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Letter from the Editor

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LETTER FROM THE EDITOR

JEFFREY A. BOTELHO

The terrorist attacks on the United States of September 11, 2001 had an enormous impact on American society and that of the international community, probably more than any single event in the past quarter century. Approximately three thousand people lost their lives as a result of the collisions of passenger aircraft into the Twin Towers in Manhattan and the Pentagon in Virginia, as well as another hijacked flight that crashed in rural Pennsylvania. The tragedies had an immediate effect on the government's domestic and foreign policy. The FAA grounded flights for a few days in an effort to put in place needed security measures, resulting in great financial loss to the airline industry. President George W. Bush, in an effort to catch the masterminds of the plot, ordered an invasion of Afghanistan to depose the Taliban leadership that had harbored the headquarters of Al-Qaeda. While successful in deposing the Taliban (though not completely eliminating them), limited U.S. forces have been unable to capture or kill Osama Bin Laden, the leader of the international terrorist organization. Two years later, the United States invaded Iraq with Congressional approval, based ostensibly on fears that Saddam Hussein possessed weapons of mass destruction that he planned to use against the United States. Meanwhile, in airports (as well as many government and public buildings) on the home front, travelers have been subject to heightened security checks to weed out terrorist threats; often, the TSA, a newly created executive agency charged with securing U.S. ports, has added measures after thwarting novel terrorist threats. For example, since the "shoe bomber," Richard Reid, in mid-flight, tried to light his shoelaces on fire in order to ignite plastic explosives on his footwear, air travelers have been asked to remove their shoes and place them on the security conveyor belt before heading to their gates. Similarly, discovery of a plot among several passengers planning to combine liquids mid-flight to create a bomb has led to a passenger bar on taking any liquids (except for minimal amounts) including bottled water, through security checkpoints.

All of the above reactions of our government to the 9/11 attacks have been part of the "War on Terror" which President Bush has declared on the stateless terrorist enemies of the United States. In this war, unlike other conventional wars, the enemy is unknown; he is everywhere and he is nowhere; he has no fixed country and no allegiance except to those who believe, as he does, that the death of the *infidel* (a term which he loosely

ascribes to all non-Muslim American citizens) is victory, even if it results in his own death. Facing an enemy of this kind requires vigilance and preparedness; however, there is also the danger that vigilance will meld quickly into paranoia. In a country such as the United States, in which the interests of the State are counterbalanced by the interests of the individual enumerated in our Bill of Rights, fighting this kind of war is extremely difficult, like walking a tightrope without a net. For example, in an effort not to discriminate in the enforcement of its measures, the TSA conducts random investigations on passengers; an 80 year old woman may be stopped and questioned instead of a 21 year-old male walking through the same line. While this may not make sense to many of us, this is the dilemma we face—how do we preserve individual freedoms while fighting the War on Terror in a practical and effective manner?

Not surprisingly, 9/11 has impacted the laws that govern us as much as it has the rest of our society. The articles in this issue reflect some of the changes that have occurred, as well as some important questions posed by these changes. Here are some of the questions our authors have raised:

Are future lawyers receiving the necessary background and training to deal with the myriad of legal problems related to national security posed by the 9/11 attacks? In a very well-written and comprehensive review of U.S. national security law casebooks, Professor Tung Yin addresses the most important changes that the attacks have effected upon the law in this area and evaluates the coverage and pedagogical effectiveness of four major law school texts with respect to each. Yin's article is more than a book review, however; it serves as a superb jumping-off point in addressing the areas of the law fundamentally impacted by 9/11, including: a) information sharing and government access to private information (FISA and the PATRIOT Act); b) federal prosecutions of terrorism crimes, many of which have been brought under the "material supporters" of terrorists provision; and c) military responses in the context of the War on Terror, including military detentions (of both U.S. citizens and non-citizens) and the establishment of military tribunals. This article is an excellent resource for national security law professors and students as well as anyone looking for a scholarly summary of the major impacts of 9/11 on U.S. law.

Is it constitutional for a U.S. citizen to be indefinitely detained based on the government's suspicion of his involvement in a terrorist plot to explode a radioactive "dirty bomb" in an American city? Should he be afforded a *habeas corpus* proceeding to force the government to justify his continued detention? Professor Charles Duskow, in his article addressing whether Jose Padilla has received constitutional due process since his

detention at a Chicago airport, explains how the Supreme Court has answered these questions; he also raises others, such as whether a bare statement of ultimate facts by the President is sufficient to declare a U.S. citizen an “enemy combatant,” a designation that appears to strip him of many of the constitutional rights with which he was born. In the next article, Dr. Saby Ghoshray also addresses the issue of indefinite detention of those classified “unlawful enemy combatants,” and argues that this classification, which he asserts leads to treatment that does not meet the due process requirements of neither the criminal law nor the Laws of War jurisprudential models, and as such is supported by no legal basis. Dr. Ghoshray tells the sombering stories of some of the post-9/11 detainees, putting a “human face” on some of the adversaries in the War on Terror. Finally, the author asserts that the American public, in its complacent attitude toward the government’s infringement of constitutional rights, is partly to blame for its failure to protest the justification of deprivations of liberty in the name of “security.” While the article is sweeping in its scope and presents some controversial points of view, it poses some interesting questions. The myriad of issues set forth in both of these articles lead to us to the more basic question of how much trust we, as a republic, should put in the actions of the chief executive of the United States. Isn’t there a reason why our government is based on a system of checks and balances instead of placing plenary power in the hands of the President, even when issues of national security are involved? Or should we trust the executive to act in good faith, with the risk that at some point, his or her motivations will be less than pure? These are the questions that Daskow and Ghoshray’s articles force us to face.

