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**“THE LONG AND WINDING ROAD”:  
REFLECTIONS ON AMERICA’S WAR(S) ON  
TERRORISM AND COUNTERTERRORISM  
EFFORTS POST 9/11**

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HONORABLE FRANCIS J. LARKIN \*

Less than two months after the events of September 11<sup>th</sup>, surely another “Day of Infamy for America”<sup>1</sup>, on November 10, 2001, United States Supreme Court Justice Stephen G. Breyer fulfilled a long standing commitment to address an international Conference of Major City Bar Leaders from around the world sponsored by the Bar Association of the City of New York. Breyer began his remarks acknowledging the horrific nature of the attacks and the incalculable toll, physical and psychic, which the events had taken on the City of New York and the Nation:

Thank you for the invitation to speak this evening. I am grateful for the opportunity to be in New York. Being here helps me understand what New Yorkers have experienced in the last two months. Two weeks ago, I visited the site of the World Trade Center, where I, like you, experienced a

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<sup>1</sup> Franklin D. Roosevelt, President of the United States of America, Address to Congress (Dec. 8, 1941) (quoting an iconic phrase used following Japan’s attack on Pearl Harbor, December 7, 1941; the event which brought the United States into WWII).

range of emotions. I saw what the near worst of human nature can do. I was moved deeply by the memorials, the flowers, the letters, the teddy bears, the photographs, and the groups of relatives of victims moving through the smoke of the ruins to visit those shrines. I wanted to say to each policeman and fireman who I saw thank you for doing what you have done and are doing. And when I saw the relief workers, the construction workers, the clearing and the resettling, I realized that they and we will re-create order out of devastation and chaos. The events of September 11 will continue to bring us together as we learn how to respond.<sup>2</sup>

Even at that early date, Justice Breyer perceived—as did the nation and the world—that the central and defining issue before the country, going forward, would be: how would we respond to an event of such dastardly carnage, cunning and cruelty.

In this regard, Justice Breyer then proceeded to enumerate certain criteria and principles which he hoped might guide the critical “response” to the conceded “infamy”—fully aware that a strong, decisive and justified “response” would surely be coming from the people of this aggrieved and savagely wounded nation.

In his remarks, Justice Breyer envisioned a significant role for members of the legal profession and the indispensable relevance of the Rule of Law in confronting the most testing of emergent issues; because lawyers were the “best qualified for the job, having experience with organizing

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<sup>2</sup> Justice Stephen G. Breyer, Address at an International Conference of Major City Bar Leaders from Around the World, “*After September 11: National and International Legal Tasks*” (2002), in *THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK*, Vol. 57, No. 1-2, at 11 (2002).

and synthesizing numerous facts and complicated issues”<sup>3</sup> associated with major events.

Next, he cited the pertinence of the Rule of Law relevant in myriad ways but in no area more significant than in assessing the appropriate balance between national security and civil liberties in times of exigency and crises.

Again, even at that early date, Justice Breyer demonstrated concern and expectation that civil rights and national security issues would be a central part of the country’s agenda. Obviously, this was born of the realization that these questions had always loomed large during similar crises in our nation’s history—witness the following extended exegesis by the Justice:

Security needs escalate during wartime and potentially conflict with the desire to maintain personal freedom’s peacetime limits. Constructive detailed legal work can be done to confine the potential conflict to areas where it is unavoidable. This is not the first time the United States has been forced to undertake such a balancing . . . . Consider, on the one hand, the Civil War, and instances in which the conflict was serious. Abraham Lincoln suspended the Writ of Habeas Corpus, imprisoned elected legislators suspected of enemy sympathies, declared that those engaging in “any disloyal practice” would be subject to martial law, and had his Postmaster General ban five New York newspapers from the mails after a jury found they contained “vituperative criticism.” Was the President right to restrict civil liberties so severely? Lincoln himself eloquently described the problem. As to habeas corpus, he asked, “Are all the laws but one to go unexecuted and the government itself to go to pieces lest that one

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<sup>3</sup> *Id.* at 13-14 (quoting the legendary former Secretary of War, Henry L. Stimson, himself a leading member of the New York Bar).

be violated?” He added, “It has long been a grave question whether any Government not too strong for the liberties of its people can be strong enough to maintain its existence in great emergencies.” The dilemma is clear.

[Again], we can contrast certain curtailments of civil liberties that took place during World War I. Congress, for example, enacted a statute that made it a crime to “advocate...forcible resistance to any law.” Initially the Supreme Court unanimously upheld the conviction of Charles Schenck for printing up leaflets urging resistance to the draft. But, when the Postmaster General banned from the mails a publication called the Masses because of four anti-capitalist cartoons, including one labeled “conscription” showing a figure grinding down figures symbolizing democracy, labor and the family, Judge Learned Hand objected on the ground that the cartoon could not “be said to advocate” forcible “resistance to the draft.” And when the Supreme Court affirmed a conviction based upon a pamphlet stating that “our entry into [the war] was determined by...J.P. Morgan’s loans,” Justice Holmes and Brandeis dissented. Contrast as well the infamous instance during World War II when the government removed American citizens of Japanese descent from California and interned them in camps. The Supreme Court found the internment constitutional.

