

# CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

EDITED BY SEAN D. MURPHY

## LEGAL REGULATION OF USE OF FORCE

### *Terrorist Attacks on World Trade Center and Pentagon*

On September 11, 2001, nineteen persons of non-U.S. nationality boarded four U.S. commercial passenger jets in Boston, Newark, and Washington, hijacked the aircraft minutes after takeoff, and crashed them into the World Trade Center in New York, the Pentagon in northern Virginia, and the Pennsylvania countryside.<sup>1</sup> All told, some three thousand persons were killed in the incidents, the worst casualties experienced in the United States in a single day since the American Civil War.

In Boston, five hijackers—Satam Al Suqami, Waleed Alshehri, Wail Alsheri, Mohamed Atta, and Abdulaziz Alomari—boarded American Airlines Flight 11, which departed from Logan Airport at 8:10 A.M. en route to Los Angeles. After takeoff, the hijackers seized the plane, flew it to New York City, and, at 8:48 A.M., crashed it into the north tower of the World Trade Center. Also in Boston, five hijackers—Marwan Al-Shehhi, Fayez Ahmed, Ahmed Alghamdi, Hamza Alghamdi, and Mohaid Alshehri—boarded United Airlines Flight 175, which departed from Logan at 7:58 A.M. en route to Los Angeles. After takeoff, the hijackers seized the plane, flew it to New York City, and, at 9:03 A.M., crashed it into the south tower of the World Trade Center.

Both 110-story towers—in which roughly 50,000 people worked—erupted into flames, forcing massive evacuations of those working on the floors below the impact sites. At 9:50 A.M., the south tower collapsed, followed by the north tower at 10:30 A.M., obliterating some 12 million square feet of office space (an amount equivalent to all the office space in Atlanta or Miami) and damaging another 18 million square feet of office space in other Manhattan buildings. Among other things, a subway station, two electrical substations, and some thirty-three miles of cables were crushed.<sup>2</sup> Nearly 2,900 persons were, as of the end of 2001, confirmed dead or missing at the World Trade Center, and 157 passengers, crew, and hijackers were killed on the two planes.<sup>3</sup>

<sup>1</sup> See Michael Grunwald, *Terrorists Hijack 4 Airliners, Destroy World Trade Center, Hit Pentagon; Hundreds Dead*, WASH. POST, Sept. 12, 2001, at A1; David Firestone & Dana Canedy, *F.B.I. Documents Detail the Movements of 19 Men Believed to Be Hijackers*, N.Y. TIMES, Sept. 15, 2001, at A3.

<sup>2</sup> See Michael Grunwald, *Terror's Damage: Calculating the Devastation*, WASH. POST, Oct. 28, 2001, at A12. The New York City comptroller issued a rough estimate of the cost of the attack on the World Trade Center: \$11 billion in the loss of "human productive value"; \$34 billion in property loss (an amount nearly double the damage from the previously worst disaster in U.S. history, Hurricane Andrew); \$14 billion in cleanup and police costs; and \$21 billion from the interruption of business in the lower Manhattan districts. *Id.* By contrast, U.S. investigators tracing the funds of the hijackers estimated that the cost of orchestrating the four hijackings was no more than \$500,000. See Kate Zernike & Don Van Natta, Jr., *Hijackers' Meticulous Strategy of Brains, Muscle and Practice*, N.Y. TIMES, Nov. 4, 2001, at A1.

<sup>3</sup> See *Dead and Missing*, N.Y. TIMES, Jan. 28, 2002, at A6; Eric Lipton, *Toll from Attack at Trade Center Is Down Sharply*, N.Y. TIMES, Nov. 21, 2001, at A1. Officials have continued to identify bodies, confirm deaths, and sort through errors and duplications, leading some to speculate that the final figure might be lower.

Just outside of Washington, D.C., five hijackers—Khalid Almihdhar, Majed Moqed, Nawaf Al Hamzi, Salem Al Hamzi, and Hani Hanjour—boarded American Airlines Flight 77, which departed from Dulles Airport at 8:10 A.M. en route to Los Angeles. After takeoff, the hijackers seized the plane and, at 9:39 A.M., crashed it into the Pentagon, killing themselves and fifty-nine passengers and crew. On the ground, 125 persons were killed immediately or in the incinerating collapse that followed.<sup>4</sup>

In Newark, four hijackers—Saeed H. Alghamdi, Ahmed Al-Haznawi, Ahmed Alnami, and Ziad Samir Jarrah—boarded United Airlines Flight 93, which departed from Newark Airport (one of the three major airports serving the New York metropolitan area) at 8:01 A.M. en route to San Francisco. After takeoff, the hijackers seized the plane, but apparently because of a revolt against the hijackers by some of the forty passengers and crew, the plane crashed into the Pennsylvania countryside at 10:10 A.M.<sup>5</sup> No one survived.

In response to the terrorist attacks, the U.S. Federal Aviation Administration immediately ordered U.S. flights to land at the nearest airports, banned takeoffs from any U.S. airport for twenty-four hours, and diverted international flights to Canada. Congress passed, and President Bush signed into law on September 18, a \$40 billion appropriation for emergency funds, primarily for disaster assistance and antiterrorist initiatives, needed to respond to the attacks.<sup>6</sup> Because the airline industry sustained heavy losses—from the attacks themselves (including potential liability), the closure of U.S. airspace, and the reluctance of passengers to resume flying—President Bush also signed into law on September 22 a multibillion dollar aid package for the industry.<sup>7</sup> This aid package includes the “September 11th Victim Compensation Fund of 2001,”<sup>8</sup> whose purpose is to provide monetary compensation, if necessary through a relative, to any individual who was physically injured or killed in the September 11 attacks. At the same time, the establishment of the fund was designed to help stabilize the airline industry by protecting American Airlines and United Airlines from potentially devastating lawsuits.<sup>9</sup>

In the wake of the attacks, U.S. law enforcement agencies commenced the largest criminal investigation in the nation’s history. The investigation revealed that the nineteen hijackers had worked as a single, integrated group for a period of eighteen months with little outside help other than funding. The six leaders of the group were well-educated, entered the United States earlier than the others, and trained as pilots. The others were younger and less educated, and served as “foot soldiers” to control the passengers.<sup>10</sup> Immediately after the attacks, U.S. government officials suspected that the hijackers had been authorized and funded by a Saudi Arabian expatriate, Osama bin Laden, based in Afghanistan and working through his secretive, compartmentalized terrorist network, Al Qaeda.<sup>11</sup> Bin Laden’s overall objectives

<sup>4</sup> See *Dead and Missing*, *supra* note 3; Don Phillips, *Hijackers Targeted Pentagon, Data Show*, WASH. POST, Sept. 21, 2001, at A10; Susan Levine, *Services Begin This Weekend for Pentagon Crash Victims*, WASH. POST, Sept. 15, 2001, at A21.

<sup>5</sup> See *Dead and Missing*, *supra* note 3; Charles Lane, Don Phillips, & David Snyder, *A Sky Filled with Chaos, Uncertainty and True Heroism*, WASH. POST, Sept. 17, 2001, at A3.

<sup>6</sup> Pub. L. No. 107-38, 115 Stat. 220 (2001).

<sup>7</sup> Air Transportation Safety System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001).

<sup>8</sup> *Id.*, Title IV, 115 Stat. 230, 237 (2001).

<sup>9</sup> The attorney general, acting through a special master, is responsible for administering the program. A claimant who files under the program can receive payment within 120 days without any showing of fault, but waives any right to file a civil action for damages sustained as a result of the attacks. All claims must be filed within two years after the initial regulations governing the program are promulgated by the Department of Justice. Payments are made by the U.S. government, but the amount for which the claimant is eligible is left to the special master (applying the law of the state in which the crash occurred), does not include punitive damages, and is to be reduced by amounts received by the claimant from other sources. The law called for the regulations to be established by December 21, 2001. For information on the regulations, see Notice of Inquiry and Advance Notice of Rulemaking, 66 Fed. Reg. 55,901 (Nov. 5, 2001). See <<http://www.justice.gov/victimcompensation/>>; see also Diana B. Henriques & David Barstow, *Victims’ Fund Likely to Pay Average of \$1.6 Million Each*, N.Y. TIMES, Dec. 21, 2001, at A1.

<sup>10</sup> See Amy Goldstein, *Hijackers Led by Core Group*, WASH. POST, Sept. 30, 2001, at A1.

<sup>11</sup> See Dan Eggen & Vernon Loeb, *U.S. Intelligence Points to Bin Laden Network*, WASH. POST, Sept. 12, 2001, at A1. For background on bin Laden, see PETER L. BERGEN, *HOLY WAR, INC.: INSIDE THE SECRET WORLD OF OSAMA BIN LADEN* (2001).

reportedly are to oust pro-Western governments in the Middle East, to remove U.S. military forces from the region, and to prevent an Arab-Israeli peace settlement. Even prior to September 11, Al Qaeda had been suspected of involvement in the 1993 bombing of the World Trade Center that killed 6 persons and wounded more than 1,000; the 1996 bombing of a U.S. military housing complex in Dhahran, Saudi Arabia, that killed 19 U.S. servicemen and wounded 372 other persons; the 1998 bombings of U.S. embassies in Tanzania and Kenya that killed 224 persons and wounded some 5,000 others; and the October 2000 bombing of the USS *Cole* in the harbor of Aden, Yemen, that killed 17 U.S. sailors and wounded 39.<sup>12</sup> Western governments reportedly believe that once Al Qaeda terrorists are sent to a country, they are provided considerable latitude in selecting their targets and executing their plans, since doing so minimizes the likelihood of detection.<sup>13</sup>

On October 4, 2001, the United Kingdom released a document entitled “Responsibility for the Terrorist Atrocities in the United States, 11 September 2001.” The document provided background on bin Laden, Al Qaeda, and their relationship to the de facto government of Afghanistan, the Taliban.<sup>14</sup> The document then noted:

21. Al Qaida virulently opposes the United States. Usama Bin Laden has urged and incited his followers to kill American citizens, in the most unequivocal terms.

