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Patriotism, Nationalism, and the War on Terror: A Mild Plea in Avoidance

Winston P. Nagan

University of Florida Levin College of Law, nagan@law.ufl.edu

Craig Hammer

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PATRIOTISM, NATIONALISM, AND THE WAR ON TERROR: A MILD PLEA IN AVOIDANCE

Winston P. Nagan & Craig Hammer***

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* Fellow, Royal Society of the Arts; Sam T. Dell Research Scholar Professor of Law at the University of Florida Levin College of Law; Visiting Fellow, Brasenose College, Oxford; Affiliate Professor of Anthropology, University of Florida; Director, Institute for Human Rights, Peace, and Development, University of Florida; Former Chairman of Amnesty International USA; Former President of the Policy Sciences Center (USA); Board of Directors of International Third World Legal Studies Association; Member of the South African Constitution Watch Commission. J.S.D., Yale Law School, LL.M., M.C.L., Duke Law School, M.A., Brasenose College, Oxford University, B.A., Brasenose College, Oxford University, B.A., University of South Africa.

** Teaching and Research Assistant to Professor Nagan; Senior Research Fellow, Institute for Human Rights, Peace, and Development, Levin College of Law, University of Florida. J.D., University of Florida Levin College of Law, B.A., University of Florida.

"Terrorism is a global menace which clearly calls for global action. Individual actions by Member States, whether aimed at State or non-state actors, cannot in themselves provide a solution. We must meet this threat together."¹

—Kofi Annan

I. INTRODUCTORY REMARKS

"Major Strasser has been shot. Round up the usual suspects."

—Captain Louis Renault, Prefect of Police, *Casablanca* (1942).

Professor Viet Dinh, this year's Dunwody lecturer, was a major drafter of and architectural influence upon the USA PATRIOT Act.² The USA PATRIOT Act was rushed through Congress in the aftermath of September 11, 2001 and a national security crisis.³ The Act itself is as

1. *Report of the Secretary-General on the Work of the Organization*, U.N. GAOR, 53d Sess., 7th plen. mtg., Agenda Item 10, at 3, U.N. Doc. A/53/PV.7 (1998). UN Secretary-General Kofi Annan continues to advance the notion that international law must be constructed to be receptive to contemporary issues in the course of international relations without compromising the fundamental normative and textual constraints of the United Nations Charter. *See Report of the Secretary-General on the Work of the Organization*, U.N. GAOR, 54th Sess., 4th plen. mtg., Agenda Item 10, at 2-4, U.N. Doc. A/54/PV.4 (1999).

2. Viet D. Dinh, *Nationalism in the Age of Terror*, 56 FLA. L. REV. 867 (2004). *See* Uniting and Stengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 [hereinafter USA PATRIOT Act]; *see also* Robert O'Harrow Jr., *Six Weeks in Autumn*, WASH. POST, Oct. 27, 2002, at W6. According to Professor Dinh, the Department of Justice began to assemble a package of authorities to facilitate what Attorney General John Ashcroft demanded: all that is necessary for law enforcement, within the bounds of the Constitution, to discharge the obligation to fight this war against terror. *Id.* As Assistant Attorney General, Professor Dinh was designated by Attorney General Ashcroft to construct such a set of policies. *See* Eric Lichtblau, *At Home in War on Terror*, L.A. TIMES, Sept. 18, 2002, at A1. The culmination of this effort by Dinh and his colleagues was the USA PATRIOT Act. *See id.*

3. Just weeks after the September 11 attacks, the Department of Justice dispatched to Congress comprehensive legislation designed to grant law enforcement agencies supplementary power, including the enhanced ability to conduct searches, police Internet communications, employ telephone taps, monitor financial transactions, and much more. Specifically, on October 23, 2001, House Bill 3162, the USA PATRIOT Act, was introduced in the House of Representatives. *See* H.R. 3162, 107th Cong. (2001). A timetable was established so that both the committee process and the floor debate were bypassed; the asserted reason for this streamlined process was that it was necessary to thwart terrorist attacks thought to be impending. *Administration's Draft Anti-terrorism Act of 2001: Hearing Before the House Comm. On the Judiciary*, 107th Cong. (2001). The House of Representatives voted 357 to 66 and the Senate voted 98 to 1 to approve the USA PATRIOT Act on October 24 and 25, 2001, respectively. *Id.* The President signed it into law on October 26th. USA PATRIOT Act, 115 Stat. at 402; *see also* Michael T. McCarthy, *USA Patriot Act*, 39 HARV. J. ON LEGIS. 435, 435 (2002).

voluminous as it is complex.⁴ It has been widely conceded that the Act was not critically read by key members of the legislative branch prior to its passage into law.⁵ This was because these members enacted the legislation under conditions of crisis in reliance on the good faith and integrity of the executive branch. The Act reflects not so much the restraints of the balance of power, but deference to the competence and integrity of the executive branch in exceptional circumstances. The Act, it is conceded, contains far-reaching restrictions on the liberties of American citizens⁶ as well as the human rights of aliens.⁷ A central concern from the point of view of national security under the Act is the ability to detain and interrogate for as long as possible those whom the administration believes may be terrorists, terrorist sympathizers, or dupes with inadvertent terrorist links.⁸ The tools to achieve these objectives, among others,⁹ are reflected

4. The USA PATRIOT Act is 131 pages long. USA PATRIOT Act, 115 Stat. at 272-402.

5. See Elizabeth A. Palmer, *Terrorism Bill's Sparse Paper Trail May Cause Legal Vulnerabilities*, 59 CONGR. Q. WKLY. 2533, 2534 (2001) (reporting that many of the lawmakers who voted for the USA PATRIOT Act never had a chance to read the final version before the bill was passed); cf. 147 CONG. REC. S10,991 (daily ed. Oct. 25, 2001) (statement of Sen. Leahy) ("We expedited the legislative process in the Judiciary Committee to consider the [Bush] Administration's proposals. In daily news conferences prior to the original passage of the USA [PATRIOT] Act, Attorney General [John Ashcroft] referred to the need for such prompt consideration.").

6. E.g., USA PATRIOT Act §§ 101, 102, 107 (making it easier for the government to initiate surveillance and wiretapping of United States citizens); § 106 (sheltering federal agents engaged in illegal surveillance without a court order from criminal prosecution in certain circumstances); § 126 (giving the government secret access to credit reports without consent or judicial process in some situations).

7. § 412 (permitting the Attorney General to classify an alien as being under suspicion of terrorist involvement, meaning that this alien may be held for up to seven days for questioning; thereafter, the alien must be either charged with a criminal or immigration laws violation or be released).

8. *Id.*; see David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 960-66 (2002) (examining the sweeping preventive detention of aliens).

9. In addition to far-reaching detainment terms, the Act has other far-reaching provisions. For example, to obtain wiretap authority before the Act was implemented, foreign intelligence collection must have been the *only* purpose of an investigation. 50 U.S.C. §§ 1804(a)(7)(B), 1823(a)(7)(b) (2000). Under the Act, intelligence agency officials are now given wiretap authority from a special intelligence court if foreign intelligence operations are a "significant purpose" of the investigation. USA PATRIOT Act § 218; see John E. Branch III, *Statutory Misinterpretation: The Foreign Intelligence Court of Review's Interpretation of the "Significant Purpose" Requirement of the Foreign Intelligence Surveillance Act*, 81 N.C. L. REV. 2075 (2003). The Act additionally criminalizes the possession of any material that could potentially be used non-peacefully, particularly as a component of a biological or chemical weapon. USA PATRIOT Act § 817. Criminal sentences for committing acts of terrorism and for harboring or financing terrorists or terrorist operations have also been increased. §§ 802-815. Also, before the Act, authorities were required to obtain new individual search warrants for each district within which they searched. FED. R. CRIM. P. 41(a) (2000) (amended 2001). The Act permits these authorities to acquire nation-wide

in the power to detain individuals without the supervision of independent appraisal.¹⁰ In short, a cornerstone of the USA PATRIOT Act is the power to detain in terms that may seem arbitrary and capricious without some form of further review and supervision. The problem with preventative or investigatory detention is that it may be subject to abuse without independent review of the grounds for detention.¹¹ Preventative detention is a method that may be abused by government, and represents precisely the problem that the United States Constitution was meant to control and regulate: namely, that the freedom of the individual is protected by the rule of law from arbitrary or capricious action by governmental authority. In international human rights and in comparative constitutional law, the principle is well established that emergency measures enacted under conditions of crisis must nonetheless be measures that are reconcilable with the culture of a democratic society based on the rule of law.¹²

search warrants for terrorism investigations. USA PATRIOT Act §§ 219-220. Restrictions on information sharing have been lifted in order that intelligence officers and criminal justice officials could be permitted to share intelligence gathered during the course of each agency's ongoing investigations. See § 203. Subpoenas have also been made far more available for electronic communications, including e-mail communication, transmitted by terrorism suspects. See § 210. Moreover, the Act has lifted restrictions on telephone taps so that rather than monitoring a specific telephone line, authorities may now monitor any telephone used by a person suspected of involvement in terrorism. § 206. The Act is equipped with a "sunset" provision which requires the enhanced surveillance powers created by the Act to expire four years after the Act is implemented (in 2005). § 224.

10. § 412. See generally Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57, 833 (Nov. 13, 2001) (prohibiting persons detained by the Secretary of Defense from seeking relief outside a military tribunal).

11. The USA PATRIOT Act also directs a branch of the United States Department of Justice, the Office of the Inspector General (OIG), to furnish Congress with semiannual reports regarding claims of civil rights and civil liberties abuses perpetrated by Department of Justice employees. § 1001. On July 17, 2003, the OIG delivered to Congress such a report, 2003 which detailed that the OIG had received 1,073 complaints of civil rights or civil liberties abuses in connection with actions taken under the USA PATRIOT Act. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REPORT TO CONGRESS ON IMPLEMENTATION OF SECTION 1001 OF THE USA PATRIOT ACT 6 (2003).

12. The International Law Association's Paris Minimum Standards of Human Rights Norms in a State of Emergency are reprinted in Richard B. Lillich, *The Paris Minimum Standards of Human Rights Norms in a State of Emergency*, 79 AM. J. INT'L L. 1072, 1073-81 (1985). For a comprehensive account of these minimum standards by the principal architect of the list, see SUBRATA ROY CHOWDHURY, *RULE OF LAW IN A STATE OF EMERGENCY* (1989) (providing, from the perspective of the principal architect of the list, a comprehensive account of the minimum standards); THEODOR MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* 19-21 (1989) (stating that freedom from enslavement is a right that cannot be derogated by a state of emergency). The three other human rights that cannot be derogated by a state of emergency are the right to life, freedom from torture, and freedom from ex post facto laws. See American Convention on Human Rights, Nov. 22, 1969, art. 27, 1144 U.N.T.S. 123, 131-32.

Professor Dinh's article, *Nationalism in the Age of Terror*, provides an indirect scholarly justification for the far-reaching powers of the USA PATRIOT Act. The title of his article, it should be noted, is not *Patriotism in the Age of Terror*, but *Nationalism in the Age of Terror*. In recent history, diverse appeals to nationalism as an ideological symbol of solidarity have often been directed at the preemption or cooptation of the symbols of patriotism and loyalty. Extreme examples include Joseph Stalin's characterization of the war against Nazi Germany as the "great patriotic war" of the Russian people.¹³ Hitler's cooptation of the symbols of nationalist Germany included the ethnic and ideological purging of undesirable Germans.¹⁴ Ethnically, those Germans not considered part of the *Herrenvolk*, such as the Jews and the Romani,¹⁵ were basically candidates for extermination. Germans whose ethnic pedigree was acceptable could nonetheless be repressed and persecuted because they were liberals, socialists, communists, and political nonconformists. The German concentration camps existed for them. For the ethnic undesirables, there were the death camps. Joseph Stalin's camps seemed to roll labor exploitation, slavery, and death into a single institutional form: the *gulag*.¹⁶

Such, then, are some of the egregious excesses of nationalism, pure or adulterated. Moreover, many forms of right-wing authoritarianism in Latin America and South Africa seemed to carry the notion that salvaging the nation, and therefore national identity, was mandated by some version of Christian ideology. In South Africa, the ideological justification of Afrikaner nationalism was "Christian Nationalism."¹⁷ South African

13. See ALBERT SEATON, *THE RUSSO-GERMAN WAR 1941-45* (1971). Russians refer to World War II as the "Great Patriotic War" because when Nazi Germany invaded the Soviet Union, it penetrated deep into Russia, where most of the worst fighting occurred. See R.R. PALMER & JOEL COLTON, *A HISTORY OF THE MODERN WORLD* 814-15 (6th ed. 1984); Craig R. Whitney, *Shared Space: Germany Again Forces a Redefining of Europe*, N.Y. TIMES, June 24, 1990, § 4, at 1. See generally SOVIET GENERALS RECALL WORLD WAR II (Igor Vitukhin ed. & Anatol Kagan trans., 1981) (describing decisive battles of Russia's "Great Patriotic War").

14. It has been argued that Hitler's use of such nationalist themes in his June 30, 1934 blood purge inspired Stalin, who employed the same nationalistic tone throughout his own purge. See W.G. KRIVITSKY, *I WAS STALIN'S AGENT* 204-05 (1939).

15. The Romani are also referred to as "Gypsies." See generally GYPSY LAW: ROMANI LEGAL TRADITIONS AND CULTURE (Walter O. Weyrauch ed., 2001) (compiling essays that describe various aspects of Romaniya).

16. Stalin took deadly measures against the Kulaks during his murderous collectivization campaign from the late 1920s to early 1930. See, e.g., NICHOLAS V. RIASANOVSKY, *A HISTORY OF RUSSIA* 551 (3d ed. 1977); see also ALEKSANDR I. SOLZHENITSYN, *THE GULAG ARCHIPELAGO* 1918-1956, at 54-57 (Thomas P. Whitney trans., 1974) (also discussing the Kulaks).

17. CHARLES BLOOMBERG, *CHRISTIAN-NATIONALISM AND THE RISE OF THE AFRIKANER BROEDERBOND IN SOUTH AFRICA, 1918-1914*, at 1 (Saul Dubow ed., 1989). The Afrikaner Broederbond—comprised of members of the National Party, the party responsible for implementing apartheid legislation—was created to advance Afrikaner cultural, political, and economic dictates.

opinion leaders explained that this form of nationalism was similar to Italian Fascism¹⁸ and German National Socialism.¹⁹ We take up these cautionary remarks not because we believe that national identity is by itself an intrinsically good or bad thing. The central question about national identity is what values are included in it, to embrace it as a defensible moral basis for demanding solidarity, patriotism, and more.

American national identity is inextricably tied to the fundamental moral principles that led to the formulation and development of the American Constitution and the rule-of-law culture that it represents. A salient question concerning United States foreign policy has been the extent to which fundamental moral precepts borne of our constitutional experience should not be reflected in our construction of foreign relations law, national security law, and international law, including international human rights law. An expectation held by many thoughtful observers of the international scene is that a state with the immense power of the United States must be seen to be *the* exemplar of its values in the international community, and that its commitment to the international rule of law must be as firm and consistent as its commitment to its own constitutional values.²⁰

Not everyone agrees with this. Many Americans believe that the United States must be exempted from the moral foundations of the international rule of law.²¹ Many of them believe that, at times, our own Constitution is

Id. at xxii, 32-36, 228. The Broederbond was essentially the culmination of various Afrikaner cultural organizations, such as the *Afrikaner Taal Beweging* (Afrikaner Language Movement) and *de Genootskap van Regte Afrikaners* (the Society of True Afrikaners). See generally W. A. DE KLERK, *THE PURITANS IN AFRICA* (1975) (recounting the Afrikaner people's attempt to remake their particular world to conform to the concept of a rational plan from the radical right).

18. See generally HOWARD SIMSON, *THE SOCIAL ORIGINS OF AFRIKANER FASCISM AND ITS APARTHEID POLICY* (1980) (examining Afrikaner fascism in relation to a general theory of fascism).

19. PATRICK LAURENCE, *THE TRANSKEI* 13-14 (1976). The Status of the Transkei Act denationalized black Africans from the Transkei region of South Africa. *Id.* at 10. This Act has been compared to the denationalization statute passed into law by Germany's Nazi government in 1941, which stripped German Jews of their citizenship. *Id.* at 13-14.

20. This position evokes Vattel's Law, which articulates that some belligerent state behavior quite exceeds the scope of its justness, which effectively robs just causes of rectitude. Vattel posited that a state is "a moral person having an understanding and a will peculiar to itself, and susceptible at once of obligations and of rights." *Introduction* to E. DE VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* § 2 (Charles G. Fenwick trans., special ed. 1993) (1758). Regarding a state's engagement in warfare, which Vattel regarded as a right belonging to nations "only as a remedy against injustice," Vattel admonished that it is "so terrible in its effects, so disastrous to mankind, so hurtful even to him who makes use of it, that the natural law only allows it as a last resort, that is to say, when justice can be obtained in no other way." *Id.* at bk. 3, § 51.

21. See MARGARET MACMILLAN, *PEACEMAKERS: THE PARIS CONFERENCE OF 1919 AND ITS ATTEMPT TO END WAR* 22 (2001) ("American exceptionalism has always had two sides: the one eager to set the world to rights, the other ready to turn its back with contempt if its message should be ignored."). For an excellent, comprehensive analysis of American exceptionalism, see generally

an impediment to securing the vital national interest of our state and, therefore, that many of its precepts may be set aside when they are inconvenient. The war against terrorism in the aftermath of September 11 has thus posed profound questions about national identity, the rule of law, and the appropriate role for the United States in the world community.

Part II of this Commentary begins by exploring the ostensible underpinnings of Dinh's article by examining his understanding of nationalism. Part III explains why crony nationalism is not the best defense against global terrorism. Part IV then analyzes some significant United States foreign policy undertakings that have arguably negatively affected United States national security. Finally, in Part V we conclude by gleaning lessons from problematic aspects of United States foreign policy.

II. PROFESSOR DINH ON AMERICAN NATIONALISM AND GLOBAL TERRORISM

Professor Dinh's article seems, at least *sub silencio*, to provide a more elaborate justification for derogations from the rule of law and fundamental values found in the USA PATRIOT Act. His piece appears to suggest that if we take patriotism seriously, then we must take national identity seriously. If we take these two matters seriously, then identifying with non-self nationals (i.e., others in the world community) erodes the spirit of patriotism required by strong national identity to successfully fight the war on terror. In this sense, his article may be seen as a transparent effort to simply invoke national identity and national solidarity as critical symbols of patriotism. Further, it may suggest that more complex versions of the elements of national identity and the grounds for solidarity in specific instances of application *are themselves* forms of concern that fall short of what real nationality requires, what real citizen obligations demand, and what real patriotism means for the citizens of the United States.

Perhaps this is an unfair characterization of what Dinh has sought to do. In effect, one construction of his piece could be that he has sought to provide an academically respectable ideological gloss for the crude appeals to patriotism by his mentors in the current administration. That certainly is a possible perspective. However ineptly, he has raised an important issue of both intellectual concern and public interest. That concern is the question of the challenges to political identity under threat of global terrorism. This seems to be an unexplored vista, and it cannot be said that Dinh's piece takes us very far. However, it is important that the complex and competing systems of identity are discussed in the context of the war against terrorism.

