World Trade Center Memo

1. Introduction

The September 11th, 2001 suicide attack on the United States is still widely perceived to have been act an 'act of war' by an independent political entity, namely the Al-Qaeda terror network One might point out that if the attack is to be considered an 'act of war', it was the most successful wartime attack on the United States since the 1941 Japanese assault on Pearl Harbor, Hawaii.

2. Social liability for 'acts of war' and acts that are similar to 'acts of war'

a. 'acts of war' as a trigger for civil liability

The question, however, as to whether the attack constitutes an 'act of war' is not enormously significant from the standpoint of military or political theoretical philosophizing. Rather, the question as to whether to attack constituted an 'act of war' is enormously significant because it triggers judicial determinations regarding state and civil liability for compensating the survivors and cleaning up the mess.

b. Responsibility for September 11th, United States government or a foreign actor

The attack appeared to be an unprecedented crushing blow against the American governmental power; especially so, because the responsible party refused to take responsibility as to which most international terrorists are generally eager. The American government, however, quickly linked the bombings to the prior truck bomb attack on the World Trade Center, the attacks on the U.S. embassies in Africa and the destruction of the U.S. naval destroyer Cole and identified an alleged perpetrator.

The United States government had already blamed those previous attacks on Osama Bin-Ladin and his Al-Qaeda terror network.[1] Osama Bin-Ladin was and perhaps still is a Yemeni/ Saudi multi-millionaire who was then, in September of 2001, resident in Taliban controlled Afghanistan.[2] While the Al-Qaeda network has never been considered to be a state power in its own right, its relationship with the Taliban allowed it to exist as a sort of state within a state within Afghanistan.[3]

By quickly pinning the bombing on Osama Bin-Ladin, the US government effectively exculpated itself, its important traditional regional allies, and just about anyone else from sharing the blame. Thus, while extensive ties have existed under both Presidents Clinton and Bush jr. between the US government and both the Taliban and Osama Bin Laden this issue was shunted aside. Most of the hijackers were allegedly of Saudi or Egyptian national origin, but the idea of bombing Cairo or Riyadh was never discussed. While United States air carriers had been warned for decades that their security procedures and especially their weak cockpit doors were inviting this sort of attack, the airlines were also quickly exculpated.

The blame had to be pinned on someone, and Osama's hosts the Taliban were it. For good measure, every person living in Afghanistan was deemed a legitimate target for American "precision" carpet bombing attacks.

c. An 'act of war'?

Was this an 'act of war'? Obviously, the string of causality between the hijackers and the Afghani nation was far less direct than the most recent historical example of the Japanese fleet's

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[1]One Man and a Global Web of Violence, New York Times, January 14, 2001

[2] Id

[3] Id

attack on Pearl Harbor, Hawaii. In contrast to Pearl Harbor, the September 11th attack began on American soil and was perpetrated by legal United States residents who happened to be of Egyptian and Saudi origins. Thus the allegation that the attack was an 'act of war' depends on believing in the existence of a convoluted conspiracy theory involving forces in many nations.

d. Nations having aided Al-Qaeda Afghanistan and the United States

i. Al-Qaeda and the United States

Following the attacks, President Bush angrily stated that the United States will not tolerate governments and groups who give material aid to terrorists who target the United States. Sub-textually, it is clearly implied that the United States government considers itself immune from the accusation that the largest patron of these anti-American terrorists has been the United States government. There were, however, clear ties between the United States and the Taliban both direct and indirectly via the United States client state Pakistan. These ties have existed throughout the last five presidential administrations (George W. Bush, Bill Clinton, George H.W. Bush, Ronald Reagan, Jimmy Carter.). There also have been close personal ties between the Bush family and the Bin-Ladin family.

ii. Al-Qaeda, Pakistan and the CIA

Mysteriously, although the Pakistani military was perhaps the most obvious suspect in the September 11 attacks[4], Pakistan was actually rewarded with the removal of American economic sanctions[5] which had been imposed after Pakistan tested a nuclear weapon as part of

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[4] US Suffers Large-Scale Terrorist Attack by Osama bin Ladin; Linked to Failed Assassination Attempt by Pakistan-Taliban-bin Ladin Axis, Newswire, September 12, 2001, from Omaid Weekly

[5] ALL SANCTIONS ON PAKISTAN NOW LIFTED, 9/17/2001, Jim Abrams, Bergen County Record

its endless arms race with neighboring India.[6]

Beyond the indirect ties through their mutual ally Pakistan, Bin-Ladin was originally trained by the CIA as part of the anti-Russian struggle in the 1980's.[7] In fact, the ties between the CIA, Bin Ladin and the anti-Soviet movement in Afghanistan are so well known that pro-establishment journalists must resort of sleights of hand to attempt to distance the CIA from Al-Qaeda.