22. On 12 October 1996 he issued a declaration of jihad as follows:

*“The people of Islam have suffered from aggression, iniquity and injustice imposed by the Zionist-Crusader alliance and their collaborators . . .*

*It is the duty now on every tribe in the Arabian peninsula to fight jihad and cleanse the land from these Crusader occupiers. Their wealth is booty to those who kill them.*

*My Muslim brothers: your brothers in Palestine and in the land of the two Holy Places [i.e. Saudi Arabia] are calling upon your help and asking you to take part in fighting against the enemy—the Americans and the Israelis. They are asking you to do whatever you can to expel the enemies out of the sanctities of Islam.”*

Later in the same year he said that

*“terrorising the American occupiers [of Islamic Holy Places] is a religious and logical obligation.”*

In February 1998 he issued and signed a ‘fatwa’ which included a decree to all Muslims:

*“. . . the killing of Americans and their civilian and military allies is a religious duty for each and every Muslim to be carried out in whichever country they are until Al Aqsa mosque has been liberated from their grasp and until their armies have left Muslim lands.”*

In the same ‘fatwa’ he called on Muslim scholars and their leaders and their youths to

*“launch an attack on the American soldiers of Satan.”*

and concluded:

<sup>12</sup> See Karen DeYoung & Michael Dobbs, *Bin Laden: Architect of New Global Terrorism*, WASH. POST, Sept. 16, 2001, at A8; Walter Pincus, *Bin Laden Seeks Instability in Mideast, Ex-Agent Says*, WASH. POST, Sept. 30, 2001, at A31. For the U.S. military response to the bombings of the U.S. embassies in East Africa, see Sean D. Murphy, *Contemporary Practice of the United States*, 93 AJIL 161 (1999).

<sup>13</sup> See Douglas Frantz & Raymond Bonner, *Web of Terrorism: Investigators See Links to bin Laden in Gaza and Across Europe*, N.Y. TIMES, Sept. 23, 2001, at A1; see also Peter Finn & Sarah Delaney, *Al Qaeda’s Tracks Deepen in Europe*, WASH. POST, Oct. 22, 2001, at A1; Doug Struck, Howard Schneider, Karl Vick, & Peter Baker, *Borderless Network of Terror*, WASH. POST, Sept. 23, 2001, at A1.

<sup>14</sup> After the Soviet Union withdrew its military forces from Afghanistan in 1989, Afghan militias previously allied against the Soviets turned on one another. A radical Islamic group, the Taliban, began seizing Afghan territory in 1994, starting at its home base in Kandahar province and reaching the capital, Kabul, in 1996. The Taliban quelled the militias and imposed a strict form of Islam throughout most of the country. For background on the Taliban, see AHMED RASHID, *TALIBAN: MILITANT ISLAM, OIL AND FUNDAMENTALISM IN CENTRAL ASIA* (2001); PETER MARSDEN, *THE TALIBAN: WAR, RELIGION AND THE NEW ORDER IN AFGHANISTAN* (1998).

*“We—with God’s help—call on every Muslim who believes in God and wishes to be rewarded to comply with God’s order to kill Americans and plunder their money whenever and wherever they find it. We also call on Muslims . . . to launch the raid on Satan’s US troops and the devil’s supporters allying with them, and to displace those who are behind them.”*<sup>15</sup>

Further, the UK document described certain evidence that connected the hijackers to bin Laden.

61. Nineteen men have been identified as the hijackers from the passenger lists of the four planes hijacked on 11 September 2001. At least three of them have already been positively identified as associates of Al Qaida. One has been identified as playing key roles in both the East African embassy attacks and the USS *Cole* attack.<sup>16</sup> Investigations continue into the backgrounds of all the hijackers.

62. From intelligence sources, the following facts have been established subsequent to 11 September; for intelligence reasons, the names of associates, though known, are not given:

- In the run-up to 11 September, Bin Laden was mounting a concerted propaganda campaign amongst like-minded groups of people—including videos and documentation—justifying attacks on Jewish and American targets; and claiming that those who died in the course of them were carrying out God’s work.
- We have learned, subsequent to 11 September, that Bin Laden himself asserted shortly before 11 September that he was preparing a major attack on America.<sup>17</sup>
- In August and early September close associates of Bin Laden were warned to return to Afghanistan from other parts of the world by 10 September.
- Immediately prior to 11 September some known associates of Bin Laden were naming the date for action as on or around 11 September.
- Since 11 September we have learned that one of Bin Laden’s closest and most senior associates was responsible for the detailed planning of the attacks.<sup>18</sup>
- There is evidence of a very specific nature relating to the guilt of Bin Laden and his associates that is too sensitive to release.

63. Usama Bin Laden remains in charge, and the mastermind, of Al Qaida. In Al Qaida, an operation on the scale of the 11 September attacks would have been approved by Usama Bin Laden himself.

64. The modus operandi of 11 September was entirely consistent with previous attacks. Al Qaida’s record of atrocities is characterised by meticulous long-term planning, a desire to inflict mass casualties, suicide bombers, and multiple simultaneous attacks.

65. The attacks of 11 September 2001 are entirely consistent with the scale and sophistication of the planning which went into the attacks on the East African Embassies and

<sup>15</sup> UK Press Release, 10 Downing Street Newsroom, Responsibility for the Terrorist Atrocities in the United States, paras. 21–22 (Oct. 4, 2001), at <<http://www.number-10.gov.uk/news.asp?NewsId=2686>>. This document was subsequently updated on November 14, 2001, see *infra* note 23.

<sup>16</sup> [Editor’s Note: That individual reportedly was Khalid Almihdhar. See Jeff Gerth & Don Van Natta, Jr., *Suspect Is Linked to Other Attacks on American Sites*, N.Y. TIMES, Oct. 6, 2001, at A1. The USS *Cole* is a U.S. destroyer that was refueling in Yemen when a harbor boat containing a bomb exploded beside it, killing 17 sailors. See John F. Burns & Steven Lee Myers, *Blast Kills Sailors on U.S. Ship in Yemen*, N.Y. TIMES, October 13, 2000, at A1.]

<sup>17</sup> [Editor’s Note: News reports asserted that interrogations of bin Laden’s extended family in Saudi Arabia revealed that he had telephoned his mother in Syria on September 10 to tell her that he could not meet her there because “something big” was imminent that would end their communications for a long time. See Patrick E. Tyler & Philip Shenon, *Call by bin Laden Before Attacks Is Reported*, N.Y. TIMES, Oct. 2, 2001, at B5.]

<sup>18</sup> [Editor’s Note: That senior associate was subsequently reported as being Mohammed Atef, a former Egyptian policeman and an associate of bin Laden for more than a decade. See Dan Eggen & Serge F. Kovaleski, *Bin Laden Aide Implicated*, WASH. POST, Oct. 7, 2001, at A1. Atef was reportedly killed in the U.S. bombing campaign in mid-November 2001. See James Risen, *Bin Laden Aide Reported Killed by U.S. Bombs*, N.Y. TIMES, Nov. 17, 2001, at A1.]

the USS *Cole*. No warnings were given for these three attacks, just as there was none on 11 September.

66. Al Qaida operatives, in evidence given in East African Embassy bomb trials, have described how the group spends years preparing for an attack. They conduct repeated surveillance, patiently gather materials, and identify and vet operatives, who have the skills to participate in the attack and the willingness to die for their cause.

67. The operatives involved in the 11 September atrocities attended flight schools, used flight simulators to study the controls of larger aircraft and placed potential airports and routes under surveillance.

68. Al Qaida's attacks are characterised by total disregard for innocent lives, including Muslims. In an interview after the East African bombings, Usama Bin Laden insisted that the need to attack the United States excused the killing of other innocent civilians, Muslim and non-Muslim alike.

69. No other organisation has both the motivation and the capability to carry out attacks like those of 11 September—only the Al Qaida network under Usama Bin Laden.<sup>19</sup>

According to UK Prime Minister Tony Blair, the evidence detailed in the document left “absolutely no doubt that bin Laden and his network are responsible” for the hijackings.<sup>20</sup> Thereafter, the United States confirmed the information contained in the UK document.<sup>21</sup> On October 4, Pakistan—a Muslim country—said that the evidence that the United States had compiled concerning bin Laden's responsibility for the attacks would provide a sufficient basis for an indictment in a court of law.<sup>22</sup> Bin Laden himself, however, did not publicly and expressly claim responsibility for the attacks.<sup>23</sup>

Some U.S. officials suspected an Iraqi role in the attacks; one of the leaders of the hijackers, Mohamed Atta, reportedly met with an Iraqi intelligence agent in Prague in June 2000.<sup>24</sup> Intelligence agencies from a number of countries reportedly concluded, however, that Iraq was not involved in the attacks.<sup>25</sup>

U.S. officials asserted that Al Qaeda used a web of charities, companies, and fraudulent activities (using credit cards and food stamps) to raise funds and to move those funds across the globe. On September 24, President Bush invoked his presidential authority, including that under the International Emergency Economic Powers Act (IEEPA), to issue an executive order that expanded the U.S. Treasury Department's power to target financial support for terrorist organizations worldwide.<sup>26</sup> In particular, the executive order froze the assets of

<sup>19</sup> UK Press Release, *supra* note 15, paras. 61–69. The document stated that this material “comes from intelligence and the criminal investigation to date. The details of some aspects cannot be given, but the facts are clear from the intelligence.” *Id.*, para. 2.

<sup>20</sup> See Patrick E. Tyler, *British Detail bin Laden's Link to U.S. Attacks*, N.Y. TIMES, Oct. 5, 2001, at A1.

<sup>21</sup> See David E. Sanger, *White House Approved Data Blair Released*, N.Y. TIMES, Oct. 6, 2001, at B6.

<sup>22</sup> See John F. Burns, *Pakistan Finds U.S. Charges Good Enough for Court*, N.Y. TIMES, Oct. 5, 2001, at B5.

