

THE AMERICAN VALUE OF FEAR AND THE INDEFINITE DETENTION OF TERRORIST SUSPECTS

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Since the attacks of September 11, 2001, Americans are more concerned than ever for the nation's safety and naturally want all reasonable action to be taken by the government to prevent any future attacks. The government's response to the attacks has been to engage in a so-called "war on terror."¹ One important aspect of this "war" has been the indefinite detention of terrorist suspects. Since January 2002 when the detention center opened, 773 men have been taken and held at the U.S. Naval Facility at Guantánamo Bay, Cuba (Guantánamo).² Currently the center houses "roughly 385 prisoners."³ Given the seriousness of these actions, it makes sense to expect that they would be supported by sound reasoning. Unfortunately, the rationale given by the U.S. for imprisoning these men is not sound. Rather than appealing solely to fact and reason, the rationale relies on an appeal to fear for much of its argumentative force. My aim in this paper is to show that fear is a part of the flawed rationale offered in support of the indefinite detention of the men at Guantánamo, that there is a sense in which this fear is an American value, and that the treatment of these men is not merely illegal, but also immoral and unjust.

THE INDEFINITE DETENTION RATIONALE

The rationale for the indefinite detention of the men at Guantánamo is given in President Bush's Military Order of November 13, 2001, *Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism*.⁴ Since U.S. support for an affirmative response to the question "Is the U.S. justified in its indefinite detention of the men at Guantánamo?" entails the reasoning found in the President's order, I take the order to be the closest thing we have to a formal argument by the U.S. in support of indefinite detention. In relevant part, the order states:

(P1) International terrorists have attacked U.S. “diplomatic and military personnel and facilities abroad” and “citizens and property within the United States.”

(P2) The scale of the attacks has been such that “a state of armed conflict” requir[ing] the use of the United States Armed Forces” has been created.

(P3) Failure to detect and prevent further attacks “will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government.”

(P4) “[T]he danger to the safety of the [U.S.] and the nature of international terrorism” are such “that it is not practicable to apply . . . the rules of evidence generally recognized in the trial of criminal cases in the [U.S.] district courts.”

(P5) “[T]he magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the [U.S.] and the probability that such acts will occur” constitute “an extraordinary emergency” for national defense and this emergency is “an urgent and compelling government interest.”

(C) The detention of those non-U.S. citizens who “I determine from time to time in writing” were, “at the relevant times,” either themselves members of “the organization known as al Qaida,” or who have engaged in or given aid to terrorism against the U.S., is necessary for the prevention of terrorist attacks and the protection of the U.S. and its citizens.

Since it is likely that most Americans take the 9/11 attacks quite seriously, this rationale naturally has a strong initial appeal. Nevertheless, it does raise some important questions and concerns. First, exactly what is it about the “nature of international terrorism” and the “danger to the safety of the U.S.” that impacts negatively on the practicality of applying rules of evidence? Second, what is the likelihood that more than a half-decade later we are still in a state of “extraordinary emergency”? Third, the rationale fails to provide any justification for discriminating against foreign nationals. There is no explanation as to why the danger to the safety of the U.S. is such that indefinite detention of terrorist suspects only applies to non-U.S. citizens.⁵ This exclusive focus on foreign nationals violates the guarantees of non-discrimination provided by the International Covenant on Civil and Political Rights (ICCPR).⁶ Fourth, there is nothing in the rationale that gives us reason to think that *indefinite* detention is justified in these cases.

Fifth, there is a serious concern regarding the grounds used for determining when an individual should be indefinitely detained. An individual is subject to the order when “there is *reason to believe* that” the individual is either a member of “the organization known as al Qaida,” or has engaged in or given aid to terrorism against the U.S.⁷ There is nothing in the rationale that speaks to how *good* the reason has to be, and without any requirement for something like rules

of evidence, the door is left wide open for cases in which any reason, no matter how trivial, could suffice to “justify” imprisonment at Guantánamo. According to former Secretary of Defense Donald Rumsfeld, the prisoners are “dangerous terrorists who were captured on the battlefield, fighting with a terrorist network that killed a great many Americans here in the United States on September 11th.”⁸ This might be all well and good were it completely true, but it isn’t. “93% of the detainees were *not* apprehended by the United States.”⁹ According to intelligence officials at Guantánamo, “[m]any of the detainees [were] captured by Afghan militias, Pakistani border guards and other surrogates, and some [were] turned in for bounties.” Hence, “[i]nformation about their identities and actions was often vague and secondhand.”¹⁰ One leaflet distributed in Afghanistan promised “millions of dollars for helping the Anti-Taliban Force catch Al-Qaida and Taliban murderers.” The leaflet reminds its readers that “[t]his is enough money to take care of your family, your village, your tribe for the rest of your life. Pay for livestock and doctors and school books and housing for all your people.”¹¹ Obviously this is a tremendous incentive to hand someone over for reasons totally unrelated to terrorism against the U.S., and thus casts serious doubt on the dangerousness of many of the prisoners. This doubt is exacerbated by the fact that “more than a dozen countries in the Middle East, Europe and South Asia” released hundreds of their countrymen when they arrived home after having been imprisoned at Guantánamo.¹²

