

*A journal of
legal theory
and practice
“to the end
that human
rights shall
be more
sacred than
property
interests.”*

—Preamble, NLG
Constitution



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editor's preface

This issue begins with a study of the recent revolution in Tunisia titled, “Promises and Challenges: The Tunisian Revolution of 2010-2011.” In March, 2011 a group of Guild members joined an international delegation to Tunisia to investigate the causes and consequences of the recent deposition of Tunisian strongman Zine al-Abidine Ben Ali. The report of this delegation is an exhaustive and remarkably engaging story of a bottom-up spontaneous revolution against a repressive autocratic regime propped up by western powers, who found Ben-Ali an eager ally in the “global war on terror.” The revolution in Tunisia is one of the seminal events of the great “Arab Spring” of 2011, a world-historical year that will forever be remembered for the uprisings that occurred throughout the Islamic world. This report serves as a contemporary account of the Tunisian revolution written from an anti-imperialist perspective by human rights-minded legal researchers during its immediate aftermath, many of whose sources both lived through and participated in events that have changed history.

The second feature in this issue is the Guild’s latest *amicus* brief on behalf of Ward Churchill. If ever a writer embodied the *raison d’être* of the First Amendment it is the petitioner in this case. In *U.S. v. Schwimmer*, a case involving a pacifist whose application for U.S. citizenship was denied because she would not swear to fight in defense of her prospective country, Justice Oliver Wendell Holmes Jr. famously wrote that the highest “imperative” of the Constitution is “freedom for the thought that we hate.”¹ Shortly after the tragedy of 9/11, Ward Churchill, a tenured professor at the University of Colorado-Boulder (“CU”), published thoughts most of America hated but that unquestionably should be protected, especially in light of Holmes’s classic admonition. Churchill claimed that some of those who died in the World Trade Center were not innocent victims. They were instead “little Eichmanns” comprising “a technocratic

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Delegation of Attorneys from National Lawyers Guild (US), Haldane Society of Socialist Lawyers (UK), and Mazlumder (Turkey)

PROMISES AND CHALLENGES: THE TUNISIAN REVOLUTION OF 2010-2011

Introduction

Had you stood on any street corner in the US before December 2010 and asked passersby what they knew about Tunisia, you'd likely have been met with blank stares. In Europe you would have fared a bit better; Europeans knew it as a tourist destination, but most knew as little about the nation's political system as Americans. No longer. In December 2010 and January 2011, our television screens were filled with images of Tunisian men and women, young and old—but mostly young—demanding that the dictator, Zine El Abidine Ben Ali, as well as his family and political cronies, “*Degage!*,” French for “Go away!” And on 14 January, Ben Ali in fact fled to Saudi Arabia, his flight the culmination of a remarkable, non-violent revolution.¹

Between March 12 and March 19, 2011, at the invitation of the National Bar Association of Tunisia, a group of 13 lawyers and academics came to Tunisia to investigate US and European complicity in human rights abuses committed by the Ben Ali regime. The Delegation was comprised of members of the National Lawyers Guild (US), the Haldane Society of Socialist Lawyers (UK) and Mazlumder—the Association of Human Rights and Solidarity for Oppressed People (Turkey). It also included academics from the School of Oriental and African Studies, University of London and Queen Mary College, University of London, and a Tunisian-born British attorney who had been unable to return to his homeland for 20 years.

Methodology

Understanding that we would be in Tunisia for only a week, the Delegation was focused on meeting with as broad a spectrum as possible of those who had participated in the Tunisian revolution. We did background research on the political and economic situation in Tunisia before arriving. We had discussions with organizations outside of Tunisia who had been involved in supporting various segments of civil society during the Ben Ali regime such as the Solidarity Center, an organization affiliated with the US AFL-CIO that

This report of the March 2011 Delegation of Attorneys to Tunisia was published in June 2011. It can be found at <http://nlgiinternational.org/report/Tunisia-Report-2011.pdf>.

is funded, in part, through the US State Department and which had worked with the Tunisian trade union federation (the UGTT). Before arriving, we also met with members of the Tunisian Solidarity Campaign (London). We involved academics in our preparation, and upon arrival in Tunisia, attended an orientation meeting with a professor of sociology, a journalist, and a former political prisoner, all who gave us an overview of the situation in Tunisia both pre-and post-revolution.