<sup>23</sup> On November 14, the United Kingdom released a revised document asserting that bin Laden had made a videotape for distribution among Al Qaeda members in which he declared that his network instigated the September 11 incidents “in self-defence. And it was in revenge for our people killed in Palestine and Iraq.” See UK Press Release, 10 Downing Street Newsroom, *Responsibility for the Terrorist Atrocities in the United States*, para. 66 (Nov. 14, 2001), at <<http://www.pm.gov.uk/news.asp?NewsId=3025>>; see also T. R. Reid, *Tape Proves Bin Laden Is Guilty, Britain Says*, WASH. POST, Nov. 15, 2001, at A29. That videotape reportedly was of an interview of bin Laden by a Persian Gulf television network, Al Jazeera, that was never aired. See James Risen & Patrick E. Tyler, *Interview with bin Laden Makes the Rounds*, N.Y. TIMES, Dec. 12, 2001, at B5. After U.S. ground forces were deployed to Afghanistan, the United States obtained possession of a videotape showing bin Laden laughing and boasting about the September 11 attacks, making statements such as “[w]e calculated in advance the number of casualties from the enemy, who would be killed based on the position of the tower” (translated from Arabic). See Elisabeth Bumiller, *Bin Laden, on Tape, Boasts of Trade Center Attacks; U.S. Says It Proves His Guilt*, N.Y. TIMES, Dec. 14, 2001, at A1.

<sup>24</sup> See Peter Finn, *Czechs Confirm Key Hijacker's 'Contact' with Iraqi Agent in Prague*, WASH. POST, Oct. 27, 2001, at A18.

<sup>25</sup> See Raymond Bonner, *Experts Doubt Iraq Had Role in Latest Terror Attacks*, N.Y. TIMES, Oct. 11, 2001, at B7; see also Rick Weiss, *Germ Tests Point Away from Iraq*, WASH. POST, Oct. 30, 2001, at A9.

<sup>26</sup> Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (2001); see Mike Allen & Paul Blustein, *Bush Moves to Cut Terrorists' Support*, WASH. POST, Sept. 25, 2001, at A1.

twenty-seven persons (including bin Laden) and groups, and blocked the U.S. transactions of those persons and of others who support them. Further, the executive order increased the ability of the Treasury Department to block U.S. assets of, and to deny access to U.S. markets by, foreign banks that refused to cooperate with U.S. authorities in identifying and freezing terrorist assets abroad. Finally, the order authorized the secretary of state and the secretary of the treasury from time-to-time to make additional designations (which occurred on November 2, when twenty-two additional groups were added).<sup>27</sup> By early October, the Treasury Department reportedly had frozen more than \$100 million of suspected terrorist assets in domestic and foreign banks.<sup>28</sup> In early November, the United States launched a round of domestic raids and international banking actions to shut down two financial networks that were allegedly funding Al Qaeda.<sup>29</sup> In its efforts to seize terrorist assets, the United States received support from some countries, such as Saudi Arabia and the United Arab Emirates,<sup>30</sup> but encountered resistance from others.<sup>31</sup>

The United States regarded the September 11 incidents as comparable to a military attack. In the week following the attacks, President Bush declared a national emergency<sup>32</sup> and called to active duty the reserves of the U.S. armed forces.<sup>33</sup> He also signed into law a joint resolution of Congress that, after noting that “the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States,” provided in Section 2:

(a) IN GENERAL. That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

(b) WAR POWERS RESOLUTION<sup>34</sup> REQUIREMENTS.

(1) SPECIFIC STATUTORY AUTHORIZATION. Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) APPLICABILITY OF OTHER REQUIREMENTS. Nothing in this resolution supersedes any requirement of the War Powers Resolution.<sup>35</sup>

Further, in a speech to the Congress on September 20, President Bush declared: “On September 11th, enemies of freedom committed an act of war against our country.”<sup>36</sup> The

<sup>27</sup> See U.S. Dep’t of State Press Release on Designation of 22 Foreign Terrorist Organizations Under Executive Order 13,224 (Nov. 2, 2001), at <<http://www.state.gov>>; Alan Sipress, *Crackdown Expanded to All Groups in Terror List*, WASH. POST, Nov. 3, 2001, at A18. These groups were already listed on the State Department’s list of foreign terrorist organizations. For background on that list, see Sean D. Murphy, *Contemporary Practice of the United States*, 94 AJIL 365 (2000).

<sup>28</sup> See Karen DeYoung & Dan Eggen, *\$100 Million in Terrorists’ Assets Frozen, U.S. Says*, WASH. POST, Oct. 3, 2001, at A9.

<sup>29</sup> See Dana Milbank & Kathleen Day, *Businesses Linked to Terrorists Are Raided*, WASH. POST, Nov. 8, 2001, at A1; Daniel Williams, *Swiss Probe Illustrates Difficulties in Tracking Al Qaeda’s Cash*, WASH. POST, Nov. 12, 2001, at A19.

<sup>30</sup> See Jeff Gerth & Judith Miller, *U.S. Makes Inroads in Isolating Funds of Terror Groups*, N.Y. TIMES, Nov. 5, 2001, at A1; *Saudis Freeze Funds of 66 on U.S. List*, N.Y. TIMES, Nov. 1, 2001, at B4.

<sup>31</sup> See, e.g., Howard Schneider, *Lebanon Won’t Freeze Hezbollah Assets*, WASH. POST, Nov. 9, 2001, at A21.

<sup>32</sup> Proclamation 7463, 66 Fed. Reg. 48,199 (Sept. 18, 2001).

<sup>33</sup> Exec. Order No. 13,223, 66 Fed. Reg. 48,201 (Sept. 18, 2001).

<sup>34</sup> [Editor’s Note: The War Powers Resolution of 1973, 50 U.S.C. §§1541–1548 (1994), calls upon the President to notify Congress within 48 hours any time that U.S. armed forces are introduced into situations involving hostilities or imminent hostilities, and in certain other situations. Pursuant to the resolution, the President then must terminate any use of those forces within 60 days unless Congress declares war, grants an extension, or is physically unable to meet.]

<sup>35</sup> Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

<sup>36</sup> 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, 1347 (Sept. 20, 2001) [hereinafter Address Before a Joint Session].

President created an Office of Homeland Security, as well as a Homeland Security Council, charged with developing and coordinating the implementation of a comprehensive national strategy to secure the United States from terrorist threats or attacks.<sup>37</sup> The potential for further attacks was confirmed when, in late September, European law enforcement authorities uncovered a fully developed plan to blow up the U.S. Embassy in Paris.<sup>38</sup> Intelligence reports of possible further attacks deemed credible by U.S. authorities led the Federal Bureau of Investigation (FBI) on October 11 and 29 to issue global alerts that more terrorist attacks might be carried out against U.S. targets in the United States or abroad.<sup>39</sup> Finally, during October 2001, sixteen persons in Florida, New Jersey, New York, and Washington, D.C., became infected with anthrax, either by inhalation or by contact with their skin, from contaminated letters sent through the U.S. mail system. Four persons who inhaled the virus died.<sup>40</sup> As of the end of 2001, law enforcement authorities were unsure whether the anthrax letters were the work of persons linked to the September 11 incidents, of domestic extremists motivated by hatred of the U.S. government, of a disturbed loner with a personal grievance, or of someone else.<sup>41</sup> When France sought to propose a UN Security Council resolution condemning the anthrax attacks, the United States responded that such a resolution was inappropriate until such time as it could be determined that they were not a domestic criminal matter.<sup>42</sup>

Although the United States had never recognized the Taliban regime as the government of Afghanistan—and therefore had no diplomatic relations with that group—certain U.S. demands were communicated to the Taliban through the government of Pakistan. Further, President Bush issued the demands in a widely reported speech to a joint session of the U.S. Congress.

[T]he United States of America makes the following demands on the Taliban: Deliver to United States authorities all the leaders of Al Qaida who hide in your land. Release all foreign nationals, including American citizens, you have unjustly imprisoned. Protect foreign journalists, diplomats, and aid workers in your country. Close immediately and permanently every terrorist training camp in Afghanistan, and hand over every terrorist and every person in their support structure to appropriate authorities. Give the United States full access to terrorist training camps, so we can make sure they are no longer operating. These demands are not open to negotiation or discussion. The Taliban must act and act immediately. They will hand over the terrorists, or they will share in their fate.<sup>43</sup>

<sup>37</sup> Exec. Order No. 13,228, 66 Fed. Reg. 51,812 (Oct. 10, 2001).

<sup>38</sup> See Chris Hedges, *The Inner Workings of a Plot to Blow Up the U.S. Embassy in Paris*, N.Y. TIMES, Oct. 28, 2001, at B1.

<sup>39</sup> See Dan Eggen & Bob Woodward, *FBI Issues 2nd Global Attack Alert*, WASH. POST, Oct. 30, 2001, at A1.

<sup>40</sup> See *Confirmed Anthrax Cases*, WASH. POST, Nov. 1, 2001, at A8. Anthrax is a disease caused by the bacterium *Bacillus anthracis*, which occurs naturally in the soil in certain regions and can be maintained in laboratories. Unlike many bacteria, *Bacillus anthracis* can form spores, which are inactive and durable, and which can germinate into bacteria once inside a human. For background on the threat of bioterrorism, see *The Threat of Bioterrorism and the Spread of Infectious Diseases: Hearing Before the Senate Comm. on Foreign Relations*, 107th Cong. (2001).

Anthrax spores were found at dozens of locations, forcing the closure of several major government offices, including congressional offices and the Supreme Court, and otherwise creating widespread apprehension about the receipt of mail in the United States. See, e.g., Carol Morello & Avram Goldstein, *Anthrax Scare Closes High Court; Treatment Urged for Thousands*, WASH. POST, Oct. 27, 2001, at A1; John Lancaster & Susan Schmidt, *31 Exposed to Anthrax on Capitol Hill; House Shuts Down; Senate Offices Close*, WASH. POST, Oct. 18, 2001, at A1. By mid-November, law enforcement authorities had identified only four letters sent through the U.S. postal system that contained anthrax spores: letters sent to Senate majority leader Tom Daschle, to Senator Patrick J. Leahy, to NBC news anchor Tom Brokaw, and to the offices of the *New York Post* newspaper. See Dan Eggen & Susan Schmidt, *Fourth Anthrax Letter Discovered by FBI*, WASH. POST, Nov. 17, 2001, at A1; *Tracing the Deadly Path of Anthrax*, N.Y. TIMES, Oct. 31, 2001, at B6.

<sup>41</sup> See David Johnston, *Baffled F.B.I. Asks for Aid in Solving Riddle of Anthrax*, N.Y. TIMES, Nov. 3, 2001, at A1; Peter Slevin, *No Consensus on Who Wrote Anthrax Letters*, WASH. POST, Oct. 25, 2001, at A23.

