2. HUMAN RIGHTS, ANTITERRORIST WRONGS

By: Diane Marie Amann*

The September 11, 2001, attacks that killed thousands in New York and Washington awakened Americans to a new sense of vulnerability. These were not the first terrorist strikes against the United States; prior assaults had included explosions at Marine barracks in Beirut in 1983 and at U.S. embassies in Africa in 1998. But this time, in a perverse twist, civilians, passengers on civil aircraft, were transformed into tools for commission of international terrorism on U.S. soil. September 11 thus shocked Americans into awareness that their borders, no less than those elsewhere in the world, could be penetrated.

The Government's Antiterrorism Campaign – With this new vulnerability might have come a new willingness to work with other nation-states against a common enemy. Initially, U.S. Secretary of State Colin M. Powell shuttled from state to state building a coalition to intervene militarily against the Taliban regime in Afghanistan, refuge of Osama bin Laden, leader of Al Qaeda, the terrorist network believed to have committed the September 11 attacks. Soon, however, the United States began following its own path.

As a result of the USA PATRIOT Act of 2001 and subsequent measures,[1] internal surveillance increased. Attorney-client conversations, once confidential, were subject to eavesdropping. Federal employees replaced private security guards, and employed more intrusive search methods at airports. Policymakers mulled combining a score of federal agencies into a new, Cabinet-level domestic security sector, to be named the Homeland Security Department, with much access to intelligence data about terrorism. More than seven thousand persons found in the United States, mostly Arabs, South Asians, or Muslims, received invitations to appear at police stations and answer questions; more than a thousand noncitizens were held in prolonged and secret detention.

Detainees outside the United States endured exceptional treatment. Those whom President George H. Bush presumed members of Al Qaeda were detained indefinitely at a U.S. military base at Guantánamo Bay, Cuba. There they were denied the protection of the U.S. Constitution. Vice-President Dick Cheney justified this by saying of terrorists, "'They don't deserve the same guarantees and safeguards that would be used for an American citizen going through the normal judicial process.'"[2] Officials endeavored to interrogate detainees, who were refused access to counsel, and the reported silence of many prompted some in the United States to discuss the use of torture to extract confessions.[3] President George W. Bush authorized the use of special military commissions, not bound to observe the panoply of the rights of the accused and not subject to judicial review, for trial of some of the detainees. The rest – and any whom a military tribunal might acquit – faced internment until the United States declared an end to its "war" against terrorism.[4]

The U.S. campaign provoked much criticism from its allies and others around the globe. Sweden pressed for release of its citizens' assets, frozen by the U.N. Security Council at the United States' request; Spain signaled that it might not hand over suspected Al Qaeda members unless the United States promised to try them in civilian courts; and several states protested the U.S. plan to seek the death penalty for one defendant, a French national.[5] States pressed for a diplomatic solution to concerns about weapons-making in Iraq in spite of U.S. demands for a military assault.

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Treatment of Guantánamo detainees sparked international outrage. Photographs of hooded men, in chains and on their knees amid cages, spurred insistence that the United States obey the third Geneva Convention, regarding the treatment of prisoners of war.[6] It requires that a High Contracting Party treat prisoners of war humanely and refrain from demanding information other than that relating to identification. Prisoners of war accused of crimes must receive a fair trial, according to the Convention – at a minimum, the same criminal process that the detaining state would accord its own military personnel. Prisoners not subject to criminal proceedings must be liberated and repatriated as soon as the conflict ends.

The United States resisted application of the Convention, arguing that the alien detainees were not prisoners of war, but rather "enemy combatants" unprotected by the Geneva framework. Eventually it relented with regard to nationals of Afghanistan. Others – nationals of more than two dozen states including Saudi Arabia, Pakistan, Yemen, Algeria, Australia, Sweden, Britain, Belgium, and France – were presumed to belong to Al Qaeda, a nonstate entity. The U.S. government continued to maintain that the Convention did not cover these detainees, more than a third of the Guantánamo captives. It further rejected the Red Cross' position that executive designation of detainee status did not satisfy the Convention requirement that "a competent tribunal" decide whether a detainee is a prisoner of war.[7]

In late 2002, the United States released four Guantánamo detainees, but brought in about thirty more, increasing the detention population to more than 600 men.[8] The proposed special military tribunals had not yet been established. Nonetheless, officials expanded the group of individuals they deemed unworthy of legal protection. Having discovered that a number of suspected terrorists were not aliens but rather U.S. citizens, the government maintained that the Supreme Court's decision in Ex parte *Quirin*, 317 U.S. 1 (1942), authorized it, without any judicial oversight, to curtail liberties of all "unlawful combatants" – even its own citizens found on its own territory.