In effect, the President’s rationale allows for an unlimited number of arrests and imprisonments based on mere suspicion. One need possess only a cursory knowledge of twentieth century American history to see how problematic such a position has been in the past. It was mere suspicion that grounded the McCarthyism of the 1950’s and the arrest and imprisonment of Japanese Americans in the 1940’s. The former began in February 1950 after the Soviet Union detonated its first nuclear device. Senator Joseph McCarthy “*claimed* to have a list of Communists who worked in the State Department,” but this accusation was never supported.¹³ The latter began shortly after the Japanese attack on Pearl Harbor, Hawai‘i when President Roosevelt signed Executive Order 9066 in February 1942. Not only did the mere suspicion of all persons of Japanese ancestry prompt the U.S. to arrest and imprison thousands of its own citizens, it also prompted the government to arrest over 2,000 Japanese Latin Americans in thirteen nations “from Mexico to Chile,” who “were sent to [internment] camps in Texas and Montana.”¹⁴ Since these phenomena are morally objectionable, and since the rationales for them rest on the same ground as the President’s order, it makes sense to think that these arrests and imprisonments are also morally objectionable.

Finally, since the imprisonment of the men at Guantánamo may contribute to the “underlying factors [that] are fueling the spread of the jihadist movement,” viz., “injustice and fear of Western domination, leading to anger, humiliation, and a sense of powerlessness,” there is a sense in which the rationale can be self-

defeating.¹⁵ Rather than being necessary for the prevention of terrorist attacks, indefinite detention may be facilitating the likelihood of future attacks.

THE PREVENTIVE DETENTION ARGUMENT

Some may be inclined to think that, even if my analysis to this point holds, the moral legitimacy of the indefinite detention of the Guantánamo prisoners can be shown by way of an analogy to preventive detention in American law. On this view:

(P1) Detaining persons in order to prevent future harms or wrongs is often justified in American law.

(P2) The predominant justification for legal preventive detention is the individual's continuing dangerousness—the person presents a threat of engaging in future harmful conduct.

(P3) Analogously, some terrorist suspects are far too dangerous to release once captured.

(C) The indefinite detention of the men imprisoned at Guantánamo is morally justified.

The difficulty with this argument is the disanalogy between the way in which preventive detention is defined in American law and the indefinite detention of the prisoners at Guantánamo. In law, preventive detention is defined as “[c]onfinement imposed usu[ually] on a criminal defendant who has threatened to escape or has otherwise violated the law while awaiting trial, or on a mentally ill person who may cause harm.”¹⁶ Since there is no claim that the prisoners are mentally ill, or that they have violated the law, and since there is no clear sense of when or if they will all be tried, the case of the prisoners at Guantánamo is not analogous to the criminal defendants envisioned in the legal definition of preventive detention.¹⁷ Hence, the preventive detention argument fails—the men being held at Guantánamo are merely *suspects*.

Moreover, the imprisonment of the men at Guantánamo violates Article 9 of the ICCPR which “guarantees the right to be free of arbitrary arrest and detention.”¹⁸ This violation is not only a matter of international law, it is also a matter of justice. As Grover Cleveland observed:

The considerations that international law is without a court for its enforcement and that obedience to its commands practically depends upon good faith instead of upon the mandate of a superior tribunal only give additional sanction to the law itself and brand any deliberate infraction of it not merely as a wrong, but as a disgrace. A man of true honor protects the unwritten word which binds his conscience more scrupulously, if possible, than he does the bond a breach of which subjects him to legal liabilities, and the United States, in aiming to maintain itself as one of the

most enlightened nations, would do its citizens gross injustice if it applied to its international relations any other than a high standard of honor and morality.¹⁹

President Cleveland's remarks hold a fortiori in this case since the ICCPR is neither unwritten nor is it a standard that other nations are attempting to impose on the U.S. Rather, it is a covenant that the U.S. voluntarily entered into. In short, the U.S. *promised* to abide by it, and hence has a moral obligation to do so.