Our meetings with Tunisians are discussed below. Most were arranged by our hosts, the Tunisian Bar Association, which we wish to thank for their help and hospitality. Meetings with government officials (such as the Prime Minister, the Minister of Justice, etc.) were generally the most formal—and least productive—of our meetings. We met with various nongovernmental organizations (NGOs), labor leaders, as well as leaders of the Communist Party and al-Nahda (Nahda), the large Islamist² party, both of which had formerly been banned. We had several wrenching meetings with former political prisoners and torture victims of the Ben Ali regime along with some of their family members. One of our meetings was with a Tunisian victim who had been detained in Guantanamo for over five years, only to be returned to Tunisia and imprisoned by Tunisian authorities until the revolution. We also met with Tunisian lawyers and a former judge who were involved with prisoner and torture matters. The American delegates met with an official of the US Embassy. The British delegates also requested a meeting with the British Embassy; on March 16 the Vice President of the Haldane Society transmitted a formal request, and further emails were sent on March 16 and 17 and April 7. At the time of preparation of this report the British Embassy had not responded to these requests. Finally, we met with some of the young people who were so instrumental in this revolution by using social media such as Facebook, blogs, and Twitter. One significant omission was not meeting with student organizations.

Finally, we had many unplanned and informal encounters. Demonstrations were everywhere, addressing a broad spectrum of issues from protesting the low wages of civil servants to Secretary of State Clinton's visit to Tunisia (which occurred while we were there) to the situation in Libya. Some of our most interesting discussions were held with demonstrators, some of whom showed us US-made tear gas canisters which had recently been used against protesters. Also, for example, we had lengthy exchanges with students and others who approached us during and after our concluding press conference that was held in the public promenade in front of our hotel.

As a result of these meetings we received a large number of diverse perspectives on the situation in Tunisia. There were, of course, many groups that we

did not have time to meet with. Nor did we meet with anyone who identified him/herself as a member or supporter of the old regime.

Summary of meetings

The Delegation was privileged to meet with the following individuals: Mahmud al-Dhawadi, journalist; Professor Mahmoud Dhaouadi, professor of sociology; Zouheir Mahklouf; activist/journalist; Abdallah Hajji; former Guantanamo Bay detainee; Fathi Mohammed Adid; former political prisoner; Ghaith Ghazouani, former political prisoner; Lilia Westlaty, blogger; Henda Hendoud, blogger; Mokhtar Yahyaoui, judge; Mehdi Barhoumi, lawyer;

And with the following representatives of the organizations listed: Anwar Kousri, Tunisian League for Human Rights (LTHR); Bassam Trifi, Organization Against Torture; Larbi Abid: National Council of Liberty, Hamza Hamza, Liberte & Equite; Abdeljabel al Bedoui, UGTT; Kheireddine Bouslah, American Center for International Labor Solidarity; Neji Beghour, National Union of Journalists; Hamma Hammami, Communist Party (POCT); Ziad Doulatli and Ajmi Lourimi, Nahda Party; Dr. Ben Achour, Commission for Protection of the Revolution;

And with the following sections of the Tunisian Interim Government: Lazhar Karoui Chebbi, Minister of Justice; members of the Ministry of Interior; and Beji Caid el Sebsi, Interim Prime Minister of Tunisia.

The revolutionary landscape

The Tunisian revolution that toppled the corrupt and repressive regime of Zine El Abidine Ben Ali in a few weeks of popular struggle, and that sent shock waves throughout the Middle East, involved hundreds of thousands of people across the country. They were a cross-section of modern Tunisia, from villagers in the interior to the urbanites from the coastal cities, men and women, young and old, religious and secular, and leftists.

The revolution was remarkably spontaneous, lacking both an acknowledged leader and unifying ideology. The have-nots, the unemployed, and the low-and medium-ranking union leaders played a major role in leading the uprising. The struggle for reform was joined by an army of trade unionists, internet-surfing youth and bloggers, grassroots movements, and human rights activists who had been active for years.