The January 14th, 2001 article entitled One Man and a Global Web of Violence is a good example of this intricate attempt at damage control. At one point the article states, "Al Qaeda grew out of the jihad inspired by Muslim scholars to combat the Soviet Union's 1979 invasion of Afghanistan."[8] At this point in the article, the fact that the 'jihad' would have been impossible without the support of the American President, Congress, military and intelligence apparatus is not even considered worthy of mention. Later in the article the CIA role is mentioned but primarily in the context of the agency pulling out of Afghanistan after the Soviet retreat.

The article states:

> A C.I.A. official said that the agency, aware of the changing nature of the jihad, had taken some steps he would not specify to counter the threat. But Milt Bearden, the former C.I.A. station chief in Islamabad, who coordinated the agency's anti-Soviet effort in Afghanistan, disagreed.
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> "The Soviet Union, armed to the teeth, was falling apart," he said. "A shooting war then erupted in the Persian Gulf. Afghanistan was off the front burner."
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> When the war ended, he said, "we got the hell out of there."[9]

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[6] Losing the Battle on Arms Control; Pakistan-India Nuclear Race Is Just Part of a Disturbing Trend, 7/17/1999, Steve Mufson

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[8] One Man and a Global Web of Violence, New York Times, January 14th, 2001

[9] Id

Therefore, even a source decidedly friendly to the American establishment cannot fail to mention the American and CIA involvement with Bin Ladin. Rather, utmost care must be taken to distinguish the years in which the Islamic fanatics were good terrorists who killed pro-Soviet Afghans and Soviet troops from the years in which these same fanatics who became bad terrorists who attacked American targets. Yet evidence of continuing ties between the CIA and international Islamic extremists abounds. Some of this evidence goes so far as to show close ties between the Bush family, Osama Bin-Ladin's family and Osama Bin-Ladin himself.

iii. The Bin-Ladin family and the Bush family

Bin-Ladin family and the Bush family had a long standing series of business ties.[10] Furthermore, the United States had provided material aid directly to the Taliban[11]. It has even been claimed in a credible French newspaper that Bin Ladin had met with the CIA shortly before September 11th and even afterwards was able to acquire kidney dialysis treatment in a Pakistani military hospital were equally buried.[12]

Until recently, the accusations of passive complicity on the part of the Bush administration were coming from relatively obscure journalists like BBC reporter Greg Palast.[13] The even more extreme accusation that Bush actually plotted the attacks has emerged from even more obscure journalists like Mike Ruppert and Jared Israel.[14]

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[10] The Background is Oil, Dale Allen Pfeiffer available at http://www.fromthewilderness.com/free/ww3/dec2001_files/background_is_oil.html

[11] Id

[12]

[13] www.gregpalast.com

[14] www.fromthewilderness.com and www.tenc.net

e. Who is responsible for the clean up?

i. Bracketing the question of who initiated the attacks

While the United States' high policy makers, military authorities and intelligence services are given wide latitude to violate both international and domestic law, and to carry out or assist acts of mass violence both internationally and domestically, United States law is intimately concerned with the health and safety of at least the domestic victims of both United States government initiated violence and 'acts of war' by foreign states an organizations.

ii. The intervention of the administrative agencies

Therefore, regardless of the nature of collaboration between the United States government and Al-Qaeda, it was unquestionably the responsibility of federal, state and local administrative agencies to respond to the September 11th attacks. While it might have been highly clarifying for the Senate to impeach all high ranking Bush administration officials for their role in collaboration with Al-Qaeda, this would have been an unlikely event given the history of collaboration with Islamic fundamentalism on the part of both major political parties. Long prior to any potential Congressional inquiry into the role of the Bush administration in either planning or intentionally or negligently failing to respond to the September 11th attacks, a panoply of federal, state and local agencies made at least some effort to mitigate the effects of the attack. The question is not whether the agencies responded, but rather the quality and the legality of their responses.

iii. The Environmental Protection Agency as lead agency?

From the beginning, the Environmental Protection Agency acted in a grossly negligent manner. As the leading agency mandated by federal law and directives to handle environmental concerns in the case of a terrorist attack, the Environmental Protection Agency made highly

influential comments regarding air safety in the days after the attack. These comments were utilized by other federal agencies, state agencies, city agencies, insurance companies, landlords and other players in the ensuing game of dodging responsibility for cleaning up the gigantic toxic release that the attacks constituted.

iv. Christine Todd Whitman's initial comments on air quality

The White Paper of Manhattan congressman Jerrold Nadler quotes from a September 18th, 2001 press release from the Environmental Protection Agency. Environmental Protection Agency Administrator Christine Todd Whitman was quoted as saying that the New York air was "safe to breathe" and that New Yorkers, "[N]eed not be concerned about environmental issues as they return to their homes and workplaces."[15] Nadler's White Paper goes on to point out that Whitman made this statement prior to receiving the results of a single test of outdoor air.

v. The World Trade Center disaster as a toxic release, comparison with Exxon Valdez

Was the World Trade Center collapse really a major release of toxic chemicals into the environment? Let's try to put this in perspective. Let us examine a well known event which is unquestionably considered to be a major toxic release, Exxon Valdez.[16]

Shortly after midnight on March 24, 1989, the tanker Valdez ran onto Bligh Reef, Alaska. The reef tore the hull open. Prince William Sound was polluted with eleven million gallons of oil. The proximate cause of the toxic contamination of Prince William Sound was the gargantuan alcoholic consumption of the alcoholic Captain Hazelwood.