The majority said that the military believed in early 1942 that the relocation was necessary, either to help protect the West Coast from Japanese military attack or to help protect the Japanese Americans from harm by their fellow citizens. The three dissenters, Justices Jackson,

Murphy and Rutledge, disagreed. They said that there was no justification as of 1942; and they added that, regardless, no one could reasonably claim that the internment was still necessary then, in 1944. I agree with the dissenters and with Judge Hand, Justice Holmes and Justice Brandeis, and I suspect most of you do too, because I believe that these severe curtailments of wartime liberty were not necessary. I doubt that they were justified by any security need. By way of contrast the Civil War examples reflect greater security needs. I contrast these examples with the Civil War curtailments in order to suggest that one important legal task is to draft laws that simply avoid the civil liberties/security conflict.<sup>4</sup>

Broadening his compass, Justice Breyer continued to demonstrate the relevance of lawyers in times of national crisis:

Traditional legal skills, focusing upon detail can help. They can help. They can seek precision in definitions, say of “terrorism” or “terrorist.” They can examine the nature of the security threat and seek ways to tailor statutes so that they aim directly at that threat. Again, they can focus upon the nature of any resulting civil liberties concern, asking whether that concern has practical importance or exists primarily in the realm of the theoretical. They can suggest procedures designed to avoid the conflict, for example, through expedition of (rather than abolition of) judicial review. This kind of detail—definition, focus, tailoring,

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<sup>4</sup> *Id.* at 15-17 (discussing *Ex parte Merryman*, 17 F. Cas. 144 (C.D.Md. 1861); *Schenck v. United States*, 249 U.S. 47 (1919); *Korematsu v. United States*, 323 U.S. 214 (1945)).

procedure—are grist for the lawyer’s mill. However dull they may sound, in practice they can avoid the unnecessary conflict and in that way help to protect traditional civil liberties interests.<sup>5</sup>

Justice Breyer concluded his memorable address as follows:

Indeed, the...areas I have mentioned have in common the fact that they all raise professional challenges. They all grow out of the September 11 events, they all seem relevant to our response to those events, and they all ask lawyers to respond with the legal skills they best know how to exercise: an understanding of institutions, a focus upon detail, and an ability to work constructively with detail both to preserve competing principles and to achieve agreement that otherwise might not exist.

I mention those challenges to you this evening because of the unique circumstances that surround this conference. The international community has been shaken by the magnitude of the September 11 attacks, and New York has felt their impact the strongest. Our sense of security has been shaken, our freedom of movement reduced, and our faith in human kind compromised. Yet despite these terrible events, we have witnessed an outpouring of support as people from across the nation and across the globe have given blood, have volunteered by the thousands, sent donations and messages of support, donated food, and provided manual labor at Ground Zero. We, as citizens, are taking steps to rebuild our cities, to reorganize our government, and to reaffirm

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<sup>5</sup> *Id.* at 17.

our values. Now, we as lawyers, must build institutions, open international dialogues, and create laws that respond to our changing needs. Our special legal and analytical skills provide us with a unique opportunity to contribute in a meaningful way—not only to overcome the events of the past but to prevent their repetition, not only to solve present problems, but to do so in a way that exemplifies and protects the democratic values that characterize our systems of law and which are now under attack. Those values are embedded in our laws' details where they are continuously practiced as part of our daily lives. And that makes all the difference . . . .<sup>6</sup>

Given the time, place and audience—a group of lawyers national and international, concerned with the effects of terrorism on large urban cities, gathered virtually at the “Ground Zero” of our own national tragedy—it was truly a remarkable address, made even more prescient, sensitive and balanced—on re-reading almost a decade later.

To be sure, Justice Breyer was not “President” Breyer, “General” Breyer, “Senator” Breyer. In his earlier years, he had been a law professor, briefly a Counsel for a Congressional Committee, and later an Appellate Judge on the United States Court of Appeals. At the time he spoke, he was still a relatively new member of the United States Supreme Court. His focus, obviously, was not suggesting imperatives for national policy. His audience consisted of members of the legal profession. His challenge to that audience, quite simply, was to remind them how a firm and nuanced application of the Rule of Law and drawing on the “Better Angels” of our legal traditions, in past times of national crisis, would best serve our nation, nothing more.

And, yet it seems evident that, almost subliminally, the inarticulate thrust of the entire Address consisted of questions (and “challenges”) addressed to the nation at large and by

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<sup>6</sup> *Id.* at 19-20.

extension to our elected officials—national and local. Those officials, most notably, the President of the United States and his closest advisors, civilian and military, who would soon be charged with the awesome challenge of *how* we would respond; *where* we would respond, and longer range, in what would consist the instrumentalities construct of that response, in terms of processes, legality and lethality. And, thus, still at heart a law professor, in effect, he posed questions like these to that audience—and perhaps to an audience beyond that hall.

First, the most general, vital, vexing and consequential query: What would be the appropriate balance between national security and civil liberties? And, in striking the balance, what deference, if any, would be accorded to the Rule of Law and our traditions of fairness established in the Constitution and evolving over all the years of our existence?

