' Court*, N.Y. TIMES, Jul. 11, 2007, at A19.

29. Kelly Ann Moore, Op-Ed., *Take Al Qaeda to Court*, N.Y. TIMES, Aug. 21, 2007, at A19.

30. Coughenour, *supra* note 27.

31. *Id.*

cally important for the United States to advance democracy and human rights. Tom Malinowski, of Human Rights Watch, stated:

America's detention policies are a gift to dictators everywhere. They can use America's poor example to shield themselves from international criticism and pressure . . . In the days of the Cold War . . . Communist leaders . . . tried to do the same thing. But it didn't work. Dissidents and ordinary people behind the Iron Curtain knew that America wasn't perfect. But they believed that the United States was at least dedicated to the principle that governments were bound by law to respect human rights. . . . It gave them hope that a different way of life was possible, and the courage to fight for it.<sup>32</sup>

I would like to end by quoting General David Petraeus, former United States commander in Iraq, who told his troops: "Adherence to our values is what distinguishes us from our enemy. This fight depends on securing the population, which must understand that we, not our enemies, occupy the moral high ground."<sup>33</sup>

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32. *CIA Hearing*, *supra* note 19.

33. Letter from Gen. David H. Petraeus to Soldiers, Sailors, Airmen, Marines, and Coast Guardsmen serving in Multi-National Force—Iraq (May 10, 2007), available at [http://www.globalsecurity.org/military/library/policy/army/other/petraeus\\_values-msg\\_torture070510.htm](http://www.globalsecurity.org/military/library/policy/army/other/petraeus_values-msg_torture070510.htm).