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[15] White Paper on Lower Manhattan Air Quality, Office of U.S. Congressman Jerrold Nadler, April 12, 2002 update, p3

[16] In re Exxon Valdez, 270 F.3d 1215 at 1223

Since Captain Hazelwood's alcoholism was well known to Exxon executives, Exxon was liable for the damages under the Tort theory of Respondiat Superior and under a standard of recklessness. The company could have faced billions of dollars through common law tort actions and citizen's suits under Federal environmental statutes. Luckily for Exxon, its good friends the State of Alaska and the United States Federal government preempted these citizen's actions with an administrative remedy. Those cases were resolved by entry of a consent decree on October 8, 1991, under the terms of which Exxon agreed to pay at least $ 900 million to restore damaged natural resources.

No environmentalist could ever claim that the Exxon Valdez spill was anything other than a great tragedy or that $900 million dollars was enough money to restore the coastline to its pre-spill state. However, simply on a quantitative level, the World Trade Center disaster was a toxic release on the scale of hundreds of Exxon Valdez spills. As of February 13th, 2002, FEMA director Joe Allbaugh said that 1.2 million tons of debris had been removed.[17]

vi. The World Trade Center as a far more complex problem of civil liability than Exxon Valdez

Nonetheless, an entire axis of more complicated problems exist in the scenario of a major toxic release in a concentrated urban area. The September 11th, collapse of the World Trade Center took place in one of the most concentrated urban environments that exist on the planet Earth. The World Trade Center and its surrounding neighborhoods were not areas of undeveloped nature were notions of liability rarely come into play. Rather the World Trade Center and its surrounding neighborhoods were and are business districts in which the interests

[17] FEMA Director Joe Allbaugh Recovery and rebuilding efforts in New York and at Pentagon ahead of schedule, The Hill, 2/13/2002

of federal, state and local governments; private insurance companies; land owners and tenants were and are intricately woven in a statutory and contractual web of reciprocity.

3. Liability as a social question

a. Sovereign Immunity

i. Sovereign immunity in general

Liability is a social question which exists in its simplest form when there are two clear civil actors. Far more complex questions emerge when the government is an actor. These claims against the government can be especially complex when they arise out of non-civil activity as in acts of war and acts of domestic terrorism as well as government responses to natural disasters. Claims against the government can be broken down firstly into political action against high government officials for high crimes and misdemeanors and secondly into causes of action created by Congressional statutes that contain mandamus powers accessible through citizen's suits and tort claims for damages authorized by the Federal Tort Claims act.

ii. Criminal actions by high government officials

High crimes by government officials fall under the constitutional purview of Article I Section 3 Clauses 6 and 7. Under these clauses, the Senate of the United States has the sole right and responsibility to impeach these criminals and remove them from office. Clause 7 specifically directs that while the conviction of the political criminals on impeachment charges should have no effect other than removing them from office, they still can be charged with these crimes once they have been removed from office.

It is possible to analyze the actions of highly placed United States government officials and the mainstream media in the weeks following September 11th to cover up any possible public investigation of the involvement of United States policy makers with the Al-Qaeda terror

network. This cover up has extended even back to actions of policy makers in the 1980's who were involved up to their ears with creation of Al-Qaeda's predecessor organizations. The very existence of this cover up constitutes prima facie evidence that, despite the bovine nature of the vast majority of the members of the Congress[18], key United States policy makers are viscerally concerned of their potential liability under Article I Section 3 Clause 6.

iii. Will the lead agency please stand up, FEMA or EPA

The most convincing argument against Bush administration collusion with Al-Qaeda would be that even a psychotic megalomaniac American government would not want to attack influential members of the ruling class like the 600 Cantor Fitzgerald bond traders, the wife of the Solicitor General Barbara Olsen and the great real estate asset which the World Trade Center represented. According to this theory, no matter how much the Bush administration might have wanted the attacks to boost their poll ratings and tear up the Bill of Rights, the losses to influential private actors like wealthy victims, airlines and insurance companies might have dissuaded them.