Let us clear the air on one matter; implicit and explicit in Dinh's article is the idea that the current terrorist crowd represents something new on the world scene.²² This is rubbish. Terrorism has been on the political landscape of the modern era, even in the United States, for a very long time. It has not been confined to non-state actors. The melancholy fact is that both state and non-state actors engage in terrorism.²³ Indeed, the Bush Administration maintains that there was enough linkage of the Taliban with al Qaeda to designate Afghanistan a terrorist state.²⁴ Sometimes the line between state-sponsored terrorism and non-state operatives is difficult

22. The title Dinh chose for his article, *Nationalism in the Age of Terror*, communicates his belief that the climate associated with contemporary terrorism is new. In his title, Dinh purposefully employs the definite article, "in the Age of Terror," as opposed to the indefinite article, "in an Age of Terror," by which he ostensibly conveys the notion that September 11 ushered in a new age in the course of human events that is characterized by terrorism. Dinh briefly alludes to the character of the age preceding this new "Age of Terror," which he suggests reflected "world order"; he then indicates that this "world order" may potentially be destroyed by the events of September 11, which inaugurated the current age. See Dinh, *supra* note 2, at 867, 869 (discussing the "exceptional nature of the [terrorism] threat" to the United States following the "September 11 . . . wake up call", the event which "marked a turn . . . [and] threatened the replacement of the world order with an era of disorder"). Dinh even asserts that "the global community is currently navigating uncharted territory." See *id.* at 881.

23. Non-state actors' increasing sophistication is the source of much concern because the future of terrorist attacks will assume a massive scope as these terrorists adopt the use of biological and nuclear weapons of mass destruction (WMD) to their strategy of activated hatred. See generally PHILIP B. HEYMAN, *TERRORISM AND AMERICA* (1998). Contemporary threats to international peace and security following September 11 continue to fuel concerns that these powerful non-state actors may also find refuge behind state protectors, who in turn invoke the principle that sovereignty in international law does not permit intervention into the sovereign domestic jurisdiction of a state. State victims of terrorist acts of aggression are reluctant to concede the principle that they may be attacked without the prospect of legitimate self-defense for real security concerns. After September 11, the Bush administration developed a national security doctrine with important challenges to sovereignty, self-defense, the use of force, and the issue of intervention. See NAT'L SEC. COUNCIL, WHITE HOUSE, *THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA* (Sept. 2002), available at <http://www.whitehouse.gov/nsc/nss.pdf>. On September 17, 2002, President Bush expanded his Administration's approach to the dangers posed by all terrorists, whether state-sponsored or non-state-sponsored and whether with or without access to WMD. See *id.* Specifically, President Bush declared that his "immediate focus will be those terrorist organizations of global reach and any terrorist or state sponsor of terrorism which attempts to gain or use weapons of mass destruction (WMD) or their precursors." *Id.* at 6. See generally Winston P. Nagan & Craig Hammer, *The New Bush National Security Doctrine and the Rule of Law*, 22 BERKELEY J. INT'L L. 375 (2004) (examining historically significant national security doctrines and the legal basis underlying the 2003 American attack on Iraq in order to explore the Bush Administration's international policy determinations).

24. See, e.g., Vice President Richard B. Cheney, Remarks at a Reception for U.S. Senate Candidate Jim Demint (July 23, 2004) (transcript available at <http://www.whitehouse.gov/news/releases/2004/07/20040726-2.html>) ("Because we acted, Afghanistan . . . ha[s] gone from [a] terrorist state[] to [a] free, sovereign nation[] . . ."); *infra* Part IV.A (entitled "The United States' Foreign Policy Partially Facilitated the Creation of the Al Qaeda Terrorist Network").

to establish. It has been said with some force that one person's terrorist is another person's freedom fighter.²⁵ The reality, however, does not diminish the value of this insight. In the United States, there have long been groups that have sponsored terrorism abroad while the United States government turned a blind eye. Irish-American support for the Irish Republican Army (IRA) yielded operations of terrorism that targeted the people of the United Kingdom.²⁶ Lord Mountbatten, a war hero, was a victim of IRA terrorism.²⁷ In truth, the United States' unwillingness to constrain Irish-American support for Irish terrorism has long been a point of discord between the United States and the United Kingdom.²⁸ The United States also supported the terrorist group in Nicaragua called the Contras, whose own acts of terrorism were described by the World Court as acts of aggression.²⁹ The Soviet Union certainly had a terrible record of

25. BRIAN M. JENKINS, *INTERNATIONAL TERRORISM* 3 (1985) (discussing the difficulty of assigning a lasting definition to terrorism, which produced the saying "one man's terrorist is another man's freedom fighter").

26. See JAMES ADAMS, *THE FINANCING OF TERROR* 134-38 (1986). Throughout the 1970s, the IRA was almost entirely dependent on financial donations to support its ongoing terrorist operations; the majority of these donations came directly from Irish-Americans living in the United States. *Id.* at 134-36. To facilitate these donations, an organization was created and based in the United States. *Id.* at 135. Irish Northern Aid contributed more than one half of all the finances used by the IRA each year throughout the early 1970s. *Id.* at 135-36. Irish-Americans also donated weapons to the IRA. *Id.* at 134.

27. Leonard Downie Jr., *IRA Bomb Kills Lord Mountbatten*, WASH. POST, Aug. 28, 1979, at A1.

28. See Valerie Epps, *Abolishing the Political Offence Exception*, in *LEGAL RESPONSES TO INTERNATIONAL TERRORISM* 203 (M. Cherif Bassiouni ed., 1988) (discussing how relations between the United States and the United Kingdom became strained as a result of cases in which the United States refused to grant the United Kingdom's extradition requests for IRA members accused of perpetrating terrorist attacks on British civilians and armed forces, including *In re Requested Extradition of Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984), *In re Requested Extradition of Mackin*, No. 80 Cr. Misc. 1, 1981 U.S. Dist. LEXIS 17746 (S.D.N.Y. Aug. 13, 1981), and *In re McMullen*, Mag. No. 3-78-1099 MG (N.D. Cal. May 11, 1979)).

29. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27). The World Court condemned the United States for its covert paramilitary support of Nicaraguan Contras, in an opinion based on official statements and United States government documents chronicling the United States' involvement with the Contras. *Id.* at 39-44, 146-49. The Court held that the acts of the Contras could not be imputed to the United States. *Id.* at 54. However, the court found that by

training, arming, equipping, financing and supplying the contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, [the United States] has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another State.

Id. at 146.

state-sponsored terrorism in other people's backyards as well.³⁰ Moreover, the United States' ally in the war against terror, Pakistan, was the leading terrorist training ground for the whole of Southeast Asia.³¹ India was the primary victim-state of the Pakistan-sponsored terrorists.³² As we later indicate in this Commentary, the United States was actively involved in supporting, depending on one's point of view, liberation movements or terrorist groups in the Middle East³³ for the purpose of the ideological war against the USSR.³⁴

From a comparative perspective, the problem with Dinh's form of nationalism is that it is short on precisely what values are compatible with a defensible domestic constitutional order and on the placement of that order in a defensible world order. It may be that the major purposes and values embodied in the United Nations Charter itself are among the most important values, which should inform, infuse, and define national identity, sovereignty, and peace within the framework of world order. At the intellectual level, to raise the question of nationality and identity in the context of global terrorism obviously raises a deeper question regarding how systems of identity inform world order and world disorder. This is an important question. If we take a position that in the United States national identity is incompatible with the fundamental values of the larger world

30. See Secretary of State Alexander Haig, A New Direction in U.S. Foreign Policy, Address Before the American Society of Newspaper Editors (Apr. 24, 1981), in DEP'T ST. BULL., June 1981, at 6. The then-Secretary of State charged that "Soviet policy seeks to exploit aspirations for change in order to create conflict justifying the use of force and even invasion. Moscow continues to support terrorism and war by proxy." *Id.* Such support was manifested by Soviet use of chemical weapons in Afghanistan, as well as by Soviet cooperation with Cuba to foment wars in Central America. See John Norton Moore, *Grenada and the International Double Standard*, 78 AM. J. INT'L L. 145, 165-68 (1984). The Soviet Union also financed state sponsors of terrorism, including Algeria and Syria, and it served as a sometime sanctuary for terrorists. See Abraham Abramovsky, *Multilateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft Part III: The Legality and Political Feasibility of a Multilateral Air Security Enforcement Convention*, 14 COLUM. J. TRANSNAT'L L. 451, 464 (1975) (discussing the Soviet position on aircraft hijackings). For an overview of Soviet interventions that tactically employed terrorism, see Nagan & Hammer, *supra* note 23, at 411-12.

31. Pakistan was long home to numerous terrorist training camps that provided Osama bin Laden with various operatives for his al Qaeda terrorist network. See YOSSEF BODANSKY, BIN LADEN 49-51, 94-95 (2001).

32. India has accused Pakistan of waging a proxy war for the Kashmir region, for which Pakistan was sponsoring terrorism by providing militants with terrorist training and allowing them to cross the Line of Control. See SUMIT GANGULY, THE CRISIS IN KASHMIR 15-16 (1997). This permitted the militants to infiltrate the part of Kashmir controlled by India, an act which violated the existing, controlling bilateral treaty. See *id.*

33. The United States also has engaged in similar support for organizations in large parts of Africa, Latin America, and Asia, but the space constraints of this Commentary do not allow for in-depth analyses of these events.

34. See *infra* Part IV.

community and world order, then we are probably caught in the trap of the clash of civilizations: *one group's national identity threatens the other group's survival*. Consequently, to use the popular version of this insight, this amounts to the clash of irreconcilable civilizations, which of course is the view of Samuel Huntington,³⁵ shared as well by Osama bin Laden.³⁶

To better explore this ostensible clash, a few threshold insights into the nature of identity may be merited. Human beings are not born fully conscious of any particular identity. They are born into families. The families themselves maintain complex connecting ties with larger family networks and community structures. The world of identity for any human being revolves around how the essential "I" broadens to include the "we." The "we" may be the family, the local community, the school, the state, the larger federal union, the broader continental framework within which the state is situated, or a still broader possible identification of the "I" with humanity as a whole and with universal solidarity.³⁷ Hence, there is a tension between local and immediate symbols of identity and those of broader, but vague, symbolic importance. A person may be a member of a family, a citizen of Florida, and a national of the United States, and still claim broader protections on the basis of human rights and humanitarianism from the larger community and its responsibilities to the individual. National identity is an important component of the identity of the individual, but of course it competes with other forms of identity reflecting the priority given to morality, ideology, and security. With these

35. See Samuel P. Huntington, *The Clash of Civilizations?*, FOREIGN AFF., Summer 1993, at 22, 22. Huntington advances the notion that emerging in international intercourse is a new structure of international relations, which centers on conflicts between groups from different civilizations, particularly the different value systems held by two of the cultural blocs he identifies: the Western and the Islamic. *Id.* at 29-32. In light of his extensive research on the subject, Huntington has concluded that the wide cultural gap between the West and other blocs, again, particularly the Islamic bloc, is essentially unbridgeable. See Samuel P. Huntington, *The West: Unique, Not Universal*, FOREIGN AFF., Nov./Dec. 1996, at 28, 33-34, 37-39.

36. For an account of how Osama bin Laden effectively shares this viewpoint with regard to his intense hatred for the West, particularly the United States, see generally JOHN CLARK MEAD, *THE NEW WORLD WAR: A BEHIND-THE-SCENES LOOK AT WHY AND HOW MILITANT MUSLIMS PLAN TO DESTROY WESTERN CIVILIZATION* (2002). For a similar analysis in more general terms, see generally ROBIN WRIGHT, *SACRED RAGE: THE WRATH OF MILITANT ISLAM* (2001).

37. For various sociological standpoints on individual and collective identity with regard to family, geography, education, sexual orientation, and other factors, comprising a sense of "I-ness" or "we-ness," see, for example, JOHN R. LOGAN & HARVEY L. MOLOTCH, *URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE* 61-62 (1987); ALBERTO MELUCCI, *NOMADS OF THE PRESENT: SOCIAL MOVEMENTS AND INDIVIDUAL NEEDS IN CONTEMPORARY SOCIETY* 63-69 (John Keane & Paul Mier eds., Temple Univ. Press 1989); RICHARD SENNETT, *THE USES OF DISORDER* 39 (1970); Verta Taylor & Nancy E. Whittier, *Collective Identity in Social Movement Communities: Lesbian Feminist Mobilization*, in *FRONTIERS IN SOCIAL MOVEMENT THEORY* 104, 105 (Aldon D. Morris & Carol McClurg Mueller eds., 1992).

preliminary thoughts, let us review what Dinh has told us about nationalism in "the Age of Terror."

A. Unpacking Professor Dinh's Article

Dinh's article is divided into an introduction and four parts. The Introduction sets out what Dinh believes is the current international climate: what he calls "the Age of Terror," which he suggests began on September 11, 2001.³⁸ Dinh's central premise throughout the article is that "our world," by which we assume he means American civilization—all lawmakers and academics, the workforce and soldiers—was forever changed by the events of that tragic day, which he holds were "unprecedented and unimaginable."³⁹ September 11 was certainly a terrible catastrophe for the United States; yet, it cannot be said that as a victim state, the United States is unique as a target of terror. From a global perspective, the practical problem historically has been the great ideological conflict among hegemonies and the strategic and tactical value of their promoting terrorism in other people's countries. Perhaps this was justifiable in the sense that it managed to avoid a direct conflict with superpowers armed to the teeth with weapons of mass destruction. A nuclear war between the United States and the U.S.S.R. would have been the ultimate act of state terrorism, the result of which would have been the destruction of the planet. In this sense, there are justifications for all the surrogate wars fought in the name of the great ideologies of the late twentieth century. However, we should keep in mind that the states that experienced such surrogate warfare also experienced unprecedented and unimaginable horror. This does not justify taking a sanguine look at the terrorism of September 11; rather, it illustrates the need for a broad approach to the problem of terrorism involving state and non-state actors, where they are constrained by basic rules of international law regarding the use of coercion to achieve political objectives.⁴⁰

Part I of Dinh's article is a brief outline of the evolution of sovereignty in international law.⁴¹ We consider his analysis inadequate, and we refer the reader to our own study of the subject entitled *The Changing Character of Sovereignty in International Law and International Relations*.⁴² In this section, Dinh lays the foundation for the remainder of

38. Dinh, *supra* note 2, at 867.

39. *Id.* at 868.

40. Terrorism is defined in the Code of Federal Regulations as "the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives." 28 C.F.R. § 0.85(l) (2004).

41. Dinh, *supra* note 2, at 870-73.

42. Winston P. Nagan & Craig Hammer, *The Changing Character of Sovereignty in International Law and International Relations*, 42 COLUM. J. TRANSNAT'L L. (forthcoming Nov.

the article by hinting at existing challenges to sovereignty. Specifically, Dinh offers a list of factors that augur “the increasing irrelevance of the sovereign nation-state.”⁴³ This list comingles Dinh’s perceived challenges, such as the international community’s increasing appreciation for international organizations with the existence of weaker failing states, commonly referred to as “terrorist states” by the Bush Administration. The difficulty of making a critique of Dinh’s second factor is his complete unfamiliarity with serious international law. It is not that these insights are wrong, it is that they are produced anecdotally: they have virtually no sense of the context, the challenges, the frameworks within which evolving constitutional orders are developing in the international system, or the threats to that system. Dinh’s invocation of the sovereignty idea appears merely to separate it from the bad guys in the international community who are terrorist groups that, consequently, either subvert or attack the concept and practice of sovereignty.

Part II of Dinh’s article argues that non-state actor terrorist groups should be seen as analogous to an extended version of the outlaw concept of the Wild West.⁴⁴ He points out that terrorists with access to war-making mechanisms who employ them to attack the structures of world order compromise the nation-state’s near monopoly over the use of force. In the specific case of the “war” waged by al Qaeda, this is a direct attack on the sovereignty of the United States.⁴⁵ Because terrorist groups have access to lethal instruments of war-making, they cannot be viewed as ordinary criminals.⁴⁶ It is unclear whether there exists a category that delineates how terrorists should be treated under the law; the implication seems to be that the terrorist group functions outside the concept of community and that accordingly, no restraints can be placed on a sovereign state in the war against terrorism.⁴⁷ This seems to be an indirect way of justifying a kind of suspension of the Bill of Rights, human rights, and humanitarian law in the fight against terrorism.⁴⁸ Dinh gives us a tour of how a terrorist fights

2004).

43. Dinh, *supra* note 2, at 873.

44. *Id.* at 874-75.

45. *Id.* at 875.

46. *Id.*

47. *See id.*

48. This philosophy is reminiscent of official sentiments that emerged during the Cold War regarding what standard of conduct the United States should adopt to counter the Soviet threat. Perhaps, philosophically, it was best reflected in a 1954 intelligence committee report supervised by Lieutenant General James Doolittle, the acclaimed war hero who led the 1942 raid on Tokyo. CALEB CARR, *THE LESSONS OF TERROR* 190 (2002). Specifically, Doolittle wrote that:

It is now clear that we are facing an implacable enemy whose avowed objective is world domination by whatever means and at whatever cost. There are

and of why such fighting falls outside the normative guidelines established by regular criminals who, according to Dinh, operate within the system of acceptable criminality.⁴⁹ Dinh then provides a sense of what he means by the term "terrorist."⁵⁰

Part III of Dinh's article is an appeal to the importance of national pride in the fight against terrorism.⁵¹ This is quite clever. According to Dinh, in being American, every citizen must discover that each has a moral stake in all aspects of the national community's domestic and international activity.⁵² Dinh cites criticisms of the importance of nationalism and acknowledges the validity of dissenting voices, but he suggests that each critic undervalues the sovereign nation-state as part of the architecture of world order.⁵³ This is facile nonsense.⁵⁴ The endangered nation-state is essentially a straw man. Here, the reader really gets a sense of Dinh's distaste for the concept of a global community. What Dinh is really getting at is his own antipathy to the principle that nation-states too are subject to the rule of law and are themselves part of the international constitutional system based on the United Nations Charter. Dinh uses a rhetoric designed to promote patriotism in his target audience. Unfortunately for Dinh, professionals and intellectuals tend to be moved by coherent arguments and restrained language rather than by crass appeals to pride and patriotism. Dinh is essentially endorsing old-fashioned isolationism: antipathy to a concept of an international community and to United States responsibilities within that community. He refers to writers skeptical of international solidarity and responsibility, such as Michael Walzer, who asserts that he is "not . . . aware that there is a world such that one could be a citizen of it,"⁵⁵ and Edmund Burke, who champions the importance

no rules in such a game. Hitherto acceptable norms of human conduct do not apply. If the U.S. is to survive, long-standing American concepts of 'fair play' must be reconsidered. We must develop effective espionage and counterespionage services. We must learn to subvert, sabotage and destroy our enemies by more clever, more sophisticated and more effective methods than those used against us. It may become necessary that the American people will be made acquainted with, understand and support this fundamentally repugnant philosophy.

FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. NO. 94-755, bk. 1, at 9 (1976) (quoting a report related to the 1954 Hoover Commission Report on government organization written by Doolittle).

49. Dinh, *supra* note 2, at 874-75.

50. *Id.*

51. *See id.* at 875-79.

52. *Id.* at 876-77.

53. *Id.* at 877.

54. *See infra* Part III for a critical analysis.