Knowledge is power, and in an age where countless details can be accessed instantly with a few strokes of a keyboard and the click of a mouse, accessing information is easier than ever. How do we balance the government’s need to access private information in order to combat terrorism with our constitutional rights of freedom of speech and thought and against unreasonable searches and seizures? Professor Karl Gruben addresses and analyzes how the law has responded to these questions, focusing his analysis on the impact of the PATRIOT Act on libraries. The author’s explanation of the FBI’s ability to obtain an administrative subpoena for information through a National Security Letter (“NSL”) with no need to articulate specific facts or finding probable cause is particularly interesting. Looking at things from the opposite perspective, when is the government justified in withholding information from the public for national security reasons? Michael Sherman, in his discussion of post-9/11 amendments to the Freedom of Information Act (“FOIA”) and new

interpretations by the courts, explains how and why the government has tightened its control over certain kinds of information, such as records relating to critical infrastructure and confidential law enforcement techniques.

President George W. Bush made immigration a central issue in the year following his inauguration. At one point, he and Vicente Fox, the President of Mexico at the time, discussed the possibility of legalizing millions of Mexican immigrants in the United States. The fact that the terrorist attacks were carried out by middle-eastern Arabs, who were in this country legally at the time, changed everything. In public debate on immigration, the focus shifted to border control while the idea of legalization fell by the wayside. As of this date, despite a failed effort by Congress in the fall of 2006 to reform the Immigration and Naturalization Act (“INA”), there have been no major substantive changes to U.S. immigration law. We chose to include a discussion of the current state of immigration law in this issue for two reasons: 1) illegal immigrants have become a fixture of the American landscape; and 2) the 9/11 attacks resulted in a profoundly protectionist anti-immigrant atmosphere which helped to block efforts at effective change. Donald Dobkin’s article describes the narrowing of the gates of legal immigration over the past 20 years, addressing both substantive changes as well as administrative actions which have further restricted immigration by narrowly interpreting the INA. Robert Amsel discusses the more specific issue of the negative consequences that taking criminal pleas have on the rights of legal immigrants, who face subsequent deportation to their country of origin. The article will be helpful to immigration practitioners and criminal attorneys for its explanation of the rights of criminal defendants to appeal and withdraw pleas in order to seek jury trial or pre-trial diversion programs that have no negative immigration consequences.

Finally, in a superb scholarly analysis of a statute, AEDPA, which he argues unconstitutionally limits the right of *habeas corpus* in U.S. courts, Muhammad Faridi touches on some of the same constitutional concerns posed by the recent suspension of the writ, in the Fall of 2006, for those designated “enemy combatants.” Mr. Faridi analyzes 28 U.S.C. § 2254, which was passed in response to the bombing of Oklahoma City by homegrown terrorist Timothy McVeigh, which streamlined *habeas* petitions to federal courts by prisoners in state custody. He argues, through and exhaustive legal analysis, that the statute is unconstitutional because it denies federal courts the power to determine the constitutionality of state court action, contrary to the principles laid out in *Marbury v. Madison* and its progeny. For the purposes of this issue, I would invite the reader to read

this article extremely carefully, and then consider its main arguments and reasoning in light of the recent suspension of the writ for those accused of being “combatants” in the war on terror, which includes people who are alleged to have materially supported terrorist activities. See 28 U.S.C. §2241 for the text of the recent Congressional suspension of the writ. Consider whether we want all future presidents and their administrations to have the latitude to designate anyone, including American citizens, as “enemy combatants,” and then proceed to hold them indefinitely, without the possibility of impartial review by an American court. These are the questions we, as concerned Americans in a difficult time, need to be asking.

The authors featured in this issue, as well as the editors and membership of the St. Thomas Law Review, have worked very hard to address some of the most pressing questions facing students of the law at this pivotal moment in our nation’s history. We hope the articles will provide substantial food for thought as to whether our reactions, in the legal arena, to the attacks of 9/11 have brought us closer to the illusive goal of the law—to work for the public good. How do we balance the need for security with the need for freedom? The truth is that we are never truly secure, nor are we ever truly free, so there is no absolute answer to the question. The important thing is that, as lawyers, professors, and students, we persevere in asking the important questions and making the necessary arguments for our clients, whether they are individuals or, for government attorneys, the people of our nation. The integrity of our legal system is only preserved when all those it touches, no matter how unpopular they are, are represented by effective advocates who argue with zeal in front of impartial arbiters who decide the issues based on our constitutional ideals. For while true perfection in the institutions of men is impossible, it is our obligation to strive for it, and may God help us never to give up.

Sincerely,

Jeffrey A. Botelho

On behalf of the St. Thomas Law Review