Included in this promise is the understanding that "Article 2 of the ICCPR obliges each State Party 'to respect and to ensure' the rights recognized in [the] Covenant and to adopt such laws as may be necessary 'to give effect' to these rights." Indeed, "the obligation is of such a high order that it 'constitutes a treaty obligation inherent in the Covenant as a whole,' and hence the obligation is non-derogable even in states of emergency."²⁰ This being the case, the U.S. has a clear legal obligation as well. Article VI, Section 2 of the U.S. Constitution clearly states that, in addition to the Constitution itself and U.S. laws made pursuant to the Constitution, "all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land."²¹ The many arrests that were made arbitrarily and the indefinite imprisonment of the men at Guantánamo constitutes a break in the promise made by the U.S. As John Stuart Mill reminds us, "it is confessedly unjust to *break faith* with anyone: to violate an engagement, either express or implied, or disappoint expectations raised by our own conduct, at least if we have raised those expectations knowingly and voluntarily."²²

THE UTILITARIAN/CONSEQUENTIALIST ARGUMENT

Others may be inclined to suggest that my analysis could benefit from an appreciation of the utilitarian, or perhaps more generally, the consequentialist grounds for indefinite detention found in the rationale. "[T]he magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the [U.S.] and the probability that such acts will occur" are severe consequences indeed. Since it is claimed that indefinite detention is a necessary condition for the prevention of these consequences, indefinite detention is morally justified on utilitarian or consequentialist grounds. At least at first blush, utilitarianism would seem to allow for individuals to be detained, even compelled to act in certain ways, given sufficiently extreme circumstances, and the case at issue clearly represents sufficiently extreme circumstances given the dangerousness of the suspects. But even if we put aside the factual evidence regarding the actual dangerousness of the prisoners and assume that all of them are in fact dangerous, this position misunderstands utilitarianism, at least insofar as a Millian utilitarianism is concerned. While it is certainly true that for Mill "particular cases may occur in which some other social duty is so important as to overrule any one of the general maxims of justice," the sorts of cases he has in mind that would justify kidnapping and compelling others to act are those where

the danger is eminent, and where the loss of life is certain. On Mill's view, "to save a life, it may not only be allowable, but a duty, to steal or take by force the necessary food or medicine, or to kidnap and compel to officiate the only qualified medical practitioner."²³ Since the immediacy of the danger and the certainty of loss of life from having these men free is far from obvious, this position is untenable.

Moreover, if this is to be a utilitarian position, then the answer to the question "consequences for whom?" with respect to U.S. actions must include persons other than those residing in the U.S. As Mill tells us, the utilitarian standard is "the greatest amount of happiness altogether," the happiness "of all concerned."²⁴ Even if this position is meant as a sort of consequentialist position that is not necessarily utilitarian, it still seems problematic. "Consequentialism in its purest and simplest form is a moral doctrine which says that the right act in any given situation is the one that will produce the best overall outcome, as judged from an impartial standpoint which gives equal weight to the interests of everyone."²⁵ Indeed, a universal idea in consequentialist moral theory generally is that "what people ought to do is to minimize evil and maximize good, to try, in other words, to make *the world* as good a place as possible."²⁶ Since this position does not consider the interests of others, it fails to meet this standard.

THE INTEREST IN INTERROGATION ARGUMENT

The notion of compelling others to act in order to avoid negative consequences suggests another possible justificatory approach. Perhaps it is not the detention itself that is meant to bring about the prevention of terrorist attacks against the U.S. Rather, it is the information obtained from the prisoners that will enable U.S. armed forces to squelch terrorist activities and thus prevent future attacks. It is precisely the U.S.'s interest in gaining such intelligence that justifies imprisoning the men at Guantánamo.²⁷ On this view:

(P1) U.S. interest in interrogating terrorist suspects for intelligence value (i.e., the value it has for aiding in the prevention of terrorist attacks) is a morally legitimate one.

(C) The indefinite detention of the men imprisoned at Guantánamo is morally justified.

The difficulty here is that, without some additional argumentation to show that this morally legitimate interest in interrogation amounts to something like a *right* to interrogate individuals for intelligence value, it fails to support the conclusion that imprisonment is justified, much less that an indefinite term of imprisonment is justified. A father may be said to have a morally legitimate interest in knowing what his daughter's companions are planning for their trip to the mall, but he is not thereby morally justified in detaining them (much less detaining them

indefinitely) for the purpose of learning of their plans by way of interrogation, even if he has reasonable concerns about his daughter's safety.