55. Dinh, *supra* note 2, at 877-78 (quoting Michael Walzer, *Spheres of Affection*, in MARTHA C. NUSSBAUM, *FOR LOVE OF COUNTRY?* 125, 125 (Joshua Cohen ed., 2002)).

of localism by “lov[ing] the little platoon.”⁵⁶ It is an interesting invocation of the authority of parochialism in an age when vast global forces have generated a fixation on globalism as a critical condition of world order. He also approves of Michael McConnell’s claim that “[w]e will not love those distant from us more by loving those close to us less.”⁵⁷ Apparently, Dinh believes being a citizen who identifies with humanity as a whole requires a citizenship that effectually rejects national identity and compromises national pride. This is startling nonsense. The normal appeal to patriotism is the exploitation of insecurity in the context of terrorism. Dinh’s article seeks to rhetorically disguise the fear factor and to promote the pride factor: if we have pride in our country, then we shall be proud of the war against terrorism; if we are proud of the war against terrorism, we will of course give unqualified support to the Administration’s agenda, and we shall then qualify as real national patriots.

Dinh completes this part of his article with a slippery line of reasoning, which tenuously ties the goal of international solidarity to statelessness, which he then connects to terror. Essentially, Dinh suggests that the future implications of a global community with universal ideals are as follows: the road to universal cosmopolitanism is paved with good intentions, but to be effective, such cosmopolitanism requires the rejection of national identity, which is tantamount to statelessness; statelessness would break the bond of community and brotherhood among geographically proximate people situated within national boundaries, and it would possibly inspire these individuals to pursue selfish motives; consequently, it follows that some of these “rudderless,”⁵⁸ self-interested people may find the “community of terror”⁵⁹ enticing. We take issue with this line of reasoning. Later in this Commentary, we shall offer an alternative viewpoint, which explains the origins of some of the terrorist forces we are fighting, and that better comports with historical and contemporary evidence.

In Part IV of his article—as an afterthought—Dinh simply presents a checklist of the United States government’s reactions to the war on terror. The information in this section was not part of Dinh’s original Dunwody Lecture and it is vastly removed from his appeal to nationalism and sovereignty as the critical lever against terrorism. In truth, one does not need an invalid form of nationalism or state absolutism to pursue these strategic and tactical measures in combating terror as it now threatens the

56. *Id.* at 878 (quoting EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 39 (Frank M. Turner ed., 2003)).

57. *See id.* (quoting Michael W. McConnell, *Don’t Neglect the Little Platoons*, in NUSSBAUM, *supra* note 55, at 78, 82).

58. *Id.* at 879.

59. *Id.*

United States. Although Professor Dinh has apparently had an opportunity to review the evidence, he regrettably seems—like some of his colleagues—to be immune to the unpleasant world of fact. As Dunwody Lecturer, Dinh had the opportunity to explore deep issues and craft reasonable, constructive conclusions about the threat posed by the current war on terror, but we believe that he did not. He instead reinforced the fictions of crony nationalism.⁶⁰ Thus, in this Commentary we provide a deeper analysis of a major issue in the war on terror—the unintended ways in which states have promoted violence, including terrorism, to achieve short-term political objectives, resulting in a legacy of dangerous actors, brutal institutions, and lasting instability. We hope that an analysis of the roots of this legacy may yield valuable lessons about the threats posed by current forms of terrorism.

*B. The National Security Discourse in the Aftermath of
September 11*

The passage of the USA PATRIOT Act was characterized by speed, haste, and, apparently, a complete lack of an informed national discourse, ostensibly motivated by the notion that crisis required expediency.⁶¹ This expediency compromised thoughtful and critical self-appraisal in light of the most fundamental values of our constitutional and political traditions. Conditions of crises test the nature and quality of our political and legal order. It will doubtless be recalled that during the period of the Cold War, a crisis emerged based on the assertion by politicians like Senator Joseph McCarthy that communist infiltrators were everywhere. At least *that* paranoia there was fed by the fact that the other side was in fact totalitarian and had serious weapons of mass destruction and delivery systems to make those threats real. This does not justify the paranoia, but perhaps the excesses of Senator McCarthy and his cohorts are easier to swallow in light of that context. Nonetheless, the excesses associated with the exploitation of the security environment left deep scars on the nature and quality of American democracy and fundamental principles of decency.

The process revealed many dirty, rotten scoundrels, and it created a climate of suspicion, which came to be linked to the idea of a state under the domination of national security operatives. Of course, we cannot wish national security threats away. These threats are real. But it is also the case that changes in governance and weakening the rule of law do not strengthen the foundations of national identity or democratic political culture—in fact, they weaken it. Therein lies the challenge. We need

60. See *infra* Part III for a more in-depth discussion of crony nationalism.

61. See Palmer, *supra* note 5, at 2533.

national security as much as we need a defensible moral order and a vibrant political culture. It is precisely these values that the terrorist seeks to destroy. We, including Professor Dinh, must therefore resist the temptation of performing according to the terrorist's predilections. It is important to deter and to stop terrorist operations. It is also important to demolish the ideas and the ideologies, however demented, which fuel terrorism. The high moral ground should never be conceded to the terrorist; if that happens, it constitutes a major victory for the forces of terrorism and darkness.

Professor Dinh rhetorically seeks to exhort his target audience to uncritically rally to the banner of his so-called "pride" and so-called "patriotism."⁶² As we have indicated, we need carefully to consider how deeply rooted the indices of pride and patriotism are in the American Revolution, the foundations of the American Constitution, and the historical experience of America as a leading force of enlightenment in the world community. We shall focus on a series of important events underlying the existing war on terror from an analytical standpoint and offer insight into how policymakers dealing with the threat might better approach its rectification.

III. CRONY NATIONALISM IS NOT THE BEST DEFENSE AGAINST TERRORISM

We have borrowed the phrase "crony" from the claims of those who believe that concerns about American capitalism are really concerns about crony capitalism,⁶³ which is not good for the economy. Similarly, it may be that the crony patriotism, and therefore the crony nationalism, that Professor Dinh seems to promote and defend is likely to lead us to a dead-end in the war against terrorism. The issues are deeper, more complex, and more challenging than he is able to present. We suggest that the specific issue of identity includes the issues of nationalism and patriotism, but more importantly, it also requires a deeper appreciation of the moral, historical, and pragmatic indicators that should infuse these ideas as critical to the war against terrorism. More than that, the war against terrorism is also a war of ideas, ideologies, and moral precepts, and these too are components of the systems of identity that inform those who seek to destroy terrorism as well as those who, however covertly, seek to

62. See, e.g., Dinh, *supra* note 2, at 876-77.

63. "Crony capitalism" is the phrase used to describe public-sector regulatory authorities' tendency to render assistance to their friends in the private sector. See John Plender, *Western Crony Capitalism*, FIN. TIMES (London), Oct. 3, 1998, at 10 (criticizing the relationship between such officials and their private-sector comrades). See generally BRUCE COGGINS, DOES FINANCIAL DEREGULATION WORK? 11-30 (1998) (critiquing the economic views of deregulation proponents).

promote and defend it. Dinh does not take us very far into this analysis. There are important concerns lurking in the interstices of his internal perspective that must be more carefully assayed.

In Part III of his article, Dinh condenses his perspective on the importance of nationalism—both his view of its general worth as well as its nature as *the* tool to fight terrorism—in the following sentences: “[L]oving our country . . . allows us . . . to love others more. . . . Loyalty to our nation . . . fosters a commitment to universal principles. [But with regard to establishing a “worldwide community of human beings,”⁶⁴] [i]t is not at all evident that rejection of national identity would foster global brotherhood”⁶⁵ It is important to note that we agree with part of Dinh’s argument—that local commonality and harmony helps to facilitate global commonality and harmony—but his claim that true international solidarity is essentially impossible is problematic. The overarching problem with the whole argument is that Dinh does not develop it; he urges the reader to love one’s country, which might lead to a more extensive kind of love, but there he ends the argument. Dinh does not complete the thought, which intuitively places importance on loving others. Instead, he truncates the thought and offers a fragment to the reader, implying that this is a complete argument. Let us examine this more carefully.

Dinh’s argument in Part III of his article rests on the dubious assumption that being a citizen nationalist and being a citizen of the world are mutually exclusive. If Dinh implies that nationalism is an important symbol of identity capable of being developed from more parochial foundations, then implicit in broadening the foundations of an individual political identity is the idea that nationalism is an important symbol for expansion. If political identity may be similarly expanded, it can certainly be expanded to become more inclusive so that the self includes the idea of identification with mankind as a whole. However, he asserts that he is “not sure that the destination justifies the journey,”⁶⁶ which intimates his belief that the eventual achievement of global solidarity is either impossible or not worth the effort to even try to bring it about. Dinh never considers that it might be possible to be a citizen of the world without rejecting national identity. Instead, a citizen of the world can adopt priorities that transcend national boundaries in order to achieve transnational harmony, which is arguably reconcilable with the concept of nationalism.⁶⁷ Indeed, Dinh

64. Martha C. Nussbaum, *Patriotism and Cosmopolitanism*, in NUSSBAUM, *supra* note 55, at 1, 4-5. Dinh also quotes Nussbaum’s phrase. Dinh, *supra* note 2, at 877.

65. Dinh, *supra* note 2, at 879.

66. *Id.* at 879.

67. See, e.g., Kwame Anthony Appiah, *Cosmopolitan Patriots*, 23 CRITICAL INQUIRY 617, 618 (1997) (reconciling cosmopolitanism with nationalist patriotism). For a fascinating

suggests that the best way to work toward international harmony is to work within the construct of the nation-state system.

The problem with Dinh's analysis is that he has not begun to understand the full range of participants within the international community, much less the importance of these actors for either enhancing or depreciating global security. The central problem with the nation-state is the problem of limiting absolute sovereignty and enhancing the principle of cooperative sovereignty within the framework of the United Nations Charter and international responsibility. This has nothing to do with either parochialism or globalism. It is concerned with how local matters may be functionally and practically decided and managed locally, and how global matters, which affect all, may be handled cooperatively and intelligently through bilateral, multilateral, and other forms of cooperation. The dynamic of global public order yields refinement techniques regarding the importance of locating public order decisions at the appropriate level of actual decisionmaking. Loose abstractions are no substitute for concrete analysis.

Dinh overuses the term cosmopolitanism; his antipathy to it smacks of a return to a crude form of nativism. Today, liberal theory addresses the complexity of reconciling nationalism with more inclusive systems of identity, and part of this complexity is the implicit difference between globalization and internationalization. Globalization is the overarching process of denationalizing political, economic, and social regimes.⁶⁸ Dinh

reconciliation of the perceived liberal universalism underlying global cosmopolitanism and the supposedly contrary disconnectedness associated with nationalistic proclivities, see generally Yael Tamir, *LIBERAL NATIONALISM* (1993).

68. Martha Nussbaum evidently subscribes to globalization-oriented cosmopolitanism, which is likely why Dinh cites to several assertions of hers. See Nussbaum, *supra* note 64, at 4. Nussbaum's account of the cosmopolitan viewpoint seeks to displace the focus of civic education from national citizenship to world citizenship. *Id.* at 6. Her understanding of the cosmopolitan model of citizenship appeals to scholars and other debate participants who believe that the best way to achieve universal moral norms is to draw all human beings into a single broad community. Her essay, *Patriotism and Cosmopolitanism*, encapsulates this moral philosophy, which she apparently realizes is not well grounded in the contemporary reality of international law and international relations. See *id.* at 15-17. This explains why, time and again, her work reads like a catalog of suggestions for future generations as to how global solidarity might eventually be achieved. For example, she advises that nation-states should eventually establish a series of international institutions, including, among various other proposals:

a world criminal court . . . to deal with grave human-rights violations; a set of world environmental regulations, with enforcement mechanisms, plus a tax on the industrial nations of the North to support the development of pollution controls in the South; a set of global trade regulations . . . ; a set of global labor standards . . . [; and] forms of global taxation [to transfer] wealth from richer to poorer nations.

fears the challenge of such inclusive systems of identity. Conversely, internationalization refers to cooperative activities of public and/or private national actors on a level beyond the nation-state, and at times under its control.⁶⁹ Dinh does not refer to this approach at all. Internationalization is also a stop-gap toward more comprehensive understanding of international relations, but it presently functions as an ideology that promotes the value of the nation-state, while fostering international solidarity valued by the international law scholars who support cooperative sovereignty.

Thus, it is possible to be a citizen of the United States and a citizen of the world community. Moreover, this understanding may be crucial in assisting humanity to work toward larger peace and solidarity efforts than ever before, such that national identity may eventually be a starting point to a more comprehensive idea of what citizenship truly means. Given enough timeline, this realization may eventually inspire individuals to continue to unify until being a citizen of the world might be realizable in a literal sense. The character of citizenship is indeed changing; we shall momentarily address the extent to which this change is under way. We must note that we are not suggesting that establishing a global democracy, à la Martha Nussbaum's professed dream,⁷⁰ is even remotely possible at this stage of human development, despite the evolving nature of citizenship. However, we regard Dinh's apparent attempt to undermine global solidarity as counterproductive and in ideological opposition to the very scholars to whom he cites in Part III of his article.

*A. Re-reading Part III of Dinh's Article: A Closer Look at
His Portrayal of Nationalism*

Employing the concept of nationalism to advance an argument—or, in other words, creating a nationalistic movement—has long been a wise political strategy to garner support for a course of action, but only if it is

Martha C. Nussbaum, *Beyond the Social Contract: Capabilities and Global Justice*, An Olaf Palme Lecture Delivered in Oxford 32 (June 19, 2003) (transcript available at http://islandia.law.yale.edu/hathaway/files/Tanner_2ROK.doc) [hereinafter Nussbaum, *Beyond the Social Contract*].

69. For an eloquent take on how this school of thought is practically applied, see Harold Hongju Koh, *Transnational Legal Process After September 11th*, 22 *BERKELEY J. INT'L L.* 337, 339-44 (2004) (explaining how "transnational legal process" triggers state interpretation of domestic law in accordance with global standards, the result of which is that these states internalize global standards into their domestic law).

70. While Dinh believes that Nussbaum "does not necessarily advocate for [a world state]," Dinh, *supra* note 2, at 878, we believe that given her extensive writings on the subject of global solidarity, it is rather clear that she does. See Nussbaum, *supra* note 64, at 4-5; *Beyond the Social Contract*, *supra* note 68.

done correctly.⁷¹ Generally, the movement that can point to genuine injustice and demonstrate that nationalistic action is a valid response can run the gauntlet of heavy scrutiny and emerge with its validity intact. However, if the merits of such a nationalistic movement are vaguely asserted, the nature of the movement tends toward illegitimacy (even if the reasons are valid), for if the underlying claim cannot be sustained, the movement is rendered invalid. Dinh posits that nationalism is the path the United States must take to overcome the terrorist threat. Unfortunately, Dinh does not do justice to the concept of nationalism in his analysis because his arguments champion illegitimate or crony nationalism.

To give substance to his argument that nationalism is the best weapon in the war on terror, Dinh seeks to establish the importance of his perception of nationalism. To do so, in Part III of his article, Dinh draws from the work of a series of scholars, including Ernest Renan, Wilfred McClay, Michael Walzer, Edmund Burke, Michael McConnell, and Walter Berns.⁷² Dinh portrays these scholars' arguments in an almost exclusively crony nationalistic way; in other words, the crux of Dinh's argument is that these scholars' writings show that nationalism is far more utilitarian than any form of international cooperation. In re-reading the works of these scholars, we find implications inclined more toward international cooperation than Dinh would apparently have his audience believe. Let us briefly examine these implications.

71. Arguments concerning the importance of nationalism with regard to various specific movements abound, as do philosophies purporting to decipher its complexities and their connection to such movements. See generally Avishai Margalit & Joseph Raz, *National Self-Determination*, 87 J. PHIL. 439 (1990) (discussing the moral justification for nationalism); Yael Tamir, *The Right to National Self-Determination*, 58 SOC. RES. 565 (1991) (arguing for a cultural interpretation of the right to national self-determination). Many of these arguments harmonize with regard to the recognition that culture is the central characteristic of nationhood, a concept that authors of various nationalistic movements, like Dinh, attempt to develop. See Tamir, *supra*, at 586-87. Tamir identifies six fundamental assumptions that tie cultural identity to the concepts of nationalism and self-determination: 1) the connection to a cultural group is a necessary human interest; 2) the interest in such a connection is significant and intense; 3) the ability to express such an interest in public as well as in private is essential; 4) public space to experience this interest is necessary; 5) the ability to regard one's community as an expression of one's national identity is essential; and 6) national self-determination necessitates political independence. *Id.* For an additional excellent analysis of the evolution of the concept of nationalism, see generally BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (rev. ed. 1991); E.J. HOBBSBAWM, *NATIONS AND NATIONALISM SINCE 1780* (1992). See also JOHN BREUILLY, *NATIONALISM AND THE STATE* (2d ed. 1993) (providing a systematic description of nationalism as a form of politics).

72. See Dinh, *supra* note 2, at 876-79.

Dinh portrays Renan's renowned essay, "What is a Nation,"⁷³ as a crony nationalist account. Renan's essay is useful to this discourse, and Dinh wisely draws attention to it, because of its forward-thinking arguments. Dinh suggests that Renan's essay finds national identity at the root of the concept of community,⁷⁴ yet we read it differently. Dinh's reading proclaims that national boundaries are the thread that holds together the fabric of global society,⁷⁵ while we see that Renan may actually mean that common values and human nature bind individuals to each other. By removing the concept from the nineteenth-century context in which it was written⁷⁶ and giving it a modern reading, we believe it is possible to cross-apply Renan's analysis to arguments that are global in scope. One of the most important and oft-quoted concepts in Renan's essay is this: "the essence of a nation is that all individuals have many things in common, and also that they have forgotten many things."⁷⁷ In other words, the core characteristics of what Renan designated "a nation" are: 1) his perception that a group of individuals with common values comprises a nation; and 2) that these individuals have "forgotten many things," by which Renan suggests that all peoples of "a nation" are subject to the same imperfections—a defining attribute of humanity. Now, armed with the recognition of global values to which the vast majority of the world now subscribes—international pacts, United Nations General Assembly resolutions and declarations, and World Court judgments—as well as the recognition that all human beings are subject to the same flaws, we find it possible to re-evaluate Renan's meaning by replacing the phrase "a nation" with "the global community." The variables in the equation are the same; yet, in light of the progress made by humanity since Renan's time, we now understand that when computed, they yield a different product.

Wilfred McClay's pro-nationalistic statement regarding the importance of absolute loyalty to one's nation⁷⁸ is as passionate a statement as Stephen

73. Ernest Renan, *What is a Nation?*, Lecture Delivered at the Sorbonne (Mar. 11, 1882), in *NATION AND NARRATION* 8 (Homi K. Bhabha ed. & Martin Thom trans., 1990).

74. Dinh, *supra* note 2, at 876.

75. *Id.*

76. Indeed, Renan's essay also suffers from some dated thinking, which must be excised from its still-useful portions so that an application of Renan's rationale to contemporary world events might retain its viability. For example, it is difficult to reconcile Renan's observations about the usefulness of brutality in shaping utilitarian political associations. Specifically, Renan wrote that "historical enquiry brings to light deeds of violence which took place at the origin of all political formations . . . [because] [u]nity is always effected by means of brutality." Renan, *supra* note 73, at 11. The passage of time and the peaceful establishment of governments, such as in South Africa, the Czech Republic, and Romania, have rendered this and similar arguments moot.