The revolutionaries were motivated to take to the streets by endemic poverty, rising food prices, and chronic unemployment. Ben Ali's government faithfully adhered to economic policies imposed by the International Monetary Fund (IMF) and the World Bank which included the firing of public sector workers, the elimination of price controls over essential consumer goods, the implementation of a sweeping privatization program, and the lifting of trade barriers. In September 2010, just months before the revolution began

and against a background of rising food prices, the IMF recommended the removal of subsidies for consumer goods to achieve fiscal austerity.

But economic issues were by no means the only critical flashpoint. The Tunisian people also demanded respect, dignity, and an end to all-pervasive corruption. And they demanded an end to repression and the arrest, torture, and imprisonment of many thousands of Tunisians under the infamous 2003 Anti-Terrorism Act which effectively criminalized their religious ideas and practices. It was a movement for democracy, for basic human rights, for social justice, and for dignity.

International political issues figured prominently in the revolution. The Tunisian people wanted an end to the subservience of the Ben Ali regime to Western powers and Tunisia's pursuit of anti-terrorist policies that resulted from Western demands and military aid incentives. What the US and Europe perceived as moderation and cooperation—which they rewarded with military, financial and political support—the Tunisian public saw as a loss of independence and sovereignty. The West gave powerful economic incentives to Tunisia and other North African countries to become more repressive in the name of the fight against “terrorism” and promoting stability.

The revolution was sparked on December 17, 2010 on the streets of the central Tunisian city of Sidi Bouzid, when Mohamed Bouazizi, an impoverished street vendor, confronting the humiliation and sheer hopelessness of his situation, set himself ablaze. Within weeks, a once seemingly indestructible police state³ was toppled and the fire of revolution engulfed the country and spread to the whole region.

There was fertile soil for the Tunisian revolution. In 2008, striking miners and unemployed workers in the west central town of Gafsa were savagely repressed by the Ben Ali regime. A number of miners were killed, the leadership was imprisoned, and the mining families suffered terribly. The brutal suppression of the protest was at first aided by the national Tunisian General Labor Union (UGTT), which withheld its support from the striking miners—although local labor leaders participated and led protests, and were arrested. The strike is often heralded as the start of the Tunisian Revolution.

In December 2010, the anger and frustration of the Tunisian people exploded. Fed-up crowds surged through the streets, establishing self-governing popular committees, fending off bullets, beatings, and tear gas, and taking control of their villages and cities. The insurrection eventually spread to downtown Tunis, the capital. Rejecting concessions or compromise, they insisted that Ben Ali and his dictatorship *Degage!* without preconditions. The people had lost their fear and thus no longer could be controlled. In the face of the insurrection, the police disappeared early on, and the army stood ready to

mutiny if ordered to open fire on vast crowds of fellow Tunisians demanding the ouster of the corrupt and murderous regime.

Achieving the removal of Ben Ali and his repressive regime, the recovery of the treasure he looted from the country, and the ending of mass arrests and systemic torture—even without any other reforms—would be a political triumph. But such achievements in themselves would not make for a successful revolution. Revolution demands not only the tearing down of the corrupt old order but the establishment of a new, more just one.

The revolution's hardest part still remains ahead. Thoroughly changing the regime and building a functioning democratic system will be difficult. It will be harder still to ensure that, once a democratic system is established, it is not dominated by entrenched, powerful interests. Finally, it will be a daunting task for any new popular democratic regime to achieve the social justice and economic growth the people are demanding. All this will be especially difficult given the lack of consensus concerning the revolution's pace and endpoint. It remains to be seen whether those demanding popular liberation and social justice will win out over those counselling the need for stability and moderation.

Tunisia after Ben Ali is in the midst of a struggle between the desire of the people, the largely unorganized opposition, for revolutionary change and the desire of the old political and economic establishment to contain and channel the revolution. The political establishment has the old state bureaucracy, the security apparatus, and money on its side. The people have the street. The neo-liberal economic policies of the old regime remain intact. On the other hand, hundreds of people who had been driven into exile or imprisoned for long terms under the old regime are resurfacing, the Islamists and secular left are cooperating, new forces, such as students and internet youth, have been set in motion, and the trade union movement has reasserted its strength and independence. The revolutionaries are determined not to accept a sanitized version of Ben Ali's rule with only a lessening of top-down political control that preserves the economic inequalities between classes and between the capital city and the interior cities, towns, and villages where the uprising began. A cause that has produced miracles of mass mobilizations and a huge rise in popular political consciousness will not be easy to crush.