The idea of trying to gain information from the prisoners by way of interrogation raises a serious concern. Interrogating individuals in an attempt to prevent terrorist attacks is a far more serious matter than interrogating petty criminals. Given the force of the desire for human intelligence in light of the potential harm of future attacks, it makes sense to be concerned that these men might be tortured in order to secure the necessary information.²⁸ Section 3 of the President's order states that any individual subject to it shall be, *inter alia*, "treated humanely" and "afforded adequate food, drinking water, shelter, clothing, and medical treatment."²⁹ But in spite of the government's claim that "it has abided by international conventions barring torture, and that detainees at Guantánamo and elsewhere have been treated humanely," the U.S. has violated Article 7 of the ICCPR.³⁰ This portion of the ICCPR "absolutely prohibits torture," and carries "an obligation from which no derogation may be made even in the context of a national emergency so severe as to threaten the life of the nation."³¹ The prisoners allege that (*inter alia*) they have been beaten, deprived of food and water for days, tortured in other countries and at U.S. military installations outside of the U.S. prior to being brought to Guantánamo, held for periods exceeding a year in solitary confinement, and raped.³² According to one FBI agent's account, prisoners were "shackled hand and foot in a fetal position on the floor . . . [and] kept in that position for 18 to 24 hours at a time[;] most had 'urinated or defacated [sic]' on themselves."³³ "On one occasion the agent reports having seen a detainee left in an unventilated, non-air conditioned room at a temperature 'probably well over a hundred degrees.' The agent notes: 'The detainee was almost unconscious on the floor, with a pile of hair next to him. He had apparently been literally pulling his own hair out throughout the night.'"³⁴

Unfortunately, such treatment is to be expected given that Guantánamo was the proving ground for torture techniques that would later be exported to Iraq, perhaps most notably to the now infamous Abu Ghraib prison. Major General Geoffrey Miller was in charge of the prisoners at Guantánamo and conducted "an inquiry on interrogation and detention procedures in Iraq" in 2003. He recommended that prison guards could assist in establishing conditions for prisoner interrogation and was subsequently given command of U.S.-run prisons in Iraq.³⁵ Miller's idea was to "Gitmoize" the prisons in Iraq and "turn Abu Ghraib into a center of intelligence for the Bush Administration's global war on terrorism."³⁶ As some of the on-site participants and observers at Abu Ghraib have maintained, the abuses "were part of a general pattern of a 'gloves off' interrogation policy that had been put in place after 9/11."³⁷ Prison guards were instructed to "keep people up all night . . . put them in stress positions and humiliate them, to prepare the prisoners for the more formal interrogation." There was "a general attitude of . . . anything goes, do what you need to do to get the information."³⁸ Indeed,

“[t]he key structural element in the[se] interrogation center[s] is the subordination of all institutional elements to the intelligence gathering function.”³⁹

The actions taken against the prisoners by the U.S. are therefore not merely illegal, since the detention itself violates the ICCPR, but also immoral, and unjust: the U.S. broke the promise it made when it signed onto the ICCPR and has imprisoned and tortured these men in clear violation of their human rights.

THE INDEFINITE DETENTION RATIONALE AS AN APPEAL TO FEAR

In light of this analysis the indefinite detention rationale is perhaps best characterized as an argument from negative consequences, specifically, an appeal to fear. The logical structure of fear appeal arguments includes two primary components, both of which are present in the indefinite detention rationale. The “practical reasoning base” presents the harmful danger and its impact on us. The “psychological overlay” targets particular feelings and emotions. “It may be hard to articulate or quantify [fear] in logical terms but it is the force that drives the argument along, and makes it effective.”⁴⁰ The form of the argument is consistent with the form of appeal to fear arguments: two premises which constitute an argument from negative consequences and a third premise that refers to our fear.

(P1) If the U.S. does not indefinitely detain terrorist suspects there will be future attacks on the U.S.

(P2) Terrorist attacks on the U.S. would be bad for us as a nation and as individuals.

(P3) We are afraid that there will be future attacks.

(C) The U.S. should indefinitely detain terrorist suspects.

RACE AND THE AMERICAN VALUE OF FEAR

In addition to the fear of terrorist attack, the appeal to fear for indefinite detention also includes an implicit appeal to racial fear. Racial fear adds to the argument’s psychological overlay, thus rendering it stronger and more efficacious. With the addition of racial fear the U.S. rationale now includes both varieties of political fear posited by Corey Robin. One mode of fear includes “the definition and interpretation by political leaders of public objects of apprehension and concern.” The primary constituency for this sort of fear is “the nation or some other presumably cohesive community, and its primary object a foreign enemy or some other approximation of the alien, like drugs, criminals, or immigrants.” A second mode of political fear “arises from the social, political, and economic hierarchies that divide a people. Though this fear is also created, wielded, or manipulated by political leaders, its specific purpose or function is internal intimidation, to use

sanctions or the threat of sanctions to ensure that one group retains or augments its power at the expense of another.”⁴¹ This kind of fear grows out of, and helps to perpetuate, inequities of wealth, status, and power in our society. Indeed, according to Robin, this sort of fear “is so closely linked to society’s various hierarchies—and to the rule and submission such hierarchies entail—that it qualifies as a basic mode of social and political control.”⁴²

