

## HAROLD HONGJU KOH<sup>1</sup>

### THE UNITED STATES AND HUMAN RIGHTS AFTER SEPTEMBER 11TH

Lord Chairman, My Lords, Ladies and Gentlemen.

Let me begin by thanking the John Galway Foster Trustees, the Blackstone Chambers, and University College London for your most flattering invitation. I am especially grateful to Professor Jeffrey Jowell for his warm hospitality, and to Charlotte Lane and Sylvia Lough for their wonderful work in preparing this event.

It is a great honor to follow such luminaries as Mary Robinson, Anthony Lewis, Sissela Bok, and Sonia Picado to this podium to deliver this distinguished lecture. Reading about John Foster yesterday at the Codrington Library at All Souls, I was struck by this description of him: a "true egalitarian," who "combined crystal-clear objectivity with great kindness and an infinite capacity for helping those in trouble." "[T]o the end of his life," his biographer Dame Miriam Rothschild wrote, "...he was happiest in crowded rooms—especially those crowded with Americans." In that spirit, let me say that these past few days, my wife Mary-Christy and I have found it glorious to be back in the mother country. It may sound odd for a Korean-American and an Irish-American to speak of England as their "mother country," but as Lord Lester mentioned, I spent two years here as a student in the '70s, and we as a family spent a wonderful sabbatical here just before I entered the US government. To this day, we reminisce about the traditional English cuisine that we enjoyed at the various Wagamama restaurants of London and recall our effortless transition into British life: one memory that lingers was of my first visit to the Senior Common Room at All Souls College, where the butler accosted me and asked: "Sir, Chinese or Indian?" When I answered: "Korean," he responded, "I was asking what kind of *tea* you want to drink."

Let me take this opportunity to pay heartfelt thanks to our Chairman, Lord Lester, and Lady Lester, both of whom have made such remarkable contributions to the cause of human rights in this country and the world. When I first met them a decade ago, I casually mentioned my interest in returning to England for my sabbatical. It will not surprise those of you who know Antony Lester to hear that from that moment on, I have received more faxes, e-mails and telephone calls from Lord Lester than from the rest of the world combined. But what is really astonishing is that whenever I mention this fact to anyone from London, they invariably say that they have also received more faxes, e-mails and telephone calls from Lord Lester than from the rest of the world combined: which suggests to me that he should henceforth be known as Lord Lester not of Herne Hill, but as Lord Lester of Information Superhighway.

Looking back at the many times I have visited London, I now see that my journeys have brought me back in successive historical eras. When I first came here to study in the mid-70s, the Cold War gripped the world, and America's obsession with Vietnam made many British skeptical of American

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power. When I returned in the mid-90s, soon after the fall of the Berlin Wall, both Americans and the British were caught up in post-Cold War euphoria about the possibilities of globalization. In those optimistic days, we marveled at the possibilities presented by truly global travel, finance, communication, and commerce. Never had America and Britain seemed closer: by airplane, telephone, fax, internet, cell phone, and instant message. The Blair and Clinton Administrations seemed like siblings as they pursued a common strategy of using global cooperation to address emerging global problems.

When I joined the Clinton administration, we used that close partnership to address human rights crises in such unexpected places as Bosnia, Kosovo, East Timor, and Sierra Leone. And when the Twin Towers fell on September 11, all Americans were touched when some of our first calls came not from next door, but from our friends throughout Britain, asking: "Are you all right? Was anyone close to you hurt?" And most touching: "how can we help?"

But by the time I boarded a plane to fly here soon after September 11, the mood had darkened dramatically. As I watched my bags x-rayed, my shoes removed, my nail clipper confiscated, and anyone of Middle Eastern appearance questioned, it struck me that the collapse of the Berlin Wall in 1989 and the collapse of the Twin Towers in 2001 marked the bookends of an age of Anglo-American optimism about globalization.

As enthusiastic as we had become about global communications and travel, September 11 brutally reminded us that terrorists could use precisely the same means of globalization to plan attacks, hijack planes, and fly them into the symbols of American power. The same global technologies that human rights activists like Lord Lester had deployed so successfully to press for enactment of a UK Human Rights Act could now be used by terrorists to disseminate propaganda, to avoid capture, and to move money across borders. And so, on September 11, we passed almost literally out of the light and into the shadows of the age of globalization.

