

A HUMAN RIGHTS PERSPECTIVE†

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As a human rights advocate based in the United States I have often used the example of U.S. adherence to human rights principles when pressing other governments to live up to their human rights obligations and respect the rights of their own citizens. I believe strongly in the potential of the United States as a force for good in the world. This country played an important leadership role in creating the international system of norms and standards that recognize the inherent dignity of all people. And so I felt privileged to be able to do human rights work from a base inside the United States. But as an organization based in the United States, I take very seriously the obligation to ensure that my own government respects those ideals. It has been increasingly difficult over the last eight years to hold the United States up as that shining city on the hill when I speak to other governments who are violating the rights of their own citizens.¹

It is important to understand what is at stake here, and how urgent it is that we get this right. The erosion of human rights protections in the United States in the aftermath of September 11, 2001 has had a profound impact on human rights standards around the world. Over the last seven years, the United States has become identified with its selective observation of international human rights treaties to which it is bound, a pattern that has weakened the fabric of human rights norms and emboldened other governments to do the same. A growing number of countries have adopted sweeping counterterrorism measures into their domestic legal systems, at times significantly expanding on the substance of U.S. measures while explicitly invoking U.S. precedent. Opportunistic governments have co-opted the U.S. “war on terror,” citing

† This Essay is adapted for publication from a panel discussion presented as part of the Regent University Law Review and The Federalist Society for Law & Public Policy Studies National Security Symposium at Regent University School of Law, September 27, 2008. The panel discussed recent Supreme Court decisions affecting national security, focusing on the 2008 decisions *Boumediene v. Bush* and *Munaf v. Geren*. Speakers included: Professor Jordan Paust, University of Houston Law Center; Commander Glenn M. Sulmasy, Associate Professor of Law, U.S. Coast Guard Academy; Elisa Massimino, CEO and Executive Director, Human Rights First; and Professor Harvey Rishikof, National War College. The panel was moderated by Dr. Jay Alan Sekulow, Chief Counsel, American Center for Law & Justice.

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¹ See John Winthrop, *A Modell of Christian Charity* (1630), in *POLITICAL THOUGHT IN AMERICA: AN ANTHOLOGY* 7, 12 (Michael B. Levy ed., Waveland Press, Inc. 2d ed. 1988) (providing the origin of the phrase designating the United States as a “city on a hill”).

support for U.S. counterterrorism policies as a basis for internal repression of domestic opponents.

In the course of my work I often meet with human rights colleagues from around the world, many of them operating in extremely dangerous situations. When I ask how we can support them as they struggle to advance human rights and democratic values in their own societies, invariably their answer is: “get your own house in order. We need the United States to be in a position to provide strong leadership on human rights.”

Failure of U.S. global leadership on human rights affects more than our own reputation and identity as a nation; it erodes worldwide commitment to the standards of universal rights and freedoms for which the United States claims to stand. That is why, during the last five or six years, my own work has been transformed from spending most of my time in the embassies of Egypt, Indonesia, China, and other countries around the world criticizing them for their human rights policies, to talking mostly to my own government.

I testified at a Senate Judiciary Committee hearing on September 16, 2008, which was entitled “Restoring the Rule of Law.”² There was some debate among the panelists and with the senators about the rule of law and whether it needs to be restored.³ But no matter where you come down on that issue, it is becoming increasingly clear, in the course of sorting our way through the challenges of responding to the terrorist threat, that we have suffered a number of self-inflicted wounds to our moral standing and to our reputation in the world as a nation that respects the rule of law.

The threat of terrorism is real and serious, and we must take steps to address it. I am very grateful for the approach this Symposium has taken to discussing these issues, because I can tell you that I have been involved in these debates in a lot of other fora where challenges to the way we are grappling with these issues are often dismissed as the inexperience of people who do not take the threat seriously. It is refreshing to be involved in a discussion where we can start from a place

² *Restoring the Rule of Law: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 110th Cong. 33–35 (2008) (statement of Elisa Massimino, Chief Executive Officer and Executive Director, Human Rights First) [hereinafter *Hearing*].

³ *Compare id.* at 6 (statement of Frederick A. O. Schwarz, Jr., Senior Counsel, Brennan Center for Justice, New York University School of Law) (“Renewing our commitment to the rule of law by confronting and acknowledging our recent failures gives substance to our national moral commitment, and thus can help begin to restore our reputation in the rest of the world.”), *with id.* at 8 (statement of Charles J. Cooper, Partner, Cooper & Kirk, PLLC) (“In perilous times such as these, with regard to momentous and difficult issues such as those that have confronted our [g]overnment, can the imperative to grant the Executive the benefit of genuine legal doubt be any greater?”).

of common ground and common purpose. I have a deep personal respect for all government servants—civilians and those who serve in uniform—who have to face these very difficult challenges every day.