<sup>42</sup> See Elaine Sciolino, *Bush Team Rejects U.N. Plan to Condemn Anthrax Attacks*, N.Y. TIMES, Nov. 1, 2001, at B8.

<sup>43</sup> Address Before a Joint Session, *supra* note 36, at 1348; see John F. Harris & Mike Allen, *President Details Global War On Terrorists and Supporters*, WASH. POST, Sept. 21, 2001, at A1.

The Taliban rejected the demands, insisting that it receive proof of bin Laden's involvement in the September 11 attacks.<sup>44</sup>

In describing U.S. objectives in responding to the attacks, President Bush stated in his speech to Congress:

Our response involves far more than instant retaliation and isolated strikes. Americans should not expect one battle but a lengthy campaign, unlike any other we have ever seen. It may include dramatic strikes, visible on TV, and covert operations, secret even in success. We will starve terrorists of funding, turn them one against another, drive them from place to place, until there is no refuge or no rest. And we will pursue nations that provide aid or safe haven to terrorism. Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime.<sup>45</sup>

The reaction of the global community was largely supportive. At the United Nations, the Security Council unanimously adopted on September 12 a resolution condemning "the horrifying terrorist attacks," which the Council regarded, "like any act of international terrorism, as a threat to international peace and security."<sup>46</sup> Further, on September 28, the Security Council unanimously adopted, under Chapter VII of the UN Charter, a U.S.-sponsored resolution that obligates all member states to deny financing, support, and safe haven to terrorists, that calls for expanded information-sharing among member states, and that establishes a Security Council committee for monitoring implementation of these measures on a continuous basis.<sup>47</sup> While the two resolutions did not expressly authorize the use of force by the United States, they both affirmed—in the context of such incidents—the inherent right of individual and collective self-defense, as well as the need "to combat by all means" the "threats to international peace and security caused by terrorist acts."<sup>48</sup> By contrast, the General Assembly condemned the "heinous acts of terrorism" but did not characterize those acts as "attacks" or recognize a right to respond in self-defense. Instead, that body called for "international cooperation to bring to justice the perpetrators, organizers and sponsors" of the incidents.<sup>49</sup> The form of cooperation was not specified, but a variety of conventions are already in place that address cooperation among states in dealing with violent or terrorist offenses.<sup>50</sup>

The North Atlantic Council of the North Atlantic Treaty Organization (NATO) decided on September 12 that, if it was determined that the incidents were directed from abroad against the United States, "it shall be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all."<sup>51</sup> On October 2, after being briefed on the known facts by the United States, the council determined that the facts were "clear and compelling" and that "the attack against the United States on 11 September was directed from abroad and shall therefore be regarded as an action covered by Article 5 of the Washington Treaty."<sup>52</sup>

<sup>44</sup> See Rajiv Chandrasekaran, *Taliban Rejects U.S. Demand, Vows a 'Showdown of Might'*, WASH. POST, Sept. 22, 2001, at A1; Rajiv Chandrasekaran, *Taliban Refuses to Surrender Bin Laden; U.S. Develops Options for Military Action*, WASH. POST, Sept. 19, 2001, at A1.

<sup>45</sup> Address Before a Joint Session, *supra* note 36, at 1349.

<sup>46</sup> SC Res. 1368, para. 1 (Sept. 12, 2001).

<sup>47</sup> SC Res. 1373, paras. 1–3, 6 (Sept. 28, 2001).

<sup>48</sup> SC Res. 1368, pmb.; SC Res. 1373, pmb.

<sup>49</sup> GA Res. 56/1 (Sept. 18, 2001).

<sup>50</sup> See *infra* pp. 255–58.

<sup>51</sup> North Atlantic Treaty Organization (NATO) Press Release No. 124, Statement by the North Atlantic Council (Sept. 12, 2001), at <<http://www.nato.int>>. The "Washington Treaty" refers to the North Atlantic Treaty, Aug. 24, 1959, TIAS 1964, 34 UNTS 243.

<sup>52</sup> Secretary General Lord Robertson, Statement at NATO Headquarters (Oct. 2, 2001), at <<http://www.nato.int>>; see William Drozdiak & Rajiv Chandrasekaran, *NATO: U.S. Evidence on Bin Laden 'Compelling'*, WASH. POST, Oct. 3, 2001, at A1. Few NATO states, however, had resources useful for conducting military operations in Afghanistan.



Similarly, the Organization of American States meeting of ministers of foreign affairs resolved:

That these terrorist attacks against the United States of America are attacks against all American states and that in accordance with all the relevant provisions of the Inter-American Treaty of Reciprocal Assistance (Rio Treaty) and the principal of continental solidarity, all States Parties to the Rio Treaty shall provide effective reciprocal assistance to address such attacks and the threat of any similar attacks against any American state, and to maintain the peace and security of the continent.<sup>53</sup>

Both Saudi Arabia and the United Arab Emirates broke diplomatic relations with the Taliban government.<sup>54</sup> The six-member Gulf Cooperation Council issued a joint statement expressing “the willingness of its members to participate in any joint action that has clearly defined objectives. It is willing to enter into an alliance that enjoys the support of the international community to fight international terrorism and to punish its perpetrators.”<sup>55</sup>

With the prospect of U.S. airstrikes against Afghanistan imminent, Taliban officials acknowledged that bin Laden was being sheltered under the control of the Taliban at a secret location in Afghanistan.<sup>56</sup> Further, they claimed that they were interested in negotiating with the United States and might agree to turn over bin Laden to a third country.<sup>57</sup> The Bush administration maintained its position, however, that there would be no negotiations; in his weekly radio address, President Bush warned the Taliban that time was running out for them to surrender “all the terrorists in Afghanistan and to close down their camps and operations.”<sup>58</sup>

On October 7, the United States informed the UN Security Council that it had been the victim of “massive and brutal attacks” and that it was exercising its right of self-defense in taking actions in Afghanistan against Al Qaeda terrorist-training camps and Taliban military installations.

In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that the United States of America, together with other States, has initiated actions in the exercise of its inherent right of individual and collective self-defence following the armed attacks that were carried out against the United States on 11 September 2001.

On 11 September 2001, the United States was the victim of massive and brutal attacks in the states of New York, Pennsylvania and Virginia. These attacks were specifically designed to maximize the loss of life; they resulted in the death of more than 5,000 persons, including nationals of 81 countries, as well as the destruction of four civilian aircraft, the World Trade Center towers and a section of the Pentagon. Since 11 September, my Government has obtained clear and compelling information that the Al-Qaeda organization, which is supported by the Taliban regime in Afghanistan, had a central role in the attacks. There is still much we do not know. Our inquiry is in its early

*See* Suzanne Daley, *NATO, Though Supportive, Has Little to Offer Militarily*, N.Y. TIMES, Sept. 20, 2001, at B5; *but see* Keith B. Richburg & DeNeen L. Brown, *Radar Planes from NATO to Patrol U.S. Coast*, WASH. POST, Oct. 9, 2001, at A9; Lois Romano, *NATO Lends a Hand with U.S. Sky Patrol*, WASH. POST, Nov. 19, 2001, at A3.

<sup>53</sup> *Terrorist Threat to the Americas*, Res. 1, Twenty-Fourth Meeting of Consultation of Ministers of Foreign Affairs Acting as Organ of Consultation in Application of the Inter-American Treaty of Reciprocal Assistance, OAS Doc. OEA/Ser.F/IL.24/RC.24/RES.1/01 (Sept. 21, 2001), at <<http://www.oas.org>>; *see* Karen DeYoung, *OAS Nations Activate Mutual Defense Treaty*, WASH. POST, Sept. 20, 2001, at A18.

<sup>54</sup> *See* Neil MacFarquhar, *Saudis Criticize the Taliban and Halt Diplomatic Ties*, N.Y. TIMES, Sept. 26, 2001, at B5; Warren Hoge, *United Arab Emirates Breaks Diplomatic Ties with Taliban*, N.Y. TIMES, Sept. 23, 2001, at B3.

<sup>55</sup> *See* Howard Schneider, *Persian Gulf Arab States Support Anti-Terror Effort*, WASH. POST, Sept. 24, 2001, at A13. The Gulf Cooperation Council consists of Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates.

<sup>56</sup> *See* Rajiv Chandrasekaran, *Taliban's Envoy Admits Bin Laden Is in Afghanistan*, WASH. POST, Oct. 1, 2001, at A10.

<sup>57</sup> *See* Douglas Frantz, *Taliban Say They Want to Negotiate with the U.S. over bin Laden*, N.Y. TIMES, Oct. 3, 2001, at B1.

<sup>58</sup> President's Radio Address, 37 WEEKLY COMP. PRES. DOC. 1429, 1430 (Oct. 6, 2001).

stages. We may find that our self-defence requires further actions with respect to other organizations and other States.

The attacks on 11 September 2001 and the ongoing threat to the United States and its nationals posed by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation. Despite every effort by the United States and the international community, the Taliban regime has refused to change its policy. From the territory of Afghanistan, the Al-Qaeda organization continues to train and support agents of terror who attack innocent people throughout the world and target United States nationals and interests in the United States and abroad.

In response to these attacks, and in accordance with the inherent right of individual and collective self-defence, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States. These actions include measures against Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan. In carrying out these actions, the United States is committed to minimizing civilian casualties and damage to civilian property. In addition, the United States will continue its humanitarian efforts to alleviate the suffering of the people of Afghanistan. We are providing them with food, medicine and supplies.<sup>59</sup>

After the Security Council met for two hours to hear the U.S. and UK justifications for acting in self-defense, the president of the Security Council (Ireland's UN ambassador, John Ryan) stated that the unanimity of support expressed in the Security Council's two prior resolutions "is absolutely maintained."<sup>60</sup>

On the same day as the above proceedings in the Security Council, the United States and the United Kingdom launched attacks against Al Qaeda and Taliban targets in Afghanistan (twenty-six days after the September 11 incidents).<sup>61</sup> In a speech to the nation, President Bush stated:

More than 2 weeks ago, I gave Taliban leaders a series of clear and specific demands . . . . None of those demands were met. And now the Taliban will pay a price. By destroying camps and disrupting communications, we will make it more difficult for the terror network to train new recruits and coordinate their evil plans.