It is ironic that the collapse of a regime that for decades had been sustained by the US and other Western governments, and that served the interests of those Western governments, was met by these same Western powers welcoming the long-overdue change in the country, applauding the bravery of the Tunisian people, and even demonizing Ben Ali. Western "advisors" and all types of self-proclaimed specialists are now rushing to Tunis to tell the Tunisians, whose

bottom-up struggle for democracy impressed the entire world, that democracy really must equal Western-style liberal democracy and free market economics—the common wisdom of Washington Consensus political and economic policy. When US President Obama talks about “managed change” and UK Prime Minister Cameron talks about “orderly transition,” they appear to be supporting the political establishment’s stubborn attempt to salvage the old system minus only its formerly favored figurehead. Although the rhetoric is about democratic change, the strategy seems to be to rob change of its essence, simply and superficially to rearrange the existing order.

Any freely elected Tunisian government, particularly one in which Islamists who had been repressed by the Americans’ War on Terror will likely play an important role, is bound to be less enthusiastic about strategic cooperation with the West and less supportive of core Western Middle East policies—from the blockade of Gaza to extraordinary rendition to policies toward Iran. Furthermore, Tunisians remember not only that the West supported Ben Ali and a long string of other Arab dictators but also that the West led the boycott of Gaza after Hamas’ victory in the January 2006 Palestinian election that even the West acknowledged was fair, open, and free. Western governments are now faced with an increasing dilemma: should they respect the voice of the people, even if they choose governments the West does not approve, or should they opt for more stable dictatorships whose price is repression and a continuation of human—rights abuses? Indeed, notwithstanding the lessons of Tunisia and Egypt, today the Western powers continue their unabated support for a number of entrenched Arab dictators.

The Delegation consistently struggled with the question of what might be done by those outside the region to promote political, economic, and social justice in Tunisia and spread those values elsewhere in the Middle East and North Africa. In the past, our respective governments have not simply tolerated a lack of democracy, they have depended actively upon dictatorships. The essence of our recommendations for the future is that the best the West can do is to let the Tunisian people find their own way without Western economic and political interference.

Overview of repression and resistance in Tunisia

Numerous and diverse monuments and historical sites dispersed throughout Tunisia bear silent witness to its history of foreign invasions, occupations, and resistance. Home to the ancient Phoenician city of Carthage, Tunisia’s location at the center of North Africa made it attractive to the rulers of the Roman, Arab, and Ottoman empires, who all recognized the geostrategic importance of the country. In 1883, using the excuse of Tunisian debt owed to its European creditors, French forces (as the British had done one year earlier in Egypt) occupied Tunisia; the French made Tunisia a “protectorate.” As with all forms

of colonial rule, under the French, Tunisia's land and native population were exploited for the benefit of the colonizers. Resistance to French colonial rule existed from the beginning and increased over time.

During World War II the Germans briefly occupied Tunisia, but toward the end of the war the French regained control. Following the war the Tunisian struggle for national independence intensified, headed by the nationalist leader Habib Bourguiba and his Neo-Destour (Constitution) party. In a sign of the growing appeal of the independence movement, in 1945, Ferhat Hached led Tunisian members out of the communist-dominated French General Confederation of Workers (Confederation Générale des Travailleurs —CGT) to form the Tunisian nationalist UGTT, the Union Generale Tunisienne du Travail.

Following several years of brutal repression of the nationalist movement, in 1954, French Premier Pierre Mendès-France promised the pro-independence "Bey"—provincial governor under the suzerainty of the Ottoman Empire—internal autonomy. After long negotiations, a French–Tunisian convention was signed in Paris and on March 20, 1956 France recognized Tunisian independence.