77. *Id.*

78. Dinh, *supra* note 2, at 877 ("For patriotism, . . . like any love, withers and dies if it is not

Decatur's.⁷⁹ However, Dinh failed to mention that McClay generally recognized the inherent danger of absolute adherence to jingoistic conceptions and advocated what might be called a thinking allegiance. McClay wrote of the concern had by left-leaning intellectuals, inspired by World War II, that mass societies possess the dangerous capability of engaging in unthinking allegiance to the state. Specifically, in *The Masterless: Self and Society in Modern America*, McClay wrote that "mass society [has] a dangerous social potential for unparalleled forms of domination, as Hitler had just made vivid by his success in imposing his authority upon the German populace."⁸⁰ McClay seemingly suggests that such unthinking allegiance is unacceptable in any form, which may be interpreted to mean that while dedication to one's nation is certainly essential in general, mass societies ought not to give instinctive assent, or acquiescence, to their national government under some circumstances. Dinh apparently rejects this scheme because it does not comport with his conception of necessary patriotism, a core tenet of his crony nationalism. Thus, we agree with Dinh that allegiance to one's nation-state is, by and large, necessarily reflexive; but we differ from him in that we believe this allegiance is premised on the nature of the nation-state's position in the international community, which Dinh does not address.

Dinh mentions Michael Walzer's critique of cosmopolitanism,⁸¹ which is not as pointed as Dinh apparently would have his target audience believe. Walzer seems to suggest that loving one's fellow local citizens is a starting point toward the greater imperative of global solidarity, as opposed to being the alpha and omega of citizenship.⁸² While Walzer certainly has obvious distaste for the phrase "citizen of the world," he nevertheless recognizes the overarching necessity of being part of the global community.⁸³ Walzer does justice to the concept of legitimate nationalism, which he regards as important because "we begin by understanding what it means to have fellow citizens and neighbors; without that understanding we are morally lost. Then we extend the sense of moral fellowship and neighborliness to new groups of people, and

accorded some degree of instinctive assent." (quoting Wilfred M. McClay, *America—Idea or Nation?*, PUB. INT., Fall 2001, at 44, 53)).

79. Dinh, *supra* note 22, at 876 ("Our country! In her intercourse with foreign nations, may she always be in the right; but our country, right or wrong." (quoting Commodore Stephen Decatur, Toast at a Dinner in Norfolk, Virginia (Apr. 1816), in ALEXANDER SLIDELL MACKENZIE, LIFE OF STEPHEN DECATUR 295, 295 (1848))).

80. WILFRED M. MCCLAY, *THE MASTERLESS: SELF AND SOCIETY IN MODERN AMERICA* 219 (1994).

81. Dinh, *supra* note 2, at 877-78 (citing Walzer, *supra* note 55, at 125).

82. See Walzer, *supra* note 55, at 125-27.

83. See *id.*

ultimately to all people.”⁸⁴ Dinh’s analysis of Walzer’s acerbic quote that he is “not even aware that there is a world such that one could be a citizen of it”⁸⁵ cuts short the apparent meaning of Walzer’s piece as a whole: despite the grammatical failings of the phrase “citizen of the world,” the underlying unity it suggests, which is prized by advocates of international cooperation, should be the goal of every individual in every nation on Earth. Thus, Dinh is correct that nationalism is important, but in the grand scheme of human relations, he appears to have ignored Walzer’s point that it is a means to an ultimate goal: the unification of all individuals.

Dinh similarly invokes Edmund Burke’s “little platoon” arguments to shore up his own contention that “much as we like to think globally, we love locally.”⁸⁶ Dinh’s analysis of Burke’s argument is partly correct, but incomplete. Dinh focuses his audience’s attention on the first part of the Burke quote, which advises individuals to “love the little platoon.”⁸⁷ This portion of the quote exhorts individuals to devote their allegiance to their immediate neighbors and government, and Dinh strives to keep his audience’s attention there. However, his audience’s attention should also be focused on the last part of the Burke quote, which suggests that loving the little platoon “is the first link in the series by which we proceed toward a love to our country and to mankind.”⁸⁸ Dinh manipulates this section to support his own contention that it is most important to pledge one’s allegiance to what is local, from which the incidental effect of respecting what is global might additionally be derived. However, what Burke evidently meant was for his “little platoon” analogy to delineate steps in a process; loving the little platoon is only the first step toward the ultimate good, which is to “proceed toward a love to our country and [then proceed toward a love] to mankind.”⁸⁹ Dinh was correct that loving what is local is important, but Burke stressed that even more important is to “proceed” or graduate to the next step, leaving the previous step behind. To Burke, this process culminates with love for mankind, a goal that advocates of international cooperation have long worked to achieve.

To best discuss Dinh’s use of Michael McConnell’s analysis of Burke’s “little platoons,” we must first briefly introduce the traditional way in which individual relationships are academically understood. Famed sociologist Ferdinand Tönnies differentiated individuals linked by kinship ties, racial connections, or religious associations, from individuals that

84. *Id.* at 126.

85. Dinh, *supra* note 2, at 877-78 (quoting Walzer, *supra* note 55, at 125).

86. *See id.* at 877-78 (quoting BURKE, *supra* note 56, at 39).

87. *See id.* (quoting BURKE, *supra* note 56, at 39).

88. BURKE, *supra* note 56, at 39; *see* McConnell, *supra* note 57, at 79 (suggesting that Edmund Burke did not consider patriotism and cosmopolitanism to be at odds).

89. *See* BURKE, *supra* note 56, at 39.

form relations for popular, functional, mercantile, or political benefit.⁹⁰ Tönnies articulated this difference using the concepts of *Gemeinschaft* (community) and *Gesellschaft* (society).⁹¹ The *Gemeinschaft* is comprised of sanguinal or organic relationships, while contractual or artificial relationships comprise the *Gesellschaft*.⁹² Tönnies's categorization did not expound on any link between these two categorizations.

Michael McConnell, on the other hand, advances the communitarian position, which holds that a discernable connection exists between personal associations and local associations.⁹³ In other words, a continuum exists with, for example, kinship ties (personal associations) on one end and nation-state identification (distant associations) on the other.⁹⁴ Because this continuum is essentially a series of concentric circles, events that affect the more immediate personal circles radiate out and affect distant circles. Indeed, communitarians are obligated not only to focus their attention on the innermost circles, but also to work their way outward to the outermost circles.⁹⁵ McConnell believes that despite the connection he recognizes, cosmopolitanism is still problematic and, like Dinh, he argues that the best way to promote concern for distant individuals is first to foster affection for local individuals.⁹⁶ We believe that based on the nature of the connection as it is articulated by McConnell, it is possible to view it broadly so that it can encompass a national, societal, and perhaps even a global scope. Thus, simply by broadening McConnell's understanding of what comprises a distant association, his model functions as an accurate reflection of the international climate.

Presumably, Dinh cites to Walter Berns's book, *Making Patriots*,⁹⁷ because the entire book is an argument that patriotism is in itself of key importance, as opposed to being important as a means to a greater end.⁹⁸ The greater end is, as Dinh perhaps unintentionally put it, "lov[ing] others more."⁹⁹ Berns's book is excellent reading, for it chronicles the history of patriotism, from Rousseau and Locke's deliberations on how a social order powered by commercial interests might be sustained, to the contemporary importance of patriotism in uncertain moral times.¹⁰⁰ Berns's examination

90. FERDINAND TÖNNIES, *COMMUNITY & SOCIETY* 33-34 (Charles P. Loomis ed. & trans., Harper & Row 1963).

91. *Id.* at 33.

92. *Id.*

93. McConnell, *supra* note 57, at 79-80.

94. *Id.*

95. *See id.*

96. *See id.* at 79.

97. Dinh, *supra* note 2, at 878-79 (citing WALTER BERNs, *MAKING PATRIOTS* 50 (2001)).

98. *See generally* BERNs, *supra* note 97.

99. *See* Dinh, *supra* note 2, at 878-79.

100. *See generally* BERNs, *supra* note 97.

of how value-driven concepts like liberty and natural rights inspire such allegiance among citizens of the United States¹⁰¹ serves as a useful reminder to his readers to be grateful for the freedoms we Americans enjoy because of the policies of so many scholars and because of the sacrifices of so many soldiers. If Dinh correctly interpreted Berns's thoughtful examination of American patriotism to show that Americans should unite to defend their national identity rather than more universal principles, then Berns's analysis suffers from the same shortcomings as Dinh's. However, we interpret Berns's message differently than Dinh does. We see that Berns offers an insightful analysis of how legitimate patriotism—not crony patriotism—has historically functioned as a secular mechanism to bring together a country full of disparate immigrants.¹⁰² It is possible to read Berns's book as laudatory not only of the United States, but also of the process of bringing together diverse groups of people, which is the aim of individuals advocating international cooperation.

B. *Reflections on the Changing Character of Citizenship*

Dinh's understanding of citizenship is the traditional view that it involves "a notion of stateness."¹⁰³ However, this perspective is slowly being outmoded as a debate emerges regarding how the concept of citizenship might better be understood. While scholars and other intellectuals possess divergent views on the subject, a non-traditional view of citizenship is gradually gaining prominence. This new perspective disputes the idea that citizenship is inextricably linked to "stateness," and it holds that the concept of citizenship is progressively taking on a non-national character.¹⁰⁴ This changing character of citizenship is rooted in the identifiable shift in current events away from purely domestic phenomena toward happenings that affect nation-states but exceed traditionally imposed nation-state boundaries. In other words, international events and increasing multilateralism have had the effect of slowly shifting citizens' identification away from the nation-state. Indeed, the slow evolution of the concept of citizenship is ongoing; citizenship is "no longer unequivocally anchored in national political collectivities."¹⁰⁵

Among the many scholars who have explored the changing character of citizenship, international law scholar Thomas Franck lays out an excellent conceptual framework. He argues that the steadily increasing

101. See, e.g., *id.* at 23-46 (discussing how freedom of religion contributes to patriotism).

102. See *id.*

103. ANTJE WIENER, 'EUROPEAN' CITIZENSHIP PRACTICE 27 (1998).

104. See Yasemin Nohuğlu Soysal, *Changing Parameters of Citizenship and Claims-Making: Organized Islam in European Public Spheres*, 26 THEORY & SOC'Y 509, 512 (1997).

105. *Id.*

intensity and ubiquitousness of transnational communication have created a new international environment of personal and professional connectedness.¹⁰⁶ Specifically, Franck asserts that “[d]ramatically multiplied transnational contacts at all levels of society have not only resulted in a greater awareness of the global context, but also have created new commonalities of identity that cut across national borders and challenge governments at the level of individual loyalties.”¹⁰⁷ He believes that what is slowly transpiring is “a global system characterized by overlapping communities and multivariegated personal loyalties yielding more complex personal identities.”¹⁰⁸

International law scholar Richard Falk has also written extensively on the subject.¹⁰⁹ Falk builds on Franck’s framework in his investigation of the gradual integration of individuals all over the world for a variety of reasons and has identified various alliances as examples of “global citizenship.”¹¹⁰ His characterization of this phenomenon is both positive and negative, depending on the context of the unification. For example, he regards the forward-looking phenomenon of international activism, which he argues has taken on a non-national character,¹¹¹ as a positive form of “global citizenship.”¹¹² On the other hand, he regards with disdain the unification of individuals around the world for business and economic gain, although he also regards this group as one citizenry. He asserts that this group amounts to a fiscal citizenry because it “shares interests and experiences . . . [and because members] have more in common [with each other] than [they do] with the more rooted, ethnically distinct members of [their] own particular civil society.”¹¹³ His aversion to this form of global citizenship is blatant when he discusses its damaging effect: “[T]he result [of this manner of global citizenship] seems to be a . . . global elite that is . . . virtually without any sense of global civic responsibility.”¹¹⁴

For better or for worse, the international climate of citizenship is certainly changing,¹¹⁵ and though Dinh seems to recognize it, the tone of

106. See Thomas M. Franck, *Community Based on Autonomy*, 36 COLUM. J. TRANSNAT’L L. 41, 43 (1997).

107. *Id.*

108. See *id.* at 63.

109. See generally Richard Falk, *The Making of Global Citizenship*, in GLOBAL VISIONS 39 (Jeremy Brecher et al. eds., 1993) (discussing the forms of global citizenship).

110. *Id.* at 40-48 (generally referring to associations of individuals from various geographic locations as a “global citizenship”).

111. *Id.* at 47-48 (referring to the transnational association of activists as one citizenry).

112. *Id.*

113. *Id.* at 44.

114. *Id.*

115. It is important to note that although citizenship is a juridical bond between the individual and the state, the current international system makes a powerful claim that the individual is the

his article suggests that he would rather ignore it. While the emphasis Dinh and other scholars place on nationalist citizenship is presently not in danger of being wholly shifted to an international regime, Dinh must nevertheless come to grips with the reality of the gradually changing character of citizenship. Generally referring to this emerging context, Warren Magnusson wrote that the cosmopolitan outlook "decenters the state as the object of political analysis, [however] it does not ignore the state or pretend that it is about to wither away."¹¹⁶ Yet, according to Robin Cohen, it is far too late to "return the genie of social identity [exclusively] to the bottle of the territorial nation-state."¹¹⁷ In short, to complete the concept cut short by Dinh, the nature of citizenship is changing so that while loving one's country is vitally important to the betterment of one's immediate and national environment, it is not the most important kind of love; the betterment of the international environment to benefit all peoples is most important. Indeed, not loving others, but *loving all* is the ultimate goal.

IV. UNITED STATES FOREIGN POLICY AND GLOBAL TERRORISM

It is easy to refer to the catalog of guiding principles underlying the actions taken by the United States government abroad, be they initiated by Congress in accordance with the Constitution or by the Executive Branch in other circumstances, as American foreign policy. This is true both when those principles are used to advance the United States' national interests, including independence, economic well-being, territorial integrity, and national security considerations, and when the principles are ostensibly used to comply with the self-appointed affirmative obligation assumed by the United States to better the international climate when such action is either required or convenient. When discussing American foreign policy, it is almost always necessary to refer to it in non-specific, typically emotional terminology because of the sheer amount of information the phrase conveys.¹¹⁸ It is difficult to encapsulate the exact nature of the many

bearer of duties based on the concept of international human rights. While this is not necessarily the same as citizenship, the fact that it confers rights and obligations on the individual from the international community as a whole promotes the idea of an emergent form of citizenship, which identifies the individual with the global community.

116. WARREN MAGNUSSON, *THE SEARCH FOR POLITICAL SPACE* 281 (1996).

117. Robin Cohen, *Diasporas and the Nation-State: From Victims to Challengers*, 72 INT'L AFF. 507, 520 (1996).

118. In 1953, former Secretary of State Dean Acheson declared that "the purpose of our foreign policy is to maintain and foster an environment in which our national life and individual freedom can survive and prosper." DEAN ACHESON, *THIS VAST EXTERNAL REALM* 19 (1973); see President John F. Kennedy's Address in Salt Lake City at the Mormon Tabernacle, 1 PUB. PAPERS 733, 736 (Sept. 26, 1963) ("[T]he purpose of foreign policy is not to provide an outlet for our own

strategies and interests that compete for primacy within this very general categorization, and we do not seek to do so in this Commentary. Rather, we seek to identify three of the United States government's most significant foreign policy undertakings that have negatively affected United States national security. We do not seek to attribute fault, for these policy undertakings resulted in "blowback"¹¹⁹ in Democratic and Republican administrations alike, and the problems inherent in these policies transcend partisan and petty differences. Rather, our purpose is to learn; we believe that only by exploring these policies may we come to understand how, in the language of the CIA, some interventions simply "blew back" and, thus, how to craft a more constructive foreign policy in the future.

Officially, the United States has long been opposed to international terrorism.¹²⁰ That is the official myth. Everyone officially opposes terrorism. The operational reality has been different. Covertly, the superpowers confronted each other through surrogates as each tested the other's willingness to defend its own spheres of influence, including security influence, around the globe. This meant collaborating with questionable groups. Because these groups were questionable, the operations typically were covert. Unfortunately, such covert interventions had unanticipated or unpredictable long-term effects, some of which were detrimental to the United States' national interests. The United States' foreign policy has from time to time indirectly been implicated in the problems of terrorism. For example, the United States supported Jonas Savimbi, the guerilla leader from Angola.¹²¹ From the point of view of most Angolans and other Africans, Savimbi was an opportunistic terrorist.¹²² In the context of Nicaragua, the United States supported the so-called Contra national liberation group.¹²³ To most Nicaraguans, the

sentiments of hope or indignation; it is to shape real events in a real world.""); GEORGE F. KENNAN, *The Two Planes of International Reality*, in REALITIES OF AMERICAN FOREIGN POLICY 3, 4 (1954) ("[A] political society . . . conducts foreign policy in order to live."). Other scholars have attempted to encapsulate American foreign policy into easy-to-digest rules for the Executive. For example, Professor Theodore Lowi offers that Executive exercise of American foreign policy powers ought to evince "secrecy, unilateral action, energy, commitment, [and] decisiveness," owing to the breakneck pace of international relations. Theodore J. Lowi, *Presidential Power and the Ideological Struggle over Its Interpretation*, in THE CONSTITUTION AND THE AMERICAN PRESIDENCY 227, 238-39 (Martin L. Fausold & Alan Shank eds., 1991).

119. See Thomas Henriksen, *The "Blowback" Myth*, WKLY. STANDARD, Oct. 15, 2001, at 25.

120. See Fred Hiatt, *Our Rose-Colored Cold War*, WASH. POST, Mar. 25, 2002, at A19 (remarking on the gradual convergence between the foreign policy ambitions of the United States' current anti-terror policy and the United States' long-term Cold War-era anti-terror policies).

121. Jon Jeter, *Angolan Rebels' Hit-and-Run Strategy*, WASH. POST, Nov. 20, 2001, at A16.

122. See Ian Fisher et al., *Chaos in Congo*, N.Y. TIMES, Feb. 6, 2000, § 1, at 1.

123. See *Atrocities Reported in Contra Raids*, CHI. TRIB., Sept. 26, 1987, at C2.

Contras were nothing but a terrorist, thug-like operation.¹²⁴ In light of the current terrorist crisis, which has its roots in United States-Middle East policy, we carefully examine several situations in which the expedience of United States policy has resulted in enhanced threats to the United States. In short, levels of intervention designed to enhance the security of the United States seem in the long term to actually have made the United States more vulnerable. We examine three specific situations: Afghanistan, Iran, and Iraq.¹²⁵

*A. The United States' Foreign Policy Partially Facilitated the
Creation of the Al Qaeda Terrorist Network*

In late December 1979, the Soviet Union unlawfully invaded Afghanistan to support Afghanistan's failing communist government.¹²⁶

124. Among other examples of such questionable foreign policy undertakings, we first considered the United States' dealings with CIA-paid Panamanian General Manuel Noriega, such as his collaboration with General Oliver North, which lasted until he lost the United States' support and was consequently removed from power, taken prisoner, tried, and convicted in a Miami court on charges of drug trafficking. *See* *United States v. Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990) (upholding the court's jurisdiction to hear the charges against Noriega), *aff'd*, 117 F.3d 1206 (11th Cir. 1997) (upholding both the lower court's finding that it had jurisdiction and Noriega's conviction for drug trafficking). *See generally* STEVE ALBERT, *THE CASE AGAINST THE GENERAL* (1993) (recounting the American trial of Noriega); Louis Henkin, *The Invasion of Panama Under International Law: A Gross Violation*, 29 COLUM. J. TRANSNAT'L L. 293 (1991) (arguing that the United States' invasion of Panama, which resulted in the arrest of Manuel Noriega, violated international law). A second such undertaking was the United States' support of Contras to overthrow the Sandanista government in Nicaragua. *See generally* DAVID NOLAN, *THE IDEOLOGY OF THE SANDINISTAS AND THE NICARAGUAN REVOLUTION* (1984) (describing the events leading up to and following the Nicaraguan Revolution); U.S. DEP'T OF STATE, *SANDINISTA ELECTIONS IN NICARAGUA* (1984) (discussing the background to the 1984 Nicaraguan elections); Arturo J. Cruz, *Nicaragua's Imperiled Revolution*, 61 FOREIGN AFF. 1031 (1982-83) (lamenting the loss of democratic ideals in the Sandanista government). The third undertaking we considered was CIA involvement in the 1973 overthrow of the Allende government in Chile, after which General Augusto Pinochet assumed power. *See generally* PAMELA CONSTABLE & ARTURO VALENZUELA, *A NATION OF ENEMIES: CHILE UNDER PINOCHET* (1991) (providing a study of Chilean society under Pinochet's military rule); POUL JENSEN, *THE GAROTTE: THE UNITED STATES AND CHILE, 1970-1973* (1989) (describing how the United States contributed to the end of the Popular Unity Government in Chile); EDY KAUFMAN, *CRISIS IN ALLENDE'S CHILE* (1988) (studying Salvador Allende's United Popular government in Chile); LOIS HECHT OPPENHEIM, *POLITICS IN CHILE* (2d ed. 1999) (explaining the political history of today's Chile, focusing on the Allende and Pinochet years).