. . . .

Today we focus on Afghanistan, but the battle is broader. Every nation has a choice to make. In this conflict, there is no neutral ground. If any government sponsors the outlaws and killers of innocents, they have become outlaws and murderers, themselves. And they will take that lonely path at their own peril.

. . . .

We did not ask for this mission, but we will fulfill it. The name of today's military operation is Enduring Freedom. We defend not only our precious freedoms but also the freedom of people everywhere to live and raise their children free from fear.<sup>62</sup>

The United States used sea-based cruise missiles, long-range bombers, and carrier-based fighter aircraft to strike at antiaircraft sites, military headquarters, terrorist camps, airfields, and a concentration of Taliban tanks, principally in the Afghan cities of Kabul (the capital),

<sup>59</sup> Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, UN Doc. S/2001/946 (Oct. 7, 2001), at <<http://www.un.int./usa/s-2001-946.htm>>. The United Kingdom provided a similar notification.

<sup>60</sup> See Christopher S. Wren, *U.S. Advises U.N. Council More Strikes Could Come*, N.Y. TIMES, Oct. 9, 2001, at B5.

<sup>61</sup> See Patrick E. Tyler, *U.S. and Britain Strike Afghanistan, Aiming at Bases and Terrorist Camps; Bush Warns 'Taliban Will Pay a Price'*, N.Y. TIMES, Oct. 8, 2001, at A1.

<sup>62</sup> Address to the Nation Announcing Strikes Against Al Qaida Training Camps and Taliban Military Installations, 37 WEEKLY COMP. PRES. DOC. 1432, 1432 (Oct. 7, 2001) [hereinafter Address to the Nation].

Kandahar (the center of the Taliban movement), Jalalabad, and Mazar-e Sharif. At the same time, the United States began dropping food and medical supplies into Afghanistan, as well as leaflets aimed at encouraging defections from the Taliban militia.<sup>63</sup> Within days, U.S. military forces controlled the skies over Afghanistan and shifted to the next phase of the campaign—bombing the barracks, garrisons, and troop encampments of Taliban military forces.<sup>64</sup> Further, special forces were deployed for operations within Taliban-held territory—including a nighttime raid on the headquarters compound of the Taliban's spiritual and military leader, Mullah Muhammad Omar.<sup>65</sup> Such special-operations activity, along with intelligence from foreign sources, improved the United States' ability to strike Taliban targets accurately.<sup>66</sup>

Although the airstrikes were against military targets, collateral civilian casualties did occur, with bombing mistakes reported almost every day of the campaign. Thus, on October 13, a Navy jet mistakenly dropped a 2,000-pound bomb on a residential neighborhood of Kabul, reportedly killing four persons and wounding another eight.<sup>67</sup> On October 14, Taliban officials took foreign journalists to a village where, the officials claimed, nearly two hundred persons had been killed. Despite the evident damage, the casualties could not be confirmed.<sup>68</sup> On October 20–21, U.S. Navy jets dropped a 1,000-pound bomb near a senior-citizens home in the western city of Herat, and two 500-pound bombs in a residential area of Kabul.<sup>69</sup> Two days later, a cluster bomb used on Herat left the village strewn with deadly unexploded “bomblets.”<sup>70</sup> Human Rights Watch documented an attack on the village of Chowkar-Karez: after bombs were dropped, slow-moving, propeller-driven aircraft gunned down civilians.<sup>71</sup> In perhaps the most notorious event, U.S. planes mistakenly bombed a Red Cross complex in Kabul on October 16, and then mistakenly returned ten days later to destroy the same complex. The complex—the only one of the Red Cross in Kabul—had supplied food and blankets for fifty-five thousand disabled Afghans.<sup>72</sup>

The bombing campaign was, in many ways, a difficult one for the U.S. military. In addition to the inherent difficulties of attacking targets on rugged terrain, the dispersal of Taliban forces to residential areas and civilian buildings (such as schools and mosques) complicated the ability of the United States to pursue airstrikes against those forces.<sup>73</sup> Further, the U.S. targeting-approval process, while designed to help minimize civilian casualties, reportedly resulted in delays that prevented the U.S. Air Force from receiving timely clearance for air strikes against top Taliban and Al Qaeda leaders.<sup>74</sup> One unexpected but fortunate outcome was that despite the expectations that the air strikes would lead to a massive flow of refugees, no such exodus occurred—probably because the journey itself was risky, and the Afghan population had become inured to living amidst warfare.<sup>75</sup>

<sup>63</sup> See Dan Balz, *U.S., Britain Launch Airstrikes Against Targets in Afghanistan*, WASH. POST, Oct. 8, 2001, at A1.

<sup>64</sup> See Bradley Graham & Dan Balz, *U.S. Controls Skies, Hunts New Targets and Offers Support to Taliban's Foes*, WASH. POST, Oct. 10, 2001, at A1; Michael R. Gordon & Steven Lee Myers, *U.S. Shifts Focus of Attack in Afghanistan by Bombing Ground Forces of Taliban*, N.Y. TIMES, Oct. 11, 2001, at A1; Vernon Loeb & Thomas E. Ricks, *Pentagon: Taliban Forces 'Eviscerated'*, WASH. POST, Oct. 17, 2001, at A1.

<sup>65</sup> See Thom Shanker & Eric Schmitt, *G.I. Raid Struck Taliban Leader's Compound*, N.Y. TIMES, Oct. 21, 2001, at A1.

<sup>66</sup> See Eric Schmitt & Steven Lee Myers, *U.S. Escalating Efforts to Bomb Taliban Caves*, N.Y. TIMES, Nov. 6, 2001, at A1.

<sup>67</sup> See Eric Schmitt & Michael R. Gordon, *Pentagon Says an Error Led to Bombings of Houses That Killed Four in Kabul*, N.Y. TIMES, Oct. 14, 2001, at B5.

<sup>68</sup> See *In Village Reportedly Struck by U.S. Air Attack, Destruction, Death and Anger*, N.Y. TIMES, Oct. 15, 2001, at B4.

<sup>69</sup> See Vernon Loeb & Bradley Graham, *Errant Bombs May Have Hit Afghan Civilians, U.S. Says*, WASH. POST, Oct. 24, 2001, at A1; see also *U.S. Airstrikes Kill 13 Civilians in Kabul*, N.Y. TIMES, Oct. 29, 2001, at B3.

<sup>70</sup> See John F. Burns, *Errant Cluster Bomb Leaves Danger Behind*, U.N. SAYS, N.Y. TIMES, Oct. 25, 2001, at B4.

<sup>71</sup> See Rajiv Chandrasekaran, *Villagers Describe Deadly Airstrike*, WASH. POST, Nov. 2, 2001, at A21. The Pentagon stated that it believed that there was a Taliban encampment near the village.

<sup>72</sup> See Elizabeth Becker & Eric Schmitt, *U.S. Planes Bomb a Red Cross Site*, N.Y. TIMES, Oct. 27, 2001, at A1.

<sup>73</sup> See Bradley Graham & Vernon Loeb, *Taliban Dispersal Slows U.S.*, WASH. POST, Nov. 6, 2001, at A1; William Branigin, *Taliban's Human Shields*, WASH. POST, Oct. 24, 2001, at A1.

<sup>74</sup> See Thomas E. Ricks, *Target Approval Delays Cost Air Force Key Hits*, WASH. POST, Nov. 18, 2001, at A1.

<sup>75</sup> See Rajiv Chandrasekaran, *Predicted Outpouring of Afghan Refugees Is More Like 'Trickle'*, WASH. POST, Nov. 1, 2001, at A21.

Within hours of the commencement of the air strikes on October 7, bin Laden appeared in a videotape that was broadcast worldwide. He celebrated the September 11 attacks as a "taste" of what "[o]ur Islamic nation has been tasting . . . for more than 80 years, of humiliation and disgrace, its sons killed and their blood spilled, its sanctities desecrated." Further, he stated, "Every Muslim must rise to defend his religion. The wind of faith is blowing and the wind of change is blowing to remove evil from the Peninsula of Muhammad, peace be upon him."<sup>76</sup> The Taliban reacted to the air strikes by reiterating its offer to hand bin Laden over to a neutral third country if the United States provided evidence connecting him to the September 11 attacks. Again, President Bush rejected the offer, stating that the U.S. demands were nonnegotiable.<sup>77</sup>

In initiating its airstrikes against Afghanistan, the United States received support from various quarters that this military response was an appropriate exercise of the right of self-defense against an armed attack. The United Kingdom itself directly participated in airstrikes against Afghanistan.<sup>78</sup> Access to airspace and facilities was provided not just by NATO allies,<sup>79</sup> but also by nations such as Georgia, Oman, Pakistan, the Philippines, Qatar, Saudi Arabia, Tajikistan, Turkey, and Uzbekistan.<sup>80</sup> Other leading nations, such as China,<sup>81</sup> Egypt,<sup>82</sup> Mexico,<sup>83</sup> and Russia<sup>84</sup> announced support for the U.S. campaign. The fifty-six nations of the Organization for the Islamic Conference called upon the United States not to extend its military response beyond Afghanistan, but made no criticism of military actions against that state.<sup>85</sup> Several representatives at a League of Arab States meeting denounced bin Laden as seeking to wage a war against the world, and said that he falsely stated that he represented Muslims and Arabs.<sup>86</sup> The twenty-one nations of the Asia-Pacific Economic Cooperation forum issued a statement "unequivocally" condemning the September 11 attacks and denouncing all forms of terrorism, but remained silent on the U.S.-led airstrikes.<sup>87</sup> Australia, Canada, the Czech Republic, Germany, Italy, Japan, the Netherlands, New Zealand, Turkey, and the United Kingdom committed the use of their ground forces if and when a military deployment occurred in Afghanistan.<sup>88</sup> The United States needed to offer induce-

<sup>76</sup> See *Bin Laden's Statement: 'The Sword Fell'*, N.Y. TIMES, Oct. 8, 2001, at B7 (translated from Arabic by Reuters); see also Neil MacFarquhar & Jim Rutenberg, *Bin Laden, in a Taped Speech, Says Attacks in Afghanistan Are a War Against Islam*, N.Y. TIMES, Nov. 4, 2001, at B2.