In April 1956, the French-educated Habib Bourguiba formed the first independent Tunisian government. His doctrine was defined by secularism, nationalist development, and a pro-West foreign policy orientation. In March 1957, Tunisia signed a bilateral agreement with the US in return for economic and technical assistance, though the country would remain firmly within France's sphere of influence for several decades to come. In July 1957, the National Assembly deposed the popular Bey and elected Bourguiba chief of state, thus establishing a republic. Bourguiba, who came to be seen by many Tunisian nationalists as "France's man," won the first presidential election in 1959 and was re-elected in 1964, 1969, and 1974, when the Assembly amended the constitution to make him president for life.

Though Bourguiba was initially supported by many Tunisians for his nationalist development program, economic malaise and increased political repression led to student and labor unrest during the late 1970s. During this period clashes with the government increased. In January 1978, violence broke out when the UGTT called a general strike in protest over the arrest of a union leader, alleging that attacks against union offices in several towns had been officially inspired. Over 50 demonstrators were killed and 200 trade union officials, including UGTT Secretary-General Habib Achour, were arrested.

In April 1980, Mohamed Mzali became prime minister, leading many Tunisians to believe that political liberalization was on the horizon. Trade union leaders were released from jails and UGTT Secretary-General Achour received a full presidential pardon. New laws were passed allowing for the creation of opposition political parties and paving the way for the first multiparty elections

in November 1981. Several opposition parties were legalized, including the Tunisian Communist Party which had been banned since 1963. The UGTT's highly contentious decision to enter into an electoral pact with President Bourguiba's Parti Socialiste Destourien (PSD, formerly Neo Destour) resulted in their "national front" winning all seats in the national assembly.

Anxious to preserve its power and fearful of the increasing popularity of Islamist movements in Tunisia and elsewhere in the region, Bourguiba's government adopted a policy of intolerance and suppression of Islamists. In 1980, at least 50 members of the Islamic Tendency Movement, predecessor to the moderate Islamist Hizb Nahda (Nahda, or Renaissance Party), were arrested, including the movement's founder, Rachid al-Ghannouchi. He was released in 1984, but returned to prison again in 1987, this time to serve a life sentence. Mr. al-Ghannouchi was released in 1988, at which point he fled to Europe where he remained in political exile for more than two decades.

In 1984, implementation of a structural adjustment plan signed with the IMF forced the elimination of food subsidies and resulted in a rise in bread and semolina prices. This action, in turn, sparked unrest and Tunisia's first wave of "bread riots" over the following year. As a consequence, public sector workers, supported by the UGTT, organized strikes demanding pay increases. This stage of resistance was followed by a period of harsh repression marked by deteriorating relations between the UGTT and the government, the closure of the union's newspaper, and the arrest of many union members, including Mr. Achour. Over the next few years, the government would consolidate its control over the UGTT.

In 1985, Israel raided the Palestinian Liberation Organization (PLO) headquarters in Tunis, which had been the PLO base since 1982 when it was driven out of Lebanon during Israel's invasion and occupation. The raid, in which 60 people were killed, marked a turning point in Tunisia's relations with the US, which came to see the North African state as a reliable regional ally.

In January 1986, the Tunisian Communist Workers' Party (POCT) was founded, but it was soon banned. In November of the following year, the Western-educated former military officer and government minister, Zine El Abidine Ben Ali, took power in a bloodless coup after having Bourguiba declared mentally unfit to rule. Ben Ali promised greater democratic openness and respect for human rights, signing a "national pact" with opposition parties, including the unauthorized Islamic Tendency party.

In 1989 the first presidential elections since 1974 were held. President Ben Ali was the only candidate and thus his election was no surprise. Although the Nahda party was banned from participating in the general elections held at the same time, its members ran as independents. The party did well, but because

of massive fraud and manipulation of the election, no one knows really how well. As a result, Ben Ali initiated a new campaign of repression against the party, which led to the arrest and imprisonment of thousands of its followers. In the Chamber of Deputies election, Ben Ali's Constitutional Democratic Rally won all 141 seats. Ben-Ali went on to be "re-elected" four more times, the last time in 2009 with 89 percent of the vote.