125. We chose these three foreign policy undertakings in light of the connections they manifest to the continuing terrorist threat as discussed by Dinh. Had more space been available, we would have pointed out other such unsuccessful undertakings in other contexts. *See supra* note 124.

126. A 1973 military coup overthrew the last Afghan king, Mohammed Zahir Shah, and brought a Marxist regime to power, led by pro-Soviet Mohammad Daoud Khan. ANTHONY HYMAN, *AFGHANISTAN UNDER SOVIET DOMINATION, 1964-83*, at 27-30 (1984). Daoud had previously served as Afghan Prime Minister from 1953 to 1964 and had relied extensively on Soviet aid; as self-appointed President, he officially established firm ties with the Soviet Union. *Id.* However, by

The *Mujahedin*, an organization of militant Islamic fundamentalists, the name of which translates to mean “those who struggle,”¹²⁷ emerged to fight the Soviet incursion. As part of the roll-back of Soviet communism,¹²⁸ the foreign policy of the United States was specifically crafted to support *Mujahedin* operations throughout the Soviet war for Afghanistan through extensive financial assistance and arms purchases in the name of furthering United States interests in the region.¹²⁹ Specifically, between 1986 and 1989, the United States donated more than one billion dollars¹³⁰ to the *Mujahedin* and provided *Mujahedin* fighters with several hundred

late 1977, Daoud had moved away from his previously pro-Soviet stance and had decreased Afghan reliance on Soviet assistance. ANTHONY ARNOLD, *AFGHANISTAN: THE SOVIET INVASION IN PERSPECTIVE* 63-65 (1981). He simultaneously sought to strengthen his own grip on power by eliminating opposition within his party. HYMAN, *supra*, at 66-68. His obstruction of leftist Afghani political movements set in motion a communist coup—the Saur Revolution—led by the People’s Democratic Party of Afghanistan. ARNOLD, *supra*, at 62-66. This radical political organization, headed by Nur Mohammad Taraki, Babrak Karmal, and Amin Hafizullah, toppled the Daoud government on April 27, 1978; Daoud was executed in the process. *Id.* at 65-66. Taraki and Karmal were thereafter installed as president and deputy prime minister, respectively, and though Taraki’s government proclaimed a return to Islamic principles and Afghan nationalism, Taraki nevertheless welcomed Soviet assistance by signing a twenty-year treaty of cooperation and friendship with the U.S.S.R. HYMAN, *supra*, at 85-92. In September 1979, Taraki was ousted by former radical compatriot Amin, who maintained Soviet ties. *Id.* at 152-55. However, Amin’s radical policies soon turned the population of Afghanistan against his rule, and both the regime’s security as well as Soviet interests in the region were imperiled. *See id.* at 155-59. Finding their position in Afghanistan imperiled, the Soviet leadership decided to invade the country. *Id.* at 159.

127. *See* JASON ELLIOT, *AN UNEXPECTED LIGHT: TRAVELS IN AFGHANISTAN* 31 (2001).

128. Soviet “roll back” was long an aspect of United States national security doctrines. *See* Nagan & Hammer, *supra* note 23, at 394-401. The policy culminated in the 1980s, when policy-makers during the Reagan Administration believed that the U.S.S.R. was vulnerable and could thus be militarily challenged in various parts of the world. *Id.* at 397. “The Reagan Doctrine was designed to move from containment,” which was an important characteristic in previous United States national security doctrines, “to encroachment, which effectively attempted to roll back Soviet ideological and territorial influence.” *Id.* at 397-98. The Reagan Doctrine is credited with the downfall of communism because the arms race it pushed eventually ended with the “missile gap” favoring the United States. *See* JAMES HUBERT MCBRIDE, *THE TEST BAN TREATY* 13-21 (1967). Put simply, as a result of the arms race, the United States spent the U.S.S.R. into bankruptcy.

129. In response to Soviet aggression in Afghanistan, President Jimmy Carter declared: “An attempt by any outside force to gain control of the Persian Gulf region will be regarded as an assault on the vital interests of the United States of America, and such an assault will be repelled by any means necessary, including military force.” President Jimmy Carter’s State of the Union Address, 1 PUB. PAPERS 194, 197 (Jan. 23, 1980). The Carter Doctrine was purported to be a self-justifying doctrine in that it derived its lawfulness from its articulated promise to defend governments from external aggression.

130. David Rogers, *Aid to Afghan Rebels Wins Approval of a House Panel*, WALL ST. J., Sept. 27, 1990, at A20; *see also* Ahmed Rashid, *Accord on Afghanistan Overtaken by Events*, INDEPENDENT (London), May 28, 1990, at 6 (describing a possible agreement in May 1990 between the United States and the U.S.S.R. to cut off arms supplies in the Afghan civil war).

shoulder-held, laser-guided Stinger anti-aircraft missiles.¹³¹ The war for Afghanistan became a war between fundamental Islam and the Soviet Union; militant Islamic fundamentalists, including Osama bin Laden, rushed to join the fight against the U.S.S.R.¹³² In the name of fighting communism, the United States essentially worked with bin Laden's organization by concurrently funding *Mujahedin* projects with bin Laden and advancing *Mujahedin* causes designed to assist bin Laden and others like him in Afghanistan. For example, in 1986 the CIA and Osama bin Laden mingled funds to develop a tunnel complex in Khost, a town approximately 150 kilometers south of Kabul, to serve as a weapons repository and training area for *Mujahedin* fighters.¹³³ Moreover, the CIA pledged to increase the ranks of the *Mujahedin*; all in all, the CIA recruited and transported to Afghanistan more than 35,000 "radical Muslims from around the world" to fight the Soviet Union.¹³⁴

The *Mujahedin* continued this fight against the U.S.S.R. for nine years, fifty thousand Soviet troops and between 1.5 and 2 million Afghans were killed in the process.¹³⁵ Eventually, the Soviet Union was defeated and driven out of Afghanistan; the United States, having achieved its goal of Soviet containment, summarily discontinued its vast support not only for the *Mujahedin*, but for the rest of the Afghan population.¹³⁶ The United States' withdrawal of support was met with surprise and frustration by much of the Afghan population.¹³⁷ Afghans viewed their participation in the war as an integral cog in the machine that brought down the Soviet Union, and they perceived betrayal in the sudden disappearance of United States support.¹³⁸ Many of these frustrated Afghans, particularly some members of the *Mujahedin*, eventually joined bin Laden's terrorist

131. AHMED RASHID, TALIBAN: MILITANT ISLAM, OIL AND FUNDAMENTALISM IN CENTRAL ASIA 129 (2000); Milton Bearden, *Afghanistan, Graveyard of Empires*, FOREIGN AFF., Nov./Dec. 2001, at 17, 20-21.

132. See Rod Nordland & Jeffrey Bartholet, *The Mesmerizer*, NEWSWEEK, Sept. 24, 2001, at 44, 45.

133. *Id.*

134. RASHID, *supra* note 131, at 129-30.

135. See ELLIOT, *supra* note 127, at 30.

136. From 1955 to 1978, total humanitarian aid contributed by the United States to the Afghan public amounted to approximately fifty times less than the amount given to the *Mujahedin* during the war. See Barnett Rubin, *Afghanistan: The Forgotten Crisis*, REFUGEE SURVEY Q. 15 (2) (UNHCR, 1996). Even the little remaining support for the Afghan public dwindled further after 1992. See generally *Final Report on the Situation of Human Rights in Afghanistan*, U.N. ESCOR, 52d Sess., U.N. Doc. E/CN.4/1996/64 (1996). See also *Report on the Situation of Human Rights in Afghanistan Prepared by the Special Rapporteur, Felix Ermacora, in Accordance with the Commission on Human Relations Resolutions*, U.N. ESCOR, 41st Sess., U.N. Doc. E/CN.4/1985/21 (1985).

137. ELLIOT, *supra* note 127, at 24, 30-32.

138. See *id.* at 160, 181, 197.

organization.¹³⁹ Indeed, the United States was seen as the cause of the ensuing unrest following the expulsion of the Soviet Union from Afghanistan because the United States “enthusiastically pour[ed] arms and strategists into the Soviet conflict and then fail[ed] to come up with the magnanimous healing gesture that might have prevented . . . civil war.”¹⁴⁰ In other words, many Afghans felt betrayed by the United States¹⁴¹ because of the speed with which the United States’ attention was diverted away from Afghanistan, and this was the *raison d’être* for the emergence of the Taliban. The United States’ withdrawal created a power vacuum that various clashing factions of *Mujahedin* sought to fill, the result of which was “banditry and lawlessness.”¹⁴² The Taliban, an organization of religious scholars, responded by initiating a resistance movement.¹⁴³ With the promise of peace, stability, and a return to Islamic principles¹⁴⁴ in the devastated, chaotic region, the Taliban rapidly attained prominence and in 1996 it became the de facto government of Afghanistan.¹⁴⁵ As the Taliban took hold, the spirit of jihad that galvanized the Afghan *Mujahedin* in opposition to the Soviet Union was redirected against the United States.

The Taliban transformed Afghanistan into a bastion of institutionalized human rights violations¹⁴⁶ and a hotbed of terrorist training. The Taliban

139. See Stephanie Nolen, *Is This the End of the Taliban? Regime’s Backers Say Kabul’s Fall Merely Signals Shift to Guerrilla Warfare*, GLOBE & MAIL, Nov. 14, 2001, at A1.

140. Jason Goodwin, *Beyond the Back of Beyond*, N.Y. TIMES BOOK REV., Apr. 8, 2001, at 10 (reviewing ELLIOT, *supra* note 127).

141. See ELLIOT *supra* note 127, at 24 (“The Americans had washed their hands of Afghanistan in the wake of the Soviet withdrawal and left ordinary Afghans with a widespread feeling of having been abandoned . . .”).

142. *Id.* at 22.

143. See KAMAL MATINUDDIN, *THE TALIBAN PHENOMENON: AFGHANISTAN 1994-1997*, at 10-11 (1999).

144. See Emily MacFarquhar, *The Rise of Taliban*, U.S. NEWS & WORLD REP., Mar. 6, 1995, at 64 (stating that Taliban leader Maulavi Mohammad Omar asserted that the Taliban sought to restore peace to Afghanistan).

145. See Greg Myre, *Taliban Score Military Victories*, ASSOCIATED PRESS ONLINE, Sept. 28, 2000, available at 2000 WL 27212354 (reporting that as of September 2000, the Taliban purportedly controlled over 95% of Afghanistan). For a detailed account of the Taliban’s ascendancy to power, see generally MICHAEL GRIFFIN, *REAPING THE WHIRLWIND: THE TALIBAN MOVEMENT IN AFGHANISTAN* (2001).

146. The Taliban punished individuals charged with the commission of most any crime according to the regime’s extreme construction of Islamic law. See BUREAU OF DEMOCRACY HUMAN RIGHTS, & LABOR, U.S. DEP’T OF STATE, *AFGHANISTAN COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1998* (Feb. 26, 1999), available at http://www.state.gov/www/global/human_rights/1998_hrp_report/afghanis.html. To illustrate, those found guilty of murder would be publicly executed, typically by throat-slitting, which was at times carried out by a member of the victim’s family. *Id.* Adulterers were usually publicly stoned or whipped to death. *Id.* Anyone found to have committed a homosexual act would be “crushed by having walls toppled over them.” *Id.* Additional human rights violations included all manner of amputations, political killings,

regime was implicated in numerous acts of terrorism because under it, Afghanistan served as a haven for terrorists.¹⁴⁷ Even so, the country was not categorized as a “state sponsor[] of terrorism” because the United States refused to recognize the Taliban as the legitimate government of Afghanistan.¹⁴⁸ Nevertheless, the State Department recognized that after the United States-backed *Mujahedin* expelled the Soviet Union from Afghanistan, the country became “a breeding ground for extremists and terrorist groups.”¹⁴⁹ Perhaps the most notorious among these terrorist organizations taking refuge in Afghanistan was al Qaeda.

The al Qaeda terrorist organization was also a disastrous result of the Anglo-American collaboration to contain Soviet communism. When the United States and the United Kingdom encouraged tens of thousands of Muslim radicals from forty-three Islamic countries in the Middle East, Northern and Eastern Africa, Central Asia, and the Far East to travel to Afghanistan and fight with the *Mujahedin* against the Soviet Union, al Qaeda was essentially born.¹⁵⁰ These *Mujahedin*, along with other transplanted and domestic militants, became al Qaeda.¹⁵¹ One of these recruits was Osama bin Laden, who in 1989 became the head of the al Qaeda terrorist organization.¹⁵² Bin Laden’s organization was born out of Afghan hatred of the West, which was the result of the perceived betrayal discussed above, and was allowed to develop because of the power vacuum also discussed above. In other words, the al Qaeda organization originated with an American and British call-to-arms against the Soviets, but it then became a network to train militant Islamic terrorists to fight all Western acts by Western governments—particularly the United States—perpetrated by Western actors,¹⁵³ to whom al Qaeda operatives

kidnappings for ransom, other forms of torture, institutionalized rape, arbitrary detention, and pillaging. *See id.* Moreover, the Taliban took sexual discrimination to an unprecedented extreme. Policies included imposing stringent dress requirements and corresponding punishments for breaches, such as public lashings, finger, hand, or limb amputations, public stonings, and executions of women for a variety of offenses, including transgressions as seemingly nominal as the failure to correctly wear a veil or burkha so that all skin was completely covered. *See id.*

147. Ben Barber, *Iran Tops U.S. List of Active Terrorists*, WASH. TIMES, May 1, 2001, at A13.

148. *Id.*

149. Thomas H. Henriksen, *The Rise and Decline of Rogue States*, 54 J. INT’L AFF. 349, 366 (2001). Eventually, however, the State Department under former Secretary of State Madeleine Albright regarded Afghanistan with particular concern because of its extensive connections to terrorist organizations, see Nancy Dunne, *Albright Warns US Travellers of Terror Threat*, FIN. TIMES, World News section, at 8, which essentially amounted to official recognition of Afghanistan as a state sponsor of terrorism. *See* 31 C.F.R. § 596.201 (2000).

150. *See* RASHID, *supra* note 131, at 128-32.

151. *See id.*

152. *See id.* at 131-32.

153. *See id.*

generally referred as “infidels.”¹⁵⁴ In retrospect, given the absence of regulatory power to prevent their assemblage in Afghanistan, it is unsurprising that these former *Mujahedin* militants remained in Afghanistan, which became the terrorist network’s headquarters. Also, given the militant nature of the organization, it should additionally come as no surprise that bin Laden named the organization *al Qaeda*, or “military base.”¹⁵⁵ As a result of al Qaeda’s extended stay in Afghanistan, the Taliban and al Qaeda were extensively connected; bin Laden enjoyed considerable influence with the Taliban regime, and the Taliban’s hostility became focused on the United States and its allies.¹⁵⁶

In short, the United States’ foreign policy, which rightly sought the roll-back of Soviet communism, was perpetrated in such a way that it inadvertently laid the groundwork for the establishment of one of the most destructive and hateful terrorist organizations in the history of mankind. Had the United States been more particular about the kind of individuals it sought to train and arm, the backlash from its disappearance in the region following the fall of communism might not have been as harsh as it was. Moreover, had the United States also taken a lasting interest in the region and worked to unite the individuals in the region instead of totally withdrawing, it would have been better situated to negotiate the power vacuum and the Taliban might not have had the edge it needed to assume control of the country.

B. The United States’ Foreign Policy Facilitated the Continuing Political Tension with Iran, the Result of Which is an Ongoing Terrorist Threat to United States’ National Security

In 1925, Mohammad Reza Shah Pahlavi (M.R. Pahlavi) became the Iranian Crown Prince when his father, Reza Shah Pahlavi, (R. Shah Pahlavi) was crowned monarch of Iran by the *ulama*.¹⁵⁷ The Crown Prince was educated in Switzerland and subscribed to Western-oriented reformation ideologies, despite his autocratic leanings.¹⁵⁸ Throughout his formative years, foreign influence in Iran was significant; the Anglo-Iranian Oil Company (AIOC), owned by the British government, steadily produced and marketed Iranian oil, which prompted Iranians to call for

154. See Adel Darwish, *Targeting Fellow Muslims May Be One Step Too Far*, INDEPENDENT (London), Nov. 11, 2003, at 16. “Infidel” typically refers to all Muslims and non-Muslims of “lesser” faith. *Id.*

155. See RASHID, *supra* note 131, at 132.

156. *Id.* at 139.

157. SANDRA MACKEY, *THE IRANIANS* 166-72 (1996).

158. See *Nationmaster*, *Encyclopedia: Mohammad Reza Pahlavi*, at <http://www.nationmaster.com/encyclopedia/Mohammad-Reza-Pahlavi> (last visited Oct. 18, 2004).

nationalization of the country's oil fields.¹⁵⁹ The Allied occupation of western Iran forced his father into exile in 1941, so M.R. Pahlavi assumed the Peacock Throne and became the Shah.¹⁶⁰

By the late 1940s, Mohammed Mossadegh, a socialist attorney and member of the *Majlis*, or parliament, emerged and become renowned both for his marked desire to wrest governing power from the Shah in favor of a socialist government and for his endorsement of the popular desire to step up Iranian control over its oil industry.¹⁶¹ The oil control issue came to a head in 1949, when another lucrative oil contract with the AIOC was negotiated.¹⁶² In that same year, the issue of national control reached a fevered pitch when the Shah attempted to manipulate the *Majlis* elections.¹⁶³ In response to the Shah's mismanagement of the Iranian military and his continuing cooperation with the West, an organization called the National Front emerged, led in part by Mossadegh.¹⁶⁴ In April 1951, public pressure prevailed and Mossadegh was appointed Prime Minister.¹⁶⁵ He would answer the popular call to nationalize the Iranian oil industry¹⁶⁶ as part of a rapid process of power consolidation from 1951 to 1953,¹⁶⁷ which led Mossadegh's leftist party to win the national election of 1952—Iran's fledgling attempt at democracy—and thus ostensibly to depose the Shah.¹⁶⁸ At first, the United Kingdom sought either to pressure Mossadegh into an AIOC settlement or to have him removed from government office.¹⁶⁹ In 1953, to safeguard Western interests, the United States collaborated with the United Kingdom to intervene in Iran's new democratic regime by way of a covert CIA operation that systematized

159. NIKKI R. KEDDIE, *ROOTS OF REVOLUTION* 133 (1981).

160. U.S. Dep't of State, *Background Note: Iran*, at <http://www.state.gov/r/pa/ei/bgn/5314.htm> (last visited Oct. 18, 2004).