The question I pose tonight, as I return to London in this new age of global pessimism is: *How has the September 11 tragedy changed America's approach toward human rights, abroad and at home?*

In this Lecture, I want to argue that September 11 ended the euphoria brought on by the fall of the Berlin Wall, in which the US and British Governments had adopted the shared strategy of using global cooperation to address emerging global problems. Since that time, the George W. Bush Administration has responded not just incrementally, but with a sweeping new global strategy: an emerging "Bush Doctrine" if you will. We now see that the Bush Administration's startling architectural response to terrorism has five identifiable elements:

First, what I call *Achilles and his heel*. September 11 brought upon America, like Achilles, a schizophrenic sense of both its exceptional power and its exceptional vulnerability. Never has a superpower seemed so powerful and vulnerable at the same time. To prevent further civilian casualties in the war against terrorism, the Bush Doctrine asked: "how can we use our superpower resources to protect our vulnerability?"

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The answer given has been *Homeland Security*, in both the pre-emptive and defensive senses of that term. To preserve American power and prevent future attack, the US government has asserted a novel right under international law to forcibly disarm any country that poses a threat through "pre-emptive self-defense," while at home instituting sweeping strategies of immigration control, security detention, governmental secrecy and information awareness (about which I shall say more shortly).

Third, the Bush Administration has opted for "*strategic unilateralism and tactical multilateralism*," a strategy that resists obedience with international treaties and institutions as too constraining on US national sovereignty. As Strobe Talbott pointed out two weeks ago at Chatham House, the Bush Administration asserts that the "sheer pre-eminence of American power could, in itself, be the ordering and taming principle of a disorderly and dangerous world."

Fourth, beginning with Afghanistan and continuing with Iraq, the administration has asserted a new strategy toward democracy-promotion. For two decades after Ronald Reagan's famous 1982 speech here in Westminster, successive US administrations had supported the global promotion of "democracy from the bottom up" as a fundamental goal of US foreign policy. But since the US invasion of Afghanistan, democracy-promotion efforts have shifted toward top-down, *militarily-imposed democracy*, characterized by US-led military attack, prolonged occupation, and the creation of resource-needy protectorates.

Fifth and finally - and here lies the focus of the rest of my remarks - the Administration has radically shifted its emphasis in human rights. In 1941, Franklin Delano Roosevelt called the allies to arms by painting a vision of the world we were trying to make: a post-war world of four fundamental freedoms: freedom of speech, freedom of religion, freedom from want, freedom from fear.<sup>2</sup>

This framework foreshadowed the post-war human rights construct - embedded in the Universal Declaration of Human Rights and subsequent international covenants - that emphasized comprehensive protection of civil and political rights (freedom of speech and religion), economic, social, and cultural rights (freedom from want), and freedom from gross violations and persecution (e.g., the Refugee Convention, the Genocide Convention, and the Torture Convention).

But after September 11, US administration officials reprioritized "*freedom from fear*" as the number one freedom we need to preserve. Freedom from fear has become the obsessive watchword of US human rights policy.

What are the elements of a US human rights policy fixated on freedom from fear? Let me sketch five:

First: closed government and invasions of privacy.

Second, scapegoating immigrants and refugees

Third, creating *extralegal zones*, most prominently at the US Naval Base at Guantanamo Bay, Cuba;

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Fourth, creating *extralegal persons* - particularly detainees labeled "enemy combatants," who, although American citizens on American soil, are accorded no legal avenues to assert their rights.

And fifth: a reduced US human rights presence throughout the rest of the globe.

Most of these elements are familiar to you, but let me offer some vignettes that illustrate these five faces of our human rights transformation.

First: closed government and invasions of privacy. Two core tenets of a post-Watergate world had been that our government does not spy on its citizens, and that US citizens should see what our government is doing. But since September 11, classification of government documents has risen to new highs and declassification activity fallen to new lows. The PATRIOT Act, passed almost without dissent after September 11, authorized the Defense Department to develop a project to promote something called "Total Information Awareness" awareness previously possessed, I had thought, only by Lord Lester.

