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WAR ON TERROR – LESSONS FROM LINCOLN

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INTRODUCTION

On May 1, 2012, President Obama announced that U.S. forces would continue their phased withdrawal from Afghanistan such that by the end of 2014, Afghan security forces will have full responsibility for their country's security.¹ Of particular note, the President's speech was directed solely at an American audience with very little attention paid to either Afghan sentiment or the Afghan people's needs. The unidirectional nature of the President's focus was inadvertently evidenced when, on Afghan soil, he closed the speech by stating:

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¹ See Mark Landler, *Obama Signs Pact in Kabul, Turning Page in Afghan War*, N.Y. TIMES, May 2, 2012, http://www.nytimes.com/2012/05/02/world/asia/obama-lands-in-kabul-on-unannounced-visit.html?pagewanted=all&_r=0; see also David E. Sanger, *Charting Obama's Journey to a Shift on Afghanistan*, N.Y. TIMES, May 20, 2012, <http://www.nytimes.com/2012/05/20/us/obamas-journey-to-reshape-afghanistan-war.html?hp>.

"May God bless our troops and may God bless the United States of America."² The President's words did not evidence any acknowledgement that an expression of American solicitude for Afghan well-being might equally be in the American people's interests. Indeed, throughout the War on Terror, American policy objectives have been hamstrung by an almost exclusive focus on domestic American public opinion and a complete failure to address the international community's perception of U.S. policies.³ The international community's suspicions as to American good faith was exacerbated by the February 2012 accidental incineration of Korans at the U.S. Air Force Base in Bagram, Afghanistan⁴ and the March 2012 killing of sixteen Afghan civilians, allegedly by U.S. Army Sergeant Robert Bales.⁵

Both the President's May 1, 2012 speech and the preceding tragic events highlight the precarious position of U.S. forces in Afghanistan. Though U.S. forces are necessary to protect President Hamid Karzai's government from the Taliban insurgency, the United States' continued presence in the country has led to widespread anger by Afghans and members of the global community who perceive that U.S. forces show insufficient concern for civilian welfare.⁶ On May 18,

² Address to the Nation on Military Operations in Afghanistan from Bagram Air Base, Afghanistan, 2012 DAILY COMP. PRES. DOC. 336 (May 2, 2012).

³ See Dr. Steven Kull, Dir., Program on Int'l Policy Attitudes (PIPA), and Editor, WorldPublicOpinion.org, *America's Image in the World*, Address Before House Committee on Foreign Affairs, Subcommittee on International Organizations, Human Rights, and Oversight (Mar. 6, 2007) (*transcript available at* http://www.worldpublicopinion.org/pipa/articles/views_on_countriesregions_bt/326.php?nid=&id=&pnt=326).

⁴ See Babrak Miakhel, *Six Dead in Afghanistan Koran Burning Protests*, BBC NEWS (Feb. 22, 2012, 10:39 ET), <http://www.bbc.co.uk/news/world-asia-17123464>.

⁵ See James Dao, *U.S. Identifies Army Sergeant in Killing of 16 in Afghanistan*, N.Y. TIMES, Mar. 17, 2012, <http://www.nytimes.com/2012/03/17/world/asia/afghan-shooting-suspect-identified-as-army-staff-sgt-robert-bales.html?pagewanted=all>.

⁶ See Ahmad Nadem & Ahmad Haroon, *Afghans Urge U.S. Exit After Killings; U.S. Says Timetable Unchanged*, REUTERS, Mar. 12, 2012, *available at* <http://www.reuters.com/article/2012/03/12/us-afghanistan-civilians-idUSBRE82A02V20120312>.

2012, the newly elected French President, Francois Hollande, informed President Obama that France would be withdrawing the majority of its 3,400 forces stationed in Afghanistan by the year's end.⁷ The French withdrawal and reluctance by other NATO allies to contribute to the Afghan anti-insurgency campaign is largely attributable to the international community's view that U.S. policy is based on domestic politics alone with insufficient solicitude shown for either Afghan civilian well-being or the concerns of world public opinion.⁸ These perceptions will make it more difficult for the Obama administration and its successor to effectively disengage from the Middle East and South Asia, share the costs of international security with its allies, and address long-neglected domestic problems.⁹

The United States' national interest has traditionally been international stability, free markets, and democratization. During much of the twentieth century, the United States was the indispensable nation that intervened at critical moments to assure the modern, increasingly democratic, and globalized world. Although these priorities remain, the United States has a further interest in seeing a shift in the global paradigm from a unipolar world, in which it bears nearly all the diplomatic and military costs of ensuring continued globalization, to a multi-polar world, in which it is, if anything, first among equals.¹⁰ This process, however, is crippled by the United States' continued military presence in both South Asia and

⁷ Dan Robinson, *Hollande Meets Obama, Reaffirms Early Afghanistan Withdrawal*, VOICE OF AMERICA (May 18, 2012), <http://www.voanews.com/content/article/727271.html>.

⁸ See Sanger, *supra* note 1; see also Tom Engelhardt, *Predator Drone Nation*, THE NATION (May 14, 2012), <http://www.thenation.com/article/167868/predator-drone-nation>.

⁹ See Jane Kelly, *Australian Ambassador Lauds U.S. Strategic Shift*, UVA TODAY (Mar. 28, 2012), <http://www.virginia.edu/uvatoday/newsRelease.php?id=17888>; see also James Kitfield, *Geopolitical Shift: Old Europe to New Asia?*, NAT'L J. NAT'L SEC. EXPERTS BLOG (Nov. 8, 2010, 10:19 AM), <http://security.nationaljournal.com/2010/11/geopolitical-shift-old-europe.php>.

¹⁰ See DAVID E. SANGER, *THE INHERITANCE: THE WORLD OBAMA CONFRONTS AND THE CHALLENGES TO AMERICAN POWER* p. 471 (Three Rivers Press 2009).

the Middle East and the United States' excessive focus on the War on Terror.¹¹ Although the United States has sincerely sought to engender both democracy and pluralism in these regions, spending billions of dollars to develop civilian infrastructure in both Iraq and Afghanistan and never seeking to acquire territory for itself, its perceived rejection of world public opinion and international legal norms has harmed both its international reputation and its ability to "turn the page" and effectively disengage.¹² President Abraham Lincoln engaged in a civil war with a wholly different purpose and context from today's circumstances. However, Lincoln did have similar hurdles to overcome, including massive military resistance and opposition to his goal of preserving the Union. Although his handling of the Civil War was not without error or controversy, there are lessons to be learned from Lincoln in terms of both his actions and his mistakes, given to us in hindsight. As set forth below, U.S. policy makers can look to Lincoln's legacy to improve its image - and thus its credibility - on the international scene.

I. THE SEPTEMBER 11, 2001 TERRORIST ATTACKS

The Al Qaeda terrorist organization, based at the time in Afghanistan, tragically attacked United States civilian infrastructure on September 11, 2001. Nineteen Al Qaeda terrorists hijacked four passenger jets, crashed two of them into the twin towers of the World Trade Center in New York City, one into the Pentagon in Arlington, Virginia and a fourth into a field near Shanksville, Pennsylvania, after

¹¹ See Anne Applebaum, *The Worst Mistake America Made After 9/11: How Focusing Too Much on the War on Terror Undermined Our Economy and Global Power*, SLATE (Sept. 4, 2011, 7:13 AM), http://www.slate.com/articles/news_and_politics/foreigners/2011/09/the_worst_mistake_america_made_after_911.html.

¹² David Cole, *After September 11: What We Still Don't Know*, N.Y. REV. OF BOOKS, (Sept. 29, 2011), <http://www.nybooks.com/articles/archives/2011/sep/29/after-september-11-what-we-still-dont-know/?pagination=false>.

passengers attempted to take control before the plane could reach the terrorists' intended target in Washington, D.C. The 9/11 attacks led to the killing of nearly 3,000 civilians on American soil¹³ and caused trillions of dollars in damage to the United States economy.¹⁴ Indeed, in the first days after the terrorist attacks, the perception was that up many more innocent civilians had been killed in the attacks than was actually the case.¹⁵

In the immediate aftermath, the international community rallied around the United States and its people. Of note, the United Nations Security Council unanimously passed Resolution 1368 that unequivocally condemned the terrorist attacks and expressed the Security Council's readiness "to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations."¹⁶ Perhaps the world's most prestigious non-English language newspaper, the French daily "Le Monde" published a September 12, 2001 cover article titled "Nous sommes tous Américains" in support of the American people.¹⁷ Indeed, public manifestations of sympathy with the American people arose immediately and spontaneously not only in industrialized and

¹³ *9/11 Investigation (PENTTBOM)*, FBI, <http://www.fbi.gov/about-us/history/famous-cases/9-11-investigation> (last visited Nov. 18, 2012).