The fear at work in the indefinite detention rationale has value because it evokes the near-universal first sort of political fear.⁴³ Many will no doubt agree that the U.S. has never had a greater single event as a public object of concern than the attacks of September 11, 2001. But there is also a sense in which the fear at work here has a particularly American value. Since there is a clear sense in which slavery is the genesis of racial injustice in America,⁴⁴ and since this fear is partly rooted in America’s history of racial injustice, there is a sense in which the racial fear implicit in the indefinite detention rationale is a particularly American value. Such implicit appeals to racial fear are regularly made in the U.S. and serve as unspoken justification for the perpetration of injustices against those who have been targeted by the dominant society. The much-publicized case of Charles Stuart is a case in point. Stuart claimed that a black man armed with a revolver “accosted” him and his wife Carol as they left a Massachusetts hospital following a child-birthing class. Stuart claimed that the robber “ordered him to drive to an isolated section of the racially mixed Mission Hill district [of Boston] where [the man] shot and robbed them. Police mounted an intense search for the killer in Mission Hill and the predominantly black Roxbury neighborhood. Black community leaders in Mission Hill complained that police were indiscriminately stopping and frisking 20 black men a day.” In the end it was discovered that Stuart had shot himself in the abdomen and mortally wounded his wife, who was seven months pregnant, by shooting her point blank in the head. Boston’s black community had felt the force of police persecution “for more than two months as the result of a lie.”⁴⁵ But what if “Charles Stuart had described a white person as his wife’s killer. Would the case have become national news? Would the police have searched Charlestown for the white everyman? Or would such a violation of individual rights not have been tolerated?”⁴⁶ The black experience in America tells us that the answer to these questions are clearly “no,” “no,” and a resounding “yes!”

Paradigmatic of the racial fear phenomenon in America is the “white fear that black men will ravish white women,” the “historical practice of lynching black men for alleged sexual offenses against white women,” and the “ever-present social taboo regarding interracial sexual relations.”⁴⁷ This “myth of the black rapist” is grounded in the view that, because of the bestial nature of their race, black men are naturally prone to rape. “In the history of the United States, the fraudulent rape charge stands out as one of the most formidable artifices invented by racism. The myth of the Black rapist has been methodically conjured up whenever recurrent

waves of violence and terror against the Black community have required convincing justifications.”⁴⁸ A classic in successful appeals to political fear that includes an implicit appeal to racial fear and that invokes the fear of the black rapist can be found in the political ads of 1988. William R. Horton, a black man “who was in jail for murder in Massachusetts in 1986, was released on a furlough. After being released, he invaded a home in Maryland where he raped a [white] woman and stabbed her fiancée. Horton had been on a weekend furlough which was part of an experiment in the criminal justice program of then-Governor Michael Dukakis.”⁴⁹ An entire series of television ads began in September 1988 as part of the Bush campaign against Dukakis. Often referred to as “Willie” Horton in the ads, his case and his image were used as symbols of “the terrors of crime in a fear appeal argument.”⁵⁰ One ad “invites the false inference that 268 murderers jumped furlough to rape and kidnap;” but Horton is the only one who fits this description.⁵¹ “Helping propel the false generalization from the isolated case of Horton to hordes of others who presumably did what he had done were complex and unspoken references to race.”⁵² The ad encouraged “unwarranted fears about blacks raping and murdering whites.”⁵³ The use of Horton “shaped the visual portrayal of crime in network news in ways that reinforced the mistaken assumption that violent crime is disproportionately committed by blacks, disproportionately committed by black perpetrators against white victims, and disproportionately the activity of black males against white females.”⁵⁴

For many, every “Arab looking” man with a darker-than-white complexion is subject to candidacy as a potential terrorist. This phenomenon can still be witnessed today at airport security check-points throughout the U.S. Like the black accused who “needs only to be ‘seen’ to be guilty of a prior offense,” his color is part of the evidence that connects him to terrorism.⁵⁵ Expressions like “rag head” and “camel jockey” may imply references to religion, customs, etc. However, the expressions “dune coon” and “sand nigger” are clear signs that the racial fear implicit in the rationale for indefinitely detaining “terrorist suspects” has some grounding in the history of racial injustice in America. Ironically, like the “Willie” Horton ads, these phrases entered our vernacular around the time of the Bush administration of almost two decades ago.

