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A RATIONAL CHOICE REFLECTION ON THE BALANCE AMONG INDIVIDUAL RIGHTS, COLLECTIVE SECURITY, AND THREAT PORTRAYALS BETWEEN 9/11 AND THE INVASION OF IRAQ

Robert Bejesky*

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I. INTRODUCTION

This study canvasses the interaction between terror threat announcements and the civil liberties/collective security balance during the three years after September 11, 2001. Part II considers how security threat environments alter the parity between collective security and civil liberties, but emphasizes that this shift is typically not from real, verified peril, but from perception of risk.¹ Part III addresses notable post-9/11 threat warnings and the detention of terror suspects.² It inquires whether terror threat notifications were prudently issued and an imperative mechanism to apprise the populace of realistic and verified risks. In most cases, it is not clear that detainees' interrogations or interviews sourced the announcements.³ A repercussion from ardent portrayals of danger is that irrational perceptions may skew informed public choice.⁴ Part IV examines alternative global, diurnal dangers to objectify the threat of terrorism.⁵ Part V concludes the work by summarizing these elements in a pithy game theory analysis.⁶

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1. See *infra* Part II.
2. See *infra* Part III.
3. See generally *infra* Parts III(B)–(C).
4. See *infra* note 26, at 26.
5. See *infra* Part IV.
6. See *infra* Part V.

II. BALANCING COLLECTIVE SECURITY AND CIVIL LIBERTIES

A. Theory

One reason governments were formed was to bestow a centralized authority to quell anarchy among people in a state of nature, which is commonly named a Lockean Bargain.⁷ Governments provided security and punished wrongdoers so that members of society would abstain from engaging in self-help.⁸ Governments prescribed rules that stationed sovereigns along a continuum of authoritarian to democratic rule, and fashioned a collective security and individual rights stasis.⁹

Sovereign governments became the norm and threats emanated from hazardous intentions and actions of other states. Following World War II, countries constituted the United Nations to provide a rule-based collective security system obliging members to respect sovereignty and reconcile dissension by diplomacy, rather than by using force.¹⁰ Nonetheless, the Cold War erupted and was marked by associations of countries clenching menacing weapons and contrasting ideals about property rights and governance.¹¹ Domestically, hawkish officials consternated over citizens possessing loyalties to a foreign government or precariously unorthodox views, leading to breeds of seditious crackdown and diluted individual liberties to avail collective security measures.¹² The distance between real and exaggerated perceptions of crisis has produced notable discord over the extent that liberties should be sacrificed in a perceived security threat atmosphere.

Benjamin Franklin advised that “[t]hose who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety.”¹³ Chief Justice Rehnquist wrote that “civil liberty [does not] occupy as favored a position in wartime as it does in peacetime,” but those civil liberties are restored after the

7. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 269–78 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); FORREST McDONALD, THE AMERICAN PRESIDENCY: AN INTELLECTUAL HISTORY 481 (1994) (noting that the protective principle extends to “ensuring domestic tranquility among a diverse and sometimes bellicose people”).

8. LOCKE, *supra* note 7, at 274–75.

9. ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 31 (2007) (“Constitutional rules do no good, and some harm, if they block government’s attempts to adjust the balance as threats wax and wane.”); Christopher Kurtz, *Torture, Necessity and Existential Politics*, 95 CAL. L. REV. 235, 273 (2007) (“The nation is rendered insecure only when its identity and existence comes under siege.”); *see generally* ARTHUR M. SCHLESINGER, JR., THE VITAL CENTER: THE POLITICS OF FREEDOM (1949); HENRY STEELE COMMAGER, FREEDOM AND ORDER (1966); FRANCIS BIDDLE, THE FEAR OF FREEDOM (1951).

10. U.N. Charter art. 2(4) (“All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

11. *Infra* note 12.

12. Robert Bejesky, *From Marginalizing Economic Discourse with Security Threats to Approbating Corporate Lobbies and Campaign Contributions*, 12 CONN. PUB. INT. L.J. (forthcoming 2012) [hereinafter Bejesky, *Economic Discourse*] (explaining crackdowns that occurred in the U.S.). Soviet republics also suppressed crime and nonconformity, perhaps with a stronger emphasis on maintaining order than upholding individual liberties. Randall Peerenboom, *Human Rights and Rule of Law: What’s the Relationship?*, 36 GEO. J. INT’L L. 809, 902–03 (2005).

13. BENJAMIN FRANKLIN, THE PAPERS OF BENJAMIN FRANKLIN 242 (Leonard W. Labaree ed., Vol. 6, 1963).

war is completed.¹⁴ Professor Ignatieff explained that “[r]ights may have to bow to security in some instances, . . . [and] rights cannot so limit the exercise of authority as to make decisive action impossible.”¹⁵ Addressing recent responses to terrorism, former United Nations General-Secretary, Kofi Annan, expounded: “Human rights, fundamental freedoms and the rule of law are essential tools in the effort to combat terrorism—not privileges to be sacrificed at a time of tension.”¹⁶

During periods in American history—including World War I, Red Scare I, World War II, Red Scare II (McCarthyism), the Cold War, the Vietnam War, and President Reagan’s Central American guerilla wars¹⁷—officials intensified collective security via initiating aggressive domestic law enforcement procedures, issuing propaganda to marginalize dissent, and impeding the free flow of information.¹⁸ In hindsight, experts have reassessed the credibility of threat eras and have leveled reproach.¹⁹

Professor Jay wrote: “From the perspective of more than a half century later, much of this fervor seems opportunistic and at times paranoid.”²⁰ Professor Wells delineated: “Government officials perceiving a potential national security threat have often engaged in widespread propaganda . . . to spur public support” with “an exaggerated characterization of the threat posed by certain individuals or groups.”²¹ Professors Lustgarten and Leigh explain that “official responses to emergencies which were overwhelmingly viewed at the time as not merely justifiable but compelling, have consistently turned out to be excessive, unnecessary, and often shameful.”²² Senator Gary Hart remarked: “Even during the cold war, those times that we sacrificed civil liberties, I found out as a member of the Church Committee, were almost always unnecessary to protect our country. Massive opening of people’s mail, massive wire tapping of phone calls—it always happens when

14. WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 224–25 (1998); Peerenboom, *supra* note 12, at 914; Vincent-Joel Proulx, *If the Hat Fits, Wear It, If the Turban Fits, Run for your Life: Reflections on the Indefinite Detention and Targeted Killing of Suspected Terrorists*, 56 HASTINGS L.J. 801, 832–33 (2005) (Article 15 of the European Convention on Human Rights permits detaining individuals without normal protections in times of national emergency).

15. MICHAEL IGNATIEFF, *THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR* 9 (2004).

16. Press Release, The Secretary General, All Must Work Together to Counter Terrorism, Prevent Spread of Weapons of Mass Destruction, Secretary-General Says, U.N. Doc. SG/SM/8624-SC/7680 (Mar. 6, 2003), available at <http://www.un.org/News/Press/docs/2003/sgsm8624.doc.htm>.

17. M. LEVIN, *POLITICAL HISTORY IN AMERICA: THE DEMOCRATIC CAPACITY FOR REPRESSION* (1971); Lance A. Harke, *The Anti-Terrorism Act of 1987 and American Freedoms: A Critical Review*, 43 U. MIAMI L. REV. 667, 668–69 (1989) (“Efforts to focus the qualms and distrust of a society on a suitable scapegoat have [included] . . . Republicans during the late 1700’s, immigrant groups throughout the 1800’s, unions during the late 1800’s, socialists during the early 1900’s, [and] Japanese-Americans during the 1940’s”); Bejesky, *Economic Discourse*, *supra* note 12.

18. Christina E. Wells, *Information Control in Times of Crisis: The Tools of Repression*, 30 OHIO N.U.L. REV. 451, 464 (2004).

19. Stewart Jay, *The Creation of the First Amendment Right to Free Expression: From The Eighteenth Century to the Mid-Twentieth Century*, 34 WM. MITCHELL L. REV. 773, 930–31 (2007).

20. *Id.*

21. Wells, *supra* note 18.

22. LAURENCE LUSTGARTEN & IAN LEIGH, IN *FROM THE COLD: NATIONAL SECURITY AND PARLIAMENTARY DEMOCRACY* 19 (1994).

people become afraid.”²³ Reflecting on judicial deference to executive crackdowns during real or perceived crises in Britain, Professor Dyzenhaus opined: “[A]fter the fact the majority judgments tend to be regarded as ‘badges of shame,’ and it is the dissenting judgments that are seen as charting the correct course for the future.”²⁴ In 1987, Justice Brennan stated: “After each perceived security crisis ended, the US remorsefully realized that the abrogation of civil liberties was unnecessary. But it has proven unable to prevent itself from repeating the error when the next crisis came along.”²⁵ A similar era followed after 9/11.²⁶

B. Post-9/11 Institutions that Marginalized Dissent

After 9/11, new regulatory frameworks were adopted that emphasized collective security, but institutions lamentably compromised more rigorous protection of individual liberties.²⁷ The Patriot Act²⁸ was enacted and extended the Bush Administration’s authority to wiretap, detain suspects, and deport non-citizens.²⁹ The Act morphed customarily understood definitions of terrorism by applying policies underlying prosaic criminal law offenses. The Act defined “domestic terrorism” as “acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; [or] . . . appear to be intended . . . to influence the policy of a government by intimidation or coercion.”³⁰ Connoting that the stigma and harm inherent in terrorism is tantamount to a violation of criminal law seems unnecessarily vague, while an unreasonable interpretation of “intimidation or coercion” might endanger First Amendment rights of free speech and protest. Author Abdus-Sattar Ghazali wrote:

23. Sherman J. Bellwood, *Lecture, National Security and the Constitution: A Dialogue with Senators Gary Hart and Alan Simpson*, 43 IDAHO L. REV. 7, 29 (2006); George Anastaplo, *September 11th, a Citizen’s Responses (Continued)*, 4 LOY. U. CHI. INT’L L. REV. 135, 147 (2006) (noting the suppression of “conspiracies” and “subversion” during the Cold War).

24. John Ip, *The Supreme Court and House of Lords in the War on Terror: Inter Arma Silent Leges?*, 19 MICH. ST. J. INT’L L. 1, 14 (2010).

25. Irene Zubaida Khan, *The 2007–2008 Mitchell Lecture: The Rule of Law and the Politics of Fear: Human Rights in the Twenty-First Century*, 14 BUFF. HUM. RTS. L. REV. 1, 9 (2008); Hamdi v. Rumsfeld, 542 U.S. 507, 545 (2004) (Souter, J., concurring) (“In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government[.]”).

26. MARC SIEGEL, FALSE ALARM: THE TRUTH ABOUT THE EPIDEMIC OF FEAR 16 (2005).

27. Jeffrey F. Addicott, *Into the Star Chamber: Does the United States Engage in the Use of Torture or Similar Illegal Practices in the War on Terror?*, 92 KY. L.J. 849, 850 (2004) (preempting terrorism involves a balance “between protecting civil liberties and providing adequate safety to the nation from the threat of terrorism[.]”); Eric K. Yamamoto, *White (House) Lies: Why the Public Must Compel the Courts to Hold the President Accountable for National Security Abuses*, 68 LAW & CONTEMP. PROBS. 285, 318 (2005); see *Terrorism and Civil Liberties: Watch Your Mouth*, THE ECONOMIST (Aug. 3, 2005), at 45–46; *Europe and Terrorism: The French Lesson*, THE ECONOMIST (Aug. 3, 2005), at 41–42 (referring to European balance between security and liberties).

28. Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107–56, 115 Stat. 272 (2001), available at <http://intelligence.senate.gov/patriot.pdf>.

29. JAMES CARROLL, CRUSADE: CHRONICLES OF AN UNJUST WAR 47 (2004).

30. 18 U.S.C. § 2331 (2006).

The so-called War on Terror has seriously compromised the First, Fourth, Fifth and Sixth Amendment rights of citizens and non-citizens alike. From the USA PATRIOT Act's over-broad definition of domestic terrorism, to the FBI's new powers of search and surveillance, to the indefinite detention of both citizens and non-citizens without formal charges, the principles of free speech, due process, and equal protection under the law have been seriously undermined.³¹

Ostensibly, Americans irresolutely permitted civil liberty values to be contravened, and accepted more intrusive law enforcement processes to remain safe,³² although the means to substantiate this espoused imperative need is premised on secretive data.³³ And, equivalent to the aforementioned security threat eras,³⁴ citizens may not have held a rational understanding of the costs of sacrificing liberties and the benefits achieved at the time deeper security measures were imposed. According to the American Civil Liberties Union, the Justice Department spurred confusion by presenting inaccurate statements about the Patriot Act in the media.³⁵ Simplistic conceptions prevailed amid erupting controversy.