While this theory might hold some water, the actions of the disaster relief agencies after September 11th drains some of the water from this cup of implausibility. From the beginning the Environmental Protection Agency's attitude was that it needed to do the bare minimum it could get away with or nothing at all. By February 22, 2002, the EPA finally came up with a bizarre statutory justification for their inaction. According to the EPA, the EPA has no role in federal disaster relief except what it is instructed to do by the Federal Emergency Management

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[18] Very recently, one national legislator, Rep. Cynthia McKinney (D-Ga.) has actually raised her voice to cautiously support the theory of Bush administration complicity. Therefore, it cannot be completely discounted that accusations against Bush will be raised from the floor of the Congress. However, the notion that they could ever win as much support for impeaching Bush as the movement against Bill Clinton's fellatio acquired is, of course, minuscule.

Authority (FEMA).[19] In his riposte, Congressman Jerry Nadler incisively points out that the organic statute that creates FEMA, the Stafford Act, actually triggers the Environmental Protection Agency's – National Contingency Plan under 40 CFR 300.3(d).

In a sense, Nadler's response was also an understatement. If the Environmental Protection Agency actually expects anyone to take this argument seriously, American citizens are very much at risk. The Stafford Act is woefully ill equipped to deal with environmental questions. It mentions the word environment only three times. Only one of these mentions seem to be relevant to the current situation and it clearly supports Nadler's interpretation

> Sec. 105. The National Environmental Protection Act of 1969, as amended [42 USCS @@ 4321 et seq.], shall be implemented to the fullest extent consistent with but subject to the time constraints imposed by this Act [this note and 42 USCS @ 3121 note], and the Secretary of Commerce when making the final determination regarding an application for assistance hereunder shall give consideration to the environmental consequences determined within that period.[20]

Clearly there is a problem with statutory construction. The missions of FEMA and the EPA overlap. However, the argument of the EPA that the Stafford act authorizes them to do as little as they desire is a tortured interpretation of the general statutory scheme. Since the Stafford Act gives no guidance whatsoever on what to do with a toxic release, it could not possibly have been the intention of Congress for the Stafford act to predominate in the case of a disaster which is simultaneously a major toxic release. In contrast, CERCLA at 42 USC 9604 contains the embryo of a well designed contingency plan to deal with a toxic release. It's neither the case that we lack any Congressional guidance beyond these three the statutes. Guidelines on the implementation of 42 USC 9604 are found in 40 CFR 300.130(c), Executive Order 12580 and

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[19] Nadler, p17

[20] 42 USCS 5184

Executive Order 12777.

There can be little question that Congressman Nadler has made out a prima facie case that the Environmental Protection Agency is engaged in a massive breach of the conduct prescribed by its organic statute. Furthermore, the problems with the conduct of the EPA do not end with their refusal to take the role of the lead agency for the environmental clean up. The EPA has gagged its own scientists, has taken aggressive legal measures to stifle its own statutorily created Ombudsman oversight mechanism and has given its approval to state and even municipal organizations to promulgate regulations which the Clean Water Act/ CERCLA envisions as a federal matter. These state and local agencies have then further delegated certain tasks to individual landlords whose sole motivation is to spend as little money as possible.

b. Liability at the ground level

i. The basic physics of the disaster

Rebuilding lower Manhattan after the September 11th disaster could not have been an easy job. The buildings had fallen with gigantic force falling into the sub-basements and effecting the subway line. New York City had not just lost parasitic bond traders at Cantor Fitzgerald. The city had lost hundreds of firefighters, other emergency personnel and other real workers. Massive infusions of cash from Washington D.C. and from private charitable organizations undoubtedly assisted in facilitating the rapid reconstruction of the city's infrastructure and gave cash compensation to many victims.

On the other hand, the EPA and the mainstream media constructed a self serving hallucinatory mechanism which operated outside of the laws of physics. In this work of science fiction, millions of tons of building had been converted into a huge pile of debris. According to the media message, this was a great tragedy which killed many people through fire, suffocation,

falling etc. According to the media message this tragedy was great enough to warrant massive retaliation even against people who had nothing to do with the act involved.

Furthermore, while the tragedy was great, the media and the EPA still insisted that these millions of tons of building had been converted into dust without the dust causing an environmental hazard. One could almost imagine some hypothetical Afghani civilian holding the body of his or her child killed by an American cluster bomb and saying, "was the quantity of your retaliation really warranted? I understand the attack was a tragedy, but according to the EPA website at least there was no problem of toxic contamination."

I raise this odd hypothetical to point out that the World Trade Center disaster existed for the media and the administrative agencies primarily for highly twisted self-serving reasons. The main message was, yes it was a tragedy, but the only victims were killed the day of the attack and the main reason to discuss the extent of the tragedy was to justify war against anyone the United States government felt like attacking.