As a nation, in fortitude and fairness, how would we answer cognate questions? What is “terrorism” and who is a “terrorist” in the real life existential sense?<sup>7</sup> And still another subsidiary question: How would elected officials react, when, inevitably, issues arose questioning the fairness of those definitions when applied to certain individuals or organizations?

In Breyer’s words, would these officials enact “statutes so that they aim directly at (perceived) threats... [and, asking further, whether those concerns have] practical importance or exist primarily in the realm of the theoretical.”<sup>8</sup>

Further, with even greater specificity and prescience, Breyer posed the question: Would our elected officials “suggest procedures designed to avoid conflict” through expedition (rather than abolition) of judicial review?<sup>9</sup> Would they seek to avoid fermenting internal discord or conflict

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<sup>7</sup> *Id.* at 17.

<sup>8</sup> Justice Stephen G. Breyer, Address at an International Conference of Major City Bar Leaders from Around the World, “*After September 11: National and International Legal Tasks*” (2002), in *THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK*, Vol. 57, No. 1-2, at 17 (2002).

<sup>9</sup> *Id.*

among the citizens and “in that way help to protect traditional civil liberties interests.”<sup>10</sup>

Finally, as Breyer put it on that now seemingly long ago evening, speaking not only to the lawyers gathered in the auditorium of the Bar Association of the City of New York, but, perhaps, to the President of the United States and our top elected officials: As a nation, would we be up to the challenge of meeting the new responsibilities thrust upon us so suddenly and savagely on 9/11; and evermore significantly “. . . do so in a way that exemplifies and protects the democratic values that characterize our system of law which are now under attack. Those values embedded in our laws’ details where they are . . . practiced as part of our daily lives.”<sup>11</sup> This practice and way of life, according to Breyer, “makes all the difference.”<sup>12</sup>

As I write these words, it is almost a decade since Justice Breyer delivered his address. Last evening, August 31, 2010, President Obama delivered another speech. He spoke from his desk in the Oval Office. He declared that the War in Iraq was over and the last combat troops were leaving the country.

In the background of my study, the music of the Beatles is playing softly on the radio. Recently there have been a number of remembrances, commemorations and tributes marking the 30<sup>th</sup> anniversary of the death of John Lennon. During the evening, two familiar songs touched me in a special way. The first, a part of the title of this piece is “The Long and Winding Road,”<sup>13</sup> the second will serve as an Epilogue for this writing.

Since 9/11, it has, indeed been a long and winding road, sand swept, blood-soaked and with tragic milestones to mark the way. In Iraq alone, quite apart from Afghanistan—the

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 19-20.

<sup>12</sup> *Id.* at 20 (The language resonates of Robert Frost’s memorable imagery in his poem, *The Road Not Taken*: “Two roads diverged in a wood, and I—I took the one less traveled by, and that has made all the difference.” ROBERT FROST, *THE ROAD NOT TAKEN AND OTHER POEMS* 1 (Dover Thrift Editions 1993)).

<sup>13</sup> PAUL MCCARTNEY, *The Long and Winding Road*, on *LET IT BE* (Capitol Records 1968).

numbers are grim: more than 4,400 Americans dead and some 35,000 wounded.<sup>14</sup> As a result of the devilish concealed and lethal “IDU’s” many, many of the wounded have been left with multiple life-changing lost limbs. And numbers less firm but widely reported: at least 100,000 Iraqis dead.<sup>15</sup>

To his credit, on the day of his Oval Office Address to the Nation, President Obama flew to Fort Bliss, Texas to extend thanks and congratulations to the valiant military men and women who have selflessly and courageously bore the brunt of our nation’s recent wars. It was a heartfelt thanks and one which our military so richly deserved. President Obama saluted the soldiers saying, “At every turn, America’s men and women in uniform have served with courage and resolve.”<sup>16</sup> President Obama then added that there were patriots who supported this war and patriots who opposed and that all of us are united in appreciation for our servicemen and women and our hope for Iraq’s future.<sup>17</sup>

In his remarks, Obama declared no victory because there was “no victory to declare.”<sup>18</sup> The decision to invade Iraq was and remains a dramatically divisive judgment. To this day, critics are legion and passionate. Perhaps one of the most searing indictments of the decision came from Peter W. Galbraith, who served as the first U.S. Ambassador to Croatia. In his book: *Unintended Consequences: How War in Iraq Strengthened American’s Enemies* he enumerated a range of ways in which the Iraqi War seriously damaged America’s interests throughout the World.

George W. Bush launched and lost America’s Iraq War. Losing is just one way in which the Iraq War did not turn out as planned.

A war intended to eliminate the threat from Saddam Hussein’s nonexistent weapons of

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<sup>14</sup> Editorial, *The War in Iraq*, N.Y. TIMES, Sept. 1, 2010, at A22.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

mass destruction ended up with Iran and North Korea much closer to having deployable nuclear weapons.

A war intended to fight terror has helped terrorists.