¹⁴ See Shan Carter & Amanda Cox, *One 9/11 Talley: \$3.3 Trillion*, N.Y. TIMES, Sept. 8, 2011, http://www.nytimes.com/interactive/2011/09/08/us/sept-11-reckoning/cost-graphic.html?_r=0.

¹⁵ NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 292 (2004), available at <http://www.9-11commission.gov/report/911Report.pdf>.

¹⁶ S.C. Res. 1368, ¶ 5, U.N. Doc. S/RES/1368 (Sept. 12, 2001); see also Press Release, Security Council, Security Council Condemns, 'In Strongest Terms,' Terrorist Attacks on United States, U.N. Press Release SC/7143 (Sept. 12, 2001), available at <http://www.un.org/News/Press/docs/2001/SC7143.doc.htm>.

¹⁷ See Jean-Marie Colombani, *Nous Sommes Tous Américains [We are all Americans]*, LE MONDE, May 23, 2007, http://www.lemonde.fr/idees/article/2007/05/23/nous-sommes-tous-americaains_913706_3232.html (Fr.).

mature democracies, but also in Russia, China, Iran, Kuwait and India.¹⁸

With strong evidence that Al Qaeda was responsible, President George W. Bush, on September 20, 2001, demanded the Taliban government in Afghanistan turn over Al Qaeda leaders, including its head, Osama bin Laden, to avoid a United States invasion of Afghanistan.¹⁹ President Bush's ultimatum was issued based on Congress' September 14, 2001 Authorization for Military Force against Terrorists that was signed into law by President Bush on September 18, 2001. The invasion of Afghanistan, which commenced on October 7, 2001 and followed the Taliban's refusal to turn bin Laden directly over to the United States,²⁰ was most likely legal under international law as an act of self-defense authorized by Article 51 of the United Nations Charter.²¹

II. THE AFGHANISTAN WAR

With the help of the Northern Alliance, the United States easily defeated the Taliban government of Mullah Omar and created

¹⁸ See Haley Sweetland Edwards, *We Are All Americans: The World's Response to 9/11*, MENTAL_FLOSS (Sept. 9, 2011, 4:04 PM), <http://www.mentalfloss.com/blogs/archives/99665>.

¹⁹ See Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 Weekly Comp. Pres. Doc. 1347 (Sept. 20, 2001); see also *Bush Delivers Ultimatum*, CNN (Sept. 20, 2001), http://articles.cnn.com/2001-09-20/world/ret.afghan.bush_1_senior-taliban-official-terrorist-ringleader-osama-bin-mullah-mohammed-omar?_s=PM:asiapcf.

²⁰ See *Taliban Won't Turn Over Bin Laden*, CBS NEWS (Feb. 11, 2009), <http://www.cbsnews.com/stories/2001/09/11/world/main310852.shtml>.

²¹ See U.N. Charter art. 51, available at <http://www.un.org/en/documents/charter/chapter7.shtml>; see also Ben Smith & Arabella Thorp, *The Legal Basis for the Invasion of Afghanistan* (House of Commons Library Standard Note SN/IA/5340, Feb. 26, 2010), available at www.parliament.uk/briefing-papers/SN05340.pdf.

an Afghan Interim Authority, which in turn led to the establishment of a government under the Presidency of Hamid Karzai.²²

Since the invasion and subsequent transfer of power to the Karzai Government, the United States and its NATO allies shifted focus and relocated troops to Iraq. This arguably facilitated the Taliban's ability to reconstitute itself and launch a vicious war against both NATO and Afghan forces for control of the country.

The Obama administration maintains that this deliberate move away from Afghanistan was a mistake, both because it was the base of Al-Qaeda's operations and because of the country's proximity to Pakistan.²³ While the troop surge of 2010 likely stabilized the predicament of the Karzai government, it has been accompanied by increased wariness about the rise in civilian casualties. The effectiveness of United States forces in Afghanistan is limited by the perception they operate at the expense of the Afghan people's well-being and safety.²⁴ This concern is exacerbated by the Obama administration's expanded use of Predator Drones within the Afghanistan-Pakistan border region to kill suspected terrorists, regardless of the effects of such policies on innocent lives. As Professor Samuel Vincent Jones writes:

The high number of civilian casualties has severely undermined support for U.S. counterinsurgency programs and the Afghan government itself. Protection of the Afghan civilian populace is critically necessary to regaining their active and continued support for the Afghan government,

²² See Britannica.com, *Hamid Karzai*, <http://www.britannica.com/EBchecked/topic/761104/Hamid-Karzai> (last visited Dec. 2, 2013).

²³ Sanger, *supra* note 1; see also U.S. DEP'T OF STATE, BUREAU OF SOUTH AND CENTRAL ASIAN AFFAIRS, *U.S. Relations with Afghanistan* (Sept. 6, 2012), <http://www.state.gov/r/pa/ei/bgn/5380.htm>.

²⁴ See Laura King, *U.S.-Afghan Divide Seen in Perceptions of Village Massacre*, L.A. TIMES, Mar. 17, 2012, <http://articles.latimes.com/2012/mar/17/world/la-fg-afghanistan-killings-20120318>.

and it is essential to depriving the Taliban of its authority and appeal.²⁵

Reversing the continued erosion of support among Afghans for the Karzai government has proved elusive, largely due to the Karzai government's inability to protect the Afghan people from either Taliban insurgents or U.S. forces.

III. USE OF GUANTANAMO BAY AS A DETENTION FACILITY

During the Afghanistan invasion, U.S. forces took custody of hundreds of individuals on Afghan soil and transferred many of these detainees to the Camp X-Ray (and subsequently Camp Delta) detention facility situated within the United States' Guantanamo Bay Naval Station in Cuba.²⁶ The reason why "GITMO" was chosen as the detention facility is largely because the Bush administration believed prisoners held on Cuban soil would not have habeas corpus rights under the United States Constitution to challenge the legality of their detention as enemy combatants in U.S. federal court. These controversial detentions engendered further international enmity when the Bush administration asserted the detainees, as "enemy combatants," need not be afforded the protections of the Geneva Conventions because such protections only apply to uniformed soldiers.²⁷

²⁵ Samuel Vincent Jones, *The Ethics of Letting Civilians Die in Afghanistan: The False Dichotomy Between Hobbesian and Kantian Rescue Paradigms*, 59 DEPAUL L. REV. 899, 901-02 (2010).

²⁶ See Briannica.com, *Guantanamo Bay Detention Camp*, <http://www.britannica.com/EBchecked/topic/1503067/Guantanmo-Bay-detention-camp> (last visited Dec. 2, 2013).

²⁷ Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, THE NEW YORKER, Feb. 14, 2005, available at http://www.newyorker.com/archive/2005/02/14/050214fa_fact6.

The detentions were further delegitimized by allegations of systematic torture against detainees by U.S. forces.²⁸ Indeed, a leaked International Committee of the Red Cross report of July 2004 cited the United States for forcing prisoners to suffer “humiliating acts, solitary confinement, temperature extremes, [and] use of forced positions.”²⁹ Many released prisoners complained of having suffered beatings, sleep deprivation, prolonged constraint in uncomfortable positions, prolonged hooding, sexual and cultural humiliation, and other physical and psychological mistreatment during their detention.³⁰

A May 2007 United Nations Human Rights Council Report stated the United States violated international law, particularly the International Covenant on Civil and Political Rights, and disputed the Bush Administration’s authority to try Guantanamo Bay prisoners as enemy combatants in military tribunals. As stated by the International Committee for the Red Cross, the body charged with monitoring compliance with the Geneva Conventions:

Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law.³¹

²⁸ Giles Tremlett, *Spanish Court Opens Investigation of Guantánamo Torture Allegations*, THE GUARDIAN, Apr. 29, 2009, <http://www.guardian.co.uk/world/2009/apr/29/spain-court-guantanamo-detainees-torture>.

²⁹ Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantánamo*, N.Y. TIMES, Nov. 30, 2004, <http://www.nytimes.com/2004/11/30/politics/30gitmo.html>.