The title "Patriot Act" served as a heuristic device to further conformity and marginalize dissent as unpatriotic,³⁶ even though an August 2005 *Associated Press* poll revealed that only forty-two percent of Americans were able to identify the purpose of the Patriot Act.³⁷ Despite that the balance between civil liberties and

31. Abdus-Sattar Ghazali, *2001–2011: A Decade of Civil Liberties' Erosion in America—Part One*, OPEdNEWS.COM (Aug. 25, 2011), <http://www.opednews.com/articles/2001-2011-A-decade-of-civ-by-Abdus-Sattar-Ghaza-110824-629.html>.

32. Harold Hongju Koh, *Rights to Remember*, THE ECONOMIST (Oct. 30, 2003), <http://www.economist.com/node/2173160> ("Bush [A]dministration officials have now reprioritized 'freedom from fear' as the number-one freedom we need to preserve. Freedom from fear has become the obsessive watchword of America's human-rights policy.").

33. There were frequent assertions that the "war on terrorism" was an effective protective measure, which espouses that a higher utilitarian purpose was being achieved. Deputy Secretary of State Richard Armitage claimed that there is "clear evidence that we are prevailing in the fight" against terrorism. R. Jeffrey Smith, *State Dept. Concedes Errors in Terror Data*, WASH. POST (June 10, 2004), at A17, available at <http://www.washingtonpost.com/wp-dyn/articles/A29664-2004Jun9.html>. Cofer Black, counterterrorism coordinator for the State Department, stated in January 2004 that seventy percent of al Qaeda had been neutralized—"They are being hunted down . . . their days are numbered." PETER LANCE, COVER UP: WHAT THE GOVERNMENT IS STILL HIDING ABOUT THE WAR ON TERROR 162 (2004).

34. See *supra* notes 17–26.

35. Press Release, *ACLU Says Justice Dept's PATRIOT Act Website Creates New Myths About Controversial Law*, ACLU (Aug. 26, 2003), <http://www.aclu.org/national-security/aclu-says-justice-depts-patriot-act-website-creates-new-myths-about-controversial->.

36. CARROLL, *supra* note 29, at 7, 48; Robert Greenwald, UNCONSTITUTIONAL: THE WAR ON OUR CIVIL LIBERTIES (DVD 2004) (Interview with Georgetown Law Professor David Cole) ("[T]he real purpose behind [the name 'Patriot Act'] of course, was to suggest that anyone who would criticize it is unpatriotic, is a traitor[.]"); Peerenboom, *supra* note 12, at 814 (calling the title the "so-called Patriot Act").

37. Poll: *Patriot Act Support Shrinks as More Learn Intent*, ASSOC. PRESS (Aug. 30, 2005), http://www.usatoday.com/news/washington/2005-08-30-patriot-act_x.htm; JEREMY BRECHER, JILL CUTLER, BRENDAN SMITH, EDS., IN THE NAME OF DEMOCRACY: AMERICAN WAR CRIMES IN IRAQ AND BEYOND 250 (2005). Through 2005, 372 local governments passed resolutions refusing to enforce provisions of the Patriot Act under the Tenth Amendment, and demanded that Congress make the Act consistent with the Constitution. *Id.*

security was exploitable,³⁸ officials insisted on being granted sweeping powers and being trusted not to abuse those powers.³⁹ Controversy erupted over the Bush Administration's use of wiretaps,⁴⁰ government attainment of private phone records,⁴¹ arrests that did not provide adequate Constitutional protections,⁴² and other policies that chilled dissent⁴³ and free speech rights.⁴⁴

III. THREAT WARNINGS

A. Secrecy

It is toilsome to evaluate whether Bush Administration initiatives to preempt threats were unnecessarily excessive because purported national security crises

38. DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* 228 (2003) ("In the midst of security crises, government officials often see rights protections as little more than obstacles to getting the job done.").

39. *Id.* Attorney General Ashcroft remarked before Congress: "[T]o those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists . . ." *Ashcroft: Critics of New Terror Measures Undermine Effort*, CNN (Dec. 6, 2001), http://articles.cnn.com/2001-12-06/us/inv.ashcroft.hearing_1_military-tribunals-terrorism-probe-attorney-general-john-ashcroft?_s=PM:US; ERIC LICHTBLAU, *BUSH'S LAW: THE REMAKING OF AMERICAN JUSTICE* 270 (2008) (calling Ashcroft's criticism "McCarthyesque"); Jay A. Yagoda, *Seeing is Believing: The Detainee Abuse Photos and "Open" Government's Enduring Resistance to Their Release During an Age of Terror*, 21 U. FLA. J.L. & PUB. POL'Y 273, 287 (2010) ("[A]fter September 11th, the Bush [A]dministration became profoundly committed to secrecy and unremitting denials of wrongdoing.").

40. Office of Senator Jay Rockefeller, *Vice Chairman Rockefeller Reacts to Reports of NSA Intercept Program in United States*, GLOBALSECURITY (Dec. 19, 2005), <http://www.globalsecurity.org/intell/library/news/2005/intell-051219-rockefeller01.htm>; *Bush Says He Signed NSA Wiretap Order*, CNN (Dec. 18, 2005), <http://edition.cnn.com/2005/POLITICS/12/17/bush.nsa/>. The Justice Department declared that Congress lacked constitutional authority to prevent warrantless wiretaps as an intelligence gathering tactic in the war against terrorism. U.S. DEP'T OF JUSTICE, *LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT* 3, 7 (Jan. 19, 2006).

41. *Verizon Faces Suit Over NSA*, ASSOC. PRESS (May 13, 2006), http://www.usatoday.com/money/industries/telecom/2006-05-13-verizon-records_x.htm; *NSA Has Massive Database of Americans' Phone Calls*, USA TODAY (May 11, 2006), http://www.usatoday.com/news/washington/2006-05-10-nsa_x.htm.

42. WALDEN BELLO, *DILEMMAS OF DOMINATION: THE UNMAKING OF THE AMERICAN EMPIRE* 206 (2005); Elaine Scarry, *Resolving to Resist*, BOSTON REV. (Feb./Mar. 2004), <http://bostonreview.net/BR29.1/scarry.php>; Jack M. Balkin, *A Dreadful Act II*, L.A. TIMES (Feb. 13, 2003), <http://articles.latimes.com/2003/feb/13/opinion/oe-balkin13>; *See infra* Part II(C).

43. New measures were criticized, but it also helps to understand initiatives that were proposed but dismissed. The Bush Administration insisted on being given discretion in the "war on terrorism." CHALMERS JOHNSON, *THE SORROWS OF EMPIRE: MILITARISM, SECRECY, AND THE END OF THE REPUBLIC* 292-93 (2004); William Safire, *You Are a Suspect*, N.Y. TIMES (Nov. 14, 2002), available at <http://www.nytimes.com/2002/11/14/opinion/you-are-a-suspect.html> (noting the Information Awareness Office's massive data gathering activities on Americans and the TIPS Information Awareness Office to inform of suspicious conduct). Another questionable proposal included the *Violent Radicalization and Homegrown Terrorism Prevention Act of 2007*, which was brought before Congress by an amendment to the Homeland Security Act of 2002 (HR 1955), 110th Congress, (Oct. 24, 2007) (passed House, did not become law), <http://www.govtrack.us/congress/billtext.xpd?bill=h110-1955>. This Act claimed the need to "prevent violent radicalization, homegrown terrorism, and ideologically based violence in the United States," and that these concerns were a "threat to homeland security." *Id.* § 899B(1)-(2). It proposed that a Commission be established to assess ideologically unsound beliefs. *Id.* § 899(C).

44. *See generally* GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* (2004); Eugene Volokh, *Deterring Speech: When is it "McCarthyism"? When is it Proper?*, 93 CAL. L. REV. 1413 (2005).

typically expand unreviewable executive secrecy prerogatives.⁴⁵ The President and the appointed members of the National Security Council control the classification and declassification of national security information, determine who is authorized to possess classified materials, and signal the extent that those who possess security clearances will be prosecuted for transgressions.⁴⁶ The problem of secrecy became so unfavorable during the Bush Administration that the Government Accountability Office (GAO) initiated legal action against Vice President Cheney in 2002, and proffered in its filing statement that this was “the first time that the GAO has filed suit against a federal official in connection with a records access issue. . . . Nevertheless, given GAO’s responsibility to Congress and the American people, we have no other choice.”⁴⁷ The suit was dismissed and there was no appeal.⁴⁸ Courts traditionally grant the government discretion when security threats are alleged and only minimally review the resulting executive action.⁴⁹ A 2004 Congressional study observed that there was “a consistent pattern in the [Bush] Administration’s actions: laws that are designed to promote public access to information have been undermined, while laws that authorize the government to withhold information or to operate in secret have been expanded.”⁵⁰

The Patriot Act and other measures might not have been perceived as necessary without cognitively available terror threat announcements that fostered the expectation of a dire need to foil probable attacks.⁵¹ The White House issued

45. Wells, *supra* note 18, at 452 (“[P]erceived security crises lead to] increased classification of information, . . . increased assertions of executive privilege, and increased secrecy with respect to government operations generally.”).

46. Robert Bejesky, *National Security Information Flow: From Source to Reporter’s Privilege*, 24(3) ST. THOMAS L. REV. (forthcoming 2012) (manuscript at 4–22) [hereinafter Bejesky, *Flow*].

47. Walker v. Cheney, 230 F. Supp. 2d 51, 51 (D.C. Cir. 2002); Jane E. Kirtley, *Transparency and Accountability in a Time of Terror: The Bush Administration’s Assault on Freedom of Information*, 11 COMM. L. & POL’Y 479, 485 (2006).

48. Kirtley, *supra* note 47, at 485–86 (stating the GAO lawsuit was followed by lawsuits by Judicial Watch, Inc. and the Sierra Club, which were also subsequently dismissed by the federal appellate court after the U.S. Supreme Court remanded the issues back to the appellate court).

49. David C. Vladeck, *Litigating National Security Cases in the Aftermath of 9/11*, 2 J. NAT. SEC. L. & POL’Y 165, 191 (2006); Raquel Aldana-Pindell, *The 9/11 “National Security” Cases: Three Principles Guiding Judges’ Decision-Making*, 81 OR. L. REV. 985, 995 (2002); Tania Cruz, *Judicial Scrutiny of National Security: Executive Restrictions on Civil Liberties When “Fears and Prejudices are Aroused,”* 2 SEATTLE J. SOC. JUST. 129, 162 (2003).

50. Minority Staff of the House of Representatives Committee on Government Reform, 108th Cong. *Secrecy in the Bush Administration* (2004), at iii, available at: <http://www.fas.org/sgp/library/waxman.pdf>; Michael Posner, *Prison and Detention: Human Rights in the Post-September 11 Environment*, 5 SEATTLE J. SOC. JUST. 181, 184 (2006) (noting that Governor Thomas Kean, head of the 9/11 Commission, remarked “that three-quarters of the classified documents that he read in preparation for the Commission’s report should not have been classified” and that “[a] National Archives audit found that one-third of the records re-classified by the CIA and other agencies in 2005 were wrongly kept secret”).

51. Former UN weapons inspector Scott Ritter remarks: “The more we’re afraid, the more you ask us to give—Patriot Act II, enhancements to the Patriot Act—now the budgets starting to be bankrupted, billions flowing out of this country . . . into a war on terror.” HIJACKING CATASTROPHE: 9/11 FEAR & SELLING AMERICAN EMPIRE (Media Education Foundation 2006) (Interview with Ritter). Emeritus Professor Chalmers Johnson notes: “Perpetual war, the loss of civil liberties, the lack of trust in government because they don’t tell the truth. These are outrageous and unpleasant political developments.” *Id.* (Interview with Johnson). “It has been far from becoming to have the remarkably costly silliness we have seen in the measures devoted to domestic security.” Anastaplo, *supra* note 23, at 149. In July 2007, the Bush Administration was offering security threats in the national media, which then placed pressure on the Democrat-controlled Congress to expand eavesdropping

orders to institute the terror warning system and the color-coded threat level classification,⁵² and publicized terror threat warnings. The media customarily portrayed the United States as a “nation under siege,”⁵³ even though there is scant evidence that terror alerts correlated with a genuine risk of strike.⁵⁴ There have been no terrorist attacks on United States soil since 9/11,⁵⁵ and University of Pennsylvania Political Science Professor Ian Lustick reminds us that there has been no credible evidence of “sleeper cells,” “attacks,” or “preparation for an attack.”⁵⁶

Warnings were often ambiguous, general announcements that caused confusion over how to prepare.⁵⁷ A GAO study surveyed twenty-eight agencies and concluded that the color-coded announcement system was obscure and confusing for law enforcement officials, that they “did not receive specific threat information and guidance,” and that the warnings “hindered their ability . . . to determine and implement protective measures.”⁵⁸ Attorney General John Ashcroft expressed to Congress that it was critical for national security to maintain secrecy over classified information, but he also wanted to increase public awareness of the threat.⁵⁹ The peril and the computed threat level derived from classified data.