A war intended to bring freedom and democracy to Iraq now has U.S. troops fighting pro-Iranian Shiite theocrats and alongside unreformed Baathists.

A war intended to undermine Iran's ayatollahs has resulted in a historic victory for Iran. Iranian-backed political parties control Iraq's government and armed forces, giving Iran a role in Iraq that it has not had in four centuries.

A war intended to promote democracy in the Middle East has set it back.

A war intended to intimidate Syria and make Israel more secure has left Israel more threatened and Syria less isolated.

A war intended to enhance America's relations with moderate Islam has made Turkey among the most anti-American countries in the world.

A war intended to showcase American power has highlighted the deficiencies of U.S. intelligence, the incompetence of American administration, and the limitations on the American military.

A war intended to boost American global leadership has driven U.S. prestige to an all-time low.

A war intended to consolidate Republican power in Washington for a generation cost the GOP control of both houses of Congress in 2006, and seems likely to help elect an anti-war Democrat president in 2008.

A war intended to make America more secure has left the country weaker.<sup>19</sup>

On the domestic scene, the Bush counterterrorism measures have been severely criticized from many aspects—essentially because tilted strongly towards increasing the power of the Presidency in all areas—epitomizing the so-called “unitary Presidency” to a degree virtually unparalleled in American history.<sup>20</sup>

However, in what sometimes seems to be overwhelming negativity against former President Bush, perhaps, all of us should take a step backward and try at least a modicum of intellectual modesty. Searching analysis is always meaningfully enhanced by hindsight. The fact remains, as supporters of Bush constantly remind us, no successful attack against America on the scale of the Twin Towers has taken place under the tenure of George Bush (although, clearly there have been some near misses). In this regard, *The Boston Globe*—certainly no fan of the Bush Administration or its

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<sup>19</sup> PETER W. GALBRAITH, UNINTENDED CONSEQUENCES, 1-2 (Simon & Schuster 2008) (This material originally appeared bulleted in the original source.).

<sup>20</sup> See MICHAEL E. TIGAR, THINKING ABOUT TERRORISM: THE THREAT TO CIVIL LIBERTIES IN TIMES OF NATIONAL EMERGENCY (2007); THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE (David Cole, ed., The New Press) (2009); Jonathan Shaw, *Habeas Corpus in an Age of Terrorism*, HARV. MAG., Jan.-Feb. 2009, at 24; PHILLIPE SANDS, LAWLESS WORLD: THE WHISTLE-BLOWING ACCOUNT OF HOW BUSH AND BLAIR ARE TAKING THE LAW INTO THEIR OWN HANDS (2005); JAMES MANN, RISE OF THE VULCANS: THE HISTORY OF BUSH’S WAR CABINETS (2004); BRUCE FEIN, AMERICAN EMPIRE: BEFORE THE FALL (2010); RICHARD A. CLARKE, AGAINST ALL ENEMIES: INSIDE AMERICA’S WAR ON TERROR (2004); CHARLES FRIED & GREGORY FRIED, BECAUSE IT IS WRONG: TORTURE, PRIVACY AND PRESIDENTIAL POWER IN THE AGE OF TERROR (2010).

policies—wrote the following on its Editorial Page, following the release of his memoir *Decision Points*:

Much of the liberal anger against Bush was deeply felt and based on specific actions; it wasn't mindless, any more than conservative opposition to President Obama's health care and economic policies is mindless. (Other furies, such as the conspiracy theory about Obama's birth certificate, are indeed expressions of unthinking anger.) But this is a good time for Bush's opponents to consider him in a different light. In retrospect, his refusal to blame Islam after 9/11 was a courageous act. It wasn't until Bush left the stage that some of his supporters began opposing mosques and equating all Muslims with terrorism. Likewise, Bush moved the Republican Party away from race- and gender-based politics. He ran an inclusive administration. His stand on immigration was far-sighted.

These accomplishments have been overshadowed by Bush's actions overseas after the 9/11 attacks. He rallied the nation but then squandered all that good will and more in the Iraq war. The war, and the lengths to which he defended it, obscures the rest of his legacy. There's nothing unfair about that. But all who chafed at the way he turned the war into a test of patriotism should also recognize that every presidential record is, in the end, a balancing act.<sup>21</sup>

At all events, as we move closer to the end of the decade, an increasing national consensus appears to be that the

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<sup>21</sup> Editorial, *Bush's Memoir*, THE BOSTON GLOBE, Nov. 10, 2010, at A14.

decision to move against Iraq rather than Afghanistan—and all the events which followed—were to some degree seriously flawed. These ambiguities and “what ifs” were prominently on display in a recent front page story in the *New York Times*. The article was written by David Sanger, a Pulitzer Prize winner for the *Times* and entitled, *Rethinking the Afghanistan War’s What-Ifs*:

Long before Afghanistan became the longest shooting war in American history, the question loomed: Could it have turned out differently?

If only we had been smart enough, the arguments went, the “good war” might not have gone bad. If only we had gone into Tora Bora with overwhelming force in the winter of 2001, and captured Osama bin Laden. If only we had put a substantial force into the country in 2002, rather than assuming that the Taliban had been “eviscerated,” the term used, and now regretted, by American military briefers. If only we had carried through on President George W. Bush’s promise of a “Marshall Plan” for Afghanistan.