Bombing Afghanistan may have given patriotic Americans an adrenaline rush. It may, perhaps, have intimidated future attackers. It did not, however, do very much to alleviate the residents of lower Manhattan whose apartments were, and in many cases still are, choking from toxic contamination from the World Trade Center dust cloud.

ii. Immediately implicated issues of federalism

Traditionally, the political right wing in the United States has focused on local power over national power since the power of the working class, the poor and minorities is only mobilizable on a national level. When they need to, however, the political right is just as adept at attacking local rights such as when the Florida Supreme Court attempted to maintain its position as the supreme interpreter of Florida election law and demanded that the year 2000

popular vote in Florida be recounted. For its part, the left will support national versus local power at its convenience. The left was all for national control over state power during the civil rights controversy, but many leftists would certainly favor local versus national control over the marijuana laws.

However, whatever one's political tendencies, it can hardly be argued that local control over toxic remediation in the face of a massive catastrophe is anything but a guaranteed failure. New York City and New York State agencies cannot possibly step into the shoes of the Federal government when faced with tasks of this magnitude. To delegate these responsibilities to state and local officials is merely to guarantee that nothing will be done. What the EPA did was worse, first it denied a problem existed and then delegated the authority to deal with the non-problem.

iii. Fortunate horizontal agency parallelism

Fortunately, not all Federal agencies were answering to EPA administrator Christine Todd Whitman, nor were all employees of the EPA immediately willing to participate in a conspiracy of silence. The most well known study of outdoor air quality which conflicts with the EPA's data was done by University of California at Davis scientist Thomas Cahill under contract with the United States Department of Energy. Dr. Cahill found an "unprecedented" level of ultra-fine particulates which "[O]ut did even the worst pollution from the Kuwait oil fields fires."[21]

The extent of the pollution disaster has confronted the inactivity of the Environmental Protection Agency on many levels. It has raised questions beyond simply whether, according to

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[21] Polakovic, Gary, "Danger Found in Trade Center Air" Los Angeles Times, February 12, 2002.

the statutory scheme, the EPA can legally remain inactive and hide behind FEMA's skirts. In the face of the Cahill study it is necessary to it is that the EPA could claim safe readings for particulate matter. Were the EPA's filters so clogged that they didn't get any reading at all? Is the EPA using inadequate information gathering methods? Are the EPA's regulations adequate for a disaster that produces a ghoulash of contaminants rather than just a lot of one thing. Are the EPA's safe levels for particulates (especially ultra-fine) particulates of the different sorts of toxic matter really low enough?

iv. Indoor air qualitatively different.

When one considers indoor air rather than outdoor air, the problems are tremendously amplified. Firstly, the outdoor air problem was far more convenient for the EPA to handle then indoor air. As Congressman Nadler explained in a New York City Council hearing, once the fires start dying down, the outdoor air has a tendency to clean itself. This comports with the EPA's desire to do nothing, because as the agency stalls and lies, the environment is busy diluting the outdoor dust plume into the atmosphere at large. Unfortunately, there is no similar automatic process with indoor air.

Its not that the EPA has never heard of indoor air. The scientists at the EPA are busy beavers who do research, create documents and post these documents on the EPA website. The problem is that the EPA hierarchy has little to no interest in the basic science that exists on its own website.

The EPA document Managing Buildings for Good Indoor Air Quality[22] is a simple statement of principles which, if applied to the EPA's response to the World Trade Center disaster would constitute a scathing indictment of administrator Whitman. The document states:

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[22] http://www.epa.gov/iaq/largebldgs/graphics/sec_5.pdf

A clean mechanical room, free of tracked-in dirt and stored chemicals is an important element in the prevention of indoor air quality problems. Airborne contaminants in the mechanical room can be drawn into ductwork through return air openings or unsealed seams in return ducts and circulated throughout the building . . .[23]

Maintain appropriate pressure relationships between building usage areas. Avoid recirculating air from areas that are strong sources of contaminants (e.g. smoking lounges, chemical storage areas, beauty salons). Provide adequate local exhaust for activities that produce odors, dust, or contaminants, or confine those activities to locations that are maintained under negative pressure (relative to adjacent areas). . . HVAC equipment maintenance schedules: Inspect all equipment regularly (per recommended maintenance schedule) to ensure that it is in good condition and is operating as designed . . .[24]

This indoor air quality document is certainly not meant to lay out regulations for dealing with remediation of indoor air quality in the situation of a major toxic release. However, the main problems associated with the clean up are laid out here extraordinarily clearly. The EPA indoor air quality document urges building owners to do regular maintenance to avoid expensive professional duct cleaning.

Curiously, the science fiction saga perpetrated against the public by the EPA and the subordinate state and local administrative agencies perversely parallels this sage advice in that it offers a method of avoid paying for professional duct cleaning. In the case of a massive toxic release which has contaminated the ductwork all over lower Manhattan the EPA's foolproof method to avoid expensive professional duct cleaning is to stifle their most honorable personnel like air quality scientist Cate Jenkins and their heroic ombudsman Ricky Martin.