Legal Challenges to the U.S. Campaign – Opponents of U.S. antiterrorist measures sought legal recourse. Resorting to one of few potential judicial mechanisms for international scrutiny, a number of U.S. human rights attorneys filed with the Inter-American human rights system a challenge to the conditions of detention at Guantánamo. Even though the United States never ratified the American Convention on Human Rights of 1969, the Inter-American Court of Human Rights had ruled in 1990 that the United States' membership in the Organization of American States rendered it liable to answer before inter-American human rights bodies.[9] Thus in March 2002, the Inter-American Commission on Human Rights adopted precautionary measures that asked the United States to "take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal." The United States refused, arguing both that the Commission lacked the competence to issue such a decision and that, in any event, the third Geneva Convention does not apply, so that there is no need to consult a "competent tribunal." The Commission held a hearing on the matter in October 2002.[10]

As this international litigation unfolded, opponents also looked to national law, calling on state and federal judges throughout the United States to examine aspects of the antiterrorism campaign. Here too the executive resisted. In cases relating to Guantánamo, it persisted in its rebuff of the Geneva Convention; in others, it argued that a post-September 11 national emergency justified measures such as protracted and secret detention and seizure of funds even absent a showing of ties to terrorism. In many cases the executive branch contended that the federal judiciary had no authority to review its decisions. Petitions

writs for habeas corpus, by which the U.S. Supreme Court had reviewed proceedings of military tribunals in World War II-era cases like *Quirin* and Application of *Yamashita*, 327 U.S. 1 (1945), were claimed to have no jurisdictional foundation. At a hearing involving Yaser Esam Hamdi, a U.S. citizen captured in Afghanistan, a district court "verbally cuffed" government lawyers for seeking to avoid judicial scrutiny of their assertion that Hamdi did not enjoy the full complement of constitutional rights; as of yet no appellate panel has ruled on the question.[11]

Actual exercise of review did not mean that judges would rule against the executive. To the contrary, one challenge to detention at Guantánamo promptly was dismissed for the reason that government action outside U.S. territory fell outside the reach of the U.S. courts.[12] Judges divided on most questions put before them; for example, whether the executive had abused its statutory power by holding individuals in custody as material witnesses despite the lack of proof of misconduct;[13] whether immigration authorities must disclose names and other information about detainees;[14] whether the government could close immigration hearings in matters that the executive branch had classified of "special interest";[15] and the degree to which the government had to prove links to terrorism before a suspect's assets could be frozen.[16]

Toward Just Decisionmaking – Judges in the United States sought guidance in their own Constitution – not only its text, but also the values and political structure underlying it. At one end of the spectrum, the U.S. Court of Appeals for the Sixth Circuit warned that "[d]emocracies die behind closed doors," and a district judge introduced her decision against the government's use of the material witness statute with this excerpt from a Civil War-era opinion: "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government." *Detroit Free Press*, 303 F.3d at 683; *Awadallah*, 202 F. Supp. 2d at 57 (quoting *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 120-21 (1866)).

At the other end, the Fourth Circuit based its reversal of an order permitting a detained citizen access to counsel on the district court's "inattention to ... cardinal principles of constitutional text and practice"; specifically, a practice of extreme judicial deference to executive and legislative acts "implicating sensitive matters of foreign policy, national security, or military affairs." *Hamdi*, 296 F.3d at 281-82. Each opinion struggled to adjudicate novel questions by application of national law. But settled national law often failed to provide an adequate means to just resolution. In tacit acknowledgment of this, one court highlighted the pertinence of the third Geneva Convention to Guantánamo detention even as it deemed itself incompetent to enforce the terms of that treaty. *See Coalition of Clergy*, 189 F. Supp. 2d at 1050 (discussing Convention and commenting that "nothing in this ruling suggests that the captives are entitled to no legal protection whatsoever").

