

Lawful Obligations

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Strings play dramatic rising chords as white letters materialize over seven shadowy figures—seven lawyers, dramatically silhouetted, who advocated for terrorist detainees and whose identities remain undisclosed. “WHOSE VALUES DO THEY SHARE?” demand the letters and an ominous voiceover. The implied answer is in the brief film clip projected faintly behind the seven silhouettes: a man, apparently addressing a crowd, raises and then lowers his hand. The clip is too fast and too small to tell who the man is, but what we *can* see are his beard and turban. “Tell Eric Holder,” the voiceover suggests helpfully, as the shot cuts to a picture of the Attorney General’s face and phone number, “Americans have a right to know the identity of the Al-Qaeda 7.” This last phrase appears in glowing white letters over the same shot: seven shadowy figures, one scary Muslim demagogue lurking behind them.

If you think the vague feelings of fear and unease in the pit of your stomach might be relieved by means of a donation to a nonprofit, follow the advice of the final set of omnipotent white letters and head on over to *KeepAmericaSafe.com*, where you can read poll numbers conveniently demonstrating that people agree with you, see AP photos captioned “A Bow To Communist Hu” that show President Obama inclining his head to the President of China at a nuclear nonproliferation summit, and sign a petition to “Keep GITMO open and keep terrorists off American soil!”

Keep America Safe is a conservative non-profit organization founded and run by Liz Cheney, attorney and daughter of former vice-president Dick Cheney; Bill Kristol, *Weekly Standard* editor and Fox News commentator; and Debra Burlingame, attorney and wife of the pilot of the hijacked plane that was flown into the Pentagon on 9/11. The organization made headlines in early March when it released the “Al Qaeda 7” ad, which has been criticized by many—including a group of former Bush administration officials—for unfairly questioning the loyalty of lawyers who were merely doing their jobs. Supporters of Keep America Safe maintain that it is acceptable to criticize the

“Al Qaeda 7” lawyers because they performed *pro bono* work for “America’s enemies”—“enemies” not protected under the Geneva Convention. No habeas corpus, no free legal counsel.

Many of the cases fought by the “Al Qaeda 7” lawyers involved petitioning for accused terrorists to have civilian trials instead of specially convened military commissions. During the Bush administration, hundreds of accused terrorists were tried and convicted in civilian courts with virtually no public protest. Even conservative *National Review* columnist Andrew McCarthy endorsed civilian trials in 2008 when a military commission failed to try terrorist Ahmed Ressay (Eviatar). But two years later, McCarthy came out strongly against them: “Like most Americans, I think it is a terrible idea to give alien enemy combatants civilian trials” (Eviatar). And then he weighed in on Keep America Safe’s “Al Qaeda 7” ad, writing an editorial in the *New York Times* supporting the non-profit and accusing the “Al Qaeda 7” lawyers of “coming to the enemy’s aid during wartime,” “demand[ing] immunity from ordinary duties of citizenship,” and “volunteering their services to those trying to kill Americans.”

McCarthy’s editorial—and his gradual conversion to a more rigid conservatism—illustrates the basic structure of the debate over terrorism trials: first, rage; then, accusations of treason and “coming to the enemy’s aid during wartime”; then, legal arguments—or, at least, pretensions to legal arguments. Sometimes these claims of populist opinion seem, for some, to be sufficient justification for making an exception to the rule of law. And McCarthy isn’t the only one who has granted himself the authority to speak for “most Americans.” Marc Thiessen, a former Bush speechwriter, often uses this phrase in an editorial in the *Washington Post* to lend a vague populist clout to his words. McCarthy and Thiessen’s writings are permeated with an “us-versus-them” tenor and studded with the word “enemy,” all while casting aspersions on the patriotism of the other side.

Jim Phillips of the Heritage Foundation claims that “these terrorists who are not recognized as soldiers don’t deserve to be treated as soldiers” (Chappell). Phillips uses this distinction not only to justify the denial of habeas corpus and the use of military commissions, but also the use of “enhanced interrogation techniques” such as waterboarding. This distinction is also the basis for the doctrine espoused by Phillips, Thiessen, and McCarthy, which holds that “our guys” are soldiers, while the detainees, “their guys,” are terrorists. But are terrorists not *also* soldiers? We must wonder who made up that definition, that distinction. The United States can unilaterally decide who’s a soldier and who’s a terrorist. But a sense of moral

superiority is essential for drawing such unambiguous lines between right and wrong, soldier and terrorist.