<sup>77</sup> See Elisabeth Bumiller, *President Rejects Offer by Taliban for Negotiations*, N.Y. TIMES, Oct. 15, 2001, at A1.

<sup>78</sup> See UK Press Release, 10 Downing Street Newsroom, Prime Minister's Statement to the House of Commons (Oct. 8, 2001), at <<http://www.number10.gov.uk/news.asp?NewsId=2694>>. Prime Minister Blair asserted that the four-week delay in responding to the September 11 incidents was due to the need to (1) establish who was responsible for the incidents, (2) provide the Taliban an opportunity to turn over the perpetrators, and (3) develop military targets in Afghanistan that would minimize the possibility of collateral civilian casualties.

<sup>79</sup> See William Drozdiak & Doug Struck, *NATO Allies Offer Help for U.S. Military Action*, WASH. POST, Oct. 5, 2001, at A26.

<sup>80</sup> See Alan Sipress & Molly Moore, *Pakistan Grants Airfield Use; U.S. Pounds Taliban Bunkers*, WASH. POST, Oct. 11, 2001, at A1; Elaine Sciolino & Steven Lee Myers, *Bush Says 'Time is Running Out'; U.S. Plans to Act Largely Alone*, N.Y. TIMES, Oct. 7, 2001, at A1; Alan Sipress, *Emir Pledges Qatar's Support but Offers Words of Caution*, WASH. POST, Oct. 5, 2001, at A23; Mark Landler, *Philippines Offers U.S. Its Troops and Bases*, N.Y. TIMES, Oct. 3, 2001, at A5; Vernon Loeb & Thomas E. Ricks, *U.S. Sends Troops to Ex-Soviet Republics*, WASH. POST, Oct. 3, 2001, at A21. In his speech to the nation, President Bush stated: "More than 40 countries in the Middle East, Africa, Europe and across Asia have granted air transit or landing rights. Many more have shared intelligence. We are supported by the collective will of the world." Address to the Nation, *supra* note 62, at 1432.

<sup>81</sup> See Mike Allen & Philip P. Pan, *China Vows to Help in Terror Fight*, WASH. POST, Oct. 19, 2001, at A1; Erik Eckholm, *China's About-Face: Support for U.S. on Terror*, N.Y. TIMES, Sept. 30, 2001, at A6.

<sup>82</sup> See Daniel Williams, *Mubarak Backs Strikes by U.S. on Afghanistan*, WASH. POST, Oct. 10, 2001, at A17.

<sup>83</sup> See Ginger Thompson, *Fox Pledges Full Support for the U.S.*, N.Y. TIMES, Sept. 28, 2001, at B2.

<sup>84</sup> See Sharon LaFraniere, *Putin Gives U.S. Attacks a Strong Endorsement*, WASH. POST, Oct. 9, 2001, at A16.

<sup>85</sup> See Daniel Williams, *Islamic Group Offers U.S. Mild Rebuke*, WASH. POST, Oct. 11, 2001, at A21.

<sup>86</sup> See *Arab League Condemns Bin Laden and His War*, N.Y. TIMES, Nov. 5, 2001, at B5.

<sup>87</sup> See Clay Chandler, *APEC Condemns Attacks on U.S.*, WASH. POST, Oct. 22, 2001, at A11.

<sup>88</sup> See Alan Sipress & Vernon Loeb, *U.S. Welcoming Allies' Troops*, WASH. POST, Nov. 11, 2001, at A38.

ments to certain states in order to obtain their support,<sup>89</sup> however, and various protests did occur in opposition to the U.S. airstrikes.<sup>90</sup>

Two weeks after the United States began its military action against the Taliban and Al Qaeda, President Bush reportedly signed a classified “intelligence finding” that authorized the Central Intelligence Agency to pursue an intense effort to end bin Laden’s leadership of Al Qaeda.<sup>91</sup> Although a standing executive order bars assassination,<sup>92</sup> the President may amend an executive order by a subsequent presidential order or directive.<sup>93</sup> Moreover, in any event, the wording of the executive order (“assassination”), coupled with the context in which it was originally formulated and passed during the Ford administration,<sup>94</sup> arguably suggests that the executive order was intended to prohibit the killing of government officials, not nongovernmental persons, such as bin Laden.

In a speech to the UN General Assembly on November 10, President Bush stated:

We meet in a hall devoted to peace, in a city scared by violence, in a Nation awakened to danger, in a world uniting for a long struggle. Every civilized nation here today is resolved to keep the most basic commitment of civilization: We will defend ourselves and our future against terror and lawless violence.

The United Nations was founded in this cause. In a Second World War, we learned there is no isolation from evil. We affirmed that some crimes are so terrible they offend humanity, itself. And we resolved that the aggression and ambitions of the wicked must be opposed early, decisively, and collectively before they threaten us all. . . .

. . . .

Every nation has a stake in this cause. As we meet, the terrorists are planning more murder—perhaps in my country, or perhaps in yours. They kill because they aspire to dominate. They seek to overthrow governments and destabilize entire regions. . . .

. . . .

The United States, supported by many nations, is bringing justice to the terrorists of Afghanistan. We’re making progress against military targets, and that is our objective. Unlike the enemy, we seek to minimize, not maximize, the loss of innocent life.

. . . .

. . . The United States will work closely with the United Nations and development banks to reconstruct Afghanistan after hostilities there have ceased and the Taliban are

<sup>89</sup> See, e.g., Pub. L. No. 107-57, 115 Stat. 403 (2001) (authorizing the President to exercise waivers of foreign-assistance restrictions with respect to Pakistan through September 2003); Jane Perlez, *U.S. Sanctions on Islamabad Will Be Lifted*, N.Y. TIMES, Sept. 22, 2001, at A1; Joseph Kahn, *U.S. Is Planning an Aid Package for Pakistan That Is Worth Billions*, N.Y. TIMES, Oct. 27, 2001, at B4.

<sup>90</sup> See, e.g., Rick Bragg, *A Pro-Taliban Rally Draws Angry Thousands in Pakistan, Then Melts Away*, N.Y. TIMES, Oct. 6, 2001, at B4; James Bennet, *Few Palestinians Back Assault on Afghanistan, Poll Shows*, N.Y. TIMES, Oct. 12, 2001, at A4; Kevin Sullivan, *War Support Ebbs Worldwide*, WASH. POST, Nov. 7, 2001, at A1.

<sup>91</sup> See John H. Cushman, Jr., *New Orders Spur C.I.A. Hunt for bin Laden*, N.Y. TIMES, Oct. 22, 2001, at B5; Barton Gellman, *CIA Weighs ‘Targeted Killing’ Missions*, WASH. POST, Oct. 28, 2001, at A1. President Clinton also reportedly issued two classified presidential directives seeking bin Laden’s capture or death. See James Risen, *U.S. Pursued Secret Efforts to Catch or Kill bin Laden*, N.Y. TIMES, Sept. 30, 2001, at A1; Bob Woodward & Thomas E. Ricks, *U.S. Was Foiled Multiple Times in Efforts to Capture Bin Laden or Have Him Killed*, WASH. POST, Oct. 3, 2001, at A1.

<sup>92</sup> The executive order provides: “No person employed by or on behalf of the United States Government shall engage in, or conspire to engage in, assassination.” Exec. Order No. 12,333, §2.11, 46 Fed. Reg. 59,941, 59,952 (1981) (issued by President Reagan); see also Exec. Order No. 12,036, 43 Fed. Reg. 3,675 (1978) (issued by President Carter); Exec. Order No. 11,905, 42 Fed. Reg. 7,707 (1976) (issued by President Ford).

<sup>93</sup> U.S. Dep’t of Justice, Office of Legal Counsel, Memorandum on Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order (Jan. 29, 2000), at <<http://www.usdoj.gov/olc/2000opinions.htm>>.

<sup>94</sup> The original executive order was adopted largely to head off legislation proposed in the Congress that would have barred assassination of foreign officials, expressly defined as senior officials of foreign governments. See *Alleged Assassination Plots Involving Foreign Leaders: An Interim Report*, S. REP. NO. 94-465, at App. A (1975) (an interim report of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, headed by Senator Frank Church).

no longer in control. And the United States will work with the U.N. to support a post-Taliban government that represents all of the Afghan people.<sup>95</sup>

During the course of Taliban rule in Afghanistan, an area in the northeast part of the country remained within the control of a coalition of Afghan opposition groups, known as the Northern Alliance, dominated by ethnic Uzbeks and Tajiks. The United Nations and many states recognized the Northern Alliance, rather than the Taliban, as the government of Afghanistan. Nevertheless, in order to provide time for a more broad-based coalition to be organized—perhaps under UN auspices—the United States initially hesitated during October 2001 at attacking the Taliban front lines in support of a Northern Alliance advance. At least six rival processes emerged for the purpose of developing a post-Taliban government, yet none of them appeared likely to succeed in the short term.<sup>96</sup> The United States therefore decided in late October to proceed with attacks against the Taliban front lines and to encourage the Northern Alliance to advance toward the Afghan capital.<sup>97</sup> In mid-November, during a five-day period, the Northern Alliance seized the northern crossroads city of Mazar-e Sharif, cut off a large concentration of Taliban forces in the north, and proceeded south to capture Kabul. Thereafter, armed opposition to the Taliban from fellow Pashtun tribal groups also ended the Taliban's control of central Afghanistan, leaving Taliban forces pinned down in the northern city of Kunduz and southern city of Kandahar.<sup>98</sup> During that advance, reports emerged of Northern Alliance executions of captured prisoners of war.<sup>99</sup> By mid-December, remaining Taliban and Al Qaeda forces were fully defeated, with hundreds captured and others fleeing from Afghanistan.<sup>100</sup>

As the military successes of the Northern Alliance in Afghanistan developed, the UN Secretary-General's special representative in Afghanistan, Lakhdar Brahimi, presented a plan to the UN Security Council on November 13 for the creation of a transitional government in Afghanistan and for the deployment of a multinational force to protect that government while it drafted a new constitution.<sup>101</sup> In endorsing Brahimi's approach, the Security Council called for a new government that "should be broad-based, multi-ethnic and fully representative of all the Afghan people and committed to peace with Afghanistan's neighbors."<sup>102</sup> After nine days of negotiations in Bonn, Germany, four Afghan factions signed an agreement to create a broad-based interim government to take power in Afghanistan for six months, leading to the creation of a transitional government that will rule for two years. After that, a regular government would be formed by elections under a new constitution.<sup>103</sup> Several countries indicated a willingness not only to participate in a multinational force to

<sup>95</sup> Remarks to the United Nations General Assembly in New York City, 37 WEEKLY COMP. PRES. DOC. 1638, 1638–40 (Nov. 10, 2001).