Under this program, the government may now gather huge amounts of information about citizens without proving that they have done anything wrong.

They can access a citizen's records - whether telephone, financial, rental, internet, medical, educational, or library-- without showing any involvement with terrorism. Internet service providers like Compuserve may be forced to produce records based solely on FBI declarations that the information is for an anti-terrorism investigation. And because the PATRIOT Act makes it a crime to reveal that the FBI has searched for such information, a librarian could be prosecuted for publicly refusing to reveal a reader's book selections. The Lawyers Committee for Human Rights reports that 20 American peace activists- including nuns and high school students - were recently flagged as security threats and detained for saying that they were traveling to a rally to protest military aid to Colombia.<sup>23</sup> The entire high school wrestling team of Juneau, Alaska was held up at airports seven times just because one member was the son of a retired Coast Guard officer on the FBI watch list.

Second, scapegoating immigrants and refugees. After September 11, 1200 immigrants were detained, more than 750 based solely on civil immigration violations. In a devastating report, the Justice Department's own Inspector General called the Attorney General's enforcement of immigration laws "indiscriminate and haphazard." The Immigration and Naturalization Service, which formerly had a mandate for humanitarian relief as well for border protection, has now been made an arm of the Department of Homeland Security. The impact on particular groups has been devastating: the number of refugees resettled in America declined from 90,000 per year before September 11 to less than a third that number, 27,000 in 2003. The Pakistani population of Atlantic County, New Jersey has fallen by half. By one estimate, since 9/11, more than 15,000 Pakistani residents of a neighborhood in Brooklyn have left the United States for Pakistan, Canada or Europe. I am told that one of the leading law graduates of Iran, who had a full scholarship to Harvard Law School, and had the full support of Senator Ted Kennedy was denied a visa solely because he was Iranian. Just think of how perverse that is to our claimed goal of seeking to promote democracy and the rule of law in

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Iran: denying Iran's finest law students the opportunities to study law in America's top law schools.

Third, the creation of lands without law, *extralegal zones*, most prominently at the US Naval Base at Guantanamo Bay, Cuba. As the lawyer for both the Haitian and Cuban refugees, I have spent as much time on Guantanamo as any American lawyer. As I can describe further in the question period, Guantanamo is an extremely strange place, well-depicted in that famous Jack Nicholson film, *A Few Good Men*. As I speak, some 660 prisoners from 42 countries are being held on Guantanamo, some for nearly two years. Three children are being detained, including one as young as 13, several of the detainees are more than 70 years old and one claims to be more than 100 years old. Courtrooms are being built to try six detainees, including two British subjects who have been declared eligible for trial by military commission. There have been 32 reported suicide attempts.

Yet even as I speak, the Bush Administration is literally pouring concrete around its detention policy, building another \$25 million concrete building on Guantanamo that will increase the detention capacity to 1100 people, and greatly expand the US ability to do interrogations.

Fourth, creating *extralegal persons*. In two cases that are quickly working their way to our Supreme Court, the Yasser Hamdi case in the Fourth Circuit Court of Appeals in Virginia and the Jose Padilla case in the Second Circuit (NY federal) appeals court, two American citizens on American soil have been designated as "enemy combatants," who have been accorded no legal channels to assert their rights.

The racial disparities in the use of this label are glaring. Contrast, for example, the treatment of Yasser Hamdi, a Louisiana citizen of Saudi Arabian ancestry, with that of John Walker Lindh - the famous "American Taliban"- a white American from a wealthy family in the San Francisco Bay area. Both are US citizens; both were captured in Afghanistan in late 2001 by the Northern Alliance; both were handed over to US forces, who eventually brought them to the United States. But federal prosecutors brought criminal charges against Lindh, who got an expensive lawyer and eventually plea bargained to a prison term. Meanwhile, Hamdi has remained in incommunicado detention without a lawyer in a South Carolina military brig for the past 16 months.