If only we had not been distracted by Iraq, or averted our eyes from the Taliban’s resurgence, or confronted the realities of Pakistan’s fighting both sides of the war

If only.

The WikiLeaks revelations of last week gave new life to this sea of second thoughts. The thousands of military reports revealed little that was fundamentally new; many should have been stamped “open secret.” But in their staccato rawness, they offered a ground-level view of how faulty assumptions gave rise to

misjudgments, and how misjudgments cascaded into everyday deadly encounters.

They also laid bare a truth: As recently as two years ago there was still debate in Washington over whether George Bush had fumbled the strategy in Afghanistan and vastly underestimated the resources needed there. Today there is virtually no debate: Liberals and conservatives, generals and even many Bush administration policymakers agree that American approach was seriously flawed for the first six or seven years.

“I don’t know anyone in the top military leadership who doesn’t think we got it wrong between 2002 and 2006,” one senior American commander said recently, declining to speak for attribution in this post-McChrystal era, where blunt, public assessment can lead to a brief and final visit to the Oval Office. “The question is whether the alternatives you hear thrown around would have produced a different result.” And on that, he noted, there is plenty of argument.<sup>22</sup>

Notwithstanding this assessment, it is important to accord credit to President Bush where credit is due, and in many areas, credit was warranted. However, whatever the reason, the war, the economy and so many other negatives, our nation is becoming increasingly polarized—fear and loathing are growing in many precincts—even when discussion turns to the events of 9/11 and its aftermath. An example of this mindset was evidenced in a recent issue of *USA Today*. An Op-Ed Piece in that paper, written by a spouse of an individual who died in the Twin Towers, reads as follows:

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<sup>22</sup> David E. Sanger, *Rethinking the Afghanistan War’s What-Ifs*, N.Y. TIMES, Aug. 1, 2010, at WK1.

Nine years out, what comes to mind when we read about or talk about or even think about 9/11 is anger or fear or mistrust; all the failures and grievances that have hardened our worldview. We've retreated to our small groups of like-minded people whose absolute certainty enables our own; we see nothing in common with those "others" whose politics, faith, background, or outlook don't match ours. We see no reason to make an effort.

If that's 9/11's legacy, if that's how we honor our dead, our country, or our values, I want no part of it.

I don't know whether or when this nation, its leaders or its citizens, might be willing to dial back the outrage and stow the self-serving grandstanding. Maybe we can start with Sept. 11, on which day we can spend more time and energy commemorating the spirit that once brought forth our better selves and bonded us in common purpose.

That's a legacy I would embrace as a far more fitting tribute to those who were killed than any memorial I can imagine.<sup>23</sup>

A similar point was made in a recent column by David Brooks:

It will take a revived patriotism to motivate Americans to do what needs to be done. It will take a revived patriotism to lift people out of their partisan cliques. How can you love your country when you hate the other half of it?

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<sup>23</sup> Nikki Stern, Op-Ed., *An Enduring Legacy of 9/11: Our Hardened Worldview*, USA TODAY, Sept. 8, 2010, at 7.

It will take a revived patriotism to get people to look beyond their short-term financial interest to see the long-term national threat. Do you really love your tax deduction more than America's future greatness? Are you really unwilling to sacrifice your Social Security cost-of-living adjustment at a time when soldiers and Marines are sacrificing their lives for their country in Afghanistan?<sup>24</sup>

Brooks poses important questions—questions which must be answered by each of us. In days of light as well as darkness, we have always been an optimistic people. We have faced challenges and, to use Faulkner's words, “. . . man will not only endure, he will prevail . . .”<sup>25</sup> This day should not be different. There is no question that 9/11 continues to cast its shadows, as does the constant threat of terroristic attacks. But if we are steady, vigilant and courageous, this day will pass and a new dawn will come.

September 11, 2001 was surely evil incarnate. But out of the shadows and embers of such devilish devastation, going forward, for society to “endure”, let alone “prevail”, a “lasting good” must emerge; an enduring immutable and sustainable commitment to peace and non-violence. And, of course, any “lasting good”, however utopian or pragmatic would surely require destruction and eradication of terrorism in all of its diverse incarnations; the eradication and destruction of the machinery of terrorism wherever it is found. Long range, it must be the goal, aspiration and belief that out of the seeds and memory of 9/11 there might come a new sense of hope and optimism among all nations. A new beginning in which nations seek to resolve differences in a calm, ordered and peaceful way; that ultimately out of the memory of that fateful day might come greater understanding between nations and faiths; and above all that there may

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<sup>24</sup> David Brooks, Op-Ed., *National Greatness Agenda*, N.Y. TIMES, Nov. 11, 2010, at A31.

<sup>25</sup> William Faulkner, Banquet Speech upon Acceptance of the Nobel Prize in Literature (Dec. 10, 1950).

come justice and prosperity for the poor and dispossessed, so that people everywhere can see, at least, the chance of a better future through the hard work and creative power of the free citizen, not the violence and savagery of the fanatic.