Discussing the method in which government officials prevalently furnished terror warnings to the media, former United Nations weapons inspector Scott Ritter recounted: “We have an intelligence report that terrorists are about to strike, ‘who?’ we don’t know, ‘where?’ we don’t know, ‘what?’ we don’t know.”⁶⁰ Denis Halliday, former Assistant Secretary-General of the United Nations,

authority. James Risen, *Democrats Scrambling to Expand Eavesdropping*, N.Y. TIMES, Aug. 1, 2007, at A12; Ellen Nakashima, *A Push to Rewrite Wiretap Law*, WASH. POST, Aug. 1, 2007, at A04; Carl Hulse, *House Leaves Surveillance Law to Expire*, N.Y. TIMES, Feb. 15, 2008, at A17 (Congress letting surveillance law expire).

52. Homeland Security Presidential Directive-3 (Mar. 11, 2002), http://www.dhs.gov/xabout/laws/gc_1214508631313.shtm#1. Frequent threat issuance may desensitize the public and reduce effective responses to real threats, or even descend into rank paranoia. SIEGEL, *supra* note 26, at 98; GAVIN DE BECKER, *THE GIFT OF FEAR: SURVIVAL SIGNALS THAT PROTECT US FROM VIOLENCE* (1997). “It is a sad state of affairs when the public is constantly cowed, shocked and awed, manipulated to be afraid, then diverted from remembering that nothing bad actually happened.” SIEGEL, *supra* note 26, at 216. Judge Lipez explained that “the constant reminders in the popular media of security alerts color perceptions of the risks around us, including the perception of judges.” James J. Knicely & John W. Whitehead, *The Caging of Free Speech in America*, 14 TEMP. POL. & CIV. RTS. L. REV. 455, 481 (2005) (citing: *Bl(a)ck Tea Soc’y et al. v. City of Boston*, 378 F.3d 8, 19 (1st Cir. 2004)). On at least one occasion, Bush seemed bothered when threats were issued. *President Holds Prime Time News Conference*, WHITE HOUSE (Oct. 11, 2001), <http://georgewbush-whitehouse.archives.gov/news/releases/2001/10/20011011-7.html> (“Today, the Justice Department did issue a blanket alert. It was in recognition of a general threat we received. This is not the first time the Justice Department have [sic] acted like this. I hope it’s the last.”).

53. CARROLL, *supra* note 29, at 96.

54. SIEGEL, *supra* note 26, at 16.

55. Brian Z. Tamanaha, *Are We Safer from Terrorism? No, But We Can Be*, 28 YALE L. & POL’Y REV. 419, 419 (2010).

56. Ian S. Lustick, *Fractured Fairy Tale: The War on Terror and the Emperor’s New Clothes*, 16 MINN. J. INT’L L. 335, 338 (2007).

57. CARROLL, *supra* note 29, at 97.

58. U.S. GOV’T ACCOUNTABILITY OFFICE, *HOMELAND SECURITY: COMMUNICATION PROTOCOLS AND RISK COMMUNICATION PRINCIPLES CAN ASSIST IN REFINING THE ADVISORY SYSTEM 5* (2004), <http://www.gao.gov/new.items/d04682.pdf>; Eric Lichtblau, *Report Questions the Value of Color Coded Warnings*, N.Y. TIMES (July 13, 2004), <http://www.nytimes.com/2004/07/13/politics/13alert.html>.

59. Letter from the Office of the Attorney General to J. Dennis Hastert, Speaker of the U.S. House of Representatives (Oct. 15, 2002), available at http://www.justice.gov/ag/readingroom/letter_house.pdf.

60. HIJACKING CATASTROPHE, *supra* note 51 (Interview with Ritter).

remarked: “Mr. Bush has very cleverly manipulated the fear, the anxiety, and every time he wants to jack up his ratings he simply stirs up the fear plot by upgrading the impending danger without any specifics, of course. I think it’s a very ugly game that’s being played on the Americans.”⁶¹ Congressman Jim McDermott, who is also a psychiatrist, stated:

Fear does work. You can make people do anything if they’re afraid . . . You make [people] afraid by creating an aura of endless threat . . . They played us like an organ. They raised the [threat level] up to orange, then up to red, then they dropped it back to orange . . . It was really very, very skillfully and ugly in what they did.⁶²

B. Examples of Threat Announcements

In the case of security threat announcements, the ultimate source is apt to be the United States Intelligence Community (IC) since it possesses national security data.⁶³ For many Americans, the IC, as the ultimate source, may increase the credibility of a public announcement.⁶⁴ However, the IC’s obligation to gather data is separate from the authority to declassify intelligence.⁶⁵ Administration officials control the national security apparatus and choose whether to release threat announcements.⁶⁶ Granted, some reports were excessively peculiar and taxing to unveil from where they originated. For example, news releases postulated that terrorists could use pen guns, hijack ferries, pack explosives into model airplanes for missions, target cattle, or attack residents in small towns.⁶⁷ However, some of the significant public announcements that ostensibly derived from classified data follow.

On May 20, 2002, FBI Director Robert Mueller declared that “another terrorist attack is inevitable.”⁶⁸ “The next day, the Department of Homeland Security issue[d] warnings of attacks against railroads nationwide and against New York

61. BREAKING THE SILENCE: TRUTH AND LIES IN THE WAR ON TERROR (DVD 2003) (Interview with Halliday). For a substantial list of books and journalist accounts to support this proposition, see also Yamamoto, *supra* note 27, at 290, 300–01.

62. Michael Moore, FAHRENHEIT 9/11 (DVD 2003) (Interview with McDermott) [hereinafter Moore, FAHRENHEIT 9/11]. Ohio Representative Dennis Kucinich remarked emphasized that Congress “did not authorize a permanent war economy” or suppression of dissent by the “Patriot Games, the Mind Games, [and] the War Games.” John Nichols, *Kucinich Rocks the Boat*, THE NATION (Mar. 7, 2002), <http://www.thenation.com/article/kucinich-rocks-boat>.

63. Bejesky, *Flow*, *supra* note 46, at 4–8.

64. GARTH S. JOWETT & VICTORIA O’DONNELL, PROPAGANDA AND PERSUASION 280 (2006) (Source credibility means that people generally respect authority figures, their knowledge, and expert opinions).

65. Bejesky, *Flow*, *supra* note 46, at 1–9.

66. *Id.* at 4–22.

67. Moore, FAHRENHEIT 9/11, *supra* note 62; Michael Moore, BOWLING FOR COLUMBINE (2002), http://www.script-o-rama.com/movie_scripts/b/bowling-for-columbine-script-transcript.html (terror warnings, apparently derived from surveillance “chatter” and was provided to residents of Tappahannock, Virginia) [hereinafter Moore, BOWLING FOR COLUMBINE].

68. ‘Countdown with Keith Olbermann’ for Friday, August 21, 2009, MSNBC (television broadcast Aug. 24 2009) transcript available at http://www.msnbc.msn.com/id/32539126/ns/msnbc_tv-countdown_with_keith_olbermann/t/countdown-keith-olbermann-friday-august/.

City landmarks”⁶⁹ These and other early-warnings may have derived from the April arrest of Abu Zubaydah, an alleged Osama bin Laden associate, in Afghanistan.⁷⁰ Professor Scharf explained that “[t]he CIA was convinced that Zubaydah knew of plans to conduct attacks against U.S. interests,” and the Bush Administration granted the CIA with authority to apply a series of more intense interrogation methods, such as cramped confinement, stress positions, sleep deprivation, and eighty-three sessions of water boarding (solely in August 2002).⁷¹ Zubaydah informed interrogators of al-Qaeda plans that were based upon scenes from the movie *Godzilla*.⁷² Dr. John Prados, an official at the National Security Archives, explained:

Zubaydah told interrogators stories based on what he thought would alarm us . . . [From *Godzilla* in which] the Brooklyn Bridge was destroyed by the monster. He told us al Qaeda was interested in destroying the Brooklyn Bridge. He told us of attacks on mass transit sources like subway trains. He told us there were intentions of attacking apartment buildings and shopping centers.⁷³

It was unclear if terrorists and equipment were prepared to carry out operations, if Zubaydah was conveying admiration for the targeting and destructive capabilities of the monster in the movie, or if there was additional information that enhanced credibility to the alleged plot. Nonetheless, based on Zubaydah’s interrogations, Attorney General John Ashcroft disclosed: “Recent intelligence reports suggest that al Qaeda leaders have emphasized planning for attacks on apartment buildings, hotels, or other soft or lightly secured targets in the United States.”⁷⁴ To produce its report, the *9/11 Commission Report* relied heavily on statements made by the CIA’s detainees, but Commissioners were never given access to the detainees or tapes.⁷⁵ Later, against the order of federal courts and Congress, the CIA apparently destroyed interrogation tapes of Zubaydah and

69. *Id.*

70. *The Power of Nightmares, Part 3: The Shadows in the Cave* (BBC 2 television broadcast Nov. 3, 2004), transcript available at <http://www.informationclearinghouse.info/video1040.htm> [hereinafter *Power of Nightmares*]; Tim Dickinson, *Closing Guantanamo Bay*, ROLLING STONE (Feb. 19, 2009), at 45 (Abu Zubaydah was “alleged to be a senior Al Qaeda operative” but he was not charged); *Captured al Qaeda Leader ‘Not Well,’* CNN (Apr. 8, 2002), http://articles.cnn.com/2002-04-08/us/zubaydah.health_1_abu-zubaydah-qaeda-al-ibli?_s=PM:US.

71. Michael P. Scharf, *The Torture Lawyers*, 20 DUKE J. COMP. & INT’L L. 389, 399 (2010).

72. *Power of Nightmares*, *supra* note 70.

73. *Id.*

74. *Id.* In April 2007, former CIA Director George Tenet was still discussing these terror warnings and considering them realistic: “I’ve got reports of nuclear weapons in New York City, apartment buildings that are going to be blown up . . .” *60 Minutes: At the Center of the Storm: Interview with George Tenet* (CBS television broadcast Apr. 29, 2007), <http://cbsnews.com/video/watch/?id=2739673n&tag=related;photovideo>.

75. Commissioners Kean and Hamilton remarked: “We also had no way of evaluating the credibility of detainee information . . . [I]t was left to the reader to consider the credibility of the source . . .” THOMAS KEAN & LEE HAMILTON, *WITHOUT PRECEDENT: THE INSIDE STORY OF THE 9/11 COMMISSION* 119, 124 (2006) (Commissioners pressed CIA Director Tenet to have direct access to the detainees or tapes, but access was denied).

others, allegedly out of concern that its officers would be implicated in crimes of torture.⁷⁶

On June 20, 2002, Attorney General Ashcroft divulged, “[w]e have disrupted an unfolding terrorist plot” with the arrest of José Padilla.⁷⁷ On the evening news, Dan Rather announced: “First, a CBS News exclusive about a captured Al Qaeda leader who says his fellow terrorists have the know-how to build a very dangerous weapon and get it to the United States.”⁷⁸ José Padilla is a United States citizen who reportedly attended an al-Qaeda training camp in Afghanistan.⁷⁹ Padilla was accused of plotting to detonate a dirty bomb and was held as an “enemy combatant.”⁸⁰ He was detained for 1,307 days, often in solitary confinement, and claimed he was drugged and tortured in custody.⁸¹ He was ultimately convicted on general criminal charges and not dirty bomb charges.⁸² Officials lost the interrogation tapes.⁸³ As with Zubaydah, it is not clear if Padilla or associates possessed such a capability or had taken substantial actions to execute a dirty bomb operation.⁸⁴ Padilla was arrested because Abu Zubaydha and Binyam Mohammed provided information under torture.⁸⁵

76. Mark Mazzetti, *CIA Destroyed 92 Interrogation Tapes*, N.Y. TIMES (Mar. 3, 2009), <http://www.nytimes.com/2009/03/02/world/americas/02iht-03webintel.20539580.html>; Mark Mazzetti & Scott Shane, *Bush Lawyers Discussed Fate of C.I.A. Tapes*, N.Y. TIMES (Dec. 19, 2007), <http://www.nytimes.com/2007/12/19/washington/19intel.htm>; *CIA Destroyed Tapes Despite Court Orders*, MSNBC (Dec. 12, 2007), http://www.msnbc.msn.com/id/22217926/ns/politics-white_house/t/cia-destroyed-tapes-despite-court-orders/; Mark Mazzetti, *C.I.A. Was Urged to Keep Interrogation Videotapes*, N.Y. TIMES (Dec. 8, 2007), <http://www.nytimes.com/2007/12/08/washington/08intel.html>.

77. *Countdown*, *supra* note 68. *Padilla v. Rumsfeld*, 352 F.3d 695, 699, 701 (2d Cir. 2003), *rev'd*, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004). As Padilla got off the plane, he was arrested and Ashcroft held a national news conference claiming law enforcement had just apprehended a terrorist who planned to set off a “dirty bomb” in an American city. ALFRED W. MCCOY, *A QUESTION OF TORTURE: CIA INTERROGATION, FROM THE COLD WAR TO THE WAR ON TERROR* 170–71 (2006); PETER IRONS, *WAR POWERS: HOW THE IMPERIAL PRESIDENCY HIJACKED THE CONSTITUTION* 255 (2005); JOHNSON, *supra* note 43, at 294; Elaine Cassel, *The Tragic Case of José Padilla*, COUNTERPUNCH (Mar. 8, 2007), <http://www.counterpunch.org/2007/03/08/the-tragic-case-of-jose-padilla/>.