161. Mark J. Gasiorowski, *The 1953 Coup D'etat in Iran*, 19 INT'L J. MIDDLE E. STUD. 261, 262 (1987). Iranians were ill-treated and underpaid by the AIOC; they were forced to pay high prices for their own oil and were given no influence in how the company was managed. See KEDDIE, *supra* note 159, at 132-33.

162. See KEDDIE, *supra* note 159, at 133.

163. See Stephen Cohen, *Conditioning U.S. Security Assistance on Human Rights Practices*, 76 AM. J. INT'L L. 246, 260 (1982).

164. MACKEY, *supra* note 157, at 196.

165. GARY SICK, *ALL FALL DOWN: AMERICA'S TRAGIC ENCOUNTER WITH IRAN* 6 (1985).

166. *Id.* For doing so, he was designated Time Magazine's "Man of The Year" in 1951. STEPHEN KINZER, *ALL THE SHAH'S MEN: AN AMERICAN COUP AND THE ROOTS OF MIDDLE EAST TERROR* 132 (2003).

167. SICK, *supra* note 165, at 6.

168. *Id.*

169. Gasiorowski, *supra* note 161, at 263.

protests and dissent to overthrow Mossadegh's government¹⁷⁰ and reinstall the pro-West Shah as national leader.¹⁷¹

United States policymakers were induced to act in Iran to stem the spread of communism; the Cold War was raging by the beginning of the 1950s, and the Soviet Union was actively searching for ways to expand its campaign of dominance.¹⁷² The strengthening of the Western alliance was offered as part of President Eisenhower's election platform so that upon his election, his Administration embarked on a course of action to overthrow Mossadegh and roll back Soviet expansionism.¹⁷³ Concerned that Iran's pro-Soviet Communist party, the *Tudeh*, was positioning itself to gain control of the country¹⁷⁴ and disturbed by Mossadegh's toleration of this communist ideology, the CIA sent operative Kermit Roosevelt to Iran for the purpose of undermining Mossadegh's government and replacing Mossadegh with a Prime Minister more sympathetic to the West.¹⁷⁵ Thus, the CIA formulated "Operation Ajax," which allowed CIA emissary Roosevelt to forge covert alliances with the Shah, royalist General Fazlollah Zahedi, religious leader Ayatollah Kashani,¹⁷⁶ and agitator and gang ringleader Shaban Jafari for the purpose of toppling Mossadegh.¹⁷⁷

Roosevelt's original design for Operation Ajax was comprised of four steps.¹⁷⁸ First, propaganda was to be disseminated to vilify Mossadegh.¹⁷⁹

170. See SICK, *supra* note 165, at 6-7.

171. RICHARD W. COTTAM, NATIONALISM IN IRAN 332 (1979) (referring to this plan as "a CIA-backed and in large part CIA-directed coup").

172. In 1947, foreign service planner George Kennan, under the pseudonym "X," see George F. Kennan, *After the Coup*, N.Y. TIMES, Aug. 24, 1991, at A4, published *The Sources of Soviet Conduct*, in which he argued for "a long-term . . . vigilant containment of Russian expansive tendencies." X, *The Sources of Soviet Conduct*, 25 FOREIGN AFF. 566, 575 (1946-1947).

173. See JAMES A. BILL, THE EAGLE AND THE LION: THE TRAGEDY OF AMERICAN-IRANIAN RELATIONS 87 (1988).

174. See *id.* at 80 (referring to "the Musaddiq national movement as 'one of the worst calamities to the anti-Communist world since the Red conquest of China'" (quoting *Iran: Whose Ox Is Nationalized?*, TIME, Mar. 26, 1951, at 31)).

175. See generally KERMIT ROOSEVELT, COUNTERCOUP: THE STRUGGLE FOR THE CONTROL OF IRAN (1979) (detailing the planning and execution of Operation Ajax, a collaborative effort by the United States and the United Kingdom in 1953 to overthrow Iranian Prime Minister Mossadegh and restore the deposed Shah to power).

176. See MOHSEN M. MILANI, THE MAKING OF IRAN'S ISLAMIC REVOLUTION 40-42 (2d ed. 1994) (writing that even senior members of the Shi'ite clergy transferred their support to the Shah as the coup persisted).

177. See BILL, *supra* note 173, at 86-94 (analyzing the 1953 Central Intelligence Agency (CIA)-backed coup in Iran).

178. Gasiorowski, *supra* note 161, at 272. See generally Moyara de Moraes Ruehsen, *Operation 'Ajax' Revisited: Iran, 1953*, 29 MIDDLE E. STUD. 467 (1993) (providing an account of the 1953 coup that returned the Shah of Iran to power).

179. Gasiorowski, *supra* note 161, at 272.

Next, political figures challenging Mossadegh were to foment public unrest with Mossadegh's government and dissent in the *Majlis*.¹⁸⁰ Then, the Shah was to have Mossadegh dismissed by royal decree, and he was to appoint General Zahedi to the post of Prime Minister.¹⁸¹ As a final point, efforts would be made to consolidate military support for the Shah and Zahedi.¹⁸² However, Roosevelt's plan was accidentally leaked to Mossadegh, who subverted it.¹⁸³ As a result, the Shah fled to Iraq, Zahedi went into hiding, and the possibility of ousting Mossadegh seemed to have been extinguished.¹⁸⁴ However, ranking members of the Eisenhower Administration, particularly brothers John Foster Dulles, the Secretary of State, and Allen Dulles, Director of the CIA, so strongly advocated regime change in Iran¹⁸⁵ that Roosevelt shortly made another effort to instigate a coup against Mossadegh.¹⁸⁶

Roosevelt encouraged Zahedi to come out of hiding and coaxed the Shah to return to Iran.¹⁸⁷ On August 19, 1953, the coup attempt succeeded,¹⁸⁸ and the CIA essentially remade the Iranian political design; Mossadegh and many of his colleagues were taken into custody,¹⁸⁹ Zahedi was appointed Prime Minister, and military supporters of the coup were placed in command of Iranian forces.¹⁹⁰ The Shah brought autocratic rule back to Iran and immediately embarked on a bold agenda to rapidly Westernize Iran, which was met with significant American support and the scorn of hard-line Islamic conservatives.¹⁹¹

In direct response to the Shah's secularization efforts, Ruhollah Khomeini, a religious cleric who had been extremely critical of the Shah's

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at 273.

184. *Id.*

185. BILL, *supra* note 173, at 89.

186. Gasiorowski, *supra* note 161, at 273.

187. See DANIEL YERGIN, *THE PRIZE: THE EPIC QUEST FOR OIL, MONEY, AND POWER* 469-70 (1992).

188. Gasiorowski, *supra* note 161, at 274-75.

189. See Jon Sawyer, *U.S.-Led Coup in 1953 Continues to Reverberate*, ST. LOUIS POST-DISPATCH, July 27, 2003, at F10.

190. BILL, *supra* note 173, at 98.

191. The Shah set out to secularize Iran. For example, the Shah raised the minimum age at which girls could marry from nine years to fifteen years, he banned traditional Shi'ite practices, such as temporary marriages, and he instituted the mandatory unveiling of women in 1936. See MACKAY, *supra* note 157, at 261, 298. He also provided for education and literacy training for both men and women, and he granted women the right to vote, the right to prevent their husbands from marrying an additional wife, the right to retain custody of their children, and the right to initiate divorce proceedings in some circumstances. *Id.* at 261.

exiled father,¹⁹² re-emerged with amplified fury and railed against the Shah's policies and his embrace of Western influence. Khomeini's hostility toward the reinstated Shah and his Western allies only intensified as the Shah continued to introduce characteristically Western policies; Khomeini notably resumed his extreme opposition to any enfranchisement of women.¹⁹³ When the Shah advanced an elections bill in 1962, Khomeini led a riotous protest against the Shah and demanded the re-Islamicization of Iran, to which the Shah responded with great and bloody force, no doubt contributing to the mounting widespread resentment among the populace.¹⁹⁴

Khomeini's fierce protest of a capitulations bill, which granted to American soldiers immunity from Iranian jurisdiction, resulted in his arrest and exile.¹⁹⁵ While exiled in Iraq, Khomeini honed his radical theocratic philosophy, which proclaimed the illegitimacy of non-theocratic forms of government and advocated a government only led by Islamic scholars.¹⁹⁶ His movement manifested "a radical departure from the classical Shi'i view" and steadily gained a following among the Iranian masses throughout the 1970s.¹⁹⁷ The Shah's reign was indeed coming to a close; in 1979, the Iranian public revolted and the West-supported Shah was again ousted,¹⁹⁸ this time by Khomeini, who imposed a revolutionary, anti-Western Shi'ite theocracy.¹⁹⁹

The extent to which Iran embraced anti-Western ideology was not fully appreciated by United States officials until after the extremely ill Shah fled

192. Khomeini condemned Reza Shah Pahlavi for refusing to permit Islamic scholars and clerical members assume authority over actions of state, and he regarded secularization, particularly regarding advancements for women, as gross violations of divine law. Khomeini favored "veils and chadors, the full-length gowns"; he justified the "executions of homosexuals, prostitutes and adulterers" by arguing that "'If our finger suffers from gangrene, what do you do? Do you let the whole hand, and the body, become filled with gangrene, or do you cut the finger off?'" Raymond H. Anderson, *Ayatollah Ruhollah Khomeini, 89, Relentless Founder of Iran's Islamic Republic*, N.Y. TIMES, June 5, 1989, at B11. Khomeini regarded the Shah's attempt to empower Iranian women as a move to destroy family life by promoting prostitution. See Azar Tabari, *The Role of the Clergy in Modern Iranian Politics*, in RELIGION AND POLITICS IN IRAN 47, 66-67 (Nikki R. Keddie ed., 1983).

193. SAID AMIR ARJOMAND, *THE TURBAN FOR THE CROWN: THE ISLAMIC REVOLUTION IN IRAN* 85 (1988).

194. *Id.* at 85-87.

195. BILL, *supra* note 173, at 156-58, 160-61; see HENRY KISSINGER, *WHITE HOUSE YEARS* 1262 (1979) ("Iran under the Shah, in short, was one of America's best, most important, and most loyal friends in the world.").

196. See MILANI, *supra* note 176, at 88, 90.

197. NAZIH N. AYUBI, *POLITICAL ISLAM* 147-48 (1991).

198. See Nikki R. Keddie, *Iranian Revolutions in Comparative Perspective*, in THE MODERN MIDDLE EAST 601, 610-11 (Albert Hourani et al. eds., 1993).

199. See ARJOMAND, *supra* note 193, at 99 (referring to Khomeini's rise to power as "an intransigently revolutionary movement").

to Mexico; he urgently needed cancer treatment that was exclusively available in the United States.²⁰⁰ Despite the obvious, potential problems associated with allowing the deposed Shah into the United States, he was nevertheless permitted.²⁰¹ Just over two weeks after the Shah entered the United States, militant Iranian students seized sixty-six American hostages and the American Embassy in Tehran; in exchange for the hostages, they demanded that the hospitalized Shah be extradited to Iran to stand trial.²⁰²

The events of what came to be known as the Iranian hostage crisis are well-chronicled in the annals of American history.²⁰³ The other repercussions of the Ayatollah Khomeini's rise to power continue to haunt all United States relations with the Iranian theocracy. Most Iranians, particularly the leadership, do not fail to recall that the United States was an instrumental part of the bloody coup that re-installed the Shah's autocratic regime.²⁰⁴ Nor do they fail to remember the financial aid and military support provided to the Shah by the United States in exchange for preferential trade status, oil interests, and perhaps most important to the United States, forestalling the spread of communism.²⁰⁵ Throughout the reign of the United States-backed Shah, torture was rampantly perpetrated by the Shah's secret police, as were imprisonment and exile, all of which the United States ignored or deemed to be internal matters of state.²⁰⁶ To

200. PIERRE SALINGER, *AMERICA HELD HOSTAGE: THE SECRET NEGOTIATIONS* 15, 18-19 (1981).

201. *See id.* at 24.

202. *See* Nora Boustany, *Cleric Says Iran Wants Hostage Issue Resolved*, WASH. POST, Aug. 9, 1991, at A1; Nicholas Cumming-Bruce, *Iranians Seize U.S. Mission, Ask Shah's Return for Trial: 100 Hostages Taken After Student Attack*, WASH. POST, Nov. 5, 1979, at A1.

203. For a detailed account of the events leading up to the Iranian hostage crisis and President Carter's reaction, see generally ROBERT D. MCFADDEN ET AL., *NO HIDING PLACE: THE NEW YORK TIMES INSIDE REPORT ON THE HOSTAGE CRISIS* 258 (1981). President Carter arrested all oil imports from Iran and froze all Iranian assets located in American banks. *Id.* President Carter also stopped military spare-parts shipments to Iran, directed the Department of Justice to scrutinize Iranian students who violated visa requirements, and had most Iranian diplomats expelled from the United States. *Id.* at 258-60. President Carter eventually attempted to initiate a dialogue with the new political infrastructure of Iran. *See* SALINGER, *supra* note 200, at 202-04. After limited success vis-à-vis the release of the hostages, the President ordered American commandos to embark on a high-risk rescue operation, which ultimately failed. *Id.* at 235-37. Following extensive negotiations for the fifty-two remaining hostages, referred to as the Algiers Agreements and which lasted up to the very last moments of the Carter Administration, the hostages were freed after 444 days of captivity, and United States sanctions against Iran were terminated. *See* MCFADDEN ET AL., *supra*, at 292-201. For examples of the terminated sanctions, see Exec. Order No. 12,294, 3 C.F.R. 139 (1982) (suspending legal claims against Iran pending in United States courts); Exec. Order No. 12,277, 3 C.F.R. 105 (1982) (transferring all Iranian assets held by the Federal Reserve Bank back to Iran or to trust funds).

204. BILL, *supra* note 173, at 91-92.

205. *Id.* at 93.

206. *See* MACKAY, *supra* note 157, at 265, 272-73, 278 (discussing how the Shah's opponents

the masses of Iran, the brutality committed by the Shah was brutality tolerated by the United States. Eventually, these masses regarded the Shah and the United States in an equally unfavorable light; in short, the Iranian people felt betrayed by the United States.²⁰⁷

Simply put, the 1953 United States intervention in Iran re-instated the Shah and displaced a democratically elected Iranian leader. The Shah brought with him secularization and Western ideology; his efforts to simultaneously secularize Iran and dispose of democratic groups opposed to his rule led to the radicalization of dissent among the masses. This dissent instigated Khomeini's transformation of the Shi'ite dogmatic law of state from its original form into the radical form to which Iran still adheres.²⁰⁸ Author James A. Bill explains how the CIA's intervention, Operation Ajax, lies at the heart of the United States-Iranian animosity that continues to this day: Operation Ajax was a "covert operation [that] left a running wound that bled for twenty-five years and contaminated America's relations with the Islamic Republic of Iran following the revolution of 1978-79."²⁰⁹ Arguably, if Iran's secular democracy had been permitted to develop unhindered by foreign intervention, it might have solidified under Mossadegh; had it been so, democracy, the very system the United States advocates for the entire region, would already exist in Iran, and it follows that the current theocratic, institutionalized Islamic fundamentalism that permeates the country, which continues to threaten the Middle East and the United States, would not have developed.

C. The United States' Foreign Policy Significantly Supported Saddam Hussein's Iraq

The monumental shift in the political make-up of Iran heralded a new world of problems for the United States. Having completely Islamicized the once pro-West Iran, the Ayatollah Khomeini sought to spread this Islamic revolution to other states in the region to effectively cast off all Western influence in the whole of the Middle East.²¹⁰ In response, the United States embarked on a new undertaking: the containment of the Islamic Republic of Iran. The selfsame radicalized nation that the United States inadvertently helped to create had become a chief threat both to

were forced into hiding or exile, and noting that President Carter championed the stability of the Shah's Iran throughout protracted demonstrations of ubiquitous Iranian hostility toward the Shah's regime).

207. See BILL, *supra* note 173, at 91-92 (discussing how the American-backed coup severely damaged the credibility of the United States in the region for years to come); George Perkovich, *Mood Swing: In Iran, Whispers of Moderation*, WASH. POST, Nov. 30, 1997, at C1.

208. See ARJOMAND, *supra* note 193, at 98-99.

209. BILL, *supra* note 173, at 86.

210. See MACKEY, *supra* note 157, at 288-300.

United States interests in the Middle East and United States national security.

Accordingly, the United States sought a new ally in the Gulf region, and it found Iraq. Even though Iraq's ruling Ba'ath Party maintained contacts with the Soviet Union and ran a steadfastly socialist welfare state,²¹¹ Iraqi leadership displayed marked hostility toward political and religious rivals, particularly Iraqis who advocated communism.²¹² United States architects of foreign policy thus felt that, given the nationalistic, secular (though Sunni Muslim dominated) state's antagonism to communism, Saddam Hussein's Iraq was positioned to be a powerful regional ally against both communism and Iran. Indeed, on April 14, 1980, five months prior to Iraq's September 22 attack on Iran, President Carter's National Security Advisor, Zbigniew Brzezinski, articulated the United States' growing appreciation of Iraq: There exists "no fundamental incompatibility of interests between the United States and Iraq . . . [and] [w]e do not feel that American-Iraqi relations need to be frozen in antagonism."²¹³

The United States had extensive dealings with Saddam Hussein prior to the escalation of hostilities between the United States and Iran. Following the failed 1959 Ba'athist attempt to assassinate then-Iraqi Prime Minister Abd al-Karim Kassim,²¹⁴ Hussein, who participated in the attempt, escaped Iraq and fled to Egypt, where he cooperated with the Cairo branch of the CIA by providing names of leftist Iraqi extremists.²¹⁵ The United States supported Kassim's overthrow chiefly because of his leftist leanings.²¹⁶ Specifically, Kassim had lifted a ban on the Iraqi Communist Party,²¹⁷ and in 1961 he pulled Iraq out of the United States-sponsored 1955 Baghdad Pact which codified anti-communist policies.²¹⁸ The United States could not risk losing support in the entire Gulf region,

211. See Eric Davis, *The Persian Gulf War: Myths and Realities*, in *THE UNITED STATES AND THE MIDDLE EAST* 251, 266 (Hooshang Amirahmadi ed., 1993).

212. See *id.*

213. See Bob Levin et al., *Iraq's Ambitious War Aims*, *NEWSWEEK*, Oct. 6, 1980, at 37.

214. See *Iraq: Facts on Saddam Hussein*, *FACTS ON FILE WORLD NEWS DIGEST*, Dec. 18, 2003, at 995A1.

215. Geoff Simons, *The Making of Iraq*, *LINK*, Dec. 2002, at 1, 7, available at http://www.ameu.org/uploads/vol35_issue5_2002.pdf (last visited Oct. 18, 2004).