But continued abdication of jurisdiction could mean that no body will be able to place a check on post-September 11 antiterrorist measures. Longstanding U.S. resistance to orders from inter-American human rights bodies make it unlikely that this regional system will persuade the United States to alter its path. The check, if there is to be one, will have to come from a U.S. judiciary – one that has liberated itself from the confines of an exclusively national constitutional jurisprudence. Constitutional law must be reformulated to acknowledge and accommodate the pervasive interdependence between United States and the rest of the world. It makes little sense to seek to apply "pure" national law, unaffected by external norms, as the sole vehicle for

adjudication of matters replete with transnational components. To limit U.S. judicial power to the territorial borders of the United States likewise seems crabbed, given that executive action is not so confined. To give the U.S. government free rein abroad invites hostility from individuals and states across the globe. It also may work substantive injustice, for it runs the risk of immunizing abuses that would not be tolerated at home. And a premise underlying decrees of deference to executive decisions implicating foreign affairs – that domestic judges cannot acquire the tools to comprehend international matters – is outdated in a century characterized by instantaneous transmission of information. Because national law fails to permit a full and just evaluation of the U.S. antiterrorism campaign, judges ought to look beyond the borders of the United States for international norms that may aid their decisionmaking.

Such an approach is scarcely without precedent. Early U.S. opinions routinely looked to foreign sources when interpreting principles of U.S. law. The practice was not uncommon to federal criminal law as late as the 1960s.[17] Last Term's decision in *Atkins v. Virginia*, 122 S. Ct. 2242 (2002), resurrected the practice of consulting international norms to determine whether punishment offends "evolving standards of decency" and so violates the Eighth Amendment to the U.S. Constitution. In citing the brief *amicus curiae* of the European Union as support for its conclusion that the Constitution forbids execution of a mentally retarded person, the Court rejected three dissenters' arguments that international values are irrelevant. *Compare id.* at 2249 n.21*with id.* at 2254-56 (Rehnquist, C.J., joined by Scalia and Thomas, JJ., dissenting) *and id.* at 2264 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting). Such values pertain equally to interpretation of the constitutional principles critical to scrutiny of the U.S. antiterrorism campaign; in particular, whether certain intrusions amount to "unreasonable searches and seizures" violative of the Fourth Amendment, and whether the government has afforded "due process" as required by the Fifth Amendment.

The inquiry should begin with examination of human rights law, which holds that individuals enjoy certain rights simply because they have been born human beings. Two of the many recitations of this principle occur in the American Declaration of the Rights and Duties of Man, which the United States endorsed, and in the International Covenant on Civil and Political Rights (ICCPR), which the United States ratified. The first proclaims that "the essential rights of man are not derived from the fact that he is a national of a certain state, but are based upon attributes of his human personality"; the second, that "the inherent dignity of the human person" gives rise to "equal and inalienable rights" that are "the foundation of freedom, justice and peace in the world."[18] Though not unfamiliar to U.S. legal tradition, the concept has withered in the face of skepticism about its natural law roots and frequent abridgment of rights via judicially created balancing tests. Decisions that sustained government deprivations in the name of state necessity, like *Abrams v. United States*, 259 U.S. 616 (1919), and *Korematsu v. United States*, 323 U.S. 214 (1944), have further diluted its force. Consideration of international human rights law could lead to revitalization of the view that rights vest in humans simply because they are human, and thus cast grave doubt on the contention that the state may deny fundamental rights if the human in question is a noncitizen, or an enemy, or a suspected terrorist.