Sometimes the EPA decries responsibility for the indoor air. In other cases it propounds methodologies of toxic measurement that are bound to indicate the indoor air is safe when it really isn't.

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[23] Id, 4

[24] Id, 5

Indoor air testing is qualitatively different from outdoor air testing. To illustrate, I point out that many people are aware that the Environmental Protection Agency's Clean Air Act monitors contaminants in outdoor ambient air from point sources. The classic example of a point source is a steel factory. In the classic mode, the Environmental Protection Agency is statutorily mandated to monitor those steady outdoor point sources which are generally industrial enterprises owned by businessmen, not terrorists. That is, unless one is an extreme environmentalist ala Earth First and considers all industrial enterprises to be terrorism.

A major toxic release in an urban center, on the other hand, is bound to contaminate apartments with toxic dust. These apartments are often rental units where the occupants have little clout over how the building structure is managed, but are not able to move out because of rental contracts. It would be the role of any government other than the most venal and sadistic to protect these victims of toxic contamination especially residential tenants.

Once an apartment or small business is contaminated with toxic dust, a highly dangerous state of affairs has come into play. Residents and small businesses are simply not equipped with the technology, the capital, the know how or the time to even determine whether their apartments are contaminated. Worse yet, as I have indicated in my quotes from the EPA document on Indoor Air Quality, even those vanguard tenants who manage to jump all the hurdles can have their apartments recontaminated because of the flow of air pressure in the overall building.

The biggest subterfuge the EPA is using to acquire results indicating that indoor air is safe involves failing to either wipe the dust on settled surfaces or to reagitate the dust using air blowers. Since dust settles, the indoor air in an apartment might be technically safe to breathe at a given moment, but the overall contamination in the cracks in the walls and floors as well as contamination from dust that has settled on furniture can continue to poison families for decades.

4. Remedies in Legislation, Tort and Equity

a. Legislative Remedies

Despite the imperious nature of the George W. Bush administration, there is little question in the American statutory scheme that Congress has the right to make the laws. While Congress cannot displace the President's function as the executory body which enforces the law, the President's executory powers to not give his branch the right to decide what the law is via selective enforcement.

One moment in American history where this question was addressed by the Supreme Court was in the budget controversies of the early 1970's. President Nixon had a habit of not spending specific sums of money earmarked for disbursement by the Congress. One illustrative case in this area is Train v City of New York, 161 U. S. App. D. C. 114, 494 F.2d 1033

In Train, the City of New York instituted a class action for declaratory and injunctive relief against the Administrator of the Environmental Protection Agency in the United States District Court for the District of Columbia. New York's suit emerged after the Administrator, pursuant to directions from President Nixon, had failed to allot to the states the full amount of the sums authorized under Title II of the Federal Water Pollution Control Act. Significantly, the Supreme Courts ruling in Train was based on statutory interpretation. Thus Congress has the right to mandate that the President enforce the laws in specific ways.

Nonetheless, the victory of the legislature over the executive in Train occurred in the background of a Congress strongly united against an unpopular Presidency. Although there is little doubt that legislation could be drawn up which would compel the Bush administration to follow the law, environmental clean ups are not the core function of the legislature the way

budgetary appropriations are. Congress likes to prepare budgets, but complex tasks like defending the environment are much more logically delegated to administrative agencies. Thus the question is posed, how could Christine Todd Whitman's statutory wiggle room be ironed out. How could Congress rip away the FEMA skirts behind which Christie is crouching.

It would obviously be an entire essay to fully respond to these questions. However, two things are clear. Congress must mandate that the Environmental Protection Agency is the lead agency for hazardous materials response in a natural disaster or terrorist attack RATHER THAN FEMA. This way, if the President decides to cross the threshold of legality and actually defy the law, a citizen's suit under the Clean Water Act/ CERCLA will have a great probability of winning in an Article III court. While Congressman Nadler has done an excellent job of showing that the EPA is breaking the law, we must always strive to make the law clearer so that judges will know what to enforce. Judges are, naturally, especially reluctant to order around administrative agencies which have vastly greater technical and scientific resources at their command than does a judge sitting in a cramped room with only the restatements and pattern jury instructions for company.