216. See ANDREW COCKBURN & PATRICK COCKBURN, *OUT OF THE ASHES: THE RESURRECTION OF SADDAM HUSSEIN* 74 (2000). He also posed a secondary, though significant, threat to the United States' interests in the Gulf, when he "threatened to occupy Kuwait and nationalized part of the Iraq Petroleum Company." *Id.*

217. THOMAS POWERS, *THE MAN WHO KEPT THE SECRETS: RICHARD HELMS & THE CIA* 128 (1979).

218. COCKBURN & COCKBURN, *supra* note 216, at 74; see also *Pact of Mutual Cooperation Between the Kingdom of Iraq, the Republic of Turkey, the United Kingdom, the Dominion of Pakistan, and the Kingdom of Iran (Baghdad Pact)*, Feb. 24, 1955, 233 U.N.T.S. 109.

so, allied with Hussein and other Ba'athist Party members, the CIA backed a 1963 coup in which Ba'athist operatives overthrew Kassim's regime.²¹⁹ Hussein then returned to Iraq as a Ba'athist Party intelligence official. What followed since has been contested by various scholars, but some believe that, upon his return, Hussein used the list of Iraqi communists and leftist dissidents he assisted the CIA to compile to search for and destroy pockets of resistance to the Ba'athist Party.²²⁰ Resistance continued, and what remains uncontested is that Hussein was instrumental in both the 1968 coup that ultimately brought the Ba'ath Party back to power, as well as in the regime's efforts to crush its opposition.²²¹

After Hussein became leader of Iraq in 1979, the United States furnished him with significant material and military aid, effectively nurturing Hussein's Iraq to become a pro-West secular stronghold to offset the new, radical theocracy of Iran.²²² As discussed above, Iran had designs on the Islamicization of the entire Gulf region, and Iraq's Ba'athist regime was the first obstacle to be overcome before such an Islamic revolution would be possible. To instigate this revolution, Tehran rallied Iraq's Kurds and the majority Shi'a population to revolt, and it urged the assassination of high-ranking Iraqi government officials.²²³ As a result of mounting tensions between the two nations, Iraq invaded Iran seemingly at the acquiescence of the United States.

219. See COCKBURN & COCKBURN, *supra* note 216, at 74.

220. See Simons, *supra* note 215, at 7-8 (alleging that Saddam Hussein hunted down thousands of Iraqis politically opposed to the Ba'ath Party, personally oversaw their torture, and ordered their murders); SAÏD K. ABURISH, SADDAM HUSSEIN: THE POLITICS OF REVENGE 61 (2000).

221. At this time, Hussein was Vice President of the Ba'ath Party under President al-Bakr, as well as Deputy Chair of the Revolutionary Command Council (RCC), which was the epicenter of the regime's power and monopolized all branches of Iraqi government. See Michel Moushabeck, *Iraq: Years of Turbulence*, in BEYOND THE STORM: A GULF CRISIS READER 25, 30-31 (Phyllis Bennis & Michel Moushabeck eds., 1991). Hussein eventually compelled President al-Bakr to retire, and he assumed the Presidency in 1979. For a more detailed account, see DILIP HIRO, IRAQ: IN THE EYE OF THE STORM 54-57 (2002). Shortly thereafter, Hussein cleansed his RCC of all non-loyalists by having five high-ranking members of the Council and sixteen others executed, which he justified as part of a plan to thwart a coup backed by Syria. See *Iraq; Facts on Saddam Hussein*, *supra* note 214.

222. See M.E. Ahrari & Brigid Starkey, *Polarity and Stability in the Post-Cold War Persian Gulf*, FLETCHER F. WORLD AFF., Winter/Spring 1997, at 133, 136-37. Iran's Ayatollah Khomeini strongly denounced all modernization, particularly Western-oriented or Western-backed secularism, which he and his theocratic government blamed for displacing the Qur'an and the Sunnah as the proper foundations for national law. See Abdulaziz A. Sachedina, *Activist Shi'ism in Iran, Iraq, and Lebanon*, in 1 FUNDAMENTALISMS OBSERVED 403, 411 (Martin E. Marty & R. Scott Appleby eds., 1991).

223. John J. Mearsheimer & Stephen M. Walt, *An Unnecessary War*, FOREIGN POL'Y, Jan./Feb. 2003, at 50, 53; see also ARTHUR MARK WEISBURD, USE OF FORCE: THE PRACTICE OF STATES SINCE WORLD WAR II, at 47 (1997) (discussing the Iranian call for the overthrow of Iraq's Ba'ath Party).

On September 22, 1980, Hussein launched a military campaign against Iran; Iraqi forces invaded the Iranian territory of Shatt al Arab and the great Iran/Iraq War commenced.²²⁴ Iraq attacked Iran to curb the theocracy's religion-oriented hegemonic ambitions in the region.²²⁵ At first, Iraq apparently planned to limit the scope of the war to weakening the Iranian infrastructure to capture its southern territory, which would give Iraq far better access to the Persian Gulf.²²⁶ This plan never came to fruition because the intensity of the war significantly escalated. Iraq responded to this increased intensity by launching chemical attacks on Iran in 1982.²²⁷

Iraq's chemical attack received mixed responses from scholars as to its propriety. Some suggested that the attack was justified. Authors John J. Mearsheimer and Stephen M. Walt described it as "an opportunistic response to a significant threat."²²⁸ Professor Richard Falk, on the other hand, regarded the invasion as a blatant contravention of international law and suggested that the world, particularly the United States, wrongly tolerated it.²²⁹ Specifically, he lamented that "the world looked on [the invasion] with indifference," and he objected to the notion that "non-involvement is the appropriate response,"²³⁰ which was the widespread justification offered by world leaders for permitting the war to rage on. However it was interpreted, Hussein persisted in depicting his attack on Iran as necessary to safeguard the entire Gulf region from Iranian expansionism,²³¹ and the United States agreed.

In February 1982, the United States eventually signaled its approval of Saddam Hussein's regime by removing Iraq from its list of international state-sponsors of terrorism.²³² As a result, United States corporations were

224. See WEISBURD, *supra* note 223, at 47.

225. Ahrari & Starkey, *supra* note 222, at 136-37.

226. See WEISBURD, *supra* note 223, at 47-48.

227. LEONARD A. COLE, THE ELEVENTH PLAGUE: THE POLITICS OF BIOLOGICAL AND CHEMICAL WARFARE 87-90 (1997). Iraq's chemical attack against Iran violated the 1925 Geneva Protocol prohibiting the use of chemical and biological warfare, to which Iraq was a signatory. See OFFICE OF THE LEGAL ADVISER, U.S. DEP'T OF STATE, PUB. NO. 9433, TREATIES IN FORCE 369 (1997). Iraq employed mustard gas and nerve agents against Iran. COLE, *supra*, at 88; see also RICK FRANCONA, ALLY TO ADVERSARY: AN EYEWITNESS ACCOUNT OF IRAQ'S FALL FROM GRACE 24-25 (1999) (exploring Iraq's use of chemical weapons against Iranian military forces).

228. Mearsheimer & Walt, *supra* note 223, at 53.

229. See Richard Falk, *Some Thoughts on the Decline of International Law and Future Prospects*, 9 HOFSTRA L. REV. 399, 399 (1981). Falk's distaste for the world's response—or rather, its lack of what Falk might perceive to be a sufficient response—to the Iran/Iraq war is palpable. He asserted: "To me, this represents a monumental, unacknowledged retreat from the post-World War I notion that aggression is the most severe form of disruption of international life." *Id.*

230. *Id.*

231. See Moushabeck, *supra* note 221, at 35.

232. Davis, *supra* note 211, at 257.

permitted to ship dual-use goods²³³ to Iraq.²³⁴ Thus, despite its initially neutral stance in the Iran/Iraq War,²³⁵ the United States ultimately offered material,²³⁶ diplomatic,²³⁷ agricultural,²³⁸ and military²³⁹ support to Hussein.²⁴⁰ Moreover, the United States, along with a series of other Western nations, sent deadly toxins to Iraq—toxins that collectively formed the basis of Iraq's biological weapons program.²⁴¹ Specifically, the United States Department of Commerce sent under license various biological agents, including strains of anthrax, to Iraq.²⁴²

The United States persisted in its assistance to Saddam Hussein's Iraq despite Hussein's flagrant deployment of chemical weapons in Iran and strong evidence that Hussein's regime perpetrated assorted crimes against humanity. Indeed, in November 1983, a high-ranking State Department official brought to the attention of Secretary of State George Schultz intelligence reports, which specified that Iraq was attacking Iranian military forces with the "almost daily use of cw [chemical weapons]".²⁴³ Also, in March 1984, two-time Secretary of Defense Donald Rumsfeld traveled to Baghdad on behalf of President Reagan to negotiate the

233. "Dual-use goods" are those that have both civilian and military utility. See The Wassenaar Arrangement for Export Controls on Conventional Arms and Dual-Use Goods and Technologies, July 12, 1996 (providing a contemporary definition of dual-use goods).

234. Davis, *supra* note 211, at 257.

235. See David L. Peace, *Major Maritime Events in the Persian Gulf Between 1984 and 1991: A Juridical Analysis*, 31 VA. J. INT'L L. 545, 546 (1991).

236. See WILLIAM D. HARTUNG, *WEAPONS AT WAR* (May 1995), at <http://www.worldpolicy.org/projects/arms/reports/wawrep.html> (last visited Oct. 18, 2004). The United States' political re-designation of Iraq allowed United States corporations to export over \$1.5 billion dollars worth of goods to Iraq from 1985 to 1990, including computer hardware, software, unarmed light aircraft, machine tools, and helicopters, all of which could easily be converted for military use. *Id.* Recipients of these goods included the Iraqi Air Force and Saad 16, an Iraqi ballistic missile production military complex. *Id.*

237. DAVIS, *supra* note 211, at 257.

238. See JAMES A. BAKER, III, *THE POLITICS OF DIPLOMACY* 262-63 (1995). Iraq's political re-designation allowed it to become eligible for agricultural assistance from the Commodity Credit Corporation under the United States Department of Agriculture; Iraq had thus become the ninth largest purchaser of United States grain in the world by 1989. *Id.* at 263.

239. See Michael Dobbs, *U.S. Had Key Role in Iraq Buildup*, WASH. POST, Dec. 30, 2002, at A1. The United States allegedly coordinated sales of cluster bombs to Iraq from a company headquartered in Chile. *Id.* Other Western nations also provided arms to Iraq. See Dennis A. Pluchinsky, *Middle Eastern Terrorist Activity in Western Europe in the 1980s: A Decade of Violence*, in *EUROPEAN TERRORISM* 12 (Yonah Alexander & Dennis A. Pluchinsky eds., 1992) (stating that from 1985 to 1986 France sold weapons to Iraq).

240. See Moushabeck, *supra* note 221, at 33; Simons, *supra* note 215, at 9.

241. COLE, *supra* note 227, at 81-82. Iraq had help establishing its chemical weapons arsenal; it received component chemicals and production equipment parts from Belgium, West Germany, Switzerland, Italy, and the Netherlands. *Id.*

242. Dobbs, *supra* note 239.

243. *Id.*

restoration of diplomatic ties between the United States and Iraq, which had been suspended since 1967.²⁴⁴ His meeting with Hussein coincided

244. The National Security Archive at George Washington University has extensively chronicled the relationship between the United States and Saddam Hussein's Iraq. Documents released under The Freedom of Information Act and the Mandatory Declassification Review enabled the National Security Archive to obtain declassified documents on December 18, 2003. See GEORGE WASHINGTON UNIV., THE NAT'L SEC. ARCHIVE, at <http://www.gwu.edu/~nsarchiv/> (last visited Oct. 18, 2004) (making available these documents). These declassified documents detail the extent to which the United States effectively embraced Saddam Hussein's regime in Iraq throughout the early 1980s in an effort to further its political objective of keeping Iran in check. See GEORGE WASHINGTON UNIV., SHAKING HANDS WITH SADDAM HUSSEIN (Joyce Battle ed., 2003), at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB82/index.htm> (last visited Oct. 18, 2004) [hereinafter SHAKING HANDS WITH SADDAM HUSSEIN]. They establish that the United States was aware that its new ally, Hussein, aspired to establish Iraq as a nuclear power, which the United States acknowledged might "pursue nuclear weapons." *Id.*

These documents at the National Security Archive include the briefing materials and diplomatic reporting on two of then-former Secretary of Defense Donald Rumsfeld's trips to Baghdad, reports on Iraqi chemical weapons use concurrent with the United States' support of Iraq throughout the 1980s, and directives signed by President Reagan that detail the United States' foreign policy priorities for the Gulf region, which included preserving the United States' access to oil, expanding the ability of the United States to exercise military power in the Gulf region, and protecting regional allies from threats in the Middle East. *Id.* paras. 14, 17, 11. These declassified documents also include a United States government report detailing the content of a December 20, 1983 conversation between then-former Secretary of Defense Donald Rumsfeld and Iraqi President Saddam Hussein. In an interview with CNN on September 21, 2002, Secretary Rumsfeld explained the nature of his meeting with Hussein: "In that visit, I cautioned him about the use of chemical weapons . . . and discussed a host of other things." CNN, *Interview with Donald Rumsfeld* (Sept. 21, 2002), at <http://www.cnn.com/TRANSCRIPTS/0209/21/cst.01.html> (last visited Oct. 18, 2004). While Secretary Rumsfeld did address chemical weapons in his subsequent meeting with Iraqi Foreign Minister Tariq Aziz—in this meeting, both agreed that "the U.S. and Iraq shared many common interests"—the report to which he referred did not address comments Rumsfeld allegedly made to Hussein regarding chemical weapons. See SHAKING HANDS WITH SADDAM HUSSEIN, *supra*, at paras. 12-13; Dobbs, *supra* note 239, at A1. Documents detailing the United States' public position on Iraq's chemical weapons use in the Iran/Iraq War were also declassified. See SHAKING HANDS WITH SADDAM HUSSEIN, *supra*, at paras. 17-18. While the United States officially condemned Iraq's use of chemical weapons, United States officials nevertheless sought to maintain ties with the Iraqi government by again casting Iran as the real enemy. See *id.* A declassified document that denounces Hussein's chemical weapons use also addressed the Ayatollah Khomeini's unwavering refusal to engage in bilateral talks with Iraq and end hostilities until Saddam Hussein was removed from power. Specifically, the United States government document reads, "The United States finds the present Iranian regime's intransigent refusal to deviate from its avowed objective of eliminating the legitimate government of neighboring Iraq to be inconsistent with the accepted norms of behavior among nations and the moral and religious basis which it claims." *Id.* para. 18. Via the National Security Council, various United States Presidents have issued directives to guide foreign policy agendas during their administrations; the effect of these directives is analogous to that of executive orders. See *Congressional Limitation of Executive Orders: Hearing on H.R. 3131, H.R. Con. Res. 30, and H.R. 2655 Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary*, 106th Cong. 47-48 (1999) (statement of Professor Phillip Cooper of the University of Vermont). Since they typically are

with a United Nations report which declared that Iraq was actively using chemical weapons against Iran.²⁴⁵

The war slowly ground to an end, and Hussein sought to consolidate his power; in March 1988, Iraqi forces were ordered to retake the Iraqi-Kurd village of Halabja, which had been overtaken by Iranian forces.²⁴⁶ To do so, Iraqi forces barraged Halabja with chemical weapons, killing an estimated five thousand Iraqi-Kurds.²⁴⁷ Still, United States officials sought to maintain ties to Iraq despite the horror of Halabja, in order to continue the profitable relationship that the two nations had established.²⁴⁸ It is important to note that what might seem like unerring United States allegiance to Iraq was in truth a form of control; the United States' foreign policy regarding the Gulf region never permitted Iraq to win the bloody eight-year war with Iran. While the assistance the United States proffered to Iraq throughout the war was vast, United States foreign policy architects never intended for Iraq to win. The policy was formulated to advance the "'ultimate American interest' . . . that 'both sides lose.'"²⁴⁹ To facilitate this goal, the United States, along with various other Western nations, not

classified material, Congress is not routinely notified of the contents of these directives. During President Ronald Reagan's Administration, these directives were referred to as National Security Decision Directives. *See id.* Among the declassified documents are two such National Security Decision Directives: National Security Decision Directive 114 and National Security Decision Directive 139. Specifically, National Security Decision Directive 114 of November 26, 1983, entitled "U.S. Policy toward the Iran/Iraq War," detailed United States foreign policy goals to be achieved during or as a result of the war between Iran and Iraq. Nat'l Sec. Decision Directive No. 114 (Nov. 26, 1983). These goals chiefly included the protection of regional sources of oil and developing the capacity to exercise United States military force in the Gulf region. *Id.* National Security Decision Directive 139 of April 5, 1984, entitled "Measures to Improve U.S. Posture and Readiness to Respond to Developments in the Iran/Iraq War," also detailed United States foreign policy goals with regard to the Iran/Iraq War, including increasing United States military access to the Gulf region and improving intelligence collection in the region. Nat'l Sec. Decision Directive No. 139 (Apr. 5, 1984). Moreover, the directive firmly outlines general United States foreign policy regarding chemical weapons and urges the "unambiguous" censure of all chemical weapons use by placing "equal stress" on both Iran and Iraq to avoid such use. *See id.* The document additionally highlights the protection of Iraq as a goal, for it qualifies Iran's tactics as "ruthless and inhumane." *Id.* Accordingly, the document directed United States officials to craft "a plan of action designed to avert an Iraqi collapse" in the event that Iran gained the upper hand. *See id.*

245. *See* Dobbs, *supra* note 239.

246. Alan Cowell, *Iran Charges Iraq with Gas Attack*, N.Y. TIMES, Mar. 24, 1988, at A11.

247. *Id.*; Chris Hedges, *Kurds Unearthing New Evidence of Iraqi Killings*, N.Y. TIMES, Dec. 7, 1991, at A1; Youssef M. Ibrahim, *Iran Reports New Iraqi Gas Raids and Says Cities May Be Hit Next*, N.Y. TIMES, Apr. 2, 1988, at A1.

248. *See generally* Christopher Dickey & Evan Thomas, *How Saddam Happened*, NEWSWEEK, Sept. 23, 2002, at 34 (detailing the United States' refusal to discontinue ties with Saddam Hussein's regime).