These activities have not only diminished America's human rights reputation, they have given cover to many foreign governments who want to use "antiterrorism" to justify their own crackdowns on human rights. To illustrate:

- In Indonesia, the TNI military has cited America's use of Guantanamo to propose building an offshore prison camp on Nasi Island to hold suspected terrorists from Aceh.
- In Australia, Parliament passed laws mandating the forcible transfer of refugees seeking entry to detention facilities in Nauru, where children as young as three years old are being held so that Australia does not (in the words of its defense minister) become a "pipeline for terrorists."
- In China, the founder of the democracy magazine *China Spring*, Wang Bingzhang, was recently sentenced to life imprisonment for "organizing and leading a terrorist group," the first time, apparently, that the Chinese government has charged a democracy activist with terrorism.

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- In Russia, Vladimir Putin on September 12, 2001 declared that the US and Russia "have a common foe" because Bin Laden's people are connected to events in Chechnya. Within months the US government had added three Chechen groups to its list of foreign terrorist organizations.
- In January 2002, the Bosnian Human Rights Chamber-a body the United States helped create in the Dayton Accords- ordered that four Algerians with Bosnian citizenship not be handed over the United States and the Bosnian Supreme Court ordered them released for lack of evidence. But despite these rulings, they were shipped to Guantanamo, where they remain today in what a judge on the Bosnian Supreme Court has called "an extra-legal procedure."
- In Egypt, the government extended for another three years its controversial emergency law, which allow it to detain suspected national security threats almost indefinitely without charge, to ban public demonstrations, and to try citizens before military tribunals. President Mubarak announced that America's parallel policies proved that "we were right from the beginning in using all means, including military tribunals, to combat terrorism...." He said, "There is no doubt that ....September 11 created a new concept of democracy that differs from the concept that Western states defended before these events, especially in regard to the freedom of the individual."
- Despite labeling as part of the "Axis of Evil" Iran and North Korea (which I visited in November 2000 with Secretary of State Madeleine Albright), the Bush Administration has pursued no visible human rights strategy toward either country.
- Just after attacking Afghanistan in 2002, President Bush announced that: "The United States will always stand for the non-negotiable demands of human dignity: [including] respect for women." Yet only months later, the Administration again declined to seek US ratification of the UN Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW).
- And finally, just three years ago, when I defended America's first report on compliance with the Torture Convention in Geneva, I announced that the United States is unalterably committed to a world without torture. Yet on Sunday, I read a telling story by Mark Bowden in the *Observer* magazine that two Afghan detainees have died in US custody at Bagram Air Base from "blunt force trauma" and that a third Afghan man recently died-- reportedly of a heart attack-- in a US holding facility in Asadabad, Afghanistan. While we do not know if they were tortured, American military spokesmen in Afghanistan confirmed that our interrogators disrupt sleep, force people to stand for extended periods of time, and awaken subjects every few minutes to disorient them: "stress and duress" tactics remarkably similar to the tactics in Northern Ireland that the European Court of Human Rights outlawed in 1978 and the Israeli security practices that the Israeli Supreme Court outlawed in 1999. When questioned about this conduct by the *Washington Post*, a US intelligence officer said, "If you don't violate someone's human rights some of the time, you probably aren't doing your job."

I could go on, but you see my point. These vignettes are all part of what the Lawyers Committee for Human Rights calls "the new normal." The image they

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use is that of a frog in hot water. If suddenly placed in very hot water, the frog would hop out. But when a frog immersed in water is gradually heated to the same temperature, it stays there until it asphyxiates, because it recognizes only too late the radical implications of an increasingly dangerous situation.

If these are the elements of the emerging Bush Doctrine, what makes it so troubling? Because each prong places the US in the position of promoting double standards, one for itself, and another for the rest of the world. The emerging Bush Doctrine has placed startling pressure upon the very global structure of human rights and international law that the United States itself designed and supported since 1948. In a remarkably short time, the United States has moved from the principal supporter of that system to its most visible outlier.

Around the globe, America's human rights policy has visibly softened, now subsumed under the all-encompassing banner of the "war against terrorism." And at home, the PATRIOT Act, military commissions, Guantanamo, and the indefinite detention of American citizens have placed the United States in the odd position of condoning deep intrusions by law even while creating zones and persons outside the law.