Despite the clearly undemocratic and repressive actions of the newly installed Ben Ali regime, which increased during the 1990s, strategic relations between the US and Tunisia were enhanced. Those relations were cemented by increased US security assistance, including an active schedule of joint military exercises involving the two states. During this period the US–Tunisian Joint Military Commission began meeting annually to discuss military cooperation, Tunisia's defense modernization program and other security matters, and a new bilateral investment treaty was signed between the two countries.⁴

In the aftermath of the attacks of September 11, 2001, US President Bush declared a War on Terror and proclaimed to the leaders of the world, "You're either with us or against us in the fight against terror."⁵ The anti-terror policies that followed paved the way for even closer relations between the US Government and the staunchly pro-American Ben Ali. President Ben Ali reiterated Tunisia's "principled and deeply anchored stand against terrorism in all its forms and manifestations."⁶ In December 2001, William Burns, US Assistant–Secretary of State with responsibility for the Middle East, visited Tunis as part of a tour of Maghreb capitals. During his talks with Ben Ali, Mr. Burns reaffirmed Washington's interest in promoting US cooperation with the North African states and articulated his appreciation to the Tunisian leadership and the Tunisian people for their expressions of solidarity following the attacks. He was particularly thankful for the cooperation of the Tunisian security services with the US Federal Bureau of Investigation (FBI) in their efforts to track terrorists of Tunisian origins based in Europe.⁷

Following the September 11 attacks, the government–controlled Tunisian press accused Nahda, the banned Islamist party whose leadership was largely imprisoned or in exile in Europe, of having links with al-Qaeda. Nahda representatives strongly denied these allegations. In early December 2002, William Burns again visited Tunis, where discussions focused on economic and political issues, in particular Tunisian cooperation in the US-led War on Terror.

After September 11, relations between Tunisia and European states were also strengthened. French President Jacques Chirac visited Tunisia to hold talks with Ben Ali on promoting cooperation in their efforts to eradicate international terrorism. The Tunisian opposition expressed outrage at Mr. Chirac's statements praising Ben Ali for his "exemplary policy of combating terrorism" while ignoring his brutal repression of political opposition.

The post–September 11 period also witnessed visits to Tunis by several other European Union (EU) heads of states and ministers, including Italian Prime Minister Silvio Berlusconi in November 2001, Spanish Premier Jose Maria Aznar in late September 2001, and German Minister of the Interior Otto Schily, who signed an agreement in April 2003 with Ben Ali to increase coordination between the two states in their efforts to fight terrorism and organized crime. Romano Prodi, President of the European Commission, also visited in April 2003 to discuss bilateral relations and enhanced security cooperation between Tunisia and the EU.⁸

Between 2001 and 2003, US–Tunisian relations were further enhanced under the US–North African Economic Partnership (USNAEP), which was designed to promote US investment in, and economic integration of, the Maghreb region. In 2002, the Middle East Partnership Initiative (MEPI) was established by then Secretary of State Colin Powell “to create educational opportunity at a grassroots level, promote economic opportunity and help foster private sector development, and to strengthen civil society and the rule of law throughout the region.”⁹ MEPI was part of an overall strategy by the Bush Administration to promote “democracy” and “free markets” in the region as an antidote to terrorism.

In 2004, the same year that President Ben Ali “won” a fourth term with 94 percent of the vote, MEPI opened its Regional Office in the US Embassy in Tunis. The US State Department Annual Human Rights Report on Tunisia that year declared:

[Tunisia’s] human rights record remained poor, and the Government continued to commit serious abuses . . . [T]here were significant limitations on citizens’ right to change their government. Members of the security forces tortured and physically abused prisoners and detainees. Security forces arbitrarily arrested and detained individuals.¹⁰

In October 2006, Ben Ali’s government launched a campaign to enforce more rigorously a 1981 ban on headscarves in public places such as schools and government offices; this move angered those on the receiving end of this campaign as well as human rights activists. The persecution of individuals for their political and/or religious beliefs and practices continued unabated in 2007. In January of that year, a shoot-out occurred between the police and alleged members of the Salafist Group for Preaching and Combat (Groupe Salafiste pour la Prédication et le Combat, or GSPC), a group allegedly linked to al-Qaeda, that left dozens dead and many others injured, including police officers. Over 60 of the alleged participants were arrested and, following unfair trials, were sentenced under the anti-terror laws; they were tortured while in prison. Many of the individuals arrested in this incident were released in the post-revolution amnesty. According to Amnesty International’s 2007 annual

human rights report on Tunisia that year, the men's ordeal was by no means an anomaly:

At least 12 people were sentenced to lengthy prison terms following unfair trials on terrorism-related charges, while around 50 others were still on trial at the end of the year. Torture and ill-treatment continued to be reported. Hundreds of political prisoners sentenced after unfair trials in previous years, including prisoners of conscience, remained in prison. Many had been held for more than a decade and were reported to be in poor health.¹¹

Also in 2007, two former Guantánamo detainees, Abdallah Hajji and Lotfi Lagha, were returned to Tunisia and, despite diplomatic assurances given by the Ben Ali regime, were subsequently imprisoned and mistreated after show trials. They have both been released in the post-revolution amnesty. An additional five Tunisian citizens today remain in Guantánamo.¹²

Despite evidence of increased religious and political persecution by the Ben Ali regime, in January 2008, the EU signed an Association Agreement with the Tunisian government, effectively eliminating customs tariffs and other trade barriers on manufactured goods and providing for the establishment of an EU–Tunisia free trade area for goods. Around this same time demonstrations took place in the southwestern mining region of Gafsa during which one demonstrator was shot dead with many others arrested. Striking union members at the Gafsa Mine were aggressively suppressed by government forces and the strike leaders were prosecuted on charges of presenting a threat to security and public order. Many received ten-year sentences.

In October 2009, President Ben Ali “won” a fifth term in office. According to the 2009 US State Department Human Rights Report on Tunisia:

There were significant limitations on citizens' right to change their government. Local and international nongovernmental organizations (NGOs) reported that security forces tortured and physically abused prisoners and detainees and arbitrarily arrested and detained individuals. Security forces acted with impunity, sanctioned by high-ranking officials. There were also reports of lengthy pre-trial and incommunicado detention. Government imposition of severe restrictions on freedoms of speech, press, and association worsened in the lead-up to the October elections. The government remained intolerant of public criticism, and there were widespread reports that it used intimidation, criminal investigations, the judicial system, arbitrary arrests, residential restrictions, and travel controls to discourage criticism. Corruption was a problem.¹³

Despite this, Western governments continued to maintain close relations with the Ben Ali regime, which was praised for its continued security cooperation in the War on Terror and for its so-called “economic miracle.”¹⁴ This position was reinforced when, in August 2010, the Tunisian government passed a law opening the Tunisian economy to foreign franchises in the sectors of retail/distribution, tourism, automotives, and training. Another sign

of encouragement for Western supporters of neo-liberal “reforms” in Tunisia came in September 2010, when an understanding was reached between Tunis and the IMF that recommended the removal of all remaining subsidies as a means to achieving fiscal balance.¹⁵

The brave and desperate actions of Mohammed Bouazizi on December 17, 2010 sparked a wave of nationwide protests not only against the rising food prices that resulted from the latest round of IMF-mandated food subsidy eliminations but also against the longstanding structural issues that underpinned the Ben Ali dictatorship, including high levels of unemployment and corruption as well as the near complete absence of civil liberties and political freedoms. The protests continued until January 14, 2011, when Ben Ali was finally forced to resign and Prime Minister Mohammed Ghannouchi announced an interim national unity government, only partly satisfying protesters’ demands. On February 27, Prime Minister Ghannouchi stepped down, responding to demonstrators’ demands calling for a clean break with the past. According to a UN human rights investigation, at least 219 Tunisians were killed during the uprisings and another 510 were injured.¹⁶

In light of the Western governments’ tendency to turn a blind eye to, or even to support and encourage, repressive Tunisian regimes so long as their economic and geo-strategic interests were safeguarded, it is not surprising that the West’s initial response to the Tunisian revolution was mild and muted, with French Minister for Foreign Affairs Michèle Alliot-Marie even offering support to Ben Ali’s repressive security apparatuses to crush the unrest.¹⁷ In the US, it took a full month of sustained protests menaced by state repression and violence for the Obama Administration finally to acknowledge publicly what State Department officials had been quietly stating in their Annual Human Rights Report for years and which recently had been confirmed by Wikileaks’ release of statements from the Obama-appointed US ambassador to Tunisia: That Ben Ali’s regime was patently corrupt and brutally repressive.¹⁸ President Obama’s condemnation of the Tunisian government’s violence on the day that Ben Ali was finally forced to flee the country and his subsequent praise for “the courage and dignity of the Tunisian people” was seen by many Tunisians as too little and too late.