As earlier suggested, it is arguable that what happened on 9/11 was an event virtually without parallel in the long and bloody history of terrorism. On that day, up to 7,000 people were annihilated, the commercial center of New York reduced to rubble, and in Washington and in a field in Pennsylvania, further death and horror on an unimaginable scale obtained. Tragically, an event of this scale and magnitude brought death and carnage to so many—to people of all races and faiths—for we should never forget that the blood of innocent Muslims were shed along with those of the Christian, Jewish and so many other faiths around the world on that fateful day.

And, of course, there had to be a reaction and there was. As suggested above, in this country and in other nations around the world, laws were changed and new laws enacted, as some would argue to deny basic liberties. But others, with equal fervor would contend with the intention to protect that most basic liberty of all: freedom from terror. Whatever the intention; sadly, we learned that in these transitions—there were inevitable excesses.

As *The Economist* magazine pointed out recently: “[i]n invading Iraq was not the act of a war criminal of a buffoon, as his critics allege, but it was a controversial war that went badly wrong and made America, the victim of 9/11, look like an aggressor.”<sup>26</sup> Whatever the reality, amidst all the talk of war, action and retribution, one of the most fundamental lessons we learned and continue to learn is how fragile are our borders and frontiers in the face of the world’s new challenges. We also learned and continue to learn daily in this post 9/11 period, that conflicts rarely stay within national boundaries. Apart from war, conflict and violence, we have also learned—from the recent lessons of the financial markets, climate change, nuclear proliferation,

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<sup>26</sup> Lexington, *Reassessing Bush: No matter how you re-tell the story, the ending is still unhappy*, *ECONOMIST*, Nov. 13, 2010, at 40.

world trade, and most certainly from the grim lessons of international terrorism—that, as a nation, our self-interest and our mutual interests are today inextricably woven together.

That is why, however achieved, there must be a coming together of nations and of peoples. There must be the power of “community” asserting itself in the face of the world’s new challenges. The real challenge of our day—and we see it everywhere around the world—is how to use the power of “community” to combine it with justice. Again, we are—whether we like it or not—in the “era of globalization.”

By the power of “community”, I mean not each person working for themselves, but working together “as a community” to ensure that everyone, not just the privileged few, get the chance to succeed. These values are not only the right values for this age but they are the indispensable values for this age, the collective ability to further the individual’s interests.

What we must seek to obtain and what must be the governing idea of modern social democracy in our own time must be the idea of community—a sense of community based on the principles of social justice—that “American ideal” that people should rise according to merit not birth—that the test of any decent society is not the contentment of the wealthy and strong, but the commitment to the poor and weak.

If globalization works only for the benefit of the few, then it will fail and deserve to fail. But, if global leaders follow the principles that had served us so well, in this country over the many years and are now seemingly in danger, if they followed the principles that power, wealth and opportunity must be in the hands of the many, not just the few, if we make that our guiding light for the global, then it will be not only a force for good, but, in my view, the surest and most certain way of defeating terrorism and, most importantly, the surely most fitting memorial to those who perished on 9/11.

In this regard, let’s consider some of the critical challenges, with global repercussions we must face in the years ahead individually or collectively. Here are just a few examples: Osama bin Laden says that the United States is at war with Islam. The charge is false, but Muslims are obviously concerned when an obscure preacher in Florida

seeking his 15-minutes of fame threatens to burn a Koran—a bizarre episode duly documented on YouTube.<sup>27</sup> It can rationally be argued that Pastor Jones was “un-American”—admittedly a serious charge—not meant to deny his First Amendment rights but rather to affirm as strongly as possible the principle of religious tolerance that has long defined us.

Fortunately, one individual realized this distinction and spoke eloquently to the decisive point. As is now familiar in New York, a bitter controversy arose over the building of a mosque and community center near Ground Zero. Michael Bloomberg, the Jewish Mayor of New York, immediately became a staunch and passionate advocate of the new building. In excerpts of his remarks, reproduced here, Bloomberg reminds his audience that we live in a constitutional democracy, something that certain citizens pay lip service to until it becomes inconvenient:

We've come here to Governors Island to stand where the earliest settlers first set foot in New Amsterdam, and where the seeds of religious tolerance were first planted. We come here to see the inspiring symbol of liberty more than 250 years later would greet millions of immigrants in this harbor. And we come here to state as strongly as ever, this is the freest city in the world. That's what makes New York special and different and strong.

Our doors are open to everyone. Everyone with a dream and a willingness to work hard and play by the rules. New York City was built by immigrants, and it's sustained by immigrants—by people from more than 100 different countries speaking more than 200 different languages and professing every faith. And whether your parents were born here or

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<sup>27</sup> Terry Jones, *Protected by the 1<sup>st</sup> and 2<sup>nd</sup> Amendments*, You Tube (Sept. 16, 2010), [http://www.youtube.com/watch?v=i\\_sSjehILzc](http://www.youtube.com/watch?v=i_sSjehILzc).

you came here yesterday, you are a New Yorker.