Former Attorney General John Ashcroft made a powerful and very profound point that resonated with me. He indicated that liberty and security are not competing interests to be balanced in kind of a zero sum game.⁴ When we view the challenge simply as getting the right balance we tend to lose our balance completely. But this is the prevailing wisdom in Washington. The attitude seems to be that if we just tinker with our liberties, trim a bit here and there, we will find the golden mean of perfect security. Respect for human rights is a core strength of this country in the asymmetric battle with terrorist enemies. So many of the missteps we have made since 9/11, as we have been trying to sort out these challenges, stem from a failure to understand this fundamental point. We cannot secure liberty if we turn away from our first principles as a nation. And yet, we seem to have to learn that lesson over and over again. As the United States Supreme Court said in *Boumediene v. Bush*, “Security subsists . . . in fidelity to freedom’s first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers.”⁵ That is an important point as we think about whether we are talking about a balance of competing interests or about core values on which the country was founded.

Many people argue that the threat of al Qaeda is unique and requires broad changes to the framework of laws dealing with terrorism and armed conflict. Glenn Sulmasy cautioned against getting stuck in the “9/10 mentality,”⁶ by which he means not taking the threat sufficiently seriously. You often hear that the whole world changed on 9/11, and in fact, many things did change, not the least of which was our sense of invulnerability. Of course we must adapt, just as the enemy has adapted. But there are some things that did not—or should not—change: our ideals, our values, and our commitment to human rights. And we must keep those in mind too. One of my fellow panelists at the Senate hearing pointed to a corollary risk, saying that not only do we have to be careful about “a September 10th mindset,” but we also have to be careful about getting “stuck in a September 12th mindset.”⁷ This goes back to what we have learned over the last seven years. The enemy is

⁴ See John D. Ashcroft, *Luncheon Address: Securing Liberty*, 21 REGENT U. L. REV. 285, 289 (2009).

⁵ 128 S. Ct. 2229, 2277 (2008).

⁶ Glenn M. Sulmasy, *Boumediene v. Bush: A Catalyst for Change*, 21 REGENT U. L. REV. 363, 364 (2009).

⁷ *Hearing, supra* note 2, at 37 (statement of Suzanne E. Spaulding, Principal, Bingham Consulting Group).

adapting, and we need to adapt too. For example, one of the things that we have learned—which is becoming more accepted throughout the government and particularly at the Pentagon—is that this conflict is, in many respects, a war of ideas. We will not win or lose it on the traditional battlefield.

When we fail to adhere to our values, even in the sincere belief that it is necessary to meet the threat, we unwittingly give the enemy an advantage. We cannot afford that. I would be curious to know how many people have read the open letter from General Petraeus to the troops that he issued in May of 2007.⁸ The letter is only one page, but it is incredibly powerful, and I think it should be required reading for every American. It was prompted in part by the results of a mental health survey of troops serving in Iraq.⁹ In the letter, General Petraeus addressed the acceptability of torture practices and abuse of prisoners.¹⁰ To General Petraeus, there was a disturbing level of acceptance of that kind of behavior.¹¹ He said:

Some may argue that we would be more effective if we sanctioned torture or other expedient methods to obtain information from the enemy. They would be wrong. Beyond the basic fact that such actions are illegal, history shows that they also are frequently neither useful nor necessary. Certainly, extreme physical action can make someone “talk,” however, what the individual says may be of questionable value. In fact, our experience in applying the interrogation standards laid out in the Army Field Manual . . . that was published last year shows that the techniques in the manual work effectively and humanely in eliciting information from detainees.¹²

He cautioned that we must adhere to our values and maintain the moral high ground.¹³ That principle extends to the issues that the Supreme Court dealt with in *Boumediene v. Bush*¹⁴ and *Hamdan v.*

⁸ Letter from David H. Petraeus, General, U.S. Army, to Soldiers, Sailors, Airmen, Marines, and Coast Guardsmen serving in Multi-National Force-Iraq (May 10, 2007) [hereinafter Petraeus Letter], available at http://www.globalsecurity.org/military/library/policy/army/other/petraeus_values-msg_torture070510.htm.

⁹ See *id.*; Sara Wood, *Petraeus Urges Troops to Adhere to Ethical Standards*, AM. FORCES PRESS SERVICE, May 11, 2007, <http://www.defenselink.mil/news/newsarticle.aspx?id=45983>.

¹⁰ Petraeus Letter, *supra* note 8.

¹¹ *Id.* (“I was concerned by the results of a recently released survey . . . that revealed an apparent unwillingness on the part of some [U.S.] personnel to report illegal actions taken by fellow members of their units. The study also indicated that a small percentage of those surveyed may have mistreated noncombatants. This survey should spur reflection on our conduct in combat.”).

¹² *Id.*

¹³ *Id.*

¹⁴ 128 S. Ct. 2229 (2008).