78. *Power of Nightmares*, *supra* note 70.

79. Leila Nadya Sadat, *Presumption of Guilt: The Unlawful Enemy Combatant and the U.S. War on Terror*, 37 DENV. J. INT’L L. & POL’Y 539, 547 (2009).

80. *Padilla*, 352 F.3d at 699, 701.

81. Padilla became the high-profile American held in military prisons on U.S. soil, and his attorneys argued that he had been “illegally tortured, threatened;” placed in sensory deprivation situations and stress positions; deprived of sleep; and incarcerated in a solitary confinement space for 1,307 days, drugged with PCP or LSD, and injections. Dan Eggen, *More Setbacks for Case Against Terror Suspect / Legal Debate Flares Over Trying Charges in a Criminal Court*, WASH. POST (Nov. 19, 2006), http://articles.sfgate.com/2006-11-19/news/17322010_1_jose-padilla-criminal-case-gang-member/3; Warren Richey, *Was José Padilla Tortured by US Military?*, CHRISTIAN SCIENCE MONITOR (Feb. 16, 2007), <http://www.csmonitor.com/2007/0216/p02s01-usju.html>; Cassel, *supra* note 77.

82. Sadat, *supra* note 79, at 547; Deborah N. Pearlstein, *Finding Effective Constraints on Executive Power: Interrogation, Detention, Torture*, 81 IND. L.J. 1255, 1293 (2005); Kim Lane Scheppele, *Hypothetical Torture in the “War on Terrorism”*, 1 J. NAT’L SEC. L. & POL’Y 285, 324 (2005) (“Whether José Padilla really planned to detonate a dirty bomb has been seriously challenged . . . [The evidence was] his own statements and the statements of others who apparently have been subjected to highly coercive interrogations.”).

83. Glenn Greenwald, *What Happened to the Padilla Interrogation Videos?*, SALON (Mar. 10, 2007), http://www.salon.com/2007/03/10/padilla_10/print/; Curt Anderson, *Tape of Padilla Interrogation is Missing*, USA TODAY (Mar. 9, 2007), http://www.usatoday.com/news/washington/2007-03-09-padilla-tapes_N.htm.

84. Scheppele, *supra* note 82.

85. Sadat, *supra* note 79, at 547.

On February 7, 2003, Secretary of the Department of Homeland Security Tom Ridge cited “credible threats” of an al-Qaeda strike and raised the terror alert level to orange.⁸⁶ On February 10, Fire Administrator David Paulison advised “Americans to stock up on plastic sheeting and duct tape to protect themselves against radiological or biological attack.”⁸⁷ Less than one month later, domestic and international dangers seemingly converged when Secretary Ridge forewarned Americans to “buy duct tape” to seal their windows and doors in anticipation of a war with Iraq.⁸⁸ Two days after the 2003 invasion of Iraq, Bush’s approval rating rose to seventy percent while the percentage of Americans who believed that the United States would be the victim of another major terrorist attack sharply increased.⁸⁹ Dr. Marc Siegel, New York University Medical School Professor, explained that it would be nearly unimaginable for clouds of dangerous gases to be delivered successfully without being blown away by wind or destroyed by the heat of the environment.⁹⁰ However, Siegel warned that suffocation risk from improper equipment usage might pose a real health hazard.⁹¹

On December 21, 2003, Homeland Security again raised the threat level to orange, apprising of plots to crash airliners into United States cities.⁹² On April 2, 2004, Homeland Security issued a warning that terrorists may attempt to blow up buses with fertilizer bombs.⁹³ On May 26, Ashcroft and FBI Director Mueller declared that al-Qaeda had a “specific intention to hit the United States hard” and that ninety percent of the arrangements for the attack were complete.⁹⁴ On July 8, Secretary Ridge announced that “al Qaeda is moving forward with its plans to carry out a large-scale attack in the United States. . . . during the summer or autumn.”⁹⁵

86. *Countdown*, *supra* note 68.

87. *Id.*

88. Philip Shenon, *Ridge Warns Iraq War Could Raise Terror Threat*, N.Y. TIMES (Mar. 4, 2003), <http://www.nytimes.com/2003/03/04/politics/04HOME.html>; LANCE, *supra* note 33, at 251 (Department of Homeland Security told all Americans “to go out and buy duct tape just before the invasion of Iraq, because of the concern for the weapons of mass destruction that didn’t exist.”).

89. Brian Cordyack, *President Bush’s Approval Ratings*, WASH. POST (Apr. 25, 2005), <http://washingtonpost.com/wp-dyn/content/graphic/2005/04/25/GR2005042500945.html>; *Terrorism in the United States*, GALLUP (Nov. 30, 2011), <http://www.gallup.com/poll/4909/Terrorism-United-States.aspx>; Humphrey Taylor, *Successful War Lifts Many (Republican) Boats and Their Ratings Surge*, HARRIS INTERACTIVE, at 1–3 (Apr. 18, 2003), <http://www.pbs.org/moyers/journal/btw/citations.html> (finding that Republicans generally saw a surge in their approval ratings).

90. SIEGEL, *supra* note 26, at 137–38; Scheppele, *supra* note 82, at 319–20 (“The chemical weapons that one can realistically imagine al Qaeda being able to make would cause little damage; the successful delivery of really harmful chemicals poses enormous scientific and logistical challenges.”).

91. SIEGEL, *supra* note 26, at 137–38. Store owners began to sell numerous chemical suits and gas masks and there were people who duct-taped their houses. Walmart reported that gun sales surged 70% and ammunition sales increased 140% after 9/11. Moore, *BOWLING FOR COLUMBINE*, *supra* note 67 (excerpting local news and commentary). Companies sold steel “safe rooms” for their houses. Moore, *FAHRENHEIT 9/11*, *supra* note 62 (excerpting local news and commentary); SIEGEL, *supra* note 26, at 16 (noting the perception of risk made “people afraid and ready to comply with the government’s agenda”).

92. *Countdown*, *supra* note 68.

93. *Id.*

94. *Id.*

95. *Id.*

On July 12, 2004, the head of the Electoral Election Assistance Commission announced that it might be necessary to cancel the presidential election if there is a terror threat.⁹⁶ Former Director Ridge, who was responsible for raising and lowering the color-coded threat alert levels, later stated that he resigned in December 2004 because he believed George W. Bush “pressured him to raise the ‘terror alert’ level to sway the November 2004 US election.”⁹⁷ A heightened security atmosphere might strengthen political ratings.⁹⁸

On August 1, 2004, the Department of Homeland Security raised the alert status for financial centers in New York, New Jersey, and Washington to orange.⁹⁹ On October 6, based on federal warnings, New York City officials announced a bomb threat to the city’s subway systems.¹⁰⁰ Local news disclosed that it was given the threat notification several days earlier, but federal authorities told them to “hold off” on making the announcement.¹⁰¹ Other media outlets later reported that the source for the warning was an informant who simply “made it up.”¹⁰²

C. Interrogation, Detention, and Convictions of Suspects

As for terrorists who might carry out operations, such as those referred to in threat announcements, administration officials provided projections of the perceived threat shortly after 9/11. Undersecretary of Defense Paul Wolfowitz explained: “This is a network that has penetrated into some 60 countries, including very definitely our own and it has got to be rooted out . . . Our intelligence priority in many ways, is getting after the network here in the United States first.”¹⁰³ Shortly after 9/11, Attorney General Ashcroft presented wide-ranging estimates of between one thousand and five thousand terror suspects inside the United States.¹⁰⁴ The apparent assumption was that legal and illegal resident foreigners could have

96. James Nieland, Note, *Executive Suspension of National Elections: Sacrificing an American Dream to Avoid a Spanish Nightmare?*, 15 TRANSNAT’L L. & CONTEMP. PROBS. 389 (2005); *Countdown*, *supra* note 68.

97. Oliver Knox, *Politics Colored US ‘Terror Alert’: Former Bush Aid*, ASSOC. FREE PRESS (Aug. 20, 2009), available at http://google.com/hostednews/afp/article/ALegM5h1W_dkUJZmLCnfp-AGQwNa0N-ptg; Ricardo Alonso-Zaldivar & Edwin Chen, *Security Czar Ridge Resigns*, L.A. TIMES (Dec. 1, 2004), <http://articles.latimes.com/2004/dec/01/nation/na-ridge1>.

98. Professor Charles Lewis stated: “We have a perpetual war, which gives the incumbent sitting president . . . a ten to fifteen point bounce on a public opinion. He is a war time president, even though we’re not at war.” BREAKING THE SILENCE, *supra* note 61 (interview with Lewis). In February 2004, Al Gore stated, in a speech at NYU, that fear was being used “as rhetoric to help politicians like Bush stay in office.” SIEGEL, *supra* note 26, at 55; CARROLL, *supra* note 29, at 196 (“[The] war on terrorism is a cynical manipulation of fears for the sake of power.”).

99. *Countdown*, *supra* note 68.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Power of Nightmares*, *supra* note 70; THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 5 (Sept. 2002), <http://www.globalsecurity.org/military/library/policy/national/nss-020920.pdf> (“thousands of trained terrorists remained at large”).

104. ROBERT DREYFUSS, *DEVIL’S GAME: HOW THE UNITED STATES HELPED UNLEASH FUNDAMENTALIST ISLAM* 13, 305 (2005).

“sleeper cells.” Law enforcement officials detained numerous suspects, but confinement procedures were criticized.¹⁰⁵ Professors Abram and Karmely wrote:

The post-9/11 [arrest and detention] procedures violated virtually every aspect essential to procedural due process: notice of charges, the right to be informed of one’s rights, access to a fair and meaningful hearing, and a fair opportunity for review of charges and grounds for detention. The blanket secrecy orders imposed by the government masked widespread violations of core constitutional rights under the Fourth, Fifth, Sixth, and Eighth Amendments.¹⁰⁶

Courts have held that “the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence is lawful, unlawful, temporary, or permanent.”¹⁰⁷ However, equal treatment for foreigners has proven to be more troublesome in practice, at least under the Fourth Amendment, when immigration control and/or security threats are elevated.¹⁰⁸ Secretive arrest processes forbid detainees from contacting family members or lawyers.¹⁰⁹

One year after 9/11, authorities detained and interrogated several thousand people, primarily from Middle Eastern and Southeast Asian countries.¹¹⁰ However, it is questionable whether investigations yielded valuable information¹¹¹ or if confinements were associated with terror warnings, such as those previously listed. The Department of Justice acknowledged that there were no leads to terrorist

105. *Id.*

106. Susan M. Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction Without a Difference?*, 38 U.C. DAVIS L. REV. 609, 658 (2005).

107. *Zadvydas v. Davis*, 533 U.S. 678, 679 (2001).

108. Akram & Karmely, *supra* note 106, at 664–67.

109. IRONS, *supra* note 77, at 246.

110. BELLO, *supra* note 42, at 207; IRONS, *supra* note 77, at 246. In January 2003, Bush announced in his State of Union address that “3,000 suspected terrorists have been arrested in many countries, and many others have met a different fate . . . [T]hey are no longer a problem for the United States.” George W. Bush, State of the Union Address of the President to the Joint Session of Congress, BBC (Jan. 28, 2003), <http://news.bbc.co.uk/2/hi/americas/2704365.stm>. By June 2004, U.S. officials estimated that three thousand terror suspects were being held in allied prisons. MCCOY, *supra* note 77, at 117; Jason Burke, *Secret World of US Jails*, GUARDIAN (June 12, 2004), <http://www.guardian.co.uk/world/2004/jun/13/usa.terrorism?INTCMP=SRCH>; Jeannine Bell, “*Behind This Mortal Bone*”: *The (In)Effectiveness of Torture*, 83 IND. L.J. 339, 352 (2008) (noting that in the U.S., “[m]ore than 5000 foreign nationals were detained between September 11, 2001, and the time the photos at Abu Ghraib were publicized”).