We may not always agree with every one of our neighbors. That's life. And it's part of living in such a diverse and dense city. But we also recognize that part of being a New Yorker is living with your neighbors in mutual respect and tolerance. It was exactly that spirit of openness and acceptance that was attacked on 9/11, 2001.

On that day, 3,000 people were killed because some murderous fanatics didn't want us to enjoy the freedoms to profess our own faiths, to speak our own minds, to follow our own dreams, and to live our own lives.

Of all our precious freedoms, the most important may be the freedom to worship as we wish. And it is a freedom that even here — in a city that is rooted in Dutch tolerance— was hard-won over many years. "In the mid-1650s, the small Jewish community living in lower Manhattan petitioned Dutch governor Peter Stuyvesant for the right to build a synagogue -and they were turned down.

In 1657, when Stuyvesant also prohibited Quakers from holding meetings, a group of non-Quakers in Queens signed the Flushing Remonstrance, a petition in defense of the right of Quakers and others to freely practice their religion. It was perhaps the first formal political petition for religious freedom in the American colonies, and the organizer was thrown in jail and then banished from New Amsterdam.

In the 1700s, even as religious freedom took hold in America, Catholics in New York were effectively prohibited from practicing their religion, and priests could be arrested. Largely as a result, the first Catholic parish in New York City was not established until the 1780s, St. Peter's on Barclay Street, which still stands just one block north of the World Trade Center site, and one block south of the proposed mosque and community center.

The simple fact is, this building is private property, and the owners have a right to use the building as a house of worship, and the government has no right whatsoever to deny that right.

And if it were tried, the courts would almost certainly strike it down as a violation of the U.S. Constitution. Whatever you may think of the proposed mosque and community center, lost in the heat of the debate has been a basic question: Should government attempt to deny private citizens the right to build a house of worship on private property based on their particular religion? That may happen in other countries, but we should never allow it to happen here.<sup>28</sup>

Mayor Bloomberg amplified these remarks in another article in *Time Magazine* entitled: *Ground Zero: Out of the Ashes*:

The rebuilding of the World Trade Center site has been perhaps the most complicated—and

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<sup>28</sup> Michael Bloomberg, Remarks on the Mosque near Ground Zero given on Governor's Island (Aug. 3, 2010) (reproduced by Jon Carrol, *A Little Something About Religious Freedom*, S.F. CHRON., Aug. 6, 2010, at F8).

important—construction project in American history.

A tower that will rise 1,776 feet is now 48 stories above ground. Thousands of construction workers are on-site night and day, building not only new skyscrapers but also an inspiring memorial and museum, which will open on the 10th anniversary of 9/11.

The rebuilding of the site is an affirmation of the American spirit—of our faith in our future and in our freedoms. The engineers and hard hats at the World Trade Center site recognize that they are working on more than just a reconstruction job. They are rebuilding a civic and commercial center that symbolizes the openness and opportunity that have always defined our city. And most important, they are helping our country fulfill a sacred obligation to those we lost, honoring their memory—and our nation's principles and values—with every steel beam that swings into place.<sup>29</sup>

Other examples abound. As Justice Breyer reminded his audience at the outset of this essay, we should never forget that we are governed under the Rule of Law. We believe in this country that people are entitled to due process within a transparent legal system. If so, then why do we hesitate to close Guantanamo and continue to resist bringing detainees to trial in civilian courts where, historically, we have successfully prosecuted terrorists for decades? Some have argued that terrorists are not entitled to a day in court at all. The United States Supreme Court gave a resounding negative answer to this in the *Boumediene* case.<sup>30</sup>

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<sup>29</sup> Michael Bloomberg, *Ground Zero: Out of the Ashes*, TIME, Dec. 6, 2010, at 42.

<sup>30</sup> *Boumediene v. Bush*, 553 U.S. 723 (2008).

In another example, the President has advanced a vision of a world without nuclear weapons. To get there, there must be fewer of them. At this writing it is hoped that the Senate will ratify the NEW START treaty<sup>31</sup> which mandates reductions in the nuclear weapons by the United States and Russia. When the first START Treaty passed in 1991<sup>32</sup>, the Senate ratified it by a vote of 93-6. No one can credibly argue that we are in greater danger of a nuclear confrontation with Russia today than we were 20 years ago. However, because of seemingly intractable partisan struggles, it is questionable whether the Senate will be able to muster the votes to ratify the treaty. If this is a negative note on the issue, what message will that send to nuclear aspirants like Iran and North Korea if we are unwilling to safely reduce *our* reliance on nuclear weapons?<sup>33</sup>

In this increasingly global economy, it has become starkly clear that in order to stay competitive as the baby boomers retire our population needs to get younger. Obviously, one effective way to achieve this goal is through immigration. Right now we have the worst of all worlds—an economy that draws more immigrants than there are available opportunities to do so legally, and a divisive political environment that precludes immigration reform. We call ourselves a nation of immigrants, and yet, at a time when we should be building bridges to attract more of the world's best and brightest, we are building walls to keep them out.