Rumsfeld.¹⁵ In some respects, the cases do not answer the most important question—how do we deal with this problem going forward? During the presidential debate on September 26, 2008, I was heartened to hear an agreement between the two candidates—they did not agree on very much, but one of the issues they did agree on was the importance of adhering to those values.¹⁶ Both appeared ready to turn the page on this chapter where we have sanctioned torture and other abuse of prisoners.¹⁷

In my business, working on Capitol Hill and lobbying on human rights issues, the way you talk about an issue is almost as important as what you say about it. This Symposium is framed as *The Battle Between Congress & the Courts*. I would like to challenge that framework and urge another way of thinking about the challenge we now face. Our government is based on a system of checks and balances between the three branches, and one of the mistakes the government made shortly after 9/11 was consciously moving detainees into a place where it believed they would be beyond the reach of the law.¹⁸ That was understandable at the time, but we need to move beyond this “September 12th mindset.”¹⁹

One of the questions posited during this Symposium was whether the current conflict can be categorized in a law enforcement framework or in a law of war framework.²⁰ Critics of the Bush administration’s framing of this struggle as a “war on terror” are often caricatured as wanting to “serve subpoenas on Osama bin Laden.” But today, seven years after the attacks, we must recognize that the challenge of countering terrorism is a complex one, and we must use all the tools of national power to deal with it. We have to be creative. We have to get beyond a September 12th mindset. We have to think outside the box. But there are boxes outside of which we should not be thinking, and those

¹⁵ 548 U.S. 557 (2006).

¹⁶ Transcript of The First McCain-Obama Presidential Debate, Sept. 26, 2008, <http://www.debates.org/pages/trans2008a.html> [hereinafter McCain-Obama Presidential Debate].

¹⁷ *See id.*

¹⁸ *See* Elizabeth A. Wilson, *The War on Terrorism and “The Water’s Edge”: Sovereignty, “Territorial Jurisdiction,” and the Reach of the U.S. Constitution in the Guantánamo Detainee Litigation*, 8 U. PA. J. CONST. L. 165, 167 (2006) (explaining that because Guantanamo is outside the United States, “[t]he [g]overnment’s position has been a simple one: the Constitution does not reach aliens detained outside of the United States. . . . [T]hey are, as aliens without significant voluntary connections with the United States, without constitutional rights”).

¹⁹ *See supra* note 7 and accompanying text.

²⁰ *Legislation Panel: Discussion & Commentary*, 21 REGENT U. L. REV. 331, 331 (2009) (the moderator asked, “[T]o what degree for instance did you find that a lot of what was discussed was based on a confusion as to whether this was purely a criminal matter or was a law of armed conflict matter . . . [?]”).

include our Constitution, our laws, and our values. We must make sure that we have a firm grounding in those three things as we try to sort through these issues.

I would like to conclude with two thoughts. As I was listening to the September 26, 2008, presidential debate,²¹ I thought, “What is it that the next President really has to do to move us beyond where we are now in our counterterrorism strategy?” I can identify two big challenges.

The first challenge is that our own people and the rest of the world—our allies and our enemies—need to understand what the United States means when it says it will treat prisoners humanely. Right now, our biggest problem is not that our enemies know what we are capable of; it is that the rest of the world—including our allies—does not. We need a single standard of humane treatment of prisoners that is consistent with our laws and values. That need not be the Army Field Manual, but it must encompass the golden rule standard that the military follows: we should not be doing anything to prisoners in our custody that we would find unacceptable if perpetrated by the enemy against captured Americans.

The second challenge is whether we are using all of the tools at our disposal. One of the tools that has not been sufficiently exploited—or at least we have not recognized the extent to which it has been exploited—is the criminal justice system. Some have argued that our existing criminal justice system is not equipped to handle complex terrorism cases and that we need special terrorism courts.²² My organization undertook the task of researching international terrorism prosecutions over the last fifteen years, and we found that most of the reasons given by critics for eschewing the regular criminal justice system in terrorism cases do not hold up under scrutiny.²³ In fact, our criminal justice system has been doing a very good job,²⁴ particularly when compared to the military commissions at Guantanamo,²⁵ in convicting dangerous terrorism suspects.

Al Qaeda terrorists who have been subjected to our criminal justice system, are no longer a problem for the United States—they are serving prison sentences, many for the rest of their lives. Obviously the criminal justice system is not the sole answer to terrorism. But it is an important and underutilized tool.

²¹ McCain-Obama Presidential Debate, *supra* note 16.

²² See, e.g., A. John Radsan, *Change Versus Continuity at Obama's CIA*, 21 REGENT U. L. REV. 299, 299–301 (2009); Sulmasy, *supra* note 6, at 369.

²³ RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS 5, 129 (2008), available at <http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf>.

²⁴ *Id.* at 129.

²⁵ *Id.* at 3.