At this point, you are surely asking: "Why did this happen?" and "What can we do about it?" In talking to British friends, I am struck by how many answer the first question - "Why?" - with a cultural explanation: what I sometimes call the "Bowling for Columbine" explanation, after Michael Moore's documentary film about America's obsession with guns. The reasons for America's recent human rights transformation, they believe, is rooted in America's national culture of unilateralism, parochialism, and obsession with power. With respect, let me urge you to see it differently. The Bush Doctrine, I believe, is less a broad manifestation of American national character than of short-sighted decisions made by a particularly extreme American administration.

Many, if not most, Americans, would have supported dealing with September 11 in a different way. Imagine, for example, the Bush Administration dealing with September 11 through the then-prevailing multilateralist strategy of using global cooperation to solve global problems. On the day after the attack, President Bush could have flown to New York to stand in solidarity with the world's ambassadors in front of the United Nations. He could have supported the International Criminal Court as a way of bringing the Osama bin Ladens and Sad dam Husseins of the world to justice. He could have refrained from invading Iraq without a U.N. resolution and he could have maintained the Kyoto Protocol, the Anti-Ballistic Missile Treaty, and a host of human rights treaties to signal the need for even greater global solidarity in a time of terror. I am convinced that the American people would have supported him in all those efforts.

So to those who would blame American culture for America's unilateralism, let me remind you that not every American is equally well-placed to promote American unilateralism. In recent years, such individuals as George W. Bush, Donald Rumsfeld, John Bolton, Jesse Helms, and Justice Antonin Scalia have

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held particularly strategic positions that have enabled them to promote this sea-change in US human rights policy.

But if particular politicians and judges are part of the problem, they are also part of the solution. For in recent months, American human rights lawyers have launched multiple efforts to counter these trends, through lawsuits seeking to persuade judges to construe American law in light of universal human rights principles.

What are some signs of this trend? I have mentioned the ongoing appeals in the Hamdi and Padilla cases, one or both of which may soon go to the US Supreme Court. The British courts in the Abassi case sharply criticized the US government's conduct on Guantanamo and a legal challenge to the detentions on Guantanamo is currently pending before the Inter-American Commission on Human Rights. The International Committee on the Red Cross has recently broken its silence to condemn the Guantanamo policy, and a group of former American diplomats and former American prisoners of war have challenged the Administration's flouting of the Geneva Conventions before the US Supreme Court.

With each passing day, I see growing resistance to these policies among ordinary Americans. Some promising signs:

- Career bureaucrats have started to challenge the Administration's policies for undoing years of hard work. As I mentioned, the Justice Department's Inspector General sharply criticized the Department's immigrant detention policies.
- Military judges and former federal prosecutors have expressed dismay over military commissions. The National Association of Criminal Defense Lawyers took the position that it is unethical for a criminal defense lawyer to represent a person accused before these military commissions because the conditions imposed upon defense counsel before these commissions make it impossible for counsel to provide adequate or ethical representation."
- A group of former federal judges filed a brief in the Padilla case challenging the President's detention of American citizens without express congressional authorization. They were joined in those efforts by two conservative libertarian groups: the CATO Institute and the Rutherford Institute.
- Career diplomats have told me of early retirements by those who refuse to implement what they view as discriminatory visa policies.
- Librarians and booksellers have joined a bipartisan group of 133 congressional representatives to press for a law, called the Freedom to Read Protection Act (H.R. 1157), that would shield library and bookstore records from unchecked government surveillance.

These grassroots efforts are finally reaching the political actors. The public outcry following the leak of a proposed second PATRIOT Act has put that legislation on hold. Resolutions opposing the first PATRIOT Act have passed in three states and 162 municipalities. The House of Representatives has refused to provide funding for the part of the PATRIOT Act that allows so-called "sneak and peek" searches of private property without prompt notice to the resident. A battle is brewing in Congress over whether parts of the current Act should be eliminated in 2005.

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Most important, the key cases are finally starting to make their way to the United States Supreme Court. Now some of you may ask: what influence can a combination of international pressure and protest from ordinary Americans have on a Court as conservative as ours?