Secondly, Congress must mandate that the EPA is responsible for indoor air quality in residences and small businesses in the case of another September 11th attack. Congress must mandate that the EPA follow the professional remediation procedures outlined in its own regulations and in the case of small businesses in OSHA's regulations.

b. The Federal Tort Claims Act: the Kepner article

Ironically, it is possible to draw a close analogy between the plight of the residents of

lower Manhattan and certain Latin Americans who have been tortured by torturers trained at the United States sponsored School of the Americas. In an exceptional law review article, Dickenson School of Law student Timothy Kepner[25] incisively explained how it might be possible for alien victims of US trained torturers to sue the United States under the Alien Tort Act of 1789[26] and the Federal Tort Claims Act.[27]

Unlike the foreign victims of torture at the hands of the School of the America alumni, the residents of lower Manhattan are mostly United States citizens and could sue the United States government directly in the Federal Court of Claims under the Federal Tort Claims Act. Kepner explains that Supreme Court jurisprudence has created a complex series of tests for potential Federal Tort Claims litigants:

The Federal Tort Claims Act

> The Federal Tort Claims Act provides a limited waiver of the United States' sovereign immunity in claims involving money damages for injuries"caused by the negligent wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[28] Even though the Federal Tort Claims Act mentions "negligence" within its statutory language, the Federal Tort Claims Act does not waive immunity solely to tort actions involving negligence, but "the Act extends to novel and unprecedented forms of liability as well."[29] By its language, the Act waives the United States' immunity in broad, sweeping terms, but the language of 28 U.S.C. 1346(b) also contains limitations to this waiver that must be overcome to maintain jurisdiction over the United States.

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[25] Torture 101: The Case Against the United States for Atrocities Committed by School of the Americas Alumni, Timothy Kepner, 19 Dick. J. Int'l L. 475

[26] from Kepner, 28 U.S.C. 1350

[27] from Kepner,28 U.S.C. 1346(b) (2000)

[28] from Kepner, Id.

[29] from Kepner, Holmes Herefords, Inc. v. United States, 753 F. Supp. 901, 910 (D. Wyo.1990)

Under the Federal Tort Claims Act, the United States is liable for the actions of its employees under the respondent superior doctrine.[30] In other words, the United States can only be held liable when a master-servant relationship exists between the United States and the wrongdoer.[31] . . .

The Federal Tort Claims Act, by its language, also limits the United States' waiver of immunity to only those torts that an individual can be liable for under state law.[32] Normally, international law applies solely to nation states and international organizations, but, as noted earlier, individuals can be found liable for international law violations that are considered notorious and egregious, such as torture. Furthermore, it has been noted that a long recognized principle exists in the United States that customary international law is part of the Federal common law. Because of the Supremacy Clause of the Constitution,[33] the Federal common law, including the integration of international law, is the Supreme Law of the land and is part of state law. In other words, because international law is integrated into state law through the Supremacy Clause and individuals can be liable for notorious and egregious violations of international law, an individual can be held liable under Georgia state law for committing and teaching torture. With the help of the Supremacy Clause and Federal common law, the United States' immunity is still waived under the Federal Tort Claims Act.

Even though the limitations contained in the text of 28 U.S.C. 1346(b) does not preclude jurisdiction over the United States, a plaintiff must still overcome the exceptions to the waiver of immunity codified by Congress in 28 U.S.C. 2680.[34] If any of the exceptions contained in this section can be applied, then jurisdiction over the United States cannot be maintained. In this case, the only exception . . . that [might] apply [is] the discretionary function exception,[35]

1. The Discretionary Function Exception - Congress implemented the discretionary function exception to the waiver of immunity in order to maintain the separation of powers between the political branches of government - the legislative and

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[30] from Kepner, See Dumansky v. United States, 486 F. Supp. 1078, 1090 (D.N.J. 1980)

[31] from Kepner, Id.

[32] from Kepner, See Reynolds v. Southern Management, Inc., 856 F. Supp. 618, 620-21 (W.D. Okla. 1994); Holmes Herefords, Inc. v. United States, 735 F. Supp. 901, 913 (D. Wyo. 1990); White v. Franklin, 637 F. Supp. 601, 613 (N.D. Miss. 1986); Dumansky v. United States, 486 F. Supp. 1078, 1087 (D.N.J. 1980).

[33] from Kepner, U.S. Const. art. VI, cl.2

[34] from Kepner, 28 U.S.C 2680

[35] from Kepner,28 U.S.C. 2680(a) (2000).

executive branches - and the judicial branch.[36] Congress wanted to prevent the judiciary from second guessing the acts or omissions performed by the members of the legislative or executive branch that involve an element of judgment or choice.[37]

The exercise of judgment which the exemption protects must be one which would otherwise involve courts in making a decision entrusted to other branches of the government. Decisions which require a government official to weigh competing policy alternatives are entitled to immunity for such decisions and are the ordinary responsibility of the legislative and executive branches.[38]

In other words, the exception does not permit the judicial branch to inquire into the action or decisions of the legislative or executive branches if these actions or decisions involved the weighing of alternative public policy considerations.[39] However, the exception does not apply in situations where the act or omission in question did not involve the exercise of choice or judgment.[40] The clearest example of actions that do not involve choice or judgment between alternative public policy considerations is when statutes, regulations, or policies exist prescribing a course of action to be followed by a governmental employee.[41]