A court that has embraced the inherent dignity of each human being likely would draw on all available sources to craft a constitutional framework for substantive justice. Obligations the United States has assumed as a state party to the third Geneva Convention thus would become relevant. The claim would not be that the Convention is automatically enforceable in U.S. courts; the structure of treaties, combined

with reservations and other mechanisms designed to limit the internal applicability of treaties, often preclude such an argument.[19] Rather, the Convention would stand as an indicator of values to which the United States has subscribed – values that implicate constitutional concepts like due process. A court well might find the fifty-three-year-old Convention ill adapted to the U.S. campaign against terrorism. The promise of liberation and repatriation at the end of the conflict, for example, rings hollow in a "war" without end. Some of the rights the Convention describes – an individual has a right not to answer all questions posed at interrogation, but no right to counsel at interrogation – fall short of standards established in the last half-century. The Convention does not apply, moreover, to anyone found in the United States and there subjected either to interrogation or detention. These failings would not stymy all reliance on the Convention, but rather would point the judge to additional sources of international law in order to develop a full understanding of contemporary values.

These other sources would reveal that the use of official torture, universally condemned as one of the worst international crimes, should be unthinkable. They would underscore the gravity of psychological harm from prolonged incommunicado detention; such harm may violate not only the nonderogable right to be free from torture, but also other human rights.[20] Still other rights would be implicated by heightened surveillance.[21] Finally, the executive's assertion that it may wage its antiterrorist campaign by unreviewable fiat also would fare poorly in light of international law's guarantee of an effective means of redress and its preference for judicial review.[22]

Even at international law, most fundamental rights are subject to derogation. One example is Article 4(1) of the ICCPR, which states: "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin." This provision is kin to the strict scrutiny a U.S. court should undertake when confronted with state deprivation of fundamental rights, yet promises far more protection for the individual. Its very specificity should cabin governmental action in a way that a catchphrase like "[p]ressing public necessity," used to justify internment of Japanese Americans during World War II,[23] cannot.

Reassessing the U.S. Campaign – The September 11 attacks marked the debut neither of the struggle against Al Qaeda nor of the assault on U.S. territory; those landmarks had been established no later than the moment the U.S. embassies in Africa were bombed. Ordinary U.S. courts earlier had proved able to adjudicate this and other cases involving international terrorism. As the passage of months failed to bring the dire assaults about which the U.S. government had given constant warnings, the American sense of immediate threat abated. Circumstances thus did not point to the nation-threatening emergency that is a condition precedent to derogation. Nor were U.S. antiterrorist measures tailored to the articulated threat. Large numbers of non-Americans found in the United States were held in secret, based on traits, such as age, sex, or national origin, shared by many law-abiding individuals. No showing of suspected links to Al Qaeda preceded detention. Similarly, the presidential order that authorized special military tribunals was not limited to persons believed to have committed terrorist acts on behalf of Al Qaeda. The terms of the order easily could be applied to an entirely different

context – to Basque separatism, perhaps. And though the national sense of urgency had eased, the measures had not – more than a year after the attacks, no end to antiterrorism measures seemed likely.

In short, under external sources of law would render aspects of the U.S. antiterrorism campaign are invalid. Its devaluation of individuals runs contrary to a founding principle of human rights law, while the length and severity of many measures cannot withstand the exacting scrutiny of derogation analysis. The standards in sources like international human rights and humanitarian law are neither unattainable nor idiosyncratic; to the contrary, many embody a consensus shared by much of the world. U.S. courts seeking to comprehend the contemporary meaning of the constitutional values at stake in antiterrorism measures – for instance, the reasonableness of a search and seizure or the fairness of procedures – properly should take these standards into account. Abandonment of an insular constitutional jurisprudence not only is appropriate in an interdependent world, but also will afford greater security to individual targets of state prerogative.

Endnotes

[1] *See* The United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, H.R. 3162, 107th Cong.; Homeland Security Act of 2002, H.R. Con. Res. 5005, 107th Cong. (2002); Aviation and Transportation Security Act, Pub. L. 107-71, 115 Stat. 597, Nov. 19, 2001; National Homeland Security and Combating Terrorism Act of 2002, S. 2452, 107th Cong. (2002); Attorney General's Order Regarding Monitoring of Confidential Attorney-Client Communications, 66 Federal Register 55,062 (Oct. 31, 2001).

[2] Peter Slevin & George Lardner, Jr., *Bush Plan for Terrorism Trials Defended*, WASH. POST, Nov. 15, 2001, at A28 (quoting Cheney).