111. Aya Gruber, *Raising the Red Flag: The Continued Relevance of the Japanese Internment in the Post-Hamdi World*, 54 U. KAN. L. REV. 307, 312 (2006) (“[C]ivil libertarians respond that the few citizen detentions, combined with the massive detentions of noncitizens, represent as big, or nearly as big, a humanitarian crisis as the large-scale detention of citizens.”); James F. Smith, *United States Immigration Law as We Know It: El Clandestino, The American Gulag, Rounding Up the Usual Suspects*, 38 U.C. DAVIS L. REV. 747, 801–02 (2005) (“With a lack of intelligence, and a lack of evidence that detainees were indeed associated with terrorism, came a need for a secrecy to cover up the government’s shotgun approach.”); David Cole, *The Priority of Morality: The Emergency Constitution’s Blind Spot*, 113 YALE L.J. 1753, 1758 (2004) (“Putting innocent people who pose no danger behind bars to reassure a panicked public is normatively unacceptable . . .”).

activity after detaining nearly one thousand individuals¹¹² and conducting five thousand interviews.¹¹³ Much of the information that led to confinements involved hearsay and unverified tips.¹¹⁴ Of the first 765 detained inside the United States, only six remained in custody and none had been charged with any terrorist act.¹¹⁵

“In May 2004, the FBI launched another ‘interview’ campaign. . . . that . . . sought to interview as many as 5000 individuals.”¹¹⁶ Thirty months after 9/11, as many as 5,000 individuals had been apprehended and held, at least temporarily, as terror suspects.¹¹⁷ Prosecutors claimed to find evidence to charge several of those detained and one was convicted.¹¹⁸ Yet at the time, Bush remarked of accomplishments: “We’ve thwarted terrorists in Buffalo and Seattle, Portland, Detroit, North Carolina, and Tampa, Florida.”¹¹⁹ Professor Cole reflected on the referenced achievements:

They say “terrorist sleeper cell.” That’s what . . . they call the Lackawanna [Buffalo] people a terrorist sleeper cell, the Detroit people a terrorist cell, the Portland people a terrorist cell. But when you look at the details, the facts just don’t support that, and they have not proved that any group within the United States has plotted to engage in any terrorist activity within the United States in all of the cases they have brought since 9/11.¹²⁰

In the Detroit case, four Arab men were arrested on suspicion of being an al-Qaeda sleeper cell.¹²¹ The prosecution claimed that the defendants’ video taken at Disneyland was replete with furtive messages to provide cell members with locations to position bombs.¹²² It was later revealed that the government’s sole witness, a man named Youssef Hmimssa, had twelve aliases and was wanted for fraud across the United States.¹²³ Two of the four were convicted, but the verdicts were overturned when Hmimssa conceded that he invented the allegations because

112. Seth F. Kreimer, *Rays of Sunlight in a Shadow “War”*: FOIA, the Abuses of Anti-Terrorism, and the Strategy of Transparency, 11 LEWIS & CLARK L. REV. 1141, 1148 (2007); MIGRATION POLICY INSTITUTE, AMERICA’S CHALLENGE: DOMESTIC SECURITY, CIVIL LIBERTIES, AND NATIONAL UNITY AFTER SEPTEMBER 11, at 7 (2003) (estimating 1,200). Given that these were foreigners in the U.S. being targeted, it should be noted that on any given day thousands of individuals are detained by the U.S. Immigration and Customs Enforcement system. Judith Resnik, *Detention, the War on Terror, and the Federal Courts: An Essay in Honor of Henry Monaghan*, 110 COLUM. L. REV. 579, 656 (2010).

113. Akram & Karmely, *supra* note 106, at 629 (citing February 2002 statement).

114. *Id.* at 625.

115. Dan Eggen, *U.S. Holds 6 of 765 Detained in 9/11 Sweep*, WASH. POST, Dec. 12, 2002, at A20.

116. Akram & Karmely, *supra* note 106, at 636.

117. COLE, *supra* note 38, at 25 (estimating 5,000).

118. *Id.*; MCCOY, *supra* note 77, at 194; OFFICE OF THE PRESIDENT OF THE UNITED STATES, THE COMMISSION ON THE INTELLIGENCE CAPABILITIES OF THE UNITED STATES REGARDING WEAPONS OF MASS DESTRUCTION 5–6 (2005).

119. *Power of Nightmares*, *supra* note 70.

120. *Id.*

121. *Id.*; Richard Serrano & Greg Miller, *How a Terrorism Case Came Undone*, L.A. TIMES (Oct. 14, 2004), http://seattletimes.nwsources.com/html/nationworld/2002062640_terror14.html.

122. *Power of Nightmares*, *supra* note 70.

123. *Id.*

prosecutors offered to reduce his fraud charges if he testified against the defendants.¹²⁴ The defense attorney, William Swor, explained the government had “reasonable questions and took them and made a complete fantasy out of them. . . . [T]his was totally driven by the need or the desire to have terrorists.”¹²⁵

Similarly, the Bush Administration hailed the Buffalo arrest as another successfully foiled terror plot.¹²⁶ The evidence was an e-mail sent by Mr. al-Bakri to his friends in Bahrain that expressed he would be getting married and would not be seeing them for a while.¹²⁷ The CIA interpreted this as a hidden message of a plot to conduct a suicide mission.¹²⁸ However, al-Bakari was indeed getting married.¹²⁹ In the case, six men pled guilty for traveling to an al-Qaeda camp in Afghanistan, but there was no evidence that the men participated in or planned any terrorist act.¹³⁰

In addition to eagerly speculating that wrongdoing was afoot, presumptions about intent to engage in terrorism evidently merged with standard criminal justice processes. For example, recall that the Patriot Act defined “domestic terrorism” as “acts dangerous to human life that are violations of criminal laws.”¹³¹ In October 2002, Attorney General Ashcroft intermingled terrorism with non-terrorism offenses when he addressed the National Conference of U.S. Attorneys and explained that the strategy should be to “neutralize potential terrorist threats by getting violators off the street by any lawful means possible, as quickly as possible . . . [and to] detain individuals who pose a national security risk for any violations of criminal or immigration laws.”¹³² In July of 2004, Attorney General Ashcroft provided a twenty-nine page report to Congress that asserted the Patriot Act had been extremely effective at fighting terrorism and was “al Qaeda’s worst

124. *Id.*; Serrano & Miller, *supra* note 121.

125. *Power of Nightmares*, *supra* note 70.

126. *Id.*; Matthew Purdy, *Aftereffects: Buffalo Case; Sixth Man Pleads Guilty to Al Qaeda Training*, N.Y. TIMES (May 20, 2003), <http://www.nytimes.com/2003/05/20/nyregion/aftereffects-buffalo-case-sixth-man-pleads-guilty-to-al-qaeda-training.html?ref=mukhtaralbakri>.

127. Press Release, *Mukhtar Al-Bakri Sentenced for Providing Material Support to Al Qaeda*, U.S. DEP’T OF JUSTICE (Dec. 3, 2003), http://www.justice.gov/opa/pr/2003/December/03_crm_658.htm; *Power of Nightmares*, *supra* note 70.

128. *Power of Nightmares*, *supra* note 70.

129. *Id.*; Susan Candiotti, *Prosecutors: No Bail for Six Accused of Helping al Qaeda*, CNN (Sept. 19, 2002), <http://edition.cnn.com/2002/LAW/09/18/buffalo.terror.probe/>.

130. Laura Parker, *Charges Often Reduced in High-profile Terrorism Cases*, USA TODAY (July 18, 2007), http://www.usatoday.com/news/nation/2007-07-18-terrorism-cases_N.htm; Purdy, *supra* note 126.

131. USA Patriot Act of 2001, Pub. L. No. 107-56, § 802(a)(5)(A), 115 Stat. 271, 376 (2001).

132. COLE, *supra* note 38, at 22 (citing Department of Justice, Remarks of Attorney General John Ashcroft, U.S. Attorneys Conference, New York City, Oct. 1, 2002); Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1116–20 (2008) (contending that there are reciprocal influences between military and criminal detention models); John T. Parry, *Terrorism and the New Criminal Process*, 15 WM. & MARY BILL RTS. J. 765, 766–67, 796–97 (2007) (marking of a spillover of terrorism processes into criminal justice processes); David Cole & Jules Lobel, *Are We Safer?*, L.A. TIMES, Nov. 18, 2007, at M4 (noting that the Justice Department claimed that there were 261 “terrorism and terrorism-related” convictions, but only two cases “actually involve[d] attempted terrorist activity”); The Association of the Bar of the City of New York Committee on Federal Courts, *The Indefinite Detention of “Enemy Combatants”: Balancing Due Process and National Security in the Context of the War on Terror*, THE RECORD 41, 110–11 (2004) (explaining that similar approaches of interrogations of terror suspects might be used in criminal law, but this poses numerous problems).

nightmare.”¹³³ Yet, of the 310 arrests, which did involve 179 guilty pleas, almost all of the cases were immigration overstay violations and domestic crime violations.¹³⁴

The ostensible leap in logic was that someone who committed a criminal act, intended to commit a criminal act, or violated immigration laws, might also possess a terrorist *mens rea*. Prior to 9/11, terrorism was treated as a criminal act and defendants were prosecuted under criminal racketeering laws.¹³⁵ However, the Bush Administration initiated confusion by reversing the inference and conjecturing that criminal acts might be analogized to or be a harbinger to terrorism. Perhaps following this supposition or something related was what led the pool of suspects to expand uncontrollably. A presidential directive, issued in September 2003, required government agencies to supply names and information about people “known or appropriately suspected to be . . . engaged in conduct constituting, in preparation for, in aid of, or related to terrorism.”¹³⁶ Despite parameters, the “terrorism watch list”—that was derived from classified information—grew to 325,000 names (2006), to 700,000 (2007), and to 900,000 (2008) and was considered “virtually useless.”¹³⁷

D. Rationale for Announcements

Were the terror threat announcement system and the broadly-applied detention and interrogation approaches reasonable? Was there a sagacious balance between secrecy and openness? After all, the National Security Act (1947) was enacted to maintain secrecy over information that Americans should not know about,¹³⁸ but

133. Shannon McCaffrey, *Ashcroft praises uses of Patriot Act*, The Seattle Times, July 14, 2004, http://seattletimes.com/html/nationworld/2001978867_patriot14.html; *President Bush Speaks at FBI Academy*, CNN (Sept. 10, 2003), <http://transcripts.cnn.com/TRANSCRIPTS/030910/se.03.html> (citing false statistics: “more than 260 suspected terrorists have been charged . . . more than 140 have already been convicted.”); see generally U.S. DEP’T OF JUSTICE, REPORT FROM THE FIELD: THE USA PATRIOT ACT AT WORK (2004), available at http://www.justice.gov/olp/pdf/patriot_report_from_the_field0704.pdf.

134. IRONS, *supra* note 77, at 246. In October 2001, Ashcroft spoke to local levels of government:

Let the terrorists among us be warned . . . If you overstay your visa—even by one day—we will arrest you. If you violate a local law, you will be put in jail and kept in custody as long as possible. We will use every available statute. We will seek every prosecutorial advantage. We will use all our weapons within the law and under the Constitution to protect life and enhance security for America.

Id. at 247; Cole & Lobel, *supra* note 132 (noting that as of June 2006, there were only two cases involving attempted terrorist activity while the Justice Department claimed there were 261 convictions and guilty pleas of “terrorism or terrorism related” offenses).

135. OFFICE OF THE INSPECTOR GENERAL, U.S. DEP’T OF JUSTICE, CHAPTER FIVE: ATTORNEY GENERAL’S GUIDELINES ON GENERAL CRIME, RACKETEERING ENTERPRISE AND TERRORISM ENTERPRISE INVESTIGATIONS (Sept. 2005), available at <http://www.justice.gov/oig/special/0509/chapter5.htm>; George C. Harris, *The Rule of Law and the War on Terror: The Professional Responsibilities of Executive Branch Lawyers in the Wake of 9/11*, 1 J. NAT’L SECURITY L. & POL’Y 409, 410 (2005) (noting that after 9/11, “the Administration decided to shift anti-terrorism efforts from a criminal justice model to a war model”).

136. Walter Pincus & Dan Eggen, *325,000 Names on Terrorism List*, WASH. POST (Feb. 15, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/02/14/AR2006021402125_pf.html.

137. *Id.*; *U.S. Terror List Now Exceeds 900,000 Names*, ACLU (Feb. 27, 2008), <http://www.aclu.org/national-security/us-terror-list-now-exceeds-900000-names>.

138. National Security Act of 1947, Pub. L. No. 235, 61 Stat. 496 (July 26, 1947).

after 9/11 national security data was employed to issue an abundant number of warnings and maneuver the color-coded terror threat level.¹³⁹ There were no attacks on United States soil after 9/11 and all that remained was bewilderment over why so many threats were announced.¹⁴⁰

There was a further potential indication of the pattern in 2009. After a suspect was arrested for allegedly planning to bomb a plane, former Vice President Cheney and Republicans “mounted a communications campaign advocating that threats exist that the current President does not properly acknowledge and address with appropriate policies.”¹⁴¹ Professor Lobel remarked that the former Vice President’s position was that “if there is just a one percent chance of the unimaginable happening, we have to treat that chance as a certainty.”¹⁴² This is likely true of authorities being vigilant, and there is no discernible reason that demonstrates President Obama’s law enforcement policies do not take realistic threats seriously. However, is Cheney’s philosophy also implicit in an approach which favors liberally-issuing terror warnings? Clearly, thwarting terrorism is not coterminous with imbuing national discourse with peril to make threats cognitively available.¹⁴³ More confounding is that publicizing severe danger, premised upon classified data that ultimately did not substantiate crisis or urgency, followed by faulty American perceptions regarding those threats,¹⁴⁴ was the same sequence for all the unsound pre-war intelligence allegations about Iraq.¹⁴⁵

Alternatively, it might be logical to release warnings to the media if there is a reasonable belief that Americans could be safer by exercising extra vigilance when driving over bridges and going to shopping malls and stadiums. Maybe Americans could detect a suspicious situation and thwart a terror plot. Or, hypothetically, perhaps issuing a warning announces to a potential terrorist that a plot or cell was discovered and prevents a strike from occurring. Yet, even if there is an underlying rationale, it is not clear that notifications were substantiated. Relying on rumors, such as those that led to the war in Iraq,¹⁴⁶ or raw data and “chatter” from the

139. See *supra* Part III (B).

140. See *supra* Part III (A).

141. Leslie Gielow Jacobs, *Bush, Obama and Beyond: Observations on the Prospect of Fact Checking Executive Department Threat Claims Before the Use of Force*, 26 CONST. COMMENT. 433, 471 (2010). NYU Media Professor Mark Crispin Miller, author of *The Bush Dyslexicon*, remarks: “This is a gang that needs people to be afraid. It’s a gang that really can’t have any political success whatsoever in a state of tranquility and peace of mind.” HUACKING CATASTROPHE, *supra* note 51 (interview with Miller).