³⁰ *Id.*

³¹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

Notwithstanding the United States Government's claims to the contrary, the Supreme Court, in three cases decided on June 28, 2004, determined the Guantanamo Bay detainees should have access to federal courts. In *Hamdi v. Rumsfeld*, the Court held that an American citizen apprehended in Afghanistan and held as an enemy combatant must be accorded due process and a meaningful factual hearing as to his enemy combatant status.³² In *Rumsfeld v. Padilla*,³³ although the Court held the lower court lacked jurisdiction to consider petitioner's *habeas corpus* petition, it signaled the government has no authority to detain an American citizen arrested on United States soil as an enemy combatant.³⁴ Finally, in *Rasul v. Bush*, the Court held that those being detained in Guantanamo Bay can have their *habeas corpus* petitions heard in United States federal courts.³⁵ These decisions, the Supreme Court's first rulings about the government's actions in the war on terrorism since the 9/11 attacks, were a political intervention by the judicial branch intended to remediate concerns the Bush Administration acted outside the requirements of both American and international jurisprudence.³⁶ Four years later, in *Boumediene v. Bush*,³⁷ the Court concluded the United States' denial of *habeas corpus* rights to non-citizens held as enemy combatants in Guantanamo Bay violated the Constitution's suspension clause because Congress had not suspended this right under its Article 1 authority.

Further undermining support for Bush's War on Terror was the administration's use of "enhanced interrogation," or torture, to obtain probative information needed to both apprehend existing terrorists and prevent further terrorist attacks.³⁸ Merits aside,

³² *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004).

³³ *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

³⁴ Nancy Morawetz, *Detention Decisions and Access to Habeas Corpus for Immigrants Facing Deportation*, 25 B.C. THIRD WORLD L.J. 13, 14 (2005).

³⁵ *Rasul v. Bush*, 542 U.S. 466, 484 (2004).

³⁶ Cole, *supra* note 12; Linda Greenhouse, *Goodbye Gitmo*, OPINIONATOR (May 16, 2012, 9:00 PM), <http://opinionator.blogs.nytimes.com/2012/05/16/goodbye-to-gitmo/?hp>.

³⁷ *Boumediene v. Bush*, 553 U.S. 723, 798 (2008).

³⁸ See generally JOSE A. RODRIGUEZ, JR. WITH BILL HARLOW, *HARD MEASURES: HOW AGGRESSIVE CIA ACTIONS AFTER 9/11 SAVED AMERICAN LIVES* 263

American government officials failed to anticipate domestic and international resistance to its interrogation methods.³⁹

Recognizing the worldwide negative reaction to continued use of Guantanamo Bay as a detention facility for alleged enemy combatants, President Obama sought to close the facility. Attorney General Eric Holder announced that the accused co-conspirators of the terrorist attacks would be tried in civilian federal district court, while other alleged offenders would be tried by military commission. In the face of strong domestic opposition to both proposals, the Obama administration has since backtracked.⁴⁰ Although this might have been necessitated by domestic politics, it can be argued the decision has worsened the United States' standing within the international community, which sees the use of military justice as both illegitimate and predetermined.⁴¹

IV. THE IRAQI INVASION AND PROBLEMS RELATED TO THE IRAQI OCCUPATION

Shortly after the Iraq occupation, and notwithstanding the fact that neither the United States nor its allies had captured any senior members of Al Qaeda, the Bush administration shifted its focus to

(Threshold Editions 2012) (discussing enhanced interrogation techniques in the wake of the attacks on 9/11); http://www.nytimes.com/2010/11/10/world/10tapes.html?_r=0

³⁹ See *9/11 and the War on Terror: Polls Show What People Think 10 Years Later*, WASHINGTON'S BLOG (Sept. 10, 2011), <http://www.washingtonsblog.com/2011/09/911-and-the-war-on-terror-polls-show-what-people-really-believe-10-years-later.html>.

⁴⁰ Evan Perez, *U.S. Reverses on 9/11 Trials*, WALL ST. J., Apr. 5, 2011, <http://online.wsj.com/article/SB20001424052748703806304576242763782267924.html>.

⁴¹ Sara Sorcher, *Insiders: Military Justice Capable of Fair Trial for Suspect in of Afghan Shooting*, NATIONAL JOURNAL, Mar. 27, 2012, available at <http://www.nationaljournal.com/nationalsecurity/insiders-military-justice-system-capable-of-fair-trial-for-suspect-of-afghan-shooting-20120326>.

“regime change” in Iraq, defined as the forcible removal of the murderous totalitarian regime of then-President Saddam Hussein.⁴²

The Bush Administration’s reasons for the invasion were based on a claim that Iraq possessed weapons of mass destruction and was, therefore, in violation of existing United Nations Security Council Resolutions.⁴³ In the process, President Bush and his administration threatened the United Nations Security Council to prove its relevance by authorizing the use of force against Iraq, all the while letting it be known the United States was prepared to use military force without United Nations approval to do so.⁴⁴ This position was contrary to international law, as Iraq posed no direct threat to the United States and, therefore, did not provide the United States with authority to undertake a unilateral invasion of Iraq based on Article 51 of the United Nations Charter.⁴⁵ Indeed, the United States, after going to the United Nations Security Council to request authorization to invade Iraq on the grounds of Iraq’s failure to disarm itself of Weapons of Mass Destruction, chose to bypass the intergovernmental body when it became clear that its request for such authority would be voted down by both the Security’s Council’s Permanent Members and the body as a whole after the United Nations Chief Weapons Inspector, Hans Blix, presented the Council with a February 14, 2003 report contradicting many United States’ claims.⁴⁶ Indeed, when the United States invasion of Iraq began on

⁴² Joseph Cirincione, *Origins of Regime Change in Iraq*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (Mar. 19, 2003), <http://www.carnegieendowment.org/2003/03/19/origins-of-regime-change-in-iraq/4pr>.

⁴³ Seymour M. Hersh, *Selective Intelligence: Donald Rumsfeld Has His Own Special Sources. Are They Reliable?*, THE NEW YORKER, May 12, 2003, available at http://www.newyorker.com/archive/2003/05/12/030512fa_fact.

⁴⁴ Agence France Presse, *Bush Threatened Nations That Did Not Back Iraq War: Report*, GOOGLE NEWS (Sept. 26, 2007), <http://afp.google.com/article/ALeqM5g3bV2LfRcSgbK7btDtgfbe2NGt8Q> (last visited Apr. 16, 2013).

⁴⁵ Rachel S. Taylor, *The United Nations, International Law, and the War in Iraq*, WORLD PRESS REVIEW, <http://worldpress.org/specials/iraq/> (last visited Apr. 16, 2013).

⁴⁶ Dr. Hans Blix, Executive Chairman of UNMOVIC, Briefing of the Security Council, 14 February 2003: An Update on Inspections, UNITED NATIONS

March 19, 2003, nearly the entire international political community was opposed to the endeavor.⁴⁷ The United States' strongest ally in the invasion, the United Kingdom, did pursue a policy of strategic cooperation with the United States, but U.K. public opinion was heavily lopsided against United States policy, with a large majority of Britons opposed to the war from the start. A January 2007 BBC World Service Poll evidenced that seventy three percent of the world's population in twenty five countries disapproved of U.S. policy in Iraq.

Lack of global public support greatly harmed the ability of the United States to democratize Iraq in a peaceful manner, and the United States was seen by key elements of Iraqi society as an invader and an occupier as opposed to a liberating force.⁴⁸ Moreover, mistakes made by the United States-led Coalition Provisional Authority that eventually handed over control of Iraq to the Iraqi government, led to both anarchy and communal violence throughout the country that was propitiated by insufficient U.S. occupation forces.⁴⁹ The consequences of these mistakes, arguably violations of the Fourth Geneva Convention, continue to persist as Iraq remains prone to high levels of communal violence.⁵⁰

MONITORING, VERIFICATION AND INSPECTION COMMISSION (Feb. 14, 2003), available at http://www.un.org/Depts/unmovic/new/pages/security_council_briefings.asp#6; see also Ronan Bennett, *Ten Days to War*, THE GUARDIAN, Mar. 7, 2008, <http://www.guardian.co.uk/world/2008/mar/08/iraq.unitednations>; Hans Blix's Briefing to the Security Council, THE GUARDIAN, Feb. 14, 2003, <http://www.guardian.co.uk/world/2003/feb/14/iraq.unitednations1>.

⁴⁷ See Britannica.com, *Iraq War*, <http://www.britannica.com/EBchecked/topic/870845/Iraq-War> (last visited Dec. 2, 2013).

⁴⁸ Cesar G. Soriano & Steven Komarow, *Poll: Iraqis Out of Patience*, USA TODAY, Apr. 30, 2004, http://www.usatoday.com/news/world/iraq/2004-04-28-poll-cover_x.htm.

⁴⁹ Anthony H. Cordesman, *American Strategic, Tactical, and Other Mistakes in Iraq: A Litany of Errors*, CENTER FOR STRATEGIC AND INT'L STUD (Apr. 19, 2006), available at http://csis.org/files/media/csis/pubs/060419_iraqlitany.pdf.