[3] *See, e.g.*, Kevin Johnson & Richard Willing, *Ex-CIA chief revitalizes 'truth serum' debate*, USA TODAY, Apr. 26, 2002, at A12 (quoting William Webster); Alan Dershowitz, *We need a serious debate about the use of torture*, GUARDIAN (LONDON), Nov. 30, 2001, at 23 (suggesting, in letter by Harvard professor of criminal law, that on rare occasions it might be appropriate to issue "torture warrants" as a means of combating terrorism); Walter Pincus, *Silence of 4 Terror Probe Suspects Poses Dilemma for FBI*, WASH. POST, Oct. 21, 2001, at A06 (quoting former U.S. Attorney General Richard L. Thornburgh and others who advocated consideration of previously disfavored interrogation techniques).

[4] *See* U.S.: Presidential Military Order – Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 FED. REG. 57833 (Nov. 13, 2001); Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, Department of Defense Military Commission Order No. 1, Mar. 1, 2002, *available at* http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf (visited March 23, 2002).

[5] *See* Azhar Cachalia, *We must fight US efforts to erode international justice*, SUNDAY TIMES (JOHANNESBURG), Mar. 17, 2002, http://www.sundaytimes.co.za/2002/03/17/insight/in04.asp (visited May 3, 2002) (commentary by a judge of South Africa's High Court); Serge Schmemann, *Swedes Take Up the Cause of 3 on U.S. Terror List*, N.Y. TIMES, Jan. 26, 2002, at A9; Sam Dillon & Donald G. McNeil Jr., *Spain Sets Hurdle for Extradition*, N.Y. TIMES, Nov. 24, 2001, at A1; Philip Shenon, *Germany Urges U.S. to Drop Death Penalty Plan*, N.Y. TIMES, Oct. 26, 2002, at A9.

[6] Geneva Convention Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, *entered into force* Oct. 21, 1950 [hereinafter Geneva Convention].

[7] *See id.*, art. 5 ("Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present convention until such time as their status has been

determined by a competent tribunal.").

[8] *See* David Rohde, *Afghans Freed from Guantánamo Speak of Heat and Isolation*, N.Y. TIMES, Oct. 29, 2002, at A14.

[9] *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion* OC-10/89, July 14, 1989, Inter-Am. Ct. H. R., ser. A, no. 10 (1990).

[10] *See* Request by the Center for Constitutional Rights, the Human Rights Clinic at Columbia Law School and the Center for Justice and International Law for Precautionary Measures under Article 25 of the Commission's Regulations, Feb. 25, 2002; Letter of Juan E. Méndez, Commission President, to Jennifer M. Green et al., Ref. Detainees in Guantanamo Bay, Cuba, Mar. 13, 2002 (both on file with author); Response of the United States to Request for Precautionary Measures - Detainees in Guantanamo Bay, Cuba, Apr. 15, 2002, *reprinted in* 41 I.L.M. 1015 (2002).

[11] Katharine Q. Seelye, *Judge Questions Detention of Americans in War Case*, N.Y. TIMES, Aug. 14, 2002, at A15. The hearing followed a remand opinion, *Hamdi v. Rumsfeld*, 296 F.3d 278, 283-84 (4th Cir. 2001), in which the Fourth Circuit had reserved judgment on the judicial review question. Further appeal was pending in late 2002, even as a second defendant began to litigate a similar challenge. *See* Katharine Q. Seelye, *Court to Hear Arguments in Groundbreaking Case of U.S. Citizen Seized With Taliban*, N.Y. TIMES, Oct. 28, 2002, at A13; Benjamin Weiser, *'Enemy Combatant' Fights to Obtain Counsel*, N.Y. TIMES, Oct. 39, 2002, at A13.

[12] Coalition of Clergy v. Bush, 189 F. Supp.2d 1036 (C.D. Cal. 2002). This decision was affirmed in November 2002, ___ F.3d ___ (9th Cir. 2002).

[13] *Compare* United States v. Awadallah, 202 F. Supp. 2d 55 (S.D.N.Y. 2002) (forbidding such use) *with In re* Application of United States for a Material Witness Warrant, 213 F. Supp. 2d 287 (S.D.N.Y. 2002) (rejecting *Awadallah* ruling and refusing to quash material witness warrant).