142. Jules Lobel, *Preventative Detention and Preventative Warfare: U.S. National Security Policies Obama Should Abandon*, 3 J. NAT’L SECURITY L. & POL’Y 341, 343 (2009).

143. Cass Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 YALE L.J. 61, 61–62 (2002) When a cognitively available heuristic is available and “intense emotions are engaged, people tend to focus on the adverse outcome, not on its likelihood.” *Id.*

144. Robert Bejesky, *Press Clause Aspirations and the Iraq War*, 48 WILLAMETTE L. REV. 343, 348–56 (2012).

145. Robert Bejesky, *Intelligence Information and Judicial Evidentiary Standards*, 44 CREIGHTON L. REV. 811, 875–82 (2011).

146. *Id.* The SSCI’s investigation concluded from interviews of over a hundred analysts that “following the terrorist attacks of September 11, 2001, the trade craft of terrorism analysis shifted and analysts now feel obligated to make more conclusive assessments regardless of the quality of the available intelligence.” SENATE SELECT COMMITTEE ON INTELLIGENCE REPORT ON THE U.S. INTELLIGENCE COMMUNITY’S PREWAR INTELLIGENCE

NSA's Echelon surveillance,¹⁴⁷ may not be the foremost sources to buttress public threat warnings. The portrayal may beget emotive public reactions and a failure to objectively and rationally assess danger.

IV. A MORE SOBER RISK CALCULATION

A. Rhetoric Elevates Risk Perceptions

Professor Daniel Reisberg explains that “people regularly overestimate the frequency of events that are, in actuality, quite rare.”¹⁴⁸ Since people exaggerate the frequency of vivid and emotional risks,¹⁴⁹ they may not objectively or appropriately calculate excessively-portrayed dangers.¹⁵⁰ Risks are a matter of perspective—one could view the world as inherently dangerous or inherently safe. Statistical evidence confirms that the high standard of living in the industrialized world and medical technology advances have gradually decreased health threats and made people safer, but the post-9/11 fear of terrorism inflicted Americans like never before.¹⁵¹ Professor Michael Ignatieff encouraged a more sober perspective to “distinguish moral condemnation from threat assessment” and divorce emotions of

ASSESSMENTS ON IRAQ 31 (July 7, 2004). The Deputy Director at the CIA's CTC Office of Terrorism Analysis explained that:

[W]e've encouraged and developed a sense of trade craft specifically on terrorism that says push the envelope because the implications are so high and because we have to acknowledge up front that . . . we have to accept that often our information is going to be fragmentary and, if we wait too long to reach conclusions, we might make a mistake.

Id. However, using a more aggressive investigatory lens inside the intelligence apparatus, does not assume that those more cautious estimates must be announced in the national media. There is a distinction between Open Source Intelligence and secretive intelligence. Jason D. Söderblom, *Opening the Intelligence Window: Realist Logic and the Invasion of Iraq*, 9(2) PERCEPTION J. OF INT'L AFFAIRS 21 (June–August 2004). Open information is just public information that in many cases may be no more accurate than information held secretly. Apparent interrogations of witnesses are made a quasi-form of Open Source Intelligence, while the source remains secret.

147. JAMES BAMFORD, *BODY OF SECRETS* 407, 421 (2001); Andrew Bomford, *Eschelon Spy Network Revealed*, BBC (Nov. 3, 1999), <http://news.bbc.co.uk/2/hi/503224.stm>; see Moore, *BOWLING FOR COLUMBINE*, *supra* note 67.

148. DANIEL REISBERG, *COGNITION: EXPLORING THE SCIENCE OF THE MIND* 380 (2d ed. 2001); David E. Adelman, *Scientific Activism and Restraint: The Interplay of Statistics, Judgment, and Procedure in Environmental Law*, 79 NOTRE DAME L. REV. 497, 543 (2004) (noting that people are apt to make decisions following a position of being “better safe than sorry”).

149. People can be trained to be afraid of anything. PAUL EKMAN, *EMOTIONS REVEALED: RECOGNIZING FACES AND FEELINGS TO IMPROVE COMMUNICATION AND EMOTIONAL LIFE* (2003); John B. Watson & Rosalie Rayner, *Conditioned emotional reactions*, 3 J. OF EXPER. PSY., 1–14 (1920), available at <http://psychclassics.yorku.ca/Watson/emotion.htm>; *Whitney v. California*, 274 U.S. 357, 376 (1927) (“Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears.”). People have a great capacity to “imagine dangers,” misperceive them, and overstate risks. SIEGEL, *supra* note 26, at 26.

150. Robert Bejesky, *Cognitive Foreign Policy: Linking Al Qaeda and Iraq*, 56 HOW. L. J. (forthcoming 2012) [hereinafter Bejesky, CFP].

151. SIEGEL, *supra* note 26, at 15–16; BARRY GLASSNER, *THE CULTURE OF FEAR: WHY AMERICANS ARE AFRAID OF ALL THE WRONG THINGS* (1999) (American culture misdirects people to focus on “dangers” that are not real tangible threats); see generally RONALD INGLEHART, *MODERNIZATION AND POSTMODERNIZATION: CULTURAL, ECONOMIC, AND POLITICAL CHANGE IN 43 SOCIETIES* (1997) (As economic modernization progressed and societies became wealthier, public desire to accept the same risks, frequently inherent in living, actually decreased).

angst and anger from risks actually posed.¹⁵² Professor Molly Walker Wilson wrote:

When events, connections, concepts, and risks are easily brought to mind, they are said to be 'available.' . . . [E]vents or depictions that are vivid or emotionally loaded, are particularly likely to become cognitively available. . . . More than a year after the [9/11] attack, public polls revealed that a significant percentage of respondents judged terrorism to be the single most important problem, and 'fluctuations [in Americans' concern about terrorism] closely track[ed] the frequency of television news stories concerning terrorism.'¹⁵³

For over three decades, studies have repeatedly confirmed that fear prompts inhibition and makes people more dependent on authority.¹⁵⁴ If government officials dispense warnings and the national media broadcasts the latest urgency,¹⁵⁵ mass society may internalize the message and fixate on low-probability risk.¹⁵⁶ When public perceptions accentuate dread, imminent danger permits the president to utilize war power under the Take Care Clause of the Constitution.¹⁵⁷

Dr. Saby Ghoshray asked, "How, then, can one determine this imminent threat? Perhaps a better framework could be to identify the factors that are used in the presidential manipulation of the perception of fear."¹⁵⁸ That is an excellent question and one that springs an additional query to mind. How frequently did President Bush provide a major speech that did not incorporate 9/11, threats or terrorism? After 9/11, Bush Administration rhetoric portrayed that the world had one exigency.¹⁵⁹ Bush announced on the evening of 9/11 that "our way of life, our very freedom came under attack."¹⁶⁰ He identified the *mens rea*: "America was targeted for attack because we're the brightest beacon for freedom and opportunity in the world."¹⁶¹ British Prime Minister Tony Blair stated that the war on terror is

152. IGNATIEFF, *supra* note 15, at 54.

153. Molly J. Walker Wilson, *Behavioral Decision Theory and Implications for the Supreme Court's Campaign Finance Jurisprudence*, 31 CARDOZO L. REV. 679, 698 (2010).

154. JOWETT & O'DONNELL, *supra* note 64, at 182–85.

155. SIEGEL, *supra* note 26, at 17.

156. *Id.* at 56; JEFFREY ROSEN, *THE NAKED CROWD* 17 (2004).

157. Saby Ghoshray, *False Consciousness and Presidential War Power: Examining the Shadowy Bends of Constitutional Curvature*, 49 SANTA CLARA L. REV. 165, 185 (2009); U.S. CONST. art. II, § 3.

158. Saby Choshray, *Illuminating the Shadows of Constitutional Space While Tracing the Contours of Presidential War Power*, 39 LOY. U. CHI. L.J. 295, 326 (2008).

159. Lustick, *supra* note 56, at 335–36; Jeanne M. Woods & James M. Donovan, "Anticipatory Self-Defense" and *Other Stories*, 14 KAN. J.L. & PUB. POL'Y 487, 499 (2005); Bejesky, CFP, *supra* note 150; Sidney Blumenthal, *Apocalyptic President*, GUARDIAN (Mar. 23, 2006), <http://www.guardian.co.uk/commentisfree/2006/mar/23/comment.religion1>.

160. President George W. Bush, *Statement by the President in His Address to the Nation* (Sept. 11, 2001), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010911-16.html>.

161. *Id.* Address to a Joint Session of Congress and the American People (Sept. 20, 2001), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/print/20010920-8.html> ("They hate our freedoms."); IGNATIEFF, *supra* note 15, at 54 (9/11 "did not endanger the social order of the United States or threaten its democracy with collapse"); Peerenboom, *supra* note 12, at 813–14 ("The war on terrorism has been

not “a clash between civilizations. It is a clash about civilization.”¹⁶² Similarly, on the day that President Bush proclaimed that the war in Iraq was over, he quoted a source: “[I]n the words of one terrorist, . . . September the 11th would be the ‘beginning of the end of America.’”¹⁶³

On September 14, 2001, Bush adopted Proclamation No. 7463, which declared a “national emergency” because of “the continuing and immediate threat of further attacks on the United States.”¹⁶⁴ The order espoused a “continuing and immediate threat,” but there were no strikes, confirmed plots, or convincing sleeper cells discovered after 9/11.¹⁶⁵ Bush continued the state of emergency annually.¹⁶⁶ The emergency had the legal effect of augmenting executive discretion and power in other political domains.¹⁶⁷ Likewise, in 2002, the National Security Strategy (NSS) compared the Cold War threat era with terrorism and construed that today “our enemies see weapons of mass destruction [WMDs] as weapons of choice,”¹⁶⁸ and Secretary of Defense Rumsfeld called the post-9/11 era potentially the most dangerous in history.¹⁶⁹ In contrast to the NSS’s portrayal, no terror group has attacked with WMDs through 2012.¹⁷⁰ According to the prevailing Cold War discourse, there were dangers from nuclear strikes as the Soviet Union and the United States pointed nuclear missiles at each other,¹⁷¹ and the supposed dangers of domestic communism across the country led to McCarthyism’s Un-American Committees.¹⁷²

Assuredly, the events on 9/11 made 2001 an anomalistic year for the number of Americans killed in acts of terrorism. By comparison, U.S. Department of State data indicated that during 2003, terrorism killed between 300 and 400 people

characterized as a war on ‘our’ way of life—on democracy, human rights and rule of law—and *ergo* on civilization itself.”); Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335, 1338 (2004) (“Post 9/11 Chicken Little visions of supposed necessity for radical transformations of legal norms are actually out of focus and unacceptable.”).

162. Janet Stobart, *Blair Defends Foreign Policy of Intervention*, L.A. TIMES, Mar. 22, 2006, at A3.

163. President George W. Bush, *President Bush Announces Combat Operations in Iraq Have Ended* (May 1, 2003).

164. Proclamation No. 7463, 66 Fed. Reg. 48, 199 (Sept. 14, 2001).

165. *Id.*; *See supra* Part III(A).

166. 67 Fed. Reg. 58, 317 (Sept. 12, 2002) (effective until Sept. 14, 2003); 68 Fed. Reg. 53, 665 (Sept. 10, 2003) (effective until Sept. 14, 2004); 69 Fed. Reg. 55, 313 (Sept. 10, 2004) (effective until Sept. 14, 2005); 70 Fed. Reg. 54, 229 (Sept. 8, 2005) (effective until Sept. 14, 2006).

167. For example, *see* 10 U.S.C. § 123(a) for the authority to “suspend the operation of any provision of law” relating to military enlistment contracts during a time of declared national emergency.

168. *See* Richard B. Doyle, *The U.S. National Security Strategy: Policy, Process, Problems*, 67 PUB. ADMIN. REV. 624, 627 (2007).