Keep America Safe is trying to preserve this brand of American exceptionalism, which historian Howard Zinn defined as the belief “that the United States alone has the right, whether by divine sanction or moral obligation, to bring civilization, or democracy, or liberty to the rest of the world, by violence if necessary.” But if America gives Al Qaeda members rights like other soldiers, we imply that their cause is somehow legitimate. Many agree that Al Qaeda’s means make them war criminals—but their very cause, the elimination of Western influence in the Middle East—is only one side to a very complicated issue. A worldview that considers the U.S. as just one player in a complex network of global relationships—in which there is no objectively “right” viewpoint—is intrinsically opposed to the exceptionalist doctrine; for those who espouse exceptionalism, opposition is unacceptable.

Part of the rationale for the doctrine of American exceptionalism is that we are bound by common values—but do these common values come from opinion and claims to higher moral ground? Or from the Constitution? According to author Seymour Martin Lipset, “In Europe, nationality is related to community, and thus one cannot become un-English or un-Swedish. Being an American, however, entails an ideological commitment. Being American is not a matter of birth. Those who reject American values are un-American.” Because the country is unique in this way, because our existence is based on “values” and not “community,” we have, so reason the exceptionalists, a “divine sanction or moral obligation” to liberate the world. America is special; therefore, “our guys” are soldiers and “their guys” are terrorists.

But soldier and terrorist briefly became one in November of 2009 when Major Nidal Malik Hasan went on a shooting rampage at Fort Hood. He was an inherent contradiction—an American soldier and doctor, about to be deployed to Afghanistan, who had communications with a radical *imam* and killed fellow soldiers, apparently in the name of Islam. Do we disown him, label him as another Al Qaeda terrorist who somehow managed to sneak into the ranks of the military, or write him off as insane, violent, frightened, tragically misguided, but still an American citizen and soldier? A few months later, indignant comparisons would be drawn between Hasan and Joe Stacks, the American citizen who flew a plane into an IRS building. In *that* case, the White House press secretary labeled the incident “not terrorism,” and an irritated commenter on an online *New York Times* discussion forum protested: “If an American doctor of Middle East heritage goes crazy and kills government agents, it’s terrorism from the get-go. But [if] an ‘American citizen’ flies his

plane into a Federal building to kill government agents he's something more nuanced" (Tuf Pak).

Fox News managed to get Hasan's lawyer on the air for eight minutes of "not being able to make a statement at this time." Gretchen Carlson stared into his soul with her mascara-rimmed laser eyes and essentially accused him of defending a traitor and—the label is irresistible—an enemy. When the lawyer stated sedately that everyone is innocent until proven guilty and that he considered it an honor to defend an American soldier, she interrupted loudly, "But by all accounts, he wasn't one of us." Rage, then accusations of treason, then legal arguments—or, at least, pretensions to legal argument. She went on, "He was for sure talking to this *imam*. . . . Was he really one of us?" The lawyer defended the Constitution with relative composure until the segment went to commercial.

Carlson invalidated Hasan's citizenship with one simple label, one dangerous distinction: "not one of us." She was able to do this because he killed American soldiers, apparently forfeiting his "American-ness" in the process. When Marc Thiessen begins a sentence in his editorial with, "Most Americans would say . . ." he's not pointing to a Rasmussen poll; he's making a statement about the "American-ness" of those who disagree with him—not through an interpretation of law, but with a scale of relative morality that seems less a scale than a binary. Evaluating "American-ness" seems to involve reaching one of only two verdicts: American, or un-American. Soldier, or terrorist. And the dangers of these unnecessary binaries feed directly into a necessary one: guilty, or innocent.

Gretchen Carlson's rhetorical revocation of Major Hasan's passport is nothing new. Sarah Palin rallied a crowd in North Carolina during the 2008 presidential campaign by calling them a "pocket" of "real America," where the people were "hard-working, very patriotic, very pro-America" (Hornick). The entire campaign was rife with variations on this theme, from Republican attempts to distance themselves from the supposedly elitist, un-American culture of Washington/San Francisco/Hollywood/Harvard/New York (the most often-cited residences of the Evil Latte-Drinking Liberals), to attacks on Barack Obama's patriotism for not wearing a flag pin or putting his hand over his heart when he says the Pledge of Allegiance.