[14] *Compare* Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 215 F. Supp. 2d 94 (D.D.C. 2002) (ordering release of detainees' names) *with* Am. Civil Liberties Union of New Jersey v. County of Hudson, 352 N.J. Super. 44, 799 A.2d 629 N.J. Super. A.D.) (reversing judgment below, which had demanded disclosure of information regarding person detained by immigration authorities), *cert. denied*, 174 N.J. 190, 803 A.2d 1162 (2002).

[15] *Compare* Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002) (condemning blanket closure in such instances) *with* North Jersey Media Group v. Ashcroft, __ F.3d __, 2002 WL 31246589 (3d Cir. Oct. 8, 2002) (finding no First Amendment right of access to such proceedings).

[16] *See* Holy Land Found. for Relief & Dev. v. Ashcroft, 219 F. Supp. 2d 57 (D.D.C. 2002) (ruling that government-proffered documents showed that Muslim charity was terrorist organization, thus justifying seizure of assets); Global Relief Found. v. O'Neill, 205 F. Supp. 2d 885 (N.D. Ill. 2002) (sustaining Patriot Act provision that permits government, pending further investigation, to freeze a suspect's asset without demonstrating the suspect's ties to terrorism).

[17] *See*, *e.g.*, Culombe v. Connecticut, 367 U.S. 568, 595-98 (1961) (discussing at length English Judges Rules, which became a basis for warning requirement enunciated in *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)).

[18] American Declaration of the Rights and Duties of Man, intro., O.A.S. Res. XXX, *adopted by* the Ninth International Conference of American States, Bogota, 1948, OAE/Ser.L/V/I.4 Rev. (1965); International Covenant on Civil and Political Rights, intro., G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1967), *reprinted in* 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). The language in the ICCPR tracks that in the introduction to the Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc. A/810, at 71 (1948), which the United States also endorsed. It is augmented by Article 16 of the ICCPR, which states, "Everyone shall have the right to recognition everywhere as a person before the law."

[19] *See*, *e.g.*, *U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights*, 138 Cong. Rec. S4781-01 (daily ed., Apr. 2, 1992) (reserving freedom to continue some U.S. practices contrary to the terms of the ICCPR, such as executions of minors, and further providing that no rights in the Covenant may be enforced in U.S. courts until Congress enacts implementing statutes).

[20] The ICCPR establishes the right to be free not only "torture," but also "cruel, inhuman or degrading treatment or punishment,"as nonderogable. ICCPR, *supra* note 22, arts. 4(1), 7. Furthermore, U.S. law enacted to implement the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. DOC. A/39/51 (1984), includes within the definition of torture, a crime punishable by death, the imposition of "severe mental pain or suffering," which includes using procedures calculated to disrupt profoundly the senses or personality." 18 U.S.C. §§ 2340, 2340A(a). Also implicated by this state action are the rights to be free from arbitrary detention and interference with privacy, ICCPR, *supra* note 22, arts. 9(1), 17(1), as well as the right to be treated during detention "with humanity and with respect for the inherent dignity of the human person," *id.*, art. 10(1).

[21] These would include both the right to liberty and security of the person, ICCPR, *supra* note 22, art. 9(1), and the freedom from "arbitrary or unlawful interference with .. privacy, family, home or correspondence," *id.*, art.17(1).

[22] On the right to a remedy, see *id.*, art. 3(a) (obliging states parties to guarantee persons whose rights have been violated "an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity"), and *Velásquez Rodríguez Case*, paras. 62-68, 4 Inter-Am. Ct. H.R. (ser. C) (1988) (interpreting guarantee of "effective recourse" in American human rights convention to require that legal avenues be capable of providing relief). On the value of judicial oversight, see ICCPR, *supra* note 22, arts. 3(b), 9(4) (requiring, respectively, that states not only to provide determination by governmental officials, but also "to develop the possibility of judicial remedy," and that "[a]nyone" detained be permitted "to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is unlawful").

[23] *See Korematsu*, 323 U.S. at 216. Decades later, convictions for resisting internment were set aside after it was shown that officials had fabricated their claims of necessity. *See* Hirabayashi v. United States, 828 F.2d 591 (9th Cir., 1987); Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal., 1984).