⁵⁰ UN: *Attacks Killed 613 Civilians in Iraq in January-March 2012*, TREND (Apr. 10, 2012), <http://en.trend.az/regions/met/iraq/2012895.html>.

V. AMERICAN ACCOMPLISHMENTS IN IRAQ

The United States did accomplish a great deal in Iraq. It removed the murderous Ba'athist Government of President Saddam Hussein from power. It also commenced a process of democratization that could, for the first time, see a genuine democracy emerge in an area that was once the Abbasid Caliphate's capital.⁵¹ The Arab Spring of 2011 manifested that democratization does have great resonance within the Arab world, despite the flawed predictions of the war's strongest proponents.⁵² To the Bush administration's credit, the United States disregarded the bipartisan Iraq Study Group's recommendation and implemented a "surge" of American forces to provide much-needed protection to Iraqis against insurgents in both Baghdad and Al-Anbar province in 2007.⁵³ It is important to recognize these actions as achievements and also as tacit recognition that mistakes were made. Unfortunately, they may have been too little too late. The Administration's unilateral and extra-legal invasion alienated world public opinion and will most likely prevent the international community and Iraqi civil society from closer rapprochement with the United States for the foreseeable future. Indeed, by most accounts, the current Iraqi Government of Prime Minister Nouri al-Maliki's closest bilateral relationship is with the Islamic Republic of Iran, a country that is vehemently opposed to U.S. interests.⁵⁴

⁵¹ David Frum, *Will Iraq's Democracy Vindicate Bush?*, CNN OPINION (Mar. 8, 2010), http://articles.cnn.com/2010-03-08/opinion/frum.iraq.election_1_polling-stations-elections-voting-procedure?_s=PM:OPINION.

⁵² Sarina A. Beges, *Stanford Scholars Reflect on Arab Spring*, STANFORD NEWS SERVICE (Jan. 25, 2012), <http://news.stanford.edu/news/2012/january/arab-spring-anniversary-012512.html>.

⁵³ Bob Woodward, *Why Did Violence Plummet? It Wasn't Just the Surge*, WASH. POST, Sept. 8, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/07/AR2008090701847.html>.

⁵⁴ David S. Cloud, *As U.S. Prepares to Leave Iraq, Iran's Shadow Looms Large*, L.A. TIMES, Nov. 14, 2011, <http://articles.latimes.com/2011/nov/14/world/la-fg-1114-us-iran-20111114>.

Although Iraq may, in time, turn into a functioning and prosperous democracy, it must be recognized that between March 2003 and July 2007, violence stemming from United States combat operations in Iraq caused the death of an estimated 125,000 to 600,000 Iraqi civilians.⁵⁵ Approximately 2.7 million Iraqis have been internally displaced by violence that followed the U.S. invasion and occupation and a further 1.7 million Iraqis have fled the conflict in Iraq, with the majority taking refuge in Syria and Jordan, and lesser numbers to Egypt, Lebanon, Iran, and Turkey.⁵⁶ In all, well over 4 million Iraqis sought refuge in other Middle Eastern countries or were internally displaced.⁵⁷ These figures are either unknown or irrelevant to United States political culture, which instead focuses almost exclusively on American casualties in considering the War's legitimacy. The relative American disregard for Iraqi civilian suffering has both delegitimized its claim to have been acting in the Iraqi people's best interest and placed it at odds with its obligations under the Fourth Geneva Conventions. This, as set forth more fully below, distinguishes American actions in Iraq from its actions during the Civil War.

VI. PROBLEMS RELATED TO THE PLANNED WITHDRAWAL FROM IRAQ AND AFGHANISTAN

The Obama administration has sought to reengage with the international community to engender assistance with a planned disengagement from the Middle East and South Asia. Both domestic and international policies, however, have made a reversal of public

⁵⁵ See Les Roberts et al., *Mortality Before and After the 2003 Invasion of Iraq: Cluster Sample Survey*, 364 THE LANCET 1857 (Nov. 2004), available at <http://www.cs.princeton.edu/~chazelle/politics/bib/lancet.pdf>; see also Jones, *supra* note 25, at 900. See also <http://www.iraqbodycount.org/>

⁵⁶ THE UN REFUGEE AGENCY, 2013 UNHCR COUNTRY OPERATIONS PROFILE – IRAQ, available at <http://www.unhcr.org/pages/49e486426.html> (last visited Nov. 12, 2013).

⁵⁷ Jones, *supra* note 25, at 900 and

opinion difficult to attain. At home, political constraints have prevented the Administration from both closing the detention facility at Guantanamo Bay and from trying suspected terrorists in United States civilian courts.⁵⁸ Overseas, the United States has increased its use of Predator Drones to kill suspected terrorists, notwithstanding the consequent deaths of South Asian civilians and a further perception the United States is a party to indiscriminate killings.⁵⁹ The use of Drones in warfare is problematic under international law. Professor Heinz Klug writes:

While “collateral damage” is acknowledged as an inevitable consequence of military action, a unique feature of “smart” weapons, and particularly the Predator UAV, is that the individual target is identified and hit in real time with a degree of certainty rare in the history of modern warfare. Outside of a theater of combat—defined by time and place—the targeting of individuals for elimination, particularly if they are not openly armed or engaged in a certain level of hostilities at the time, without an attempt to apprehend them or to give them a chance to surrender, could be considered murder under the Geneva Conventions.⁶⁰

Most recently, the United States has been involved in “regime change” in Libya, and has mooted an invasion of the Islamic Republic of Iran, largely at the Israeli government of Prime Minister Binyamin Netanyahu and the United States pro-Israel lobby’s behest.⁶¹ The

⁵⁸ Scott Shane & Mark Landler, *Obama Clears Way for Guantánamo Trials*, N.Y. TIMES, Mar. 7, 2011, <http://www.nytimes.com/2011/03/08/world/americas/08guantanamo.html>.

⁵⁹ Jane Mayer, *Jane Mayer: Predator Versus International Law*, THE NEW YORKER (Oct. 29, 2009), <http://www.newyorker.com/online/blogs/newsdesk/2009/10/jane-mayer-predator-versus-international-law.html>.

⁶⁰ Heinz Klug, *The Rule of Law, War, or Terror*, 2003 WIS. L. REV. 365, 381-82 (2003).

⁶¹ Steve Kingstone, *Netanyahu Talks Tough in Obama Iran Meeting*, BBC NEWS (Mar. 6, 2012, 2:23 ET), <http://www.bbc.co.uk/news/world-us-canada-17260083>; Dana Milbank, *AIPAC Beats the Drums of War*, WASH. POST, Mar. 5, 2012, http://www.washingtonpost.com/opinions/aipac-beats-the-drums-of-war/2012/03/05/gIQASVMZtR_story.html.

American policy of forcing the Islamic Republic to completely renounce its nuclear program is delegitimized by the fate of the Gaddafi regime in Libya, which previously gave up its nuclear weapons program, and by the relatively restrained United States policy towards Pakistan and North Korea, both of which possess substantial nuclear weapon arsenals.⁶² All of this must be seen through the prism of the world following the financial crisis, in which much of the international community blames the United States government's loose regulatory paradigm for plunging the world into a near-depression and for acting as a predatory, as opposed to benevolent, hegemon that is incapable of addressing its pronounced domestic problems. In short, the United States has ceased to be the focus of global aspirations, well symbolized in the early 1990s, when Filipino demonstrators carried signs reading "Yankee Go Home — and take me with you."⁶³

Where did things go wrong? What caused the United States to go from the leading liberal democracy whose hard and soft power enabled it to lead the Western world in its confrontation with the Axis Powers, Soviet Communism and beyond, to a country viewed globally with skepticism and distrust?

VII. AMERICAN CONSERVATIVE PERSPECTIVE

Many on the political right justifiably posit that much of this skepticism is nothing more than parochial anti-Americanism, brought about by worldwide envy at American wealth and power. Indeed, many conservatives, including the neoconservative scholar Robert Kagan, claim this anti-Americanism is a concomitant of the United

⁶² Fredrik Dahl, *Analysis: Libya Conflict May Strengthen Iran Nuclear Defiance*, REUTERS, Mar. 24, 2011, available at <http://www.reuters.com/article/2011/03/24/us-iran-libya-nuclear-idUSTRE72N4WH20110324>.

⁶³ Edwin Kiestler, Jr. & Sally Valente Kiestler, *Yankee Go Home — And Take Me With You!*, SMITHSONIAN MAG., May 1999, available at <http://www.smithsonianmag.com/travel/philips-abstract.html>.