President Kennedy said fifty years ago that America was ready to pay any price or bear any burden in the struggle against the “common enemies of man: tyranny, poverty, disease and war.”<sup>34</sup> This is the essential function of

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<sup>31</sup> Treaty on Measures for the Further Reduction and Limitation on Strategic Offensive Arms, U.S.-Russian Federation, Apr. 18, 2010, available at <http://www.state.gov/documents/organization/140035.pdf>.

<sup>32</sup> Strategic Arms Reduction Treaty, U.S.-USSR, July 31, 1991, available at <http://www.state.gov/www/global/arms/starhtml/start/start1.html>.

<sup>33</sup> Jennifer Steinhauer, *Senator Lugar Charts His Own Course Against the Winds*, N.Y. TIMES, Nov. 28, 2010, at A24.

<sup>34</sup> John F. Kennedy, President of the United States of America, Inaugural Address in Washington, D.C. (Jan. 20, 1961).

government. And yet, in this recent campaign, we heard many calls for tax cuts, but little discussion of how we will sustain vital activities in Afghanistan, Pakistan, Somalia, Yemen, Iraq and the Maghreb where groups affiliated with al Qaeda continue to operate and threaten our interests. We remain engaged in the longest conflict in our history, but the only one in history for which we have no plan to pay for it.

Given the economic challenges we face and the fears they engender, it would be understandable to turn inward and pull back. But we do not live in a world that will allow us to do that. And that is not who we are.

Even though globalization has lost its luster over the past decade, our connections in this world are undeniable. Whether we like it or not, we are global citizens. In certain circles, this is posed as a zero-sum proposition—the more we cooperate multilaterally, the less sovereign we are. But this is a false choice. It is a false choice because unlike many countries, we are not captive to the past. We are guided by our hopes, not our fears. “Hopes” that would have been seen as delusional decades ago, in recent days, we have begun to see fulfilled—a man of color as President; three of the four most recent Secretaries of State are women. This is what happens in our country—we “imagine things” with hope, courage and unnerving effort, frequently they come to pass.

Tonight, near midnight, I am reminded of these things, and as I write these words, with the music of the Beatles playing softly in the background, perhaps that was the idea and the vision which John Lennon had in mind when he wrote the following song:

### **“Imagine”**

Imagine there's no Heaven  
It's easy if you try  
No hell below us  
Above us only sky  
Imagine all the people  
Living for today

Imagine there's no countries

It isn't hard to do  
Nothing to kill or die for  
And no religion too  
Imagine all the people  
Living life in peace

You may say that I'm a dreamer  
But I'm not the only one  
I hope someday you'll join us  
And the world will be as one

Imagine no possessions  
I wonder if you can  
No need for greed or hunger  
A brotherhood of man  
Imagine all the people  
Sharing all the world

You may say that I'm a dreamer  
But I'm not the only one  
I hope someday you'll join us  
And the world will live as one<sup>35</sup>

Too, an even more fitting coda is supplied in a recent book by Charles Fried, presently Harvard Law Professor, former Solicitor General of the United States, and Associate Justice of the Massachusetts Supreme Judicial Court, co-written by his son, Gregory Fried, a professor of Philosophy. The book is entitled: *Because It Is Wrong: Torture, Privacy and Presidential Power in the Age of Terror*:

In addressing these questions [torture, violation of privacy and Presidential power], we believe that it would be bad faith to pretend that our traditional sense that some things are simply wrong has not been pushed to its limit. This is not to say from the outset that we must capitulate to that pressure, but we

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<sup>35</sup> JOHN LENNON, IMAGINE (Capitol Records 1971).

must take it seriously, we must think it through. . . . It does no one any good to pretend that we are not confronted with decisions that go to the very foundations of the republic, even if the dust and fear of 9/11 have seemed to settle and the battle lines pushed back to Iraq, Afghanistan, and other regions even more remote from our everyday lives.

The fervent mixture of panic and patriotism that defined the months after 9/11 have since faded into a resigned sense that we face a long, planetary struggle against an elusive enemy. But we must not allow the inertia of war to prevent us from confronting what we are doing and becoming. While we make an argument and defend it here, we do so in a spirit that recognizes the enormous burden on those responsible for actual policy decisions. But in the end, in a democracy, that is all of us, and so we all must take responsibility for what we now do and become as a nation.

While . . . concerned with the policy issues of our day, we have attempted to address these in terms of principles and debates that transcend the moment, and so in making our case, we have not tried to advance a brief for what detailed policies should be implemented, or which public official should be prosecuted or lionized. Our aim is to make the questions as vividly difficult as we have found them to be, even as we try to answer them, and to provoke all those committed to free, republican forms of government to deliberate about them carefully. Because the stakes are high, we hope to include as many fellow citizens as

possible in conversations that began privately,  
now clearly a decade ago.<sup>36</sup>

Let both of these works, words and music, message and meaning serve as epilogues to this article for our Symposium Issue on Terrorism.

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<sup>36</sup> CHARLES FRIED & GREGORY FRIED, BECAUSE IT IS WRONG: TORTURE, PRIVACY AND PRESIDENTIAL POWER IN THE AGE OF TERROR 16-17 (2010).