169. Robert Bejesky, *Politico-International Law*, 57 LOY. L. REV. 29, 42–43 (2011) [hereinafter Bejesky, *Politico*].

170. Andrew O’Neil, *Terrorist use of weapons of mass destruction: how serious is the threat?*, 57 AUST. J. INT’L AFF. 99, 101 (2003) (noting that “political paranoia . . . has been fueled further by a prevailing view among policy elites and much of the academic community that large-scale terrorist acts using WMD are only ‘a matter of time.’”).

171. Bejesky, *Politico*, *supra* note 169, at 42–43.

172. Bejesky, *Economic Discourse*, *supra* note 12.

worldwide,¹⁷³ “ranking it so far down the list of dangers to livelihood that it [was] barely visible.”¹⁷⁴ Similarly, out of a population of 300 million, 350 Americans are struck by lightning each year.¹⁷⁵ Since only thirty-five Americans died from terrorist operations in 2003,¹⁷⁶ Deputy Secretary of State Armitage remarked that the low number was “clear evidence that we are prevailing in the fight [against terrorism].”¹⁷⁷

The next year the State Department modified the name of its reports and stopped tabulating statistics.¹⁷⁸ The National Counterterrorism Center began to provide a “Statistical Annex Supplement” that instituted a “broader statutory definition of ‘terrorism,’” which escalated the number of deaths caused by terrorist acts.¹⁷⁹ The threat appeared more urgent, and thirty percent of global terrorist acts occurred inside Iraq.¹⁸⁰ With these adjustments, one newspaper explained that the number of “significant [global] terrorist attacks” in 2004 was 655, which tripled the number from 2003.¹⁸¹

From data compiled by the University of Maryland, there were relatively few terrorist attacks in Iraq prior to the 2003 invasion, but after the invasion, the number of acts progressively increased each year to nearly 1,200 in 2010.¹⁸² According to these accumulating numbers, Iraq became the country with the most terrorist strikes over the 1970 to 2006 period at 7,511, with the highest death toll at 19,415.¹⁸³ Currently, Iraq has nearly double the number of attacks as Columbia, the second-ranked country.¹⁸⁴ Of all the chaos, coups, and rebellions in the world over the past four decades, Iraq tops the list, and almost all of the atrocities and deaths followed the 2003 invasion.¹⁸⁵ As for Iraqi sentiment regarding foreign occupation,

173. CRS Report for Congress, *The Department of State's Pattern of Global Terrorism Report: Trends, State Sponsors, and Related Issues*, at 8 (June 1, 2004), <http://www.fas.org/irp/crs/RL32417.pdf>; Smith, *supra* note 33, at A17.

174. Lawrence Martin, *Patriot Game, Media Shame*, GLOBE & MAIL (Toronto) (July 29, 2004), <http://www.commondreams.org/views04/0729-04.htm>.

175. Dr. Mary Ann Cooper, *Medical Aspects of Lightning*, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, <http://www.lightningsafety.noaa.gov/medical.htm> (last visited Jan. 29, 2013).

176. CRS Report, *supra* note 173, at 8 (noting 27 American deaths from terrorism in 2002 and 35 in 2003).

177. Smith, *supra* note 33, at A17.

178. See contents of the new reports for 2004–2010. U.S. DEP'T OF STATE, *Country Reports on Terrorism*, <http://www.state.gov/s/ct/rls/crt/index.htm> (in each of the reports, statistics have been replaced by anecdotal chronologies).

179. NATIONAL COUNTERTERRORISM CENTER, *Country Reports on Terrorism 2005: NCTC Statistical Annex Supplement on Terrorism Deaths, Injuries, Kidnappings on Private U.S.* (Apr. 28, 2006), http://www.globalsecurity.org/security/library/report/2006/c-rprt-terrorism_2005-anx.htm.

180. *Id.*

181. Kevin J. Fandl, *Recalibrating the War on Terror by Enhancing Development Practices in the Middle East*, 16 DUKE J. COMP. & INT'L L. 299, 310 n.60 (2006) (citing Tom Regan, *Global Terror Attacks Tripled in 2004*, CHRISTIAN SCIENCE MONITOR, Apr. 28, 2005).

182. University of Maryland, *Global Terrorism Database*, <http://www.start.umd.edu/gtd/search/> (click “advanced search” and use “Iraq” as the parameter to graph the chronological trend).

183. Gary LaFree & Laura Dugan, *Research on Terrorism and Countering Terrorism*, 38 CRIME & JUST. 413, 450 (2009).

184. *Id.*

185. *Id.*

in periodic polls conducted over seven years from the invasion through 2009, approximately eighty percent of Iraqis were opposed to the occupation.¹⁸⁶

Professor Addis remarked that the “rhetoric of the war on terror” was undermining American government institutions and individual rights, and “leading to what Jacques Derrida has referred to as an ‘autoimmune disorder’”—a “social crisis shapes the identity of the body politic just as a medical crisis shapes the physical body.”¹⁸⁷ After all, the Bush Administration represented that the battle was an “unending” war on terror,¹⁸⁸ or a fight that “could last several generations.”¹⁸⁹ Evoking the concept of war as temporally uncertain expands presidential power.¹⁹⁰ Even after the Bush Administration departed from office, some asserted that there was still the “specter of a universal enemy,”¹⁹¹ that “the number and geographic range of al-Qaeda-inspired attacks has been growing each year,”¹⁹² and that looser social movements may pose a serious terror threat.¹⁹³ Another author wrote:

2009 was a perplexing year in the ‘war on terrorism.’ The gravest terrorist threats to the U.S. homeland arose . . . from the impetuous acts of a baseball cap-wearing pushcart vendor, a U.S. Army psychiatrist, a former high school defensive lineman, a gang of ne’er-do-well ex-cons, and the confused, frustrated scion of a wealthy banking family. . . . Over nine years after September 11, 2001, the war on terrorism shows no sign of drawing to a close.¹⁹⁴

Did an era of frequent threat announcements and excessive consternation over terrorism during the Bush Administration influence societal perspectives? Prior to 9/11, would preemptive action in cases analogous to the aforementioned have been regarded as actions to confront suspects posing potential dangers to themselves and others, or as thwarting foreseeable criminal acts, instead of subjects in the war on terrorism? If the highly-emotive word “terrorism” was dropped from public

186. Bejesky, *Politico*, *supra* note 169, at 102–07.

187. Adeno Addis, “*Informal*” *Suspension of Normal Processes: The “War on Terror” as an Autoimmunity Crisis*, 87 B.U. L. REV. 323, 324–35 (2007).

188. Diane Marie Amann, *Guantanamo*, 42 COLUM. J. TRANSNAT’L L. 263, 283 (2004); Alan Clarke, *Creating a Torture Culture*, 32 SUFFOLK TRANSNAT’L L. REV. 1, 18 (2008) (“no geographical limitations and no end in sight”).

189. Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365, 1409 (2008).

190. Mary L. Dudziak, *Law, War, and the History of Time*, 98 CALIF. L. REV. 1669, 1669–70 (2010).

191. Darryl Li, *A Universal Enemy?: “Foreign Fighters” and Legal Regimes of Exclusion and Exemption Under the “Global War on Terror”*, 41 COLUM. HUMAN RIGHTS L. REV. 355, 356 (2010).

192. Tamanaha, *supra* note 55, at 422 (citing The Fort Hood Attack: A Preliminary Assessment: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs, 111th Cong. 3–4 (2009) (statement of Brian Michael Jenkins, Senior Advisor, RAND Corporation)).

193. MARC SAGEMAN, *LEADERLESS JIHAD: TERROR NETWORKS IN THE TWENTY-FIRST CENTURY* 31 (2008).

194. Adam Klein, *The End of Al Qaeda? Rethinking the Legal End of the War on Terror*, 110 COLUM. L. REV. 1865, 1865–66 (2010).

discourse might perceptions change?¹⁹⁵ At a law conference in 2008, Professor Hirsh was anticipating that the post-9/11 “era of fear” could be expected to conclude in a “grand transition anticipated for the end of 2008.”¹⁹⁶ Was it that the “threat” was objectively ending, or was it that overwrought portrayals would finally cease from government discourse?

The latter interpretation can be explained by the chronology of unsubstantiated threat announcements during the Bush era, and by the fact that shortly after inauguration, President Obama scrapped the phrase “global war on terrorism” and designated the conflict “overseas contingency operations.”¹⁹⁷ Secretary of State Hillary Clinton remarked that “the administration has stopped using the phrase [“war on terror”] and I think that speaks for itself.”¹⁹⁸ The other characterization—that the threat was tangibly diminishing—was mentioned recently by Secretary of Defense Leon Panetta.¹⁹⁹ Panetta stated that the United States is “within reach of strategically defeating al Qaeda.”²⁰⁰

My point is that there is such a copious inventory of varying and frequently irreconcilable news releases upon which scholars and commentators can either view with a glass half-empty or half-full, and risk-prone or risk-averse, and apply to “terrorism” that law review articles will stretch a vast gorge of interpretation. Diversity makes for fruitful dialogue. However, statistical data does suggest that the phenomenon of terrorism and its risks should be placed into a sedate and objective vista, and perhaps be considered alongside other hazards.

B. Greater Risks

People regularly accept far more life-threatening dangers than terrorism by driving vehicles and smoking cigarettes.²⁰¹ Every year, approximately 43,000 people in the United States and over a million worldwide die in automobile accidents.²⁰² People dread harms that might kill in vivid and “awful ways, like being eaten by a shark” even though the “risk of dying in less awful ways, like

195. Of course, isolating the emotive impact of the word, and the depth that the media favors riveting stories is entirely unrelated to supporting government functions that confront realistic threats from terrorism. Bejesky, CFP, *supra* note 150.

196. Susan F. Hirsch, *Fear and Accountability at the End of an Era*, 42 LAW & SOC'Y REV. 591, 593 (2008).

197. Wilson & Al Kamen, *'Global War on Terror' Is Given New Name*, WASH. POST (Mar. 25, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/24/AR2009032402818.html>.

198. Sue Fleming, *Obama Team Drops "War on Terror" Rhetoric*, REUTERS (Mar. 31, 2009), <http://www.reuters.com/article/idUSTRE52T7MH20090331>.

199. Mary Walsh, *Panetta: U.S. "Within Reach" of Defeating al Qaeda*, CBS NEWS (July 9, 2011), http://www.cbsnews.com/8301-503543_162-20078130-503543.html.

200. *Id.*

201. Miranda Hitti, *Car Crashes Kill 40,000 in U.S. Every Year*, FOX NEWS (Feb. 3, 2005), <http://www.foxnews.com/story/0,2933,146212,00.html>; U.S. ENVIRONMENTAL PROTECTION AGENCY, *Health Risks*, <http://www.epa.gov/radon/healthrisks.html> (last visited Oct. 9, 2012) (citing 160,000 cancer deaths per year from smoking).

202. Richard H. McAdams, *Beyond the Prisoners' Dilemma: Coordination, Game Theory and the Law* 39, (Chicago John M. Olin Law & Economics Working Paper No. 437, Oct. 2008), available at <http://ssrn.com/abstract=1287846>.

heart disease—the leading killer in America,” is immeasurably higher.²⁰³ On 9/11, 2,978 Americans died, but during 2001, heart disease killed 700,142; cancer 553,768; accidents 101,537; suicides 30,622; and murders 17,330.²⁰⁴ In the United States each year, 36,000 die of influenza,²⁰⁵ 63,000 of pneumonia, and 15,000 of AIDS.²⁰⁶ The Institute of Medicine reported that as many as “98,000 Americans die each year from preventable medical mistakes. . . . [M]edical care is the third leading cause of death in the United States, accounting for 225,000 deaths annually.”²⁰⁷

Globally, eleven million die each year from infectious diseases, including three million from AIDs and one million from malaria.²⁰⁸ Ten million children die of preventable diseases each year, which means thirty thousand per day.²⁰⁹ By 2000, over 4.3 million children globally had died of HIV/AIDS.²¹⁰ Irene Zubaida Khan, Secretary General of Amnesty International, explained: “The ‘War on Terror’ dominates the world agenda. The sexual terror that millions of girls and women suffer in the bedroom, in the battlefield, in the streets and in workplaces, is ignored.”²¹¹ In an address at Cornell University, former President Clinton stated:

Half the world is living on less than \$2 a day. A billion people live on less than a dollar a day. A billion people go to bed hungry every night. A billion and a half people never get a single clean glass of water in their lives. . . . One in four of all people who will perish on Earth this year will die of AIDS, TB, malaria and infections related to diarrhea.”²¹²

Since the end of WWII, there have been approximately 250 conflicts resulting in an estimated seventy to 170 million deaths.²¹³

203. DAVID ROPEIK & GEORGE GRAY, *RISK: A PRACTICAL GUIDE FOR DECIDING WHAT’S REALLY SAFE AND WHAT’S DANGEROUS IN THE WORLD AROUND YOU* 17 (2002).