States being the only first-world nation that uses hard or military power to police the international system.⁶⁴ This is a position worthy of further discussion and elaboration beyond the scope of this paper.

VIII. PROBLEMS RELATED TO ASYMMETRIC WARFARE

In reality, there is more at work here than mere parochial envy. The problem stems from an almost pathological obsession with domestic politics in formulating U.S. foreign policy, in conjunction with the United States being confronted, for the first time, with a form of asymmetric warfare against terrorist adversaries, who profit from and take shelter in failed states such as Afghanistan, portions of Pakistan, Somalia, Yemen and beyond. As a result, the U.S.'s success in this endeavor is not only based on its military successes, but on engendering international cooperation and good will in an effort to both isolate and defeat anti-civilizational terrorist networks and their allies. This, of course, requires the United States to prevent these organizations from replenishing their membership via recruitment. This was well-enunciated by former Defense Secretary Donald Rumsfeld, who, in an internal October 16, 2003 memorandum to General Richard Myers, Paul Wolfowitz, and Douglas Feith, wrote the following:

Today, we lack metrics to know if we are winning or losing the global war on terror. Are we capturing, killing or deterring and dissuading more terrorists every day than the madrassas and the radical clerics are recruiting, training and deploying against us?

Does the US need to fashion a broad, integrated plan to stop the next generation of terrorists? The US is putting relatively little effort into a long-range plan,

⁶⁴ Robert Kagan, *Power and Weakness*, 113 POL'Y REV. (June 2002), available at <http://www.hoover.org/publications/policy-review/article/7107>.

but we are putting a great deal of effort into trying to stop terrorists. The cost-benefit ratio is against us! Our cost is billions against the terrorists' costs of millions.⁶⁵

The United States, however, has approached the “War on Terror” solely through the prism of domestic politics and has needlessly alienated large segments of the international community by its failure to address the concerns of global public opinion. Its decision to both threaten and then bypass the United Nations Security Council, its use of Camp X-Ray and Guantanamo Bay to detain enemy combatants, its use of enhanced interrogation measures, “rendition” and Predator Drones⁶⁶ are all actions that have had significant domestic support, but which have alienated key international constituencies. A year 2010 University of Maryland Poll of Arab public opinion, conducted by Zogby International, evidences continued antipathy towards the U.S.⁶⁷

To borrow the title of the Russian novelist Nikolai Chernyshevsky’s nineteenth century novel, “What is to be done?” Certainly the 9/11 terrorist attacks were shockingly destructive to both American life and property. Moreover, it is unequivocally true that Al-Qaeda would certainly have attacked the United States again were the United States not to have actively disrupted and destroyed this anti-civilizational international terror network. Should the violation of international human rights and warfare norms delegitimize an undertaking that was designed solely to protect the

⁶⁵ Memorandum from Donald Rumsfeld, Secretary of Def., to Gen. Richard Myers et al. (Oct. 16, 2003), *available at* <http://www.usatoday.com/news/washington/executive/rumsfeld-memo.htm>.

⁶⁶ Both of which are proscribed by the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and signed by President Reagan on April 18, 1988 and ratified by the United States Senate on October 27, 1990. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51, at 197 (June 26, 1987).

⁶⁷ Eyder Peralta, *New Poll Finds U.S. Viewed Less Favorably in Arab World*, NPR (Jul. 13, 2011, 2:11 PM), <http://www.npr.org/blogs/thetwo-way/2011/07/18/137821453/new-poll-finds-u-s-viewed-less-favorably-in-arab-world>.

United States and the international system from terror networks like Al-Qaeda? After all, aren't the first victims of Islamic extremists innocent women, girls and moderate Muslims who seek to integrate their countries within the international system? And didn't Lincoln countenance far worse during the American Civil War in order to fulfill the far more pressing imperative of preserving the Union?

IX. LESSONS FROM LINCOLN

Lincoln's conduct as Commander-in-Chief was premised on the sole objective of preserving the Union.⁶⁸ Indeed, during the Civil War, the "'predominant purpose' of all federal operations was the political goal of reestablishing U.S. government authority over the states that had seceded from the Union."⁶⁹ With that goal in place, the Lincoln administration countenanced the use of harsh and illegal measures in the process of defeating the Confederacy. This included President Lincoln's implementation of an illegal suspension of the writ of habeas corpus notwithstanding Chief Justice Taney's opinion in *Ex Parte Merryman*, which confirmed the text of the United States Constitution Article I's Suspension Clause and held the President has no authority to unilaterally suspend habeas corpus rights.⁷⁰ In total, Lincoln's suspension of the writ resulted in 38,000 civilians being arrested and held by the military without trial and judicial review.⁷¹ Among those arrested were prominent members of American society,

⁶⁸ See BURRUS M. CARNAHAN, *LINCOLN ON TRIAL: SOUTHERN CIVILIANS AND THE LAW OF WAR* 9 (The University Press of Kentucky 2010); see also Robert Fabrikant, *Lincoln, Emancipation, and "Military Necessity": Review of Burrus M. Carnahan's Act of Justice, Lincoln's Emancipation Proclamation and the Law of War*, 52 HOW. L.J. 375, 377 (2009).

⁶⁹ Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of the Military Necessity*, 92 AM. J. INT'L L. 213, 222 (1998).

⁷⁰ Joseph Margulies, *Evaluating Crisis Government*, 40 No. 6 CRIM. L. BULL., art. 5, 5-8 (2004).

⁷¹ Aaron L. Jackson, *Habeas Corpus in the Global War on Terror: An American Drama*, 65 A.F. L. REV. 263, 266 (2010).

including a newspaper editor who publicly criticized the actions of President Lincoln when he took office.⁷² Professor Scott Sullivan writes:

Lincoln's execution of the Civil War demonstrated little patience with legal niceties that could potentially impede his prosecution of the war effort. Some of Lincoln's most controversial acts include unilaterally suspending habeas corpus rights in parts of the Confederacy, engaging in military action that was unsanctioned by Congress, embracing the concept of total war that led to the burning of Atlanta by General Sherman's troops, and ordering a military blockade in the absence of congressional authorization.⁷³

The Lincoln Administration, moreover, countenanced both the retaliatory killing of innocent civilians and destruction of civilian property within the Confederate States.⁷⁴ Sullivan writes:

The rights-restricting actions imposed during the ongoing war on terror have been much more restrained than that of the Civil War. Unlike Lincoln's broad grants of power to military commanders to suspend habeas corpus as they saw fit, there has been no suspension of the right of habeas corpus. The detention facilities at the U.S. Naval Station at Guantanamo Bay compare quite favorably to the harsh treatment and occasional summary execution suffered during the Civil War. Similarly, President Bush has received Congressional authorization for each major military operation in which his administration engaged, despite his clear belief that such assent is Constitutionally unnecessary.⁷⁵

⁷² *Id.*

⁷³ Scott Sullivan, *International Law and Domestic Legitimacy: Remarks Prepared for Lincoln's Constitutionalism in Time of War: Lessons for the Current War on Terror?* 12 CHAP. L. REV. 489, 490 (2009); see also CARNAHAN, *supra* note 67, at 109.

⁷⁴ CARNAHAN, *supra* note 68, at 60-62.

⁷⁵ Sullivan, *supra* note 73, at 491.

The political paradigm faced by Lincoln, however, differs markedly from that which was presented to Presidents Bush and Obama. Lincoln prosecuted an unequivocal war of necessity to preserve the Union and did so at a time when both international law and the laws of war were in their infancy. Robert Fabrikant writes:

Prior to the Civil War there were no international conventions laying out the law of war. To say that international law was in its infancy at that point would be an understatement. There was no accepted legal code that embodied international law, including the law of war. European countries had a loose, and entirely unenforceable, set of understandings extending back millennia to which they resorted in the context of resolving commercial, not military, disputes. These understandings were referred to as customs and usages, but there was no universal agreement as to their content or meaning.

The international law of war was even less undeveloped than its commercial counterpart. The legal thinking which existed in this realm came largely, perhaps exclusively, in the form of scholarly writings. Naturally, these writings conflicted with one another, and they had no binding effect.⁷⁶

Unlike the Civil War, where international public opinion counted for very little, the War on Terror, set in a very different media age, was subjected to heightened public scrutiny. By way of example, Congress' bipartisan 9-11 Commission concluded allegations that the United States abused prisoners in its custody "make it harder to build the diplomatic, political, and military alliances the government will need [for] a successful counterterrorism strategy."⁷⁷ According to a report by the United States Senate Armed Services Committee, "[t]he

⁷⁶ Fabrikant, *supra* note 68, at 388-89 (2009); *see also* Sullivan, *supra* note 73, at 494-95.