<sup>96</sup> See, e.g., John Ward Anderson & Molly Moore, *Rivalries Poison Political Efforts*, WASH. POST, Nov. 1, 2001, at A1; Pamela Constable & John Pomfret, *Afghan Factions Far Apart on Government*, WASH. POST, Oct. 25, 2001, at A1.

<sup>97</sup> See Michael R. Gordon, *U.S. Bombs Taliban's Forces on Front Lines Near Kabul; Powell Sees Rebel Advance*, N.Y. TIMES, Oct. 22, 2001, at A1.

<sup>98</sup> See William Branigin & Keith B. Richburg, *Alliance Surges Across North*, WASH. POST, Nov. 12, 2001, at A1; William Branigin, *Afghan Rebels Seize Control of Kabul*, WASH. POST, Nov. 14, 2001, at A1; John Pomfret & Rajiv Chandrasekaran, *Taliban Faces Tribal Revolt*, WASH. POST, Nov. 15, 2001, at A1; Rajiv Chandrasekaran & Vernon Loeb, *Taliban Under Assault in 2 Last Strongholds*, WASH. POST, Nov. 16, 2001, at A1.

<sup>99</sup> See David Rohde, *Executions of P.O.W.'s Cast Doubts on Alliance*, N.Y. TIMES, Nov. 13, 2001, at B1; John F. Burns, *P.O.W.'s Were Shot; Question Is How Many?* N.Y. TIMES, Nov. 14, 2001, at B3; David Rohde, *Foreigners Who Fought for Taliban Shot in Head*, N.Y. TIMES, Nov. 19, at B3.

<sup>100</sup> See John Kifner & Eric Schmitt, *Al Qaeda Routed from Afghanistan, U.S. Officials Say*, N.Y. TIMES, Dec. 17, 2001, at A1; Molly Moore & Susan B. Glasser, *Remnants of Al Qaeda Flee Toward Pakistan*, WASH. POST, Dec. 17, 2001, at A1.

<sup>101</sup> See Alan Sipress & Colum Lynch, *Brahimi Calls for U.N. Troops in Afghanistan*, WASH. POST, Nov. 14, 2001, at A23.

<sup>102</sup> SC Res. 1378, para. 1 (Nov. 14, 2001).

<sup>103</sup> See Letter of the Secretary-General to the President of the Security Council, UN Doc. S/2001/1154 (2001); Steven Erlanger, *After Arm-Twisting, Afghan Factions Pick Interim Government and Leader*, N.Y. TIMES, Dec. 6, 2001, at B1. The Security Council unanimously endorsed the agreement. See SC Res. 1383 (Dec. 6, 2001).

help police Afghanistan, but to spend billions of dollars to reconstruct Afghanistan.<sup>104</sup> On December 20, the UN Security Council authorized the deployment of a peacekeeping force to Afghanistan under the command of the United Kingdom.<sup>105</sup>

In an effort to prevent further terrorist acts against the United States, domestic law enforcement activities radically intensified—and changed in character—after the September 11 attacks. Prior to those attacks, U.S. authorities had uncovered several groups or “cells” of persons in the United States that had ties to Al Qaeda. Since these persons had entered the country legally and had not engaged in any illegal activities, most were kept under surveillance but not arrested.<sup>106</sup> When, after September 11, the FBI intercepted telephone calls in which these same persons were overheard celebrating the attacks, the FBI arrested them as material witnesses to a crime.<sup>107</sup> The FBI arrested other persons who were engaged in highly suspicious activities<sup>108</sup>—and also, as a preventive strategy against future terrorist operations, hundreds of others on assorted other grounds. By the end of October 2001, more than 1,100 persons had been arrested and held without bond; the number subsequently released is unknown. Although the basis for holding some of these persons was insubstantial, the government’s position before federal courts was that the “business of counterterrorism intelligence gathering in the United States is akin to the construction of a mosaic”; until all the pieces of information can be analyzed together, it cannot be determined whether something that “may seem trivial” is in fact “of great moment to those within the FBI or the intelligence community who have a broader context.”<sup>109</sup> By the end of November, the Justice Department announced that it had charged 104 individuals for federal criminal offenses (55 of those individuals were in custody), while another 548 individuals under investigation were in the custody of the Immigration and Naturalization Service (INS) on immigration charges.<sup>110</sup>

Such arrests—which were on a scale not seen in the United States since the Second World War—were conducted under great secrecy. Gag orders and other rules (including rules relating to the grand jury and to the detainees’ privacy) prevented officials from discussing the detainees, and defense lawyers were sometimes allowed to see documents only at the courthouse.<sup>111</sup> A *Washington Post* analysis of 235 detainees revealed that the largest groups came from Egypt, Pakistan, and Saudi Arabia; virtually all were men in their twenties and thirties; and the greatest concentration were in U.S. states with large Islamic populations that included what law enforcement officials identified as Al Qaeda sympathizers: California, Florida, Michigan, New Jersey, New York, and Texas. Many were arrested because they were

<sup>104</sup> See Alan Sipress & Colum Lynch, *Turkey, Britain, France to Head Peacekeeping Forces*, WASH. POST, Nov. 16, 2001, at A29; Joseph Kahn & Stephanie Flanders, *U.S. and 21 Other Nations Vow to Spend Billions on Afghanistan*, N.Y. TIMES, Nov. 21, 2001, at B1.

<sup>105</sup> SC Res. 1386 (Dec. 20, 2001).

<sup>106</sup> See Bob Woodward & Walter Pincus, *Investigators Identify 4 to 5 Groups Linked to Bin Laden Operating in U.S.*, WASH. POST, Sept. 23, 2001, at A1.

<sup>107</sup> See Neil A. Lewis & David Johnston, *Jubilant Calls on Sept. 11 Led to F.B.I. Arrests*, N.Y. TIMES, Oct. 28, 2001, at A1.

<sup>108</sup> See, e.g., Christopher Drew & William K. Rashbaum, *2 Found with Box Cutters Sept. 12 Remain Intriguing but Silent Suspects*, N.Y. TIMES, Oct. 24, 2001, at B1; Brooke A. Masters, *Man Named in Note in Hijacker’s Car Is Indicted*, WASH. POST, Oct. 24, 2001, at A3; David Johnston & Paul Zielbauer, *3 Held in Detroit After Aircraft Diagrams Are Found*, N.Y. TIMES, Sept. 20, 2001, at B2.

<sup>109</sup> See Amy Goldstein, *A Deliberate Strategy of Disruption*, WASH. POST, Nov. 4, 2001, at A1. The quotes reportedly are from a seven-page document signed by a senior FBI counterterrorism official that was used in numerous court proceedings across the United States. See also David Johnston, *Detentions May Be Aimed at Deterring Other Attacks*, N.Y. TIMES, Oct. 14, 2001, at B3.

<sup>110</sup> U.S. Dep’t of Justice Press Release on Attorney General Ashcroft Provides Total Number of Federal Criminal Charges and INS Detainees (Nov. 27, 2001), at <[http://www.justice.gov/ag/speeches/2001/agcrisisremarks11\\_27.htm](http://www.justice.gov/ag/speeches/2001/agcrisisremarks11_27.htm)>; see Tamar Lewin, *Accusations Against 93 Vary Widely*, N.Y. TIMES, Nov. 28, 2001, at B6; Jodi Wilgoren, *Swept Up in a Dragnet, Hundreds Sit in Custody and Ask, “Why?”* N.Y. TIMES, Nov. 25, 2001, at B5; Dan Eggen, *Many Held on Tenuous Ties to Sept. 11*, WASH. POST, Nov. 29, 2001, at A18.

<sup>111</sup> See Goldstein, *supra* note 109.

in the same places or engaged in the same kinds of activities as the hijackers (for example, taking flying lessons); many others apparently were detained because they came from certain countries or had violated U.S. immigration law.<sup>112</sup> Further, the Justice Department announced a new policy that it would monitor communications between lawyers and persons being held on suspicion of being terrorists.<sup>113</sup>

Other countries assisted the United States in its investigation. In November 2001, German authorities identified a group of 5 persons in Hamburg thought to have provided financial and other support to the September 11 hijackers.<sup>114</sup> At roughly the same time, Spanish authorities arrested and charged a group of 8 persons on suspicions that some may have assisted the hijackers.<sup>115</sup> Belgian, French, and Italian authorities arrested 15 men with suspected links to Al Qaeda.<sup>116</sup> Yemeni troops even assaulted tribal forces in Yemen's central Marib region when local tribal leaders refused to turn over 5 persons suspected of connections with Al Qaeda.<sup>117</sup> By the end of November, some 50 countries had detained about 360 suspects with alleged connections to Al Qaeda.<sup>118</sup>

As a means of bringing known terrorists into custody, President Bush announced on October 10 the creation of a "most wanted" list of twenty-two suspected terrorists, including bin Laden. A reward of up to \$5 million (later increased to \$25 million) was offered for information leading to the capture of anyone on the list.<sup>119</sup> All of the persons on the list were under indictment in the United States for bombings other than the attacks of September 11.<sup>120</sup>

In order to further enhance law enforcement capabilities for investigating and prosecuting terrorists, President Bush signed the USA PATRIOT Act into law on October 26.<sup>121</sup> The new law contained various components, including the following: (1) restrictions were lifted so as to allow intelligence and criminal justice officials to share information on investigations;<sup>122</sup> (2) law enforcement authorities may be authorized by a special intelligence court<sup>123</sup> to conduct "roving" wiretaps on a person suspected of involvement in terrorism, meaning that rather than being restricted to monitoring a specific telephone line, authorities may monitor *any* telephone that the person uses;<sup>124</sup> (3) intelligence authorities may obtain wiretap authority from the special intelligence court if foreign intelligence operations are a "significant purpose" of the investigation (previously, foreign intelligence collection had

<sup>112</sup> *Id.*

<sup>113</sup> See William Glaberson, *Legal Experts Divided on New Antiterror Policy That Scuttles Lawyer-Client Confidentiality*, N.Y. TIMES, Nov. 13, 2001, at B7.