When the Supreme Court first analyzed the discretionary function exception, the Court created a planning/operational dichotomy to determine whether an act or decision was "discretionary."[42] The Court reasoned that decisions occurring at the "planning" level, such as the creation of laws, were discretionary while decisions occurring at the "operational" level, such as the enforcement of laws, were not discretionary.[43] Four decades later, however, the Court determined that this dichotomy was not appropriate because there were decisions that arguably occurred at the "operational" level that could be considered discretionary.[44] In place of the planning/operational dichotomy, the Court

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[36] from Kepner, Canadian Transport Co. v. United States, 663 F.2d 1081, 1086 (D.C. Cir. 1980)

[37] from Kepner, Clark v. United States, 805 F. Supp. 84, 87 (D.N.H. 1992)

[38] from Kepner, Canadian Transport Co., 663 F.2d at 1087

[39] from Kepner, Clark, 805 F. Supp. at 87

[40] from Kepner, Id

[41] from Kepner, Id

[42] from Kepner, Dalehite v. United States, 346 U.S. 15, 42 (1953)

[43] from Kepner,id.,42

[44] from Kepner, United States v. Gaubert, 499 U.S. 315, 324 (1991)

stated that a court should inquire into "the nature of the actions taken and whether they are susceptible to policy analysis."[45] The most recent application of this new analysis is found in Vickers v. United States.[46]

The Ninth Circuit Court of Appeals first noted that the discretionary function exception had been enacted to prevent the judiciary from re-analyzing legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."[47] The court then explained the two-step analysis that the Supreme Court created in Gaubert.

The first inquiry is whether the challenged action involved an element of choice or judgment, for it is clear that the exception "will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow.' . . . *If choice or judgment is exercised, the second inquiry is whether that choice or judgment is of the type Congress intended to exclude from liability - that is, whether the choice or judgment was one involving social, economic, or political policy*.[48]

Furthermore, the court clarified that a decision by a government officer or agency does not have to actually be based on policy considerations to fall within the discretionary function exception, but the decision need only be "*susceptible to policy analysis*."[49]

After analyzing the Supreme Courts modern test for discretionary functions, Kepner, attempted to apply that test to his hypothetical suit by foreign victims of torture against the United States government:

Applying the two-prong standard to the case against the United States for the School of the Americas curriculum, one finds that the discretionary function exception

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[45] from Kepner, Id.,325

[46] from Kepner, 228 F.3d 944 (9th Cir. 2000) In Vickers, the plaintiff's ex-husband, a detention enforcement officer for the Immigration and Naturalization Service (INS), had shot her. The plaintiff alleged that the United States government was liable for her injuries for two reasons. First, the plaintiff alleged that the INS was negligent in supervising and retaining her ex-husband as an officer entitled to carry a firearm. The plaintiff also alleged that the INS failed to investigate a previous shooting incident involving her ex-husband and his former girlfriend

[47] from Kepner, Id. 949 quoting United States v. Gaubert, 499 U.S. 315, 323 (1991)

[48]from Kepner, Vickers, 228 F.3d at 949

[49] from Kepner, Id. 950-51 In regards to the plaintiff's first claim [against the INS], the court stated that decisions concerning the hiring, training, and supervision of employees fall within the discretionary function exception.

does not bar suit against the United States. The first prong requires one to determine whether a federal statute, regulation or policy exists prescribing a course of action that would then preclude a person from using judgment or choice. As early as 1866, the Supreme Court recognized that "There is no law for the government of the citizens, the armies or the navy of the United States ... which is not contained in or derived from the Constitution."[50] In other words, the Constitution is the source of military law. This being the case, the Supremacy Clause makes the Constitution the supreme law of the land along with the Federal common law. Once again, customary international law, which prohibits torture, is part of the Federal common law and supreme law of the land. Because the military is controlled by the Constitution, military regulations and training procedures must not violate the supreme law of the land or customary international law.

In the case of intentional acts of terrorism perpetrated or aided by U.S. intelligence agencies against American targets, the governmental actors would be, at least in theory, liable under criminal statutes. However, at least theory, intentional state terrorism against American targets are ministerial acts by the government and thus technically the government would not be civilly liable.

This macabre state of affairs for injured defendants is ironically similar the situation of natural disasters where there is no one to sue. In the case of natural disasters, it may be possible to acquire insurance which fills the role of a second civil actor. However, the situation for plaintiffs can be even worse in real wartime attack on United States property or a terrorist attack deemed a wartime attack than they would be in the case of many natural disasters. This is because acts of war and terrorism can trigger exculpation clauses in insurance contracts and other commercial contracts called force majeure clauses.

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[50] from Kepner, Ex Parte Milligan, 71 U.S. 2, 141 (1866)