⁷⁷ Keith A. Petty, *Beyond the Court of Public Opinion: Military Commissions and the Reputational Pull of Compliance Theory*, 42 GEO. J. INT'L L. 303, 319 (2011) (quoting 9-11 COMMISSION REPORT 379 (2004), *available at* <http://www.9-11commission.gov/report/911Report.pdf>).

fact that America is seen in a negative light by so many complicates our ability to attract allies to our side, strengthens the hand of our enemies, and reduces our ability to collect intelligence that can save lives.”⁷⁸ In short, United States policymakers have failed to place the country “in front” of its international obligations to its overall detriment. This is in marked contrast to the United States government’s behavior in Lincoln’s time.

First, Lincoln successfully rebutted Confederate claims to self-determination by spearheading a war effort to delegitimize slaveholding as an aspect of Southern identity worthy of self-determination. Second, it was Lincoln himself who first codified Dr. Francis Lieber’s Instruction for the Government of Armies of the United States on the Field, originally published as General Orders No. 100, War Department, Adjutant General’s office - the first ever codification of the Laws of War- commonly known as the Lieber Code, named after its drafter.⁷⁹ The Lieber Code was the foundation for similar law of war codifications in Prussia, the Netherlands, France, Russia, Spain and Great Britain.⁸⁰ “It was also an important influence at the conferences of Brussels in 1874 and at the Hague in 1899 and 1907” and led to the eventual formulation and adoption of the Hague Conventions in 1907, which formalized and circumscribed the behavior of belligerents.⁸¹ How important was the Lieber Code? A half century after the Civil War, in his opening address as President of the American Society of International Law, former Secretary of State and Nobel Laureate Elihu Root said the following:

⁷⁸ U.S. SENATE ARMED SERVS. COMM., Senate Armed Services Inquiry into the Treatment of Detainees in U.S. Custody, at xxv (Nov. 20, 2008), available at http://www.armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf.

⁷⁹ Carnahan, *supra* note 69, at 213; see also Theodor Meron, *Francis Lieber’s Code and Principles of Humanity*, 36 COLUM. J. TRANSNAT’L L. 269, 270 (1997).

⁸⁰ Gideon M. Hart, *Military Commissions and the Lieber Code: Toward a New Understanding of the Jurisdictional Foundations of Military Commissions*, 203 MIL. L. REV. 1, 4 (2010).

⁸¹ *Id.*; see also Heinz Klug, *The Rule of Law, War, or Terror*, 2003 WIS. L. REV. 365, 369-70 (2003).

[W]hile the instrument was a practical presentation of what the laws and usages of war were, and not a technical discussion of what the writer thought they ought to be, in all its parts may be discerned an instinctive selection of the best and most humane practice and an assertion of the control of morals to the limit permitted by the dreadful business in which the rules were to be applied.⁸²

The foremost scholar on Lincoln's actions as Commander-in-Chief, Burrus M. Carnahan, writes:

Drafted by an academic intent on drawing general principles of human morality from empirical evidence, and issued by a President determined to found his policies on human reason, the Lieber Code may be considered the final product of the eighteenth-century movement to humanize war through the application of reason. From this standpoint, the Lieber Code's greatest theoretical contribution to the modern law of war was its identification of military necessity as a general legal principle to limit violence, in the absence of any other rule.⁸³

Because it was signed and approved by President Lincoln, the Lieber Code enabled the United States Army to present itself as the world leader in respect of army conduct. No other western army had previously limited the conduct of its soldiers on the battlefield like the U.S. Army ostensibly did while conducting a war for the nation's very survival.⁸⁴

It would be going too far to say that President Lincoln's adoption of the Lieber Code hamstrung the effectiveness of United States armies. Indeed, it has been demonstrated that Civil War combatants paid little attention to the Code's requirements.⁸⁵

⁸² Meron, *supra* note 79, at 271 (quoting Elihu Root, Opening Address at the Seven Annual Meeting of the American Society of International Law (Apr. 24, 1913), reprinted in 7 AM. J. INT'L L. 453, 456 (1913)).

⁸³ Carnahan, *supra* note 69, at 213.

⁸⁴ *Id.*

⁸⁵ Hart, *supra* note 80, at 46.

Moreover, to the extent it was followed, Article 15 of the Code set forth that Union forces were to be guided by the Military Necessity Doctrine, which, left broad authority to military commanders to pursue their objective to preserve the Union.⁸⁶ The Military Necessity Doctrine grants considerable latitude to the military in the face of its enemy and even civilians. It even allows for a quarantining of a civilian population and, at times, the collective punishment of civilian non-combatants.⁸⁷ Indeed, its very expansiveness led many to see it as little more than a means for providing an ethical justification for a Carthaginian-style destruction of the States comprising the Confederacy.⁸⁸

However, as Professor Carnahan writes, “recognition of military necessity as a legal precondition for destruction represented an enlightened advance in the laws of war in the nineteenth century.”⁸⁹ This is because “the law of nations permitted the capture or destruction of any and all property belonging to any person owing allegiance to an enemy government, whether or not these measures were linked to military needs.”⁹⁰ Indeed, even with respect to the overall parlous civilian treatment by Union Armies, Carnahan writes:

There is a continuing debate over whether the Civil War was the first “modern war” or “total war,” the precursor of the world wars of the twentieth century. Most historians agree, however, that in one crucial respect the Civil War differed from total wars of the last century. Except in retaliation for unlawful acts of the enemy, the organized armies on both sides did not target civilians for deliberate killing. Inhabitants of the Warsaw Ghetto, Nanking, or Tokyo in World War II, or Rwanda and the former Yugoslavia in the 1990s, surely would gladly have exchanged places with

⁸⁶ *See Id.*

⁸⁷ *See Id.*

⁸⁸ Hart, *supra* note 80, at 47.

⁸⁹ Carnahan, *supra* note 69, at 217.

⁹⁰ *Id.*

Southern civilians in the path of Hunter, Sherman, or Sheridan in 1864.⁹¹

To Lincoln, the most fundamental limitation on military necessity was that it could be invoked only to attain a particular military objective and never solely a political one.⁹² Notwithstanding today's legal suppositions as to self-determination, he was guided solely by his goal of preserving the Union in a manner that evidenced, to a degree, solicitude and respect for the rule of law under the United States Constitution.⁹³ Lincoln, however, was governed by objectives outside of mere military necessity and the "fundamental distinction between combatants and noncombatants was maintained throughout the war."⁹⁴ By way of example, by proposing that special consideration be given to private homes, Lincoln adumbrated the 1907 Hague Regulations on land warfare, the 1907 Convention on naval bombardment, and Protocol Additional I to the Geneva Conventions that all prohibit any attack on undefended dwellings. Included within the doctrine of military necessity was the need to take measures to ensure public order and safety.⁹⁵ This foreshadowed Article 43 of the Hague Regulations that "declared the obligation of an occupying commander to 'take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.'"⁹⁶

Lincoln's prosecution of the war was enhanced not only by the necessity of prosecuting what clearly was a civil war for the nation's survival, but by his placing the U.S. out front of its international obligations by promulgation of the Emancipation Proclamation, which effectively rebutted the Southern claim of self-determination and his adoption of the Lieber Code. This careful positioning of the

⁹¹ CARNAHAN, *supra* note 68, at 109.

⁹² Carnahan, *supra* note 69, at 219.

⁹³ *Id.*

⁹⁴ *Id.* at 228.

⁹⁵ *See id.* (recognizing that President Lincoln insisted on refraining from destroying property to harass members of the opposition).

⁹⁶ *Id.* at 224.

U.S. with respect to international law and international public opinion is a lesson that has largely been lost by today's U.S. leaders.

X. THE CURRENT WAR ON TERROR AND LINCOLN

Unlike Lincoln who if anything, waged a war of absolute necessity to insure the continued survival of the Union, the Bush Administration chose to wage an absolute "war of choice" against Saddam Hussein's Iraq. Not only was the Iraq War an unjustifiable response to the 9/11 Al Qaeda terrorist attacks, but it was carelessly and illegally executed after its supposed justification was rejected by the United Nations Security Council.⁹⁷ This diverted resources from the then-nascent Afghanistan occupation, cost thousands of lives, much treasure and complicated Iraq's eventual transition to a stable democracy.