<sup>114</sup> See Peter Finn, *Germans Identify More Terror Suspects*, WASH. POST, Nov. 17, 2001, at A21.

<sup>115</sup> See Sam Dillon, *Spanish Judge Charges 8 With Terrorism, Citing Likely Links to Al Qaeda*, N.Y. TIMES, Nov. 19, 2001, at B5; Peter Finn & Pamela Rolfe, *Calls Central to Spain's Sept. 11 Case*, WASH. POST, Nov. 21, 2001, at A17.

<sup>116</sup> See William Drozdiak, *14 Held in Europe; Bin Laden Ties Alleged*, WASH. POST, Nov. 27, 2001, at A5; Sarah Delaney, *Italy Arrests Man Believed to Have Key Ties to Al Qaeda*, WASH. POST, Dec. 2, 2001, at A14.

<sup>117</sup> See Howard Schneider, *Yemen Attacks Tribes Linked to Al Qaeda*, WASH. POST, Dec. 19, 2001, at A16.

<sup>118</sup> See Bob Woodward, *50 Countries Detain 360 Suspects at CIA's Behest*, WASH. POST, Nov. 22, 2001, at A1.

<sup>119</sup> See U.S. Dep't of State, *Most Wanted Terrorists*, at <<http://www.dssrewards.net>> (visited Nov 19, 2001); James Risen & Thom Shanker, *U.S. Broadcasting \$25 Million Offer to Find bin Laden*, N.Y. TIMES, Nov. 20, 2001, at A1. Separately, President Bush signed into law permanent authority to grant nonimmigrant "S" visas to aliens who supply critical information to U.S. law enforcement agencies on criminal or terrorist organizations. See Pub. L. No. 107-45, 115 Stat. 258 (2001).

<sup>120</sup> See David Johnston & Philip Shenon, *U.S. Lists Most Wanted Terrorists and Offers Reward of Millions*, N.Y. TIMES, Oct. 11, 2001, at B3.

<sup>121</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

<sup>122</sup> *Id.* §203.

<sup>123</sup> The court exists pursuant to the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§1801-1811 (1994). In 2000, the U.S. government made 1,005 applications under FISA for electronic surveillance and physical search warrants. The FISA court approved all of the applications. See Neil A. Lewis & David Johnston, *Jubilant Calls on Sept. 11 Led to F.B.I. Arrests*, N.Y. TIMES, Oct. 28, 2001, at A1.

<sup>124</sup> USA PATRIOT Act, *supra* note 121, §206.



to be the only purpose of the investigation in order to obtain such authorization);<sup>125</sup> (4) the scope of subpoenas for electronic communications (such as email messages) sent by terrorism suspects was expanded;<sup>126</sup> (5) authorities may obtain nationwide search warrants for terrorism investigations, rather than being required to obtain new ones in each district in which they operate;<sup>127</sup> (6) the law's "sunset" provisions terminate the preceding, enhanced surveillance powers after four years;<sup>128</sup> (7) the attorney general or the INS commissioner may certify an alien as being under suspicion of involvement in terrorism, in which case the alien may be held for up to seven days for questioning, after which he must be released if he is not charged with a violation of criminal or immigration laws;<sup>129</sup> and (8) possession of substances that can be used as biological or chemical weapons for anything other than a "peaceful" purpose was criminalized, and criminal sentences for committing acts of terrorism and for harboring or financing terrorists or terrorist organizations were increased.<sup>130</sup>

The most striking alteration of U.S. criminal justice practice was President Bush's issuance on November 13 of a military order allowing special U.S. military tribunals to try foreigners charged with terrorism. The order read, in part:

Section 1. *Findings.*

(a) International terrorists, including members of al Qaeda, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States armed forces.

. . . .

(e) To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.

(f) Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with [10 U.S.C. §836 (1994)] that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.

. . . .

Sec. 2. *Definition and Policy.*

(a) The term "individual subject to this order" shall mean any individual who is not a United States citizen with respect to whom I determine from time to time in writing that:

- (1) there is reason to believe that such individual, at the relevant times,
  - (i) is or was a member of the organization known as al Qaida;
  - (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
  - (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) . . . ; and

<sup>125</sup> *Id.* §218.

<sup>126</sup> *Id.* §210.

<sup>127</sup> *Id.* §§219–220.

<sup>128</sup> *Id.* §224.

<sup>129</sup> *Id.* §412.

<sup>130</sup> *Id.* §§802–817.

(2) it is in the interest of the United States that such individual be subject to this order.

....

Sec. 3. *Detention Authority of the Secretary of Defense.* Any individual subject to this order shall be—

(a) detained at an appropriate location designated by the Secretary of Defense outside or within the United States;

(b) treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria;

(c) afforded adequate food, drinking water, shelter, clothing, and medical treatment;

(d) allowed the free exercise of religion consistent with the requirements of such detention; and

(e) detained in accordance with such other conditions as the Secretary of Defense may prescribe.

Sec. 4. *Authority of the Secretary of Defense Regarding Trials of Individuals Subject to This Order*

(a) Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death.

(b) As a military function and in light of the findings in section 1, including subsection (f) thereof, the Secretary of Defense shall issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary to carry out subsection (a) of this section.

(c) Orders and regulations issued under subsection (b) of this section shall include, but not be limited to, rules for the conduct of the proceedings of military commissions, including pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and qualifications of attorneys, which shall at a minimum provide for—

(1) military commissions to sit any time and any place, consistent with such guidance regarding time and place as the Secretary of Defense may provide;

(2) a full and fair trial, with the military commission sitting as the triers of both fact and law;

(3) admission of such evidence as would, in the opinion of the presiding officer of the military commission (or instead, if any other member of the commission so requests at the time the presiding officer renders that opinion, the opinion of the commission rendered at that time by a majority of the commission), have probative value to a reasonable person;

(4) in a manner consistent with the protection of information classified or classifiable under [U.S. law], (A) the handling of, admission into evidence of, and access to materials and information, and (B) the conduct, closure of, and access to proceedings;

(5) conduct of the prosecution by one or more attorneys designated by the Secretary of Defense and conduct of the defense by attorneys for the individual subject to this order;

(6) conviction only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present;

(7) sentencing only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present; and

(8) submission of the record of the trial, including any conviction or sentence, for review and final decision by me or by the Secretary of Defense if so designated by me for that purpose.<sup>131</sup>

The military order also purported to preclude defendants from having recourse to any collateral review, stating that

the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.<sup>132</sup>

White House officials justified the measure as necessary to protect potential U.S. jurors from harm and to prevent public disclosure of the government's intelligence methods.<sup>133</sup> Although it is expected that the rights of defendants before such tribunals would be fewer than exist in federal courts or even in a court-martial under the Uniform Code of Military Justice,<sup>134</sup> during the Second World War the Supreme Court upheld the use of such military tribunals for the prosecution and execution of certain Nazi saboteurs who had infiltrated the United States.<sup>135</sup> European authorities, however, expressed reluctance to extradite persons to the United States if they were to be tried before a military tribunal.<sup>136</sup>

By mid-December, only one individual—a French national named Zacarias Moussaoui—had been formally indicted for conspiracy to commit the acts of September 11. According to the U.S. government, Moussaoui engaged in the same kind of training and other activities as the hijackers, received funding from Al Qaeda sources, may have intended to be the twentieth hijacker, but was detained in August on immigration charges and thus was unable to participate in the September 11 attacks.<sup>137</sup> Although Moussaoui was not a U.S. national, the Bush administration elected not to prosecute him before a military tribunal.

#### INTERNATIONAL CRIMINAL LAW

##### *Conventions on the Suppression of Terrorist Bombings and on Financing*

The United States is a party to several antiterrorist conventions that address cooperation among states in dealing with hijacking of aircraft,<sup>1</sup> sabotage of aircraft,<sup>2</sup> taking of hostages,<sup>3</sup>

<sup>131</sup> Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

<sup>132</sup> *Id.* §7(b)(2). The language of the order ("shall not be privileged") suggests an intent to prevent any federal habeas corpus proceedings. If so intended, some legal scholars have doubted the constitutionality of the provision, at least with respect to persons detained in the United States. Under the U.S. Constitution, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. Art. I, §9. Since it is located in Article I of the Constitution, the power to suspend the writ is considered a power of the Congress, and in any event may be exercised only upon "rebellion" or "invasion." See *Ex parte Merryman*, 17 F.Cas. 144, 148 (C.C.D. Md. 1861) (No. 9,487). Further, while the President arguably retains certain core powers to address exigent circumstances when Congress cannot convene, Congress had already addressed the process for detaining individuals suspected of terrorism as a part of the USA PATRIOT Act, *supra* note 121, and in that context not only insisted that aliens be detained for no more than seven days without charge, but left available to them the writ of habeas corpus.

<sup>133</sup> See Elisabeth Bumiller & David Johnston, *Bush Sets Option of Military Trials in Terrorist Cases*, N.Y. TIMES, Nov. 14, 2001, at A1.

<sup>134</sup> 10 U.S.C. §§801-946 (1994).

<sup>135</sup> See *Ex parte Quirin*, 317 U.S. 1 (1942).

<sup>136</sup> See T. R. Reid, *Europeans Reluctant to Send Terror Suspects to U.S.*, WASH. POST, Nov. 29, 2001, at A23.

<sup>137</sup> See Dan Eggen & Brooke A. Masters, *U.S. Indicts Suspect in Sept. 11 Attacks*, WASH. POST, Dec. 12, 2001, at A1; Robert O'Harrow, Jr., *Moussaoui Ordered to Stand Trial in Alexandria*, WASH. POST, Dec. 14, 2001, at A15.

<sup>1</sup> See Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 UST 1641, 860 UNTS 105.

<sup>2</sup> See Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 UST 565, 974 UNTS 177.

<sup>3</sup> See International Convention Against the Taking of Hostages, Dec. 17, 1979, TIAS 11,081, 1316 UNTS 205.