204. SIEGEL, *supra* note 26, at 196; Stephen P. Marks, *Branding the “War on Terrorism”: Is There a “New Paradigm” of International Law?*, 14 MICH. ST. J. INT’L L. 71, 74 (2006) (“There is a low probability of occurrence of acts of terrorism and the number of victims is likely to be limited, whereas there is a high probability (even certainty) of large-scale loss of life from preventable diseases.”).

205. CENTER FOR DISEASE CONTROL AND PREVENTION, *Questions and Answers Regarding Estimated Deaths from Influenza in the United States*, http://www.cdc.gov/flu/about/disease/us_flu-related_deaths.htm.

206. SIEGEL, *supra* note 26, at 18, 155.

207. Randolph I. Gordon & Brook Assefa, *A Tale of Two Initiatives: Where Propaganda Meets Fact in the Debate Over America’s Health Care*, 4 SEATTLE J. SOC. JUST. 693, 693 (2006).

208. Marks, *supra* note 204, at 73.

209. Peerenboom, *supra* note 12, at 857.

210. Nina J. Crimm, *Toward Facilitating a Voice for Politically Marginalized Minorities and Enhancing Presidential Public Accountability and Transparency in Foreign Health Policymaking*, 39 VAND. J. TRANSNAT’L L. 1053, 1058–59, 1064–66 (2006).

211. Khan, *supra* note 25, at 3.

212. William Jefferson Clinton, *Remarks as Delivered at Cornell University*, 38 CORNELL INT’L L.J. 1, 4 (2005).

213. M. Cherif Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, 98 J. CRIM. L. & CRIMINOLOGY 711, 712 (2008); Peerenboom, *supra* note 12, at 812–13 (“With one-fourth of the world’s population living below the international poverty line of \$581 a year per capita, 790 million people lacking adequate nourishment, one billion living without safe water to drink, two billion suffering from inadequate sanitation and 880 million lacking access to basic healthcare.”).

After 9/11, consider humanitarian disasters that rose to attention and eventually disappeared from headlines. Many natural disasters may have been caused by or were aggravated by climate change.²¹⁴ The United Nations recently declared a famine in Somalia.²¹⁵ Nearly 300,000 died from the 2004 tsunami that hit Indonesia.²¹⁶ In January 2010, an earthquake in Haiti reportedly killed over 200,000.²¹⁷ Following the earthquake and tsunami in Japan during March of 2011, an estimated 10,000 were killed, financial costs were appraised at \$180 billion, and the nuclear meltdown from the nuclear plants was called the greatest Japanese crisis since World War II.²¹⁸

Consider traditional conflict among states and government abuse of populations. Professors Finnegan and Hackley wrote:

The history of the past one-hundred years includes world wars and other catastrophic examples of violent conflict, in which protagonists were armies battling to gain supremacy and dominate their enemies. As a consequence of these wars, more than one-hundred million people died and many more suffered, national boundaries were redrawn, and governments rose and fell.²¹⁹

Approximately 116,000 Americans died in World War I and 500,000 in World War II.²²⁰ Tens of millions died by dictatorial regimes killing citizens in internal state suppression, including genocide;²²¹ and many other wars, rebellions and civil wars led to extraordinary death tolls.²²²

214. William C. Banks, *Responses to the Ten Questions*, 35 WM. MITCHELL L. REV. 5007, 5010 (2009).

215. Mark Tran, *UN Declares Famine in Somalia*, GUARDIAN (July 20, 2011), <http://www.guardian.co.uk/global-development/2011/jul/20/un-declares-famine-somalia>.

216. *Tsunami Death Toll Passes 283,000*, SYDNEY MORNING HERALD (Jan. 28, 2005), <http://www.smh.com.au/news/Asia-Tsunami/Tsunami-death-toll-passes-283000/2005/01/27/1106415737181.html>.

217. *Haiti Retracts Death Toll No.*, Citing Typo, CBS NEWS (Feb. 10, 2010), <http://www.cbsnews.com/stories/2010/02/10/world/main6194956.shtml>.

218. Taiga Uranaka & Ki Joon Kwon, *Quake-hit Japan Battles to Avert Radiation Leak*, REUTERS (Mar. 15, 2011).

219. Amy C. Finnegan & Susan G. Hackley, *Negotiation and Nonviolent Action: Interacting in the World of Conflict*, 24 NEGOTIATION J. 7, 9 (2008); Christopher C. Joyner, "The Responsibility to Protect": Humanitarian Concern and the Lawfulness of Armed Intervention, 47 VA. J. INT'L L. 693, 694 (2007) (estimating thirty-five million killed in interstate conflict during the twentieth century).

220. Christopher A. Preble, *The Founders, Executive Power, and the Military Intervention*, 30 PACE L. REV. 688, 697 (2010).

221. Joyner, *supra* note 219, at 694; Jon M. Van Dyke, *Promoting Accountability for Human Rights Abuses*, 8 CHAP. L. REV. 153, 167–70, 173 (2005).

222. *Vietnam War: History: Introduction*, BBC, http://news.bbc.co.uk/2/shared/spl/hi/asia_pac/05/vietnam_war/html/introduction.stm (last visited Oct. 9, 2012) (the Vietnam War led to four million deaths). In Algeria, an estimated one hundred thousand died at the hand of the government and opposing military groups during the 1990s. Karima Bennouna, *Terror/Torture*, 26 BERKELEY J. INT'L L. 1, 3–4 (2008). Declassified national security documents reported on U.S. officials supported many military regimes. Bejesky, *Politico*, *supra* note 169, at 54–57; Robert Bejesky, *Currency Cooperation and Sovereign Financial Obligations*, 24 FLA. J. INT'L L. 91, 132–37 (2012) [hereinafter Bejesky, *Currency Cooperation*]. In the Philippines, 9,531 victims of human rights abuses have been seeking compensation by litigating claims against Marco's Estate. Van Dyke, *supra* note 221, at 156. In Chile, there were at least 2,000 cases of individuals who had been murdered or disappeared, and 27,000 who had been tortured, after arrest at the hand of the Pinochet dictatorship. *Id.* at 157–58.

Amnesty International called 9/11 a crime against humanity.²²³ Undoubtedly, it is important to recognize victims. The United Nations' Secretary General stated to terror victims:

To all victims around the world, our words of sympathy can bring only hollow comfort. They know that no one who is not so directly affected can truly share their grief. . . . We must respect them. . . . We must do what we can to help them. We must resolve to do everything in our power to spare other from meeting their fate. Above all, we must not forget them.²²⁴

This is true, but it is also important to commensurately recognize other global problems, such as poverty. Interestingly, when President Bush addressed poverty, he frequently conjoined it with the issues of combating terrorism and fostering open market initiatives.²²⁵

For domestic social problems, Hurricane Katrina caused tens of billions of dollars in damage, homicide has been relatively common in urban America, one in every three children living in violent neighborhoods has had post-traumatic stress disorder, and the probability that a African American would go to prison had a greater likelihood than going to college or the military.²²⁶ Not far from Bush's current abode, across the border in Mexico, in 2007 there were 3,000 kidnappings for ransom, likely due to poverty, at a value of over \$100 million; and four rival cartels murdered 16,000 people from 2000 to 2008.²²⁷

223. Khan, *supra* note 25, at 4. Before the U.N., as Argentina noted "that it does not accept the argument that the acts of international terrorism constitute a human rights violations, since, by definition, only States are capable of violating human rights." U.N. ECON. & SOC. COUNCIL, SUB-COMM. ON PREVENTION OF DISCRIMINATION & PROT. OF HUMAN RIGHTS, *Specific Human Rights Issues: New Priorities, in Particular Terrorism*, P 2, U.N. Doc. E/CN.4/Sub.2/2003/WP.1/Add.2 (Aug. 8, 2003).

224. Kofi Annan, Secretary-General's Keynote Address to the Closing Plenary of the International Summit on Democracy, *Terrorism and Security: A Global Strategy for Fighting Terrorism* (Mar. 10, 2005), <http://www.un.org/sg/statements/?nid=1345>.

225. NATIONAL SECURITY STRATEGY, *supra* note 103, at opening statement 2, and text 3, 10, 17 ("Poverty does not make poor people into terrorist and murderers. Yet poverty, weak institutions, and corruption can make weak states vulnerable to terrorist networks."); Jeffrey D. Sachs, *Global Poverty and U.S. Foreign Policy*, CARNEGIE COUNCIL (Nov. 6, 2002), <http://www.carnegiecouncil.org/studio/transcripts/226.html> (stating that the Bush Administration's "philosophy is quite clear, which is that what will make globalization work is a strong United States, a strong defense, a war on terrorism, and open market, which will ensure the economic benefit of this process of integration all over the world"); see Bejesky, *Currency Cooperation*, *supra* note 222, at 99–104 (philosophy applied in Iraq); Editorial, *America's Promises*, N.Y. TIMES (Jan. 28, 2005), <http://www.nytimes.com/2005/01/28/opinion/28fri1.html> (noting that Bush's Millennium Challenge Account to address poor countries was not as effective as promised in 2002).

226. Diane Marie Amann, *The Course of True Human Rights Progress Never Did Run Smooth*, 21 HARV. HUM. RTS. J. 171, 174–76 (2008).

227. Cecilia M. Bailliet, *Towards Holistic Transnational Protection: An Overview of International Public Law Approaches to Kidnapping*, 38 DENV. J. INT'L L. & POL'Y 581, 604 (2010).

V. CONCLUDING ANALYSIS

The following chart depicts whether government publicly accentuates potential terror threats and whether a strike occurs.

	ATTACK	NO ATTACK
GOVERNMENT ACCENTUATES THREATS	Q1 -1, -2	Q2 2, 1
GOVERNMENT IS RESTRAINED IN ISSUING THREAT WARNINGS	Q3 -2, -1	Q4 1, 2

The first value in each Quadrant is a government payoff and the second refers to the populace utility. The variables operate on two premises. First, both government and the populace experience positive utilities if no terror strike occurs. Second, a heightened threat atmosphere is apt to increase a government's approval rating²²⁸ and make the populace more amenable to accepting heightened collective security measures, even though measures could temporarily reduce civil liberties.²²⁹ The values are hypothetical but are consistent with these premises. The rationale for particular values follows.

In Quadrant 1, government accentuates warnings and there is an attack. The payoff to government is negative for failing to thwart a strike, while the populace utility is the lowest because there was an attack, and the citizenry likely experienced negative, fearful sentiment with media warnings. In Quadrant 2, the populace has a positive payoff because there was no attack, while the government payoff is the highest because extenuating warnings without a strike may make government appear more active and successful in implementing security measures that ostensibly prevented an attack. This perception—that government successfully averted or thwarted an attempted strike when one does not occur—may be a false perception, which is why the populace payoff should intrinsically be lower than if citizens were operating under more accurate perceptions. This Quadrant seems to typify a circumstance in which there is a barrage of periodic terror warnings that did not result in verifiable plots or suspects being arrested.

In Quadrant 3, government did not accentuate threat warnings, but there was an attack. Here, the government has the lowest utility because a strike occurred and no warnings may have made the populace perceive that government was unprepared.

228. See *supra* notes 61–62, 96; Bejesky, CFP, *supra* note 150; James Moore, *We're Afraid of the Big Bad Wolf: Judicial Review and the Implication of Race in Government Designation of Enemy Combatants*, 7 RUTGERS RACE & L. REV. 185, 191 (2005) (the Bush Administration exploited fears of terrorism and lacking security to institute unconstitutional measures).

229. See generally Part II.

However, in comparison to Quadrant 1, the populace utility is not as low because it was not subjected to the negative consequences of periodic threat warnings. In Quadrant 4, government does not emphasize threat warnings and there is no terror strike. The public obtains the highest payoff, and the payoff should be higher than Quadrant 2 because the citizenry was not subjected to warnings or under a possible false perception about the danger.

With these premises, values, and reasoning, it is expected that government will choose to accentuate threats amid uncertainty since political payoffs will likely be higher whether or not there is an attack. If there was an attack, the government forecasted correctly and warned even though it was not prevented; and if there was no attack, the government may conceive an aura that adequate security is being provided (even if this belief is inaccurate). Moreover, from a utilitarian perspective, government might be able to reduce the possibility of attack because it seems more acceptable to the populace to permit intensified collective security measures, detentions, interrogations, and other measures when security danger appears higher. However, this may compromise individual rights, something that the populace might not condone but for the perception of peril. It also forms an immense pool of wrongly confined individuals as suspected terrorists, i.e. false positives.

In the case at hand, the uncertainty is whether the threat was as dire as the Bush Administration presented, which is largely unconfirmed even today as the full data may bide in national security secrecy prerogatives. However, the lack of prosecutions suggests that the threat was not so importunate. Likewise, it would seem that there are comparatively more grievous dangers facing the world than terrorism, but elevating jeopardy makes the threat cognitively available. Additionally, with a heightened domestic threat level, citizens may be more prone to accept the credibility of other alleged national security threats, such as from Iraq, which did indeed encompass the same time period surveyed in this article.