Finally, the U.S. imprisonment of Japanese Americans in part because of race helps to explain the imprisonment of the men at Guantánamo. It also lends support to the idea that the appeal to fear for indefinite detention includes an implicit appeal to racial fear. Although Franklin Roosevelt made no mention of Japanese Americans in his Executive Order 1066, it was nevertheless apparently clear to a majority of Americans which people were to be the objects of the order. As a means of ensuring “every possible protection against espionage and against sabotage to national defense material, . . . premises and . . . utilities,” he “authorized and direct[ed] the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deem such

action necessary or desirable to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which . . . the right of any person to enter, remain in, or leave shall be subject to whatever restriction the Secretary of War or the appropriate Military Commander may impose in his discretion.”⁵⁶ Given the history of race in America it is hardly surprising that the order did not inspire large-scale imprisonments of white Americans. The Axis powers included Italy and Germany, and we had already been at war with Germany less than three decades prior to our entry into World War II. Moreover, Germany committed a near-genocide in its efforts toward fulfilling Hitler’s Final Solution. Yet there were no internment camps for German Americans. Indeed, while blacks continued to endure the injustice of American apartheid throughout the 1940’s, not only did German Americans continue to enjoy the benefits of white privilege, but German prisoners of war regularly enjoyed the benefits of this privilege as well. Charles Dryden, one of the few surviving Tuskegee Airmen, recently “recalled his pride in returning from Africa and Europe after serving in Tuskegee’s original 99th Fighter Squadron, only to be stationed in Walterboro, [South Carolina] where he saw German prisoners of war get privileges in theaters and cafeterias that were denied to Black soldiers.”⁵⁷

More than four decades after the end of World War II the U.S. finally admitted that its imprisonment of people of Japanese ancestry was in part racially motivated. The Civil Liberties Act of 1988 (H.R. 442) declares that

(1) a grave injustice was done to citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II; [and] (2) these actions were without security reasons and without any acts of espionage or sabotage documented by the Commission on Wartime Relocation and Internment of Civilians, and were motivated by *racial prejudice*, wartime hysteria, and a failure of political leadership[.]⁵⁸

Grave injustice, lack of reason, racial prejudice, wartime hysteria, and a failure of political leadership—sounds just like our approach to Guantánamo.⁵⁹

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NOTES

1. But “[o]n whom is a war on ‘terrorism’ declared?” Claudia Card, “Questions Regarding a War on Terrorism,” *Hypatia*, vol. 18 (2003), p. 166. The difficulty with the meaning of this phrase was recognized in a House Armed Services Committee staff memo circulated on March 27, 2007. The memo states that “colloquialisms” like “global war on terror” are not to be used in the 2008 defense budget. Rick Maze, “No More GWOT, House Committee Decrees,” http://www.navytimes.com/news/2007/04/military_gwot_democrats_070403w/, accessed April 5, 2007.

2. “For Guantánamo Review Boards, Limits Abound,” *New York Times*, December 31, 2006, p. 20.

3. “Gitmo Detainees’ Rights Undecided,” *Daily Reflector*, April 3, 2007, p. A3. In June 2006 the number stood at “[a]pproximately 450 detainees.” “Detainee Transfer Announced,” News Release, U.S. Department of Defense, June 24, 2006. <http://www.defenselink.mil/releases/2006/nr20060624-13329.html> (accessed September 26, 2006).

4. Military Order of November 13, 2001, *Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 FED. REG. 57833 (November 16, 2001) (hereinafter Military Order of November 13, 2001).

5. It is important to note that the Patriot Act limits the indefinite detention of “aliens” who are in the U.S. and who are suspected of terrorism. In such cases it is the Attorney General who authorizes the detention. According to section 412 (a), aliens are to be placed “in removal proceedings, or shall [be] charge[d] . . . with a criminal offense, not later than 7 days after the commencement of such detention.” An alien detained and not yet removed from custody “whose removal is unlikely in the reasonably foreseeable future, may be detained for additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person.” *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001*, Public Law 107-56, 107th Cong. (October 26, 2001), 272, 351.

6. Center for Constitutional Rights, International Federation for Human Rights, and Center for International Human Rights of Northwestern University School of Law, “U.S. Violations of the International Covenant on Civil and Political Rights” (June 2006), http://www.ohchr.org/english/bodies/hrc/docs/ngos/CCR_FIDH.pdf, accessed September 20, 2006 (hereinafter U.S. Violations of the ICCPR), pp. 25, 26.

7. Military Order of November 13, 2001, emphasis added.

8. Remarks by Secretary of Defense Donald Rumsfeld to Greater Miami Chamber of Commerce, February 13, 2004, www.defenselink.mil/transcripts/2004/tr20040213-0445.html (accessed March 16, 2007) (hereinafter Remarks by Donald Rumsfeld).