Although the Obama Administration was warmly received by the international community – to the point where the forty-fourth President was prematurely and embarrassingly awarded the Nobel Peace Prize during his first year in office – its continued use of Predator Drones to kill suspected terrorists, regardless of civilian casualties, and its failure to close the detention facility in Guantanamo Bay has compromised the effectiveness of its strategy in Afghanistan and worsened already problematic relations with a nuclear armed and unstable Pakistan. These failures have harmed the Obama Administration's strategic imperative, which is to engender international cooperation from our allies to share the costs of ensuring international peace and relocate the focus of American foreign and security policy from the Middle East and Afghanistan/Pakistan

⁹⁷ Peter Slevin & Dana Priest, *Wolfowitz Concedes Iraq Errors*, WASH. POST, Jul. 24, 2003, <http://www.washingtonpost.com/wp-dyn/articles/A37468-2003Jul23.html>.

region toward the dynamic Asia Pacific Region.⁹⁸ This is necessitated by a decline in relative American power, the need to engage an increasingly powerful and assertive China and ensure an established American presence in the world's fastest growing economic region. Due largely to the perception of American unilateralism and lawlessness though, both the Bush and Obama Administrations have been unable to fully engage the international community to deal with matters of obvious global concern.⁹⁹ Sullivan writes:

In the war on terror, international law, and especially international humanitarian law, has played a crucial role in providing the previously established standards in the most fevered debates over detention policy and accepted means of interrogation. The primacy of international law in these realms is somewhat surprising given the American predisposition to dismiss the importance of international law generally. In spite of this general attitude to such law, I believe that international law has acted as a cornerstone here in gauging the legitimacy of state action as a general matter. This is due to the greater incorporation into a rights-oriented regime affecting traditionally domestic concerns combined with (1) its place as an external benchmark of executive action; and (2) the absence of domestically embedded

⁹⁸ See Robert Burns & Julie Pace, *Obama to Talk Afghanistan Drawdown, Announce Return of 34,000 Troops in a Year*, HUFFINGTON POST, Feb. 12, 2013, http://www.huffingtonpost.com/2013/02/12/obama-afghanistan_n_2669267.html; see also Ed Kiernan, *Huge Military Exercise Highlights "Rebalancing of U.S. Policy Toward Asia,"* NBC NEWS (Feb. 15, 2013), http://worldnews.nbcnews.com/_news/2013/02/15/16973088-huge-military-exercise-highlights-rebalancing-of-us-policy-toward-asia?lite.

⁹⁹ See GEIR LUNDESTAD, *JUST ANOTHER MAJOR CRISIS?: THE UNITED STATES AND EUROPE SINCE 2000*, 177, 256 (Oxford University Press 2008) ("The aggressive unilateralism of U.S. policy, the rejection of international rules and multilateral institutions that has characterized the response to 9/11, and the anti-European undertones of American officials and commentators have weakened American prestige and legitimacy.").

rules and standards acting contrary to the thrust of international law.¹⁰⁰

The consequences of United States policymakers' failure to recognize this as well as the importance of global public opinion have been severe. By way of example, the Obama Administration has been unable to obtain United Nations Security Council's cooperation to deal with the present humanitarian catastrophe in the Syrian Arab Republic.¹⁰¹ The Administration's proposed sanctions against Bashar al-Assad's Alawite regime were vetoed by two Security Council Permanent Members, the Russian Federation and the People's Republic of China.¹⁰² Recognizing these states have interests completely separate from those of the United States, including a strategic interest in reasserting a non-interventionist paradigm, both countries were able to veto the proposed measure with a impunity due to the international community's increased skepticism as to American motives. This, of course, provides no comfort to the Syrian people and their advocates, who must turn increasingly to an assertive Republic of Turkey to potentially fulfill the United Nations' Responsibility to Protect.¹⁰³

Similarly, the United States, by any international standard, was entitled to protect itself by killing the Al-Qaeda leadership, including Osama bin Laden, who was killed by a United States Navy

¹⁰⁰ Sullivan, *supra* note 73, at 494 (footnote omitted).

¹⁰¹ Press release, U.S. Mission to the United Nations No. 2012/081, Explanation of Vote by Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, at the Adoption of UN Security Council Resolution 2042 (Apr. 14, 2012), available at <http://usun.state.gov/briefing/statements/187914.htm>.

¹⁰² Paul Harris et al., *Syria Resolution Vetoed by Russia and China at United Nations*, THE GUARDIAN, Feb. 4, 2012, <http://www.guardian.co.uk/world/2012/feb/04/assad-obama-resign-un-resolution>.

¹⁰³ *Syria Unrest: Turkey Says UN "Supports" Repression*, BBC NEWS (Apr. 3, 2012, 3:39 PM), <http://www.bbc.co.uk/news/world-middle-east-17602136>
Conditions for Ceasefire Appear Unstable Amid Expanding Violence, INT'L COALITION FOR THE RESP. TO PROTECT (Apr. 11, 2012), <http://www.responsibilitytoprotect.org/index.php/component/content/article/35-r2pcs-topics/4103-crisis-update-on-syria-conditions-for-ceasefire-appear-unstable-amid-expanding-violence->.

Seal Team on May 2, 2011, while at his compound in Abbottabad, Pakistan, situated close to the Pakistan Military Academy. Although the Obama Administration deserves credit for risking its prestige to kill him, the fact Bin Laden was comfortably housed in Pakistan near a prominent military academy raises the very troubling question of how Pakistani political culture views its United States backer and aid donor.¹⁰⁴

The Eurozone Debt Crisis is another case in point. To date, the United States has spent at least \$2 trillion on the wars in Iraq and Afghanistan.¹⁰⁵ This expense stands in marked contrast with United States Treasury Secretary Timothy Geithner's April 2012 refusal to donate any money to the International Monetary Fund's request for emergency funds to deal with the Eurozone debt crisis. It is, to this writer, evidence of the United States government's failure that it continues to spend large sums in an area that is tangentially related to American prosperity and security, while at the same time refusing to spend any money on a problem that is central to this objective. As the *Financial Times'* Chief Foreign Affairs Correspondent Gideon Rachman recently wrote, the United States' unwillingness to address the Eurozone debt crisis is due to a lack of available resources and a collapse in American prestige and influence. He writes:

So what has changed? A lack of money is a large part of the problem. America spent the equivalent of 5 per cent of its gross domestic product on the Marshall Plan. That is not feasible now. Tim Geithner, the US Treasury secretary, frequently urges his European colleagues to do much more to solve the

¹⁰⁴ *Troubling Questions on Bin Laden*, *TIMES FREE PRESS*, May 8, 2011, <http://timesfreepress.com/news/2011/may/08/troubling-questions-bin-laden/>; see also Benjy Sarlin, *Pakistan Under Harsh Scrutiny in Wake of Raid on Bin Laden Compound*, *TALKING POINTS MEMO* (May 3, 2011, 10:12 AM), <http://tpmdc.talkingpointsmemo.com/2011/05/pakistan-under-harsh-scrutiny-in-wake-of-raid-on-bin-laden-compound.php>.

¹⁰⁵ Alan Zarembo, *Cost of Iraq, Afghanistan Wars Will Keep Mounting*, *L.A. TIMES*, Mar. 29, 2013, <http://articles.latimes.com/2013/mar/29/nation/la-na-0329-war-costs-20130329>.

debt crisis. But, while he can speak softly, he is not carrying a big cheque book.

However, American leadership has not always relied on cash. The “committee to save the world” did not spend a huge amount of money. But it was operating in a different period. Less than a decade after the collapse of the Soviet Union – and with the American economy booming – US policymakers had the credibility and the confidence to lead. In large part, that is lacking today. The financial crisis has taken its toll on America’s ability to persuade, as well as on its finances.¹⁰⁶

To this, I would add the War on Terror.

The current United States predicament is well-stated by Associate Justice Stephen G. Breyer, who, in an address to the Association of the Bar of the City of New York, said the following:

The Constitution always matters, perhaps particularly so in times of emergency. . . . Security needs may well matter, playing a major role in determining just where the proper constitutional balance lies. It is this proper constitutional balance of both civil liberties and national security that our three co-equal branches of government have worked rigorously to attain amidst the current wartime climate.¹⁰⁷

Breyer, however, fails to take account of the international perspective. Like it or not, America’s War on Terror requires a broad level of international legitimacy and support that cannot succeed if based on domestic concerns alone. Accordingly, although use of military commissions to try alleged terrorists is constitutional and

¹⁰⁶ Gideon Rachman, *America, Greece and a World on Fire*, FIN. TIMES, Jan. 16, 2012, <http://www.ft.com/intl/cms/s/0/0ec863ec-3e30-11e1-ac9b-00144feabdc0.html#axzz2QNbkB7Rj>.