249. *See* Davis, *supra* note 211, at 256 (attributing this quote to former Secretary of State and foreign policy scholar Henry Kissinger).

only assisted Iraq, but also supported Iran,²⁵⁰ in part by encouraging countries to sell weapons to the anti-West theocracy.²⁵¹ The policy worked. By the end of the war in 1988, over one million lives were lost and no clear winner was discernable.²⁵²

The United States persisted in cultivating ties with Iraq.²⁵³ Ranking United States government representatives were sent to Iraq for the official purpose of rebuking Hussein for his regime's use of chemical weapons, but they also were sent to communicate to Hussein that the United States continued to support his rule.²⁵⁴ A book published by the staff of *U.S. News & World Report*, titled *Triumph Without Victory: The Unreported History of the Persian Gulf War*, gives the following account:

[O]n April 12, [1990,] five senators, led by Robert Dole, the minority leader, had met with Saddam Hussein in Mosul. The senators delivered a letter condemning Iraq's quest for chemical and nuclear weapons. But, according to Iraqi officials who secretly taped the meeting and later released a transcript, Dole wanted to let Saddam know that not everyone in Washington was against him.²⁵⁵

Additionally, two months before Iraq invaded Kuwait, Assistant Secretary of State John Kelly testified before the Senate Foreign Relations Committee that imposing sanctions against Iraq would be a mistake because, according to Kelly, Hussein's regime was generally exercising restraint and cooperation in the region, which were steps in the right direction.²⁵⁶ Also, on July 25, 1990—eight days before the August 2, 1990 Iraqi invasion of Kuwait—April Glaspie, the United States Ambassador to Iraq, met with Saddam Hussein at his Presidential Palace in Baghdad.²⁵⁷

250. See MARK PHYTHIAN, *ARMING IRAQ* 24-25 (1997).

251. See *id.* at 33.

252. See Jeffrey Goldberg, *The Great Terror*, *NEW YORKER*, Mar. 25, 2002, at 52, 55.

253. In October 1989, President George H.W. Bush delivered National Security Decision Directive 26, which asserted that "[n]ormal relations between the United States and Iraq would serve our longer-term interests and promote stability in both the Gulf and the Middle East." Nat'l Sec. Decision Directive No. 26 (Oct. 2, 1989).

254. U.S. NEWS & WORLD REPORT, *TRIUMPH WITHOUT VICTORY: THE UNREPORTED HISTORY OF THE PERSIAN GULF WAR* 19 (1992).

255. *Id.* The other four senators were Alan Simpson, Frank Murkowski, James McClure, and Howard Metzenbaum. Sen. Arlen Specter, *Confrontation in the Gulf; War and Peace: A Sampling from the Debate on Capitol Hill*, *N.Y. TIMES*, Jan. 11, 1991, at A8.

256. *United States Policy Toward Iraq: Human Rights, Weapons Proliferation, and International Law: Hearing Before the S. Comm. on Foreign Relations*, 101st Cong. 5 (1990) (testimony of Assistant Secretary of State John Kelly); see also Jim Hoagland, Editorial, *Turning a Blind Eye to Baghdad*, *WASH. POST*, July 5, 1990, at A19.

257. Roxanne Roberts, *The Silence of the Diplomat*, *WASH. POST*, Mar. 15, 1991, at C1.

The content of the conversation that took place has been the subject of debate from the moment the transcript was made available.²⁵⁸ Regardless of the tone of the conversation, Ambassador Glaspie uttered the now infamous assertion to Hussein that the United States has “no opinion on the Arab-Arab conflicts, like your border disagreement with Kuwait.”²⁵⁹

Despite this support, United States foreign policy regarding Iraq changed drastically when Iraq invaded Kuwait on August 2, 1990. Notably, Hussein’s invasion of Kuwait was not unanticipated by the United States. In 1989, the United States military commenced battle simulations, which drilled maneuvers specifically designed to repel Iraqi armed forces from Kuwait or Saudi Arabia in the event of an invasion.²⁶⁰ There was steadily mounting evidence that Hussein was planning to attack Kuwait, with which Iraq had continuing border and economic disputes.²⁶¹ On April 1, 1990, Hussein gave a speech that elucidated Iraq’s chemical weapon capabilities when he publicly threatened to use these weapons against Israel if Tel Aviv attacked Iraq as part of a Coalition effort to defend Kuwait.²⁶² Hussein was evidently levying a threat against the United States, Israel’s long-standing ally. Indeed, the United States was again forced to come to terms with the fact that yet another former cohort (of sorts) had become a mortal enemy.

258. *Id.* (reporting that the State Department maintained that the transcript of the conversation between Glaspie and Hussein that was released by the Iraqis “was heavily edited and excludes Glaspie’s sharper remarks to Saddam and his assurances that he had no intentions of invading Kuwait”).

259. *Id.*

260. See WILLIAM BLUM, *KILLING HOPE: U.S. MILITARY AND CIA INTERVENTIONS SINCE WORLD WAR II*, at 324 (1995).

261. See BOB WOODWARD, *THE COMMANDERS* 206-07 (1991) (“[B]order disputes and animosities continued [between Iraq and Kuwait, in spite of Iraq’s] . . . acquiesce[nce] to Kuwait’s status as a nation when [Iraq] permitted Kuwait’s admission to the Arab League in 1963.”). Specifically, by the late 1980s, Iraq was extraordinarily indebted to various Arab nations, particularly Kuwait, to which Hussein owed over \$14 billion. Generally, Hussein proclaimed that Iraq’s engagement in the Iran-Iraq war defended the interests of the entire Gulf region; this, according to Hussein, mitigated all debt that Iraq incurred from its Arab lender. This argument was not well received. Hussein had planned to repay Iraq’s debts by cutting Iraq’s OPEC oil production, thereby increasing the price of oil. However, Kuwait countered by increasing its own oil production, which lowered oil prices and thwarted Hussein’s plan; Kuwait ostensibly did so to gain leverage in its ongoing border dispute with Iraq. As a result, tension between Iraq and Kuwait hugely escalated. Hussein accused Kuwait of taking advantage of the Iran-Iraq War when it drilled for oil and constructed military installations in the territory of Iraq proximate to Kuwait. These factors are generally understood to be the underlying reasons for the intense Iraq-Kuwait hostility, which culminated in Hussein’s invasion of Kuwait in August 1990. For more information on the Persian Gulf War, see generally HIRO, *supra* note 221.

262. WOODWARD, *supra* note 261, at 201; see also Davis, *supra* note 211, at 274.

The United States assembled a coalition to drive Hussein's armed forces out of Kuwait.²⁶³ This coalition, led by the United States, launched an air campaign against Iraq that began on January 16, 1991, and raged for thirty-eight days.²⁶⁴ Then began the ground operation, which ended within 100 hours, and resulted in Iraq's surrender.²⁶⁵

The United States proffered a variety of public justifications for its involvement in the Persian Gulf War. The ostensible initial justification was that immediate action was necessary to defend the United States' access to existing channels of oil because the United States economy was entirely dependant on this oil. President George H.W. Bush also portrayed United States involvement as required to protect Saudi Arabia, a long-standing American ally, from an Iraqi invasion,²⁶⁶ despite the lack of evidence that Hussein was planning such an attack. Other justifications emerged as the public outcry²⁶⁷ against a war premised on the United States' dependency on oil intensified. These justifications included Iraq's extensive history of human rights violations in and out of the context of the Iran-Iraq War, Hussein's pursuit of nuclear weapons, Iraq's continued defiance of a series of United Nations General Security Council Resolutions,²⁶⁸ and Hussein's invasion of Kuwait in and of itself,²⁶⁹ which

263. This coalition consisted of thirty-four countries: Afghanistan, Argentina, Australia, Bahrain, Bangladesh, Canada, Czechoslovakia, Denmark, Egypt, France, Germany, Greece, Hungary, Honduras, Italy, Kuwait, Morocco, The Netherlands, Niger, Norway, Oman, Pakistan, Poland, Portugal, Qatar, Saudi Arabia, Senegal, South Korea, Spain, Syria, Turkey, United Arab Emirates, the United Kingdom, and the United States. Kathy Gill, *War in Iraq*, at <http://uspolitics.about.com/od/wariniraq/i/iraq-overview.htm> (last visited Oct. 19, 2004).

264. See David Ballingrud & Tom Drury, *Gulf War Revisited*, ST. PETERSBURG TIMES (Florida), Jan. 12, 2003, at 1A.

265. See William M. Arkin, *The Gulf 'Hyperwar'—An Interim Tally*, N.Y. TIMES, June 22, 1991, Op-Ed section, at 23 (discussing the impact of the Gulf War).

266. See *Bush: No Appeasement*, L.A. TIMES, Aug. 8, 1990, at P1 (reporting on President George H.W. Bush's news conference on August 8, 1990, in which the President announced that the United States sought to protect Saudi Arabia from Iraqi aggression).

267. See Glenn Frankel, *Millions Worldwide Protest Iraq War*, WASH. POST, Feb. 16, 2003, at A1.

268. As a P-5 member of the United Nations Security Council, the United States officially approved of each of the sixty UNSC Resolutions specifically levied against Iraq, which were each created after Iraq proclaimed its antipathy to the United States and its allies. The first of these, Resolution 660, was created on August 2, 1990, condemned the Iraqi invasion of Kuwait, and demanded that it immediately and unconditionally withdraw from Kuwait. See S.C. Res. 660, U.N. SCOR, 45th Sess., 2932d mtg., U.N. Doc. S/RES/660 (1990). This Resolution was followed by a series of analogous resolutions until the Council voted to adopt of Resolution 678, which authorized the use of force. See *id.*; S.C. Res. 661 U.N. SCOR, 45th Sess., 2933rd mtg., U.N. Doc. S/RES/661 (1990); S.C. Res. 662, U.N. SCOR, 45th Sess., 2934th mtg., U.N. Doc. S/RES/662 (1990); S.C. Res. 664, U.N. SCOR, 45th Sess., 2937th mtg., U.N. Doc. S/RES/664 (1990); S.C. Res. 662, U.N. SCOR, 45th Sess., 2934th mtg. U.N. Doc. S/RES/662 (1990); S.C. Res. 665, U.N. SCOR, 45th Sess., 2938th mtg., U.N. Doc. S/RES/665 (1990); S.C. Res. 666, U.N. SCOR, 45th Sess., 2939th

President George H.W. Bush categorized as “naked aggression.”²⁷⁰ All of these reasons were valid, regardless of whether they manifested the true reasons why the United States led what was designated Operation Desert Storm, because taken together they showed how Saddam Hussein’s Iraq significantly endangered the national security of the United States.²⁷¹

In addition to the support proffered to Hussein by the CIA, which helped facilitate his rise to power, the United States expended considerable effort opening channels that permitted American companies to arm and materially support Hussein’s Iraq. In other words, the United States

mtg., U.N. Doc. S/RES/666 (1990); S.C. Res. 667, U.N. SCOR, 45th Sess., 2940th mtg., U.N. Doc. S/RES/667 (1990); S.C. Res. 669, U.N. SCOR, 45th Sess., 2942d mtg., U.N. Doc. S/RES/669 (1990); S.C. Res. 670, U.N. SCOR, 45th Sess., 2943d mtg., U.N. Doc. S/RES/670 (1990); S.C. Res. 674, U.N. SCOR, 45th Sess., 2951st mtg., U.N. Doc. S/RES/674 (1990); S.C. Res. 677, U.N. SCOR, 45th Sess. 2962d mtg., U.N. Doc. S/RES/677 (1990).

269. See Davis, *supra* note 211, at 252.

270. Dan Balz, *President Pessimistic About Iraq*, WASH. POST, Dec. 6, 1990, at A48.

271. Saddam Hussein was long thought to have been working to construct nuclear weapons in order to match Israeli WMD developments. This belief seized the attention of the international community, especially the United States and Israel. In 1981, Israel claimed it acted in self-defense when it bombed an inactive Iraqi nuclear reactor, arguing that Iraq was going to use the reactor to make nuclear weapons to threaten Israel. STANIMIR A. ALEXANDROV, *SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW* 159-60 (1996). If Saddam Hussein was indeed seeking to secretly develop nuclear WMD, which would be over and above the stocks of chemical WMD he had already developed and employed, the possibility of his development of a sophisticated delivery system posed a grave future threat to the national security of the United States. Hussein’s indignant attitude toward United Nations Security Council Resolutions also became a sore point for the United States; in seeking the rollback of Iraq after Iraq’s invasion of Kuwait, the United States confronted certain ethnic conflicts and acts of aggression, which positioned the United States to generally conform its national security policy to the framework of the United Nations Charter. See Nagan & Hammer, *supra* note 23, at 400. Iraq’s invasion of Kuwait was rebuked in international circles where the values of the United Nations Charter, having survived the Cold War, were directly threatened by Hussein’s unilateral repudiation. The invasion was a direct violation of Article 2(4), and there was no pretense that Article 51 could cover the obviousness of the aggression. United States national defense and defense of the United Nations Charter became core reasons to wage war against Hussein’s Iraq. These reasons comprised a more moral justification for fighting a country that posed a significant threat to vital energy interests in the region. Multilateralism became fashionable, and President George H.W. Bush viewed this as an opportunity to construct a different national security doctrine. *Id.* With the benefit of hindsight, some United States government officials and scholars now feel that the threat posed by Hussein to United States national security was best illustrated by his attempt to assassinate President George H.W. Bush. See, e.g., Richard Bernstein, *Raid on Baghdad: The United Nations, U.S. Presents Evidence to U.N. Justifying Its Missile Attack on Iraq*, N.Y. TIMES, June 28, 1993, at A7 (reporting Madeleine K. Albright’s statement to the United Nations that the Clinton Administration was justified in attacking an Iraqi intelligence site because it was self defense against the Iraqi government’s plot to assassinate former President George H. W. Bush); *Raid on Baghdad: Excerpts from U.N. Speech: The Case for Clinton’s Strike*, N.Y. TIMES, June 28, 1993, at A7 (reporting excerpts of the statement of Madeleine K. Albright, United States delegate to the United Nations, about evidence linking Iraq to the attempt to assassinate President George H.W. Bush).

endeavored to maintain a mutually beneficial relationship with Hussein's regime even as that regime flaunted its brutality. As evidenced above, the foreign policy goal of this long-lasting support was to balance the political environment of the Gulf region; when the relationship between the two nations soured—in part because of the conflict created by simultaneous United States support of mortal enemies Iraq and Israel—Hussein turned against the United States. What has happened since between the United States and Iraq continues to be thoroughly documented.²⁷² The process by which the two nations devolved into arch-nemeses is elementary. Had the United States employed a different policy regarding Iran's attempt at democracy (recalling that its actual policy significantly assisted in the creation of the tyrannical theocracy that is present-day Iran), the United States likely would not have been compelled to intervene in Iraq to the extent that it did (if, indeed, at all) to establish a secular counterweight in the Gulf region. Not only does this mean that the Iran-Iraq War could have been averted had United States foreign policy been crafted differently with regard to both countries, but the 1991 Persian Gulf War (Operation Desert Storm) as well as the 2003 war in Iraq (Operation Enduring Freedom) may have never been necessary. In any case, it is again evident that the foreign policy of the United States embraced a characteristically corrupt, violent regime for the purpose of furthering United States interests. When relations with that regime eventually fell apart, it turned against its one-time ally and, as indicated above, the United States national security was seriously imperiled as a result.

V. CONCLUDING THOUGHTS

Dinh re-characterizes nationalism as a means of achieving an end internal to the enterprise of national security rather than as a technique for promoting national solidarity—a beneficial, redistributive goal intrinsic to it, but outside of the national security discourse. By doing so, Dinh and those who follow his lead succeed in dampening the meanings of the statements uttered or written by the speakers and authors to whom Dinh cites in Part IV of his article. The heuristic value of such an “internal” perspective on nationalism in the American citizenry provides greater illumination about the key questions regarding the value and purpose of legitimate nationalism under consideration than does a perspective that imperceptibly shifts between values internal and external to issues of national security. Dinh, however, does not suggest that all internal and external value implications be considered. We submit that these internal

272. See generally Nagan & Hammer, *supra* note 23 (examining historically significant national security doctrines and the legal basis underlying the 2003 American attack on Iraq in order to explore the Bush Administration's international policy determinations).

and external values have important points of overlap; from a practical standpoint, these overlapping intersections about the goals and values of nationalism are an inevitable element of the task of using disciplined intellectual tools to ground these value judgments and perspectives in particular contexts.

Dinh seeks to bind crony nationalism to the province of national defense as the nation's primary mechanism to fight terror.²⁷³ He seems to search for a way in which everyday citizens can join in the fight. We seek to ground the value judgment of nationalism in its correct and legitimate context: as an ever-useful tool for the everyday citizen to resist chaos. Thus, nationalism has inherent value in the war on terror, but not as the first line of national defense. This is an important distinction. All Americans are obligated to participate in the war on terror, but the most useful and practical mechanism at their disposal is a voting booth. This is because the most effective weapon against terror is not crony nationalism, but a strong, carefully conceived foreign policy.

As Dinh briefly noted in the second paragraph of his article, American citizens must be prevention-minded, while American foreign policy must be preemption-minded.²⁷⁴ With regard to American foreign policy, Dinh apparently echoes President George W. Bush's Administration's doctrinal philosophy of preemptive warfare rather than the largely accepted formula of essentially reactive warfare.²⁷⁵ While there are theoretical justifications

273. It is important to note that some scholars would likely take issue with the whole of Dinh's argument, for some like author, scholar, and nationalism expert John Breuilly have argued that "it seems to be impossible to produce an independent definition of the nation which can be correlated in any reliable way with the existence or intensity of nationalism." BREUILLY, *supra* note 71, at 405.

274. See Dinh, *supra* note 2, at 867.

275. The traditional concept of national self-defense is usually deciphered by exploring the dictates of Articles 51 and 2(4) of the United Nations Charter, as well as the customary international law articulated by the Caroline doctrine and in the Nicaragua case. Article 51 holds that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." U.N. CHARTER art. 51. Article 2(4) holds that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state." *Id.* at art. 2, para. 4. The Caroline doctrine can be used to give substance to these general rules; the doctrine recognizes the "necessity of . . . self-defence [that] is instant, overwhelming, and leav[es] no choice of means, and no moment for deliberation." Letter from Daniel Webster, U.S. Secretary of State, to Lord Ashburton, British Plenipotentiary (Aug. 6, 1842), in 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 412 (1906). The International Court of Justice has stated that a state may only use "self-defence . . . measures which are proportional to the armed attack and necessary to respond to it." Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 94 (June 27). The United States interpreted this customary international law pronouncement to mean that the lawfulness of an act of national self-defense depends in part on the necessity and the proportionality of the measures taken. See *id.* at 103.

that support the new Bush doctrine of preemptive action,²⁷⁶ a more valuable version of preemptive-mindedness has long been the foreign policy tool of preemptive strategizing to displace potential or otherwise inevitable conflicts. Despite the intuitiveness and relative simplicity of this approach to the war on terror, the United States has nevertheless engaged in undertakings that do not comport with it.²⁷⁷ An important lesson to be gleaned is that the United States must craft the security interests of its foreign policy such that interference in the political infrastructures of other states is available as an option only if blowback—the likes of which the United States has experienced, most notably in the above examples—might be avoided in order to safeguard the citizenry of the United States. But most critically, the long-term interests of the United States' foreign policy are vindicated when foreign policy is consistent with the fundamental democratic rule-of-law values upon which the Republic was founded.

276. See Nagan & Hammer, *supra* note 23, at 413-33.

277. Through its foreign policy, the United States has long cultivated ties—indeed, even embraced dictators—that would eventually prove extremely harmful to United States interests or national security. Despite this alarming trend, it appears to us that the same foreign policy mistakes are being made time and again. We believe the reason for this is that the philosophy underlying the cultivation of such problematic alliances has not changed; some moral compromises are deemed necessary to acquire pro-West, secular support from foreign regimes to further United States economic interests or for intelligence acquisition. Perhaps President Franklin Delano Roosevelt best articulated this compromise when he spoke of United States support for 1930s Nicaraguan dictator Anastasio Somoza by asserting that “[h]e may be a son of a bitch, but he’s *our* son of a bitch.” STANLEY KARNOW, *IN OUR IMAGE: AMERICA’S EMPIRE IN THE PHILIPPINES* 388 (1989).