9. Mark Denbeaux and Joshua Denbeaux, “Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data” (February 2006), Seton Hall Public Law Research Paper No. 46. http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf, accessed Sept. 26, 2006 (hereinafter Report on Guantanamo Detainees), p. 14.

10. “For Guantánamo Review Boards, Limits Abound,” *New York Times*, December 31, 2006, p. 20.

11. Denbeaux and Denbeaux, “Report on Guantanamo Detainees,” Appendix A, p. 25.

12. “‘Vicious Killers’ from Guantanamo Bay Routinely Freed,” *Daily Reflector*, December 17, 2006, p. A10. The Associated Press tracked 245 former prisoners from seventeen countries and concluded the following (inter alia). “Once the detainees arrived in other countries, 205 of the 245 were either freed without being charged or were cleared of charges related to their detention at Guantanamo.” “All 29 detainees who were repatriated to Britain, Spain, Germany, Russia, Australia, Turkey, Denmark, Bahrain and the

Maldives were freed, some within hours after being sent home for ‘continued detention’” (ibid.).

13. “United States (History),” *Microsoft Encarta Encyclopedia 2000*, emphasis added.

14. “Funds Urged for Forgotten Internees,” *Honolulu Advertiser*, February 21, 1999, p. A17.

15. “Declassified Key Judgments of the National Intelligence Estimate on Global Terrorism,” *New York Times*, September 27, 2006, p. A16.

16. *Black’s Law Dictionary*, 7th ed. (St. Paul: West Group, 1999), p. 459. According to Phillip Montague, not only is preventive detention “almost invariably a societal response to punishable conduct,” “purely preventive responses to criminal dangerousness are usually short-term measures.” Phillip Montague, “Justifying Preventive Detention,” *Law and Philosophy* 18 (1999): 179.

17. The Military Commissions Act of 2006 “authorize[s] trial by military commission for violations of the law of war, and for other purposes.” U.S. Congress, S. 3930, 109th Cong., 2nd sess., 28 September 2006. An investigation by the New York Times into the Guantánamo review boards “suggests that they have often fallen short, not only as a source of due process for the hundreds of men held there, but also as a forum to resolve questions about what the detainees have done and the threats they may pose.” “For Guantánamo Review Boards, Limits Abound,” p. 1.

18. U.S. Violations of the ICCPR, p. 11.

19. President Grover Cleveland, “An Act of War: Special Message to Congress on Recent Events in the Kingdom of Hawaii,” December 18, 1893 (an excerpt), in *Islands in Captivity: The Record of the International Tribunal on the Rights of Indigenous Hawaiians*, ed. Ward Churchill and Sharon H. Venne (Cambridge, Mass.: South End Press, 2004), p. 168.

20. U.S. Violations of the ICCPR, p. 17.

21. As Tamar Meisels notes: “In the months after September 11 a small band of conservative lawyers within the Bush administration staked out a forward-leaning legal position regarding the unfolding war in Afghanistan. It was, these lawyers said, a conflict against a vast, outlawed, international enemy, in which the rules of war, international treaties, and even the Geneva conventions did not apply. While the administration has avoided taking any clear official stand on these issues, the emergent approach appears to have been that America’s enemies in this war were ‘unlawful’ combatants, without rights.” Tamar Meisels, “Combatants—Lawful and Unlawful,” *Law and Philosophy*, vol. 26 (2007), pp. 34–35.

22. John Stuart Mill, *Utilitarianism*, 2nd ed., ed. George Sher (Indianapolis: Hackett, 2001), p. 45, emphasis in the original.

23. Ibid., pp. 63–64.

24. Ibid., pp. 11, 17.

25. Samuel Scheffler, ed., Introduction to *Consequentialism and Its Critics* (Oxford: Oxford University Press, 1988), p. 1.

26. Ibid., p. 1, emphasis added.

27. "Detaining enemy combatants also serves another purpose [in addition to constraining dangerous individuals]. It provides us with intelligence that can help us prevent future acts of terrorism." Remarks by Donald Rumsfeld.

28. If Deirdre Golash is correct, torture as a means to gaining information is "a deeper denial of personhood and autonomy than is torture as punishment." Deirdre Golash, "Torture and Self-Defense," in *Intervention, Terrorism, and Torture: Contemporary Challenges to Just War Theory*, ed. Steven P. Lee (Dordrecht, The Netherlands: Springer, 2007), p. 268.

29. According to the Detainee Treatment Act of 2005, no prisoner "shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation." Detainee Treatment Act of 2005, <http://jurist.law.pitt.edu/gazette/2005/12/detainee-treatment-act-of-2005-white.php>, accessed October 3, 2006.