¹⁰⁷ Frank J. Williams et al., *Still a Frightening Unknown: Achieving a Constitutional Balance Between Civil Liberties and National Security During the War on Terror*, 12 ROGER WILLIAMS U. L. REV. 675, 678 (2007) (footnotes omitted).

may be the only option available to the Obama administration in view of domestic politics, it works against the United States' interest in engendering global cooperation and assistance in the War on Terror.

The Honorable Frank Williams, Chief Justice of the Rhode Island Supreme Court states the following, the facts of which are incontrovertible:

Criticism surrounding the Bush administration's decisions about how to safeguard the United States seems to these writers to be particularly ill-founded when one considers that the President's actions pale in comparison to actions taken by prior presidents, such as Abraham Lincoln, who, despite his widespread suspension of habeas corpus, is still ranked among the nation's greatest leaders. Lincoln's actions, although radical, were necessary during the Civil War, as now, when grave national security problems were pandemic.

Almost 150 years later, the Bush administration, like Lincoln, is faced with yet another grave national emergency that requires unpopular decisions.¹⁰⁸

Correct as Judge Williams may be, his analysis partly misses the point. President Lincoln's war against the Confederacy was not only a war of necessity, but one that involved solely domestic actors. It was, after all, a civil war. Second, the war was conducted before the development of international jurisprudence regarding the conduct of armies on the battlefield and, to the extent that such requirements were extant, President Lincoln placed the United States Army "in front" of the issue by his adoption of the Lieber Code and its military necessity doctrine. None of these factors apply to the Bush and Obama administrations. Although the Bush administration had strong international support for the initial invasion of Afghanistan, the support for United States presence in Afghanistan has dissipated due to both the length of the endeavor and a perception that the United States public, its politicians and military pay insufficient

¹⁰⁸ *Id.* at 680-81 (footnotes omitted).

attention to both the needs and safety of Afghan civilians, who are increasingly caught between the corruption and incompetence of the Karzai government and the brutality and viciousness of the Taliban insurgents. Perhaps equally important, United States legitimacy in the “War on Terror” was undermined by the largely unilateral invasion of Iraq against the will of the international community. Although the Saddam Hussein regime was almost unique in its barbarity, the United States claim of pre-emption was viewed as incredible by both United States allies and the international community. The United States’ subsequent failure to ensure the safety of Iraqi civilians after the invasion cost it further international legitimacy and support. Perhaps most significantly, the Bush and Obama administrations’ focus in waging the “War on Terror” has been based solely on domestic political legitimacy when the endeavor’s success requires greater international support and cooperation.

Andrew Kent writes, “the clear trend in the Court and legal academy is globalist—viewing the reach of the Constitution’s protection of individuals as unaffected by geography, citizenship or hostility to the United States and construing the document as if it were an international human rights instrument.”¹⁰⁹ Indeed, these are requirements of an increasingly active global political culture and civil society. This heightened scrutiny did not restrict the U.S. Army during Lincoln’s time, but it does today. The United States’ failure to recognize this fact accounts in large measure for the decline in its geopolitical position.

XI. CAUTIONARY ASPECTS TO LINCOLN’S LEGACY

This is not to say that Lincoln’s legacy is unblemished. Far from it. Lincoln as Commander-in-Chief needlessly countenanced

¹⁰⁹ Andrew Kent, *The Constitution and the Laws of War During the Civil War*, 85 NOTRE DAME L. REV. 1839, 1844 (2010) (footnotes omitted).

actions by Union troops that delegitimized the Union war effort and made his eventual goal of reintegrating the Confederacy into the Union more difficult. By way of example, Lincoln's unauthorized suspension of the writ of habeas corpus greatly and perhaps needlessly delegitimized the Union war effort.

Although Lincoln adopted the Lieber Code and required the U.S. Army to abide by the military necessity doctrine, this still left ample room for abuse of Southern civilians to the overall detriment of both Southerners and the United States government, which sought to subsequently reintegrate the Confederate States into the Union. The Lieber Code's military necessity doctrine countenanced the starving of the enemy, whether armed or unarmed, in order to effectuate its speedier subjugation.¹¹⁰ It also allowed Union forces to both drive civilians back into a besieged city that is short of provisions, so as to hasten surrender and, if necessary, deny quarter when one's "salvation makes it impossible to cumber" oneself with prisoners.¹¹¹ Notwithstanding the Lieber Code's application, the U.S. Army ensured that Southern civilians and infrastructure paid a heavy price for the Confederate rebellion against the Union. Southern cities were besieged and burned, and civilian life and property were often disregarded.¹¹²

Moreover, Lincoln's critics note that his claim to have acted to free the slaves is belied by his failure to enunciate the Emancipation Proclamation until this was necessitated by Congressional radical Republicans and only after the continued support of Union slaveholding States became less critical.¹¹³ As William Klingaman points out, the President's decision to issue the emancipation proclamation "was a gamble born of desperation and frustration from repeated military failures."¹¹⁴ Indeed, at the outset of his presidency,

¹¹⁰ Meron, *supra* note 79, at 272.

¹¹¹ *Id.* at 273.

¹¹² CARNAHAN, *supra* note 68, at 60-62.

¹¹³ Fabrikant, *supra* note 68, at 377.

¹¹⁴ WILLIAM K. KLINGAMAN, ABRAHAM LINCOLN AND THE ROAD TO EMANCIPATION, 1861-1865, 28 (Penguin Group 2002).

“Lincoln supported a constitutional amendment barring the federal government from touching slavery in states where it already existed.”¹¹⁵ Perhaps this was little more than acknowledgment of both a political and strategic reality. That said, the fact Lincoln countenanced slavery in Border States such as Kentucky, Delaware, Missouri and Maryland and refused to emancipate slaves in certain conquered portions of the Confederacy, contrary to the requirements of the Lieber Code, has propitiated the claim, heard in the South to this day, that the Civil War had more to do with “northern aggression” than slavery. This has permitted a siege mentality to thrive as part of Southern identity that has hindered a more complete integration of African Americans with Southern Whites. These problematic aspects to Lincoln’s legacy evidence how difficult the United States’ current predicament is, especially since its eventual success will require winning not only the battle for global public opinion, but sufficient “hearts and minds” within the Islamic world to delegitimize and neuter anti-civilizational Muslim radicals such as Al-Qaeda.

CONCLUSION

The United States’ national interest in this globalized, post-financial crisis world is to remediate many long-neglected domestic problems, including a faltering education system, unemployment, stagnant wages, income inequality, and falling international competitiveness. To a degree, these challenges cannot feasibly be addressed so long as the United States continues to bear almost the entire cost of maintaining international peace and security. Its allies will be less likely to share these costs if the United States is seen as unilateral, aggressive and indifferent to ensuring international human rights. American actions in both Iraq and Afghanistan largely perceived as negligent and without regard for civilian welfare, have

¹¹⁵ Fabrikant, *supra* note 68, at 377.

harmed its international reputation and hindered cooperation from United States allies and strategic partners. As a consequence, the United States now finds it more difficult to obtain international assistance in its goal of peaceable disengagement from the Middle East and South Asia. Although the brutality of the Civil War has been unsurpassed in United States history, Lincoln's actions as Commander-in-Chief were undertaken to fulfill the compelling interest of preserving the Union before either global public opinion or international law became relevant to the war's legitimacy. Indeed, to the extent international standards were relevant, President Lincoln shrewdly placed the United States ahead of the curve by taking a strong stand against slavery and by his adoption of the Lieber Code to govern the conduct of U.S. armies in the field. That said, the viciousness of the war effort, while it facilitated the United States' immediate goal of restoring the Union, worked against the long-term goal of ensuring a stable rapprochement between North and South.

It is a complicated predicament. While the United States must protect its citizens and territory from terrorist attacks, it cannot do so in a manner that alienates world public opinion and engenders antipathy. These were lessons well understood by United States leaders from both major political parties during the twentieth century, when United States actions corresponded with an interest in ensuring international stability, free markets and democratization. Examples include the United States' actions as the leading democracy against the Axis Powers during World War II, aid to Greece and Turkey and the Marshall Plan in the immediate post-war aftermath, its key support for the nascent European Coal and Steel Community that developed into today's European Union, its support for democratization and open markets in South Korea and Japan, the opening to China that led to several hundred million Chinese being freed from poverty, its actions as the leading democracy in opposition to the Soviet Union during the Cold War and its critical intervention on behalf of German unification at the Cold War's end. The key to United States success in the twentieth century was not only the country's unmatched economic and military might, but the preponderant international perception that United States interests

corresponded with a more open and prosperous world. It remains in the United States' interest to see a more stable and prosperous world, albeit one in which the costs of global security are shared more equitably by emerging and mature powers that have a stake in world stability. The challenge for United States policymakers is to ensure United States policies reflect these interests.