Let me mention three recent cases that may give hope. First, in the 2002 case of *Atkins v. Virginia*, a number of us filed *amicus curiae* briefs encouraging the Court to consider the opinions of foreign and international courts in deciding whether such executions constitute "cruel and unusual punishment" forbidden by our Eighth Amendment. In 1989, Justice Scalia had written for the Court that in such death penalty cases "it is [only] American conceptions of decency that are dispositive." But in the *Atkins* case, six Justices overrode Justice Scalia's dissent and struck down the execution of persons with mental retardation, noting that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."

Similarly, last June, Justices Ginsburg and Breyer cited the international understanding of affirmative action in the Convention on the Elimination of All Forms of Racial Discrimination (CERD) in construing our constitutional guarantee of equal protection to permit the affirmative action policies pursued by the University of Michigan.

Just three days later, in *Lawrence v. Texas*, the Supreme Court finally overruled its seventeen-year old decision in *Bowers v. Hardwick*, which had permitted states to ban same-sex sodomy among consenting adults. Representing former UN Human Rights High Commissioner Mary Robinson and several other human rights groups, I had filed an *amicus* brief urging the Court to consider two decades of European human rights precedent rejecting the criminalization of same-sex sodomy as a violation of the European Convention's right to privacy.

Last June, in a 6-3 vote, Justice Anthony Kennedy cited our brief, writing that the rationale of *Bowers* had been rejected by "values we [Americans] share with a wider civilization." The Court noted that "the right petitioners seek in this case has been accepted as an integral part of human freedom in many other countries" and that "[t]here has been no showing in [the US] that governmental interest in circumscribing personal choice is somehow more legitimate or urgent."

What all this means is that when the September 11 cases get to the Supreme Court, American human rights lawyers can similarly argue that the legality of our policies must be evaluated by "values we [Americans] share with a wider civilization." Citing *Lawrence*, human rights advocates can urge the Court to decide whether the rights being asserted by detainees like Hamdi, Padilla and those on Guantanamo "have been accepted as an integral part of human freedom in many other countries" and can argue that the US government has not demonstrated "that the governmental interest in circumscribing [these freedoms] is somehow more legitimate or urgent" in the US than in other countries that have seen fit to forego such legal restrictions.

Whether our Supreme Court will accept these arguments remains unclear.

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But these cases will likely determine whether historians will remember these past two years as a fundamental change or as only a temporary eclipse in America's human rights leadership.

In closing, let me say that I, for one, have neither given up hope, nor accepted as inevitable, a 21<sup>st</sup> century US human rights policy that is increasingly at odds with core American and universal values. In our Declaration of Independence, Thomas Jefferson wrote: "When in course of human events, it becomes necessary for one people....to assume among the Powers of the Earth, the separate and equal Station to which the Laws of Nature....entitle them, a decent respect to the opinions of mankind requires that they should declare the causes....." Most patriotic Americans, I believe, still think that our human rights policy should pay "decent respect to the opinions of mankind." As a nation conceived in liberty and dedicated to certain inalienable rights, our country has strong primal instincts to address the world not just in the language of power, but through a combination of power and principle.

In 1759, Benjamin Franklin wrote: "They that can give up essential liberty to obtain a little temporary safety deserve neither." But in the months ahead, I believe, we can both obtain our security and preserve our essential liberty, but only so long as we have courage from our courts, commitment from ordinary citizens, and pressure from our foreign allies. Even after September 11, the United States can still stand for human rights, but we can only get there - as four famous Brits have said - with a little help from our friends.

Thank you, and I look forward to answering your questions.

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<sup>1</sup> Gerard C. and Bernice Latrobe Smith Professor of International Law, Yale Law School; US Assistant Secretary of State for Democracy, Human Rights and Labor, 1998-2001. These remarks were delivered on 21 October 2003, at University College, London.

<sup>2</sup> Franklin Delano Roosevelt, Eighth Annual Message to Congress (Jan. 6, 1941), in 3 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS, 1790-1966, at 2855 (Fred L. Israel ed., 1966).

<sup>3</sup> These and other examples in this Lecture are drawn from the Lawyers Committee for Human Rights' excellent report, "Assessing the New Normal: Liberty and Security for the post-September 11 United States" (Sept. 2003), available at [www.lchr.org](http://www.lchr.org).