30. "Memo Offered Justification for Use of Torture," *Washington Post*, June 8, 2004, p. A01. Then-Secretary of Defense Donald Rumsfeld asserted that the prisoners "are being treated in a manner that is consistent with the Geneva Convention." Remarks by Donald Rumsfeld.

31. U.S. Violations of the ICCPR, p. 11.

32. U.S. Violations of the ICCPR, pp. 13–14.

33. American Civil Liberties Union (ACLU), "FBI E-Mail Refers to Presidential Order Authorizing Inhumane Interrogation Techniques," December 20, 2004, <http://www.aclu.org/safefree/general/18769prs20041220.html>, accessed October 3, 2006.

34. *Ibid.* For a range of first-hand testimony, see The Guantánamo Testimonials Project, <http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/index>, accessed April 12, 2007.

35. "Abu Ghraib Timeline," Friday, May 7, 2004, <http://www.scvhistory.com/scvhistory/signals/iraq/abughraib-timeline.htm>, accessed March 14, 2007.

36. Seymour M. Hersh, *Chain of Command: The Road From 9/11 to Abu Ghraib* (New York: Harper Collins, 2004), p. 31.

37. "Ghosts of Abu Ghraib: Synopsis," <http://www.hbo.com/docs/programs/ghostsofabughraib/synopsis.html>, accessed March 14, 2007.

38. "Ghosts of Abu Ghraib: Interview with Rory Kennedy," <http://www.hbo.com/docs/programs/ghostsofabughraib/interview.html>, accessed March 14, 2007.

39. Ken Kipnis, "Prisons, POW Camps, and Interrogation Centers: Reflections on the Juridic Status of Detainees," in *Intervention, Terrorism, and Torture*, p. 294.

40. Douglas Walton, *Scare Tactics: Arguments That Appeal to Fear and Threats* (Dordrecht, The Netherlands: Kluwer, 2000), p. 143.

41. Corey Robin, *Fear: The History of a Political Idea* (Oxford: Oxford University Press, 2004), p. 18.

42. *Ibid.*, p. 19. Robin argues that "politically repressive fear is far more present in the United States than we like to believe. This may be a fear of threats to the physical security or moral well-being of the population, against which elites position themselves as protectors, or it may be the fear among the powerful of the less powerful, and vice versa.

These two kinds of fear—the first uniting the nation, the second dividing it—reinforce each other, with elites reaping the benefit of their combined force” (p. 162).

43. By “value” I mean something like “what there is reason to desire or promote or protect.” Robin Attfield, “John Laird and *The Idea of Value*,” *Journal of Value Inquiry*, vol. 29 (1995), p. 113.

44. Rodney C. Roberts, “The Counterfactual Conception of Compensation,” in *Genocide’s Aftermath: Responsibility and Repair*, ed. Claudia Card and Armen T. Marsoobian (Oxford: Blackwell, 2007), p. 143.

45. Margaret Carlson, “Hero, Suspect, Suicide,” *Time*, January 15, 1990, <http://www.time.com/time/magazine/article/0,9171,969173-1,00.html>, accessed March 17, 2007.

46. Jeanne Theoharis and Lisa Woznica, “The Forgotten Victim: The Collision of Race, Gender, and Murder,” http://www.digitas.harvard.edu/~perspy/old/issues/2000/retro/forgotten_victim.html, accessed on March 17, 2007.

47. Tommy L. Lott, “Frederick Douglass on the Myth of the Black Rapist,” in *Frederick Douglass: A Critical Reader*, ed. Bill E. Lawson and Frank M. Kirkland (Oxford: Blackwell, 1999), pp. 313, 314.

48. Angela Y. Davis, *Women, Race & Class* (New York: Random House, 1981), p. 173.

49. Walton, *Scare Tactics*, p. 10.

50. *Ibid.*, p. 11.

51. Kathleen Hall Jamieson, *Dirty Politics: Deception, Distraction, and Democracy* (New York: Oxford University Press, 1992), p. 20.

52. *Ibid.*, p. 33.

53. *Ibid.*, p. 40.

54. *Ibid.*, p. 133.

55. Lewis R. Gordon, *Bad Faith and Antiracist Racism* (Atlantic Highlands, N.J.: Humanities Press, 1995), p. 102.

56. Exec. Order No. 9066 (1942) at <http://bss.sfsu.edu/internment/executiorder9066.html> (accessed October 6, 2006).

57. “Tuskegee Airmen of World War II Awarded Congressional Gold Medal,” *Chicago Defender*, March 30–April 1, 2007, p. 7.

58. U.S. Congress, H.R. 442, 100th Cong., 2nd sess., August 10, 1988 (from conference report filed in House, H. Rept. 100-785, July 26, 1988), emphasis added.

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