The fact that people are clinging ever more stubbornly to the doctrine of American exceptionalism, which allegedly justifies the right to repossess the citizenship of anyone who threatens or rejects "American values," indicates that they feel the foundations of their world shaking. Conservatives Richard Lowry and Ramesh Ponnuru, in an article in the *National Review* called "An

Exceptional Debate: The Obama Administration's Assault on American Values," explicitly state their fear that "every important aspect of American exceptionalism has been under threat from President Obama and his allies in Washington." They cite Obama's apologetic and deferential attitude towards other countries and his "unease with traditional American patriotism" (the flag pin thing again). Older white male politicians used to a social position of authority are threatened from without and within. The entire framework upon which their world is built is beginning to shake: China has surpassed the U.S. in auto sales; by 2012, non-Hispanic births will be in the minority; two black men, a Jew, and a woman hold some of the most powerful positions in the new administration; and, the most powerful elderly white male in the White House right now not only has the word "vice" in his title but is often portrayed as a joke in the conservative media narrative.

Unlike the fringe right's paranoia about Obama's religion/nationality/Antichrist status, the threats actually posed by terrorism are real and deserve to be taken seriously. Fear of the collapse of the old order may be driving some to limit the rights of accused terrorists, but the fear of terrorism itself is a deep and human emotion. It is also an emotion that can transform into the spark of exceptionalism: anger. It can be heard in Marc Thiessen's voice when he explains to Jon Stewart why he opposes defending terrorists "who kill *thousands of people*" (emphasis added): genuine, emphatic anger. The common characterization of those on Thiessen's side of the debate as unfeeling torturemongers is as unfair a distinction as "enemy." They have very strong feelings on behalf of the American soldiers killed in combat, and of the families torn apart by terrorist attacks. Debra Burlingame has every right to be enraged at those who murdered her husband, and it's entirely understandable that her personal grievances extend to the lawyers who defended them.

And yet, isn't this defense of country conceived at the expense of the human rights of others, insular and selective? It values the lives of American citizens over the innocent civilians of other nations. We become enraged about the 2,976 victims claimed on 9/11 but justify killing 30,000 Afghan civilians in retaliation. "Do people think that government workers in Iraq are any less human than those killed in Oklahoma? Do they think that Iraqis do not have families who will grieve and mourn the loss of their loved ones?" wrote a critic of U.S. foreign policy. "In this context, do people come to believe that the killing of foreigners is somehow different than the killing of Americans?" Those who value all innocent human lives equally cannot excuse the relative size of this death toll. And this relativity in the valuation of human life has infected our justice system; it sits at the heart of the exceptionalist

doctrine. The U.S. is responsible for the killing of more innocent civilians than any terrorist organization, and must be stopped at any cost. Or so argued that infamous critic of the U.S. government, Timothy McVeigh, in a letter he wrote from his jail cell shortly before being executed for blowing up a government building in Oklahoma—the largest terrorist attack on U.S. soil until 9/11.

McVeigh, like Osama Bin Laden, like Marc Thiessen, like me, was angry about something he saw as a great global injustice—not just against himself, but against large groups of innocent people. Anyone can feel passionate anger on behalf of one's country or one's fellow man; it is a natural and necessary emotion, and has inspired great social and political movements. But it is often a blinding and overwhelming emotion, overriding the constraints of justice and the rule of law. It is extremely dangerous to be ruled by such grand anger, especially in a nation as powerful and influential as the United States. We fight terrorists by trying to stop their activities, arresting and jailing them. But terrorism itself is bigger than the individual orchestrators, just as the fear it instills is much more widespread than the terrorists' actual ability to harm people. In a review of books dealing with counterterrorism for *The New Yorker*, Nicolas Lemann asserts that terrorism works by making people crazy: "Their intention is to intimidate an audience larger than their immediate victims, in the hope of generating widespread panic and, often, a response from the enemy so brutal that it ends up backfiring by creating sympathy for the terrorists' cause." One of the only effective ways to fight *terrorism*, rather than individual *terrorists*, is to resist the chaos and panic it sows, to override the fear that causes us to make hasty, black-and-white distinctions.

The United States cannot keep playing the hapless victim of utterly unprovoked attacks by mysterious evil powers. The shock and grief generated by the 9/11 attacks was matched in intensity only by the military response; indeed, it may have been exceeded. We tore madly into Kandahar and then Baghdad in search of something—Osama Bin Laden, nuclear weapons, revenge . . . whatever we could use to quell our fears. The national delusion that we are just innocent victims allows us to ignore the complex global system in which the United States is inextricably entangled. "Evil from time immemorial has often worn a mask of innocence," writes John Berger in his essay "Hiroshima," an essay that labels the U.S. "terrorist" in its explicit targeting of civilians in the bombing of Hiroshima and Nagasaki. "Only by looking beyond or away can one come to believe that such evil is relative, and therefore under certain conditions justifiable" (262). With the blinders of relativity on, we can look beyond our acts of war—the people we kill and the lives we destroy—by playing innocent, by playing righteous, by playing exceptional. But human rights demand more from all of us.

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