Key revolutionary actors in the Tunisian revolution

Union Generale Tunisienne du Travail (UGTT)

This country-wide labor federation, was crucial in ultimately bringing about the downfall of the Ben Ali regime. Although the national UGTT was slow to support the protests when they first began in December 2010, the federation did respond after local and regional UGTT offices began protesting. The national UGTT called local general strikes on January 12 and then a national strike on January 14, the day Ben Ali resigned. Perhaps the UGTT’s

importance was most apparent in the decision by the initial transitional government which included leaders of Ben Ali's government and the dominant RCD party—to include three UGTT representatives in the government in an effort to legitimize the government. Within hours, protesters were mobilizing again in the streets and opposition emerged to any participation by UGTT members in the government. The UGTT cabinet members quickly resigned.

The UGTT is a labor federation; as such it operates on the national as well as regional and local levels.¹⁹ People expressed their doubts to the Delegation about the independence of the national union leadership under Ben Ali, noting that the UGTT had in essence accommodated to the repression and corruption of the Ben Ali regime. Unions could make economic demands and go on strike so long as the line of political opposition was not crossed. But the reasons for this accommodation became clear through the Delegation's meetings with several labor leaders. Although UGTT local unions and the local and regional UGTT offices demanded a leadership uninfluenced by the regime, the reality is that members of Ben Ali's ruling political party were present even on the union's national administrative commission and executive bureau. When the government could not control the union leadership, it crushed them through arrests and removing them from the UGTT's leadership.

An example of the limits of the UGTT's national leadership and the government's superior power is the response to the strikes in the Gafsa mining region in 2008. The protests began among unemployed non-union workers and students who were unable to get jobs in the mines. The miners' union, as well as the ruling political party, cooperated with the owner of the mine—the Gafsa Phosphate Company—to limit and control who would get jobs working in the mine. Protests by the unemployed erupted, supported by miners' widows and families, focusing on unemployment, the cost of living, nepotism, and the unfair recruitment practices of the mining company. Local UGTT leaders supported the protests; hunger strikes continued for months. But there was little support and often opposition from the UGTT regional and national levels. Several of the local union leaders were prosecuted and imprisoned.

The Delegation met with Abdeljelil Bedoui, one of the high-ranking union officials who had been appointed to the transitional government but resigned one day after its formation along with two UGTT colleagues in what they called a response to the people's demands. He told us that following Bouazizi's self-immolation, people went to the UGTT's office in Sidi Bouzid to demand that the union show its opposition to government corruption. But people also knew that the police would not violate the sanctity of the union's offices. Mr. Bedoui explained that if the UGTT showed its support on any issue it becomes a *de facto* spokesperson for popular movements. In the weeks following the incident in Sidi Bouzi, the UGTT became a conduit for popular discontent in various regions. Mr. Bedoui said this was what distinguished it from the

protests in Gafsa in 2008, when the popular movement and the national UGTT were at odds, and the protests were essentially confined to the Gafsa region.

It is important, then, that critics of the UGTT recognize the tremendous political pressures under which the organization operated. There is no better way to intimidate or crush an organization than by imprisoning its leaders. Kheireddine Bouslah, a labor leader with whom we met, said that since the revolution, the UGTT has taken a leadership role in resisting efforts to reverse political gains, taking to the streets in the Kasbah whenever necessary.

Parti des ouvriers communistes tunisiens (POCT)

The Tunisian Communist Workers Party is a Marxist–Leninist political party founded in January 1986. It was banned throughout the Ben Ali years and hundreds of its members were imprisoned, some tortured to death. In June 2002 Hama Hammami, leader of the POCT, was arrested and accused of being a member of an illegal organization and of inciting rebellion. His wife Radhia Nasraoui, a human rights lawyer and chairperson of the Association against Torture in Tunisia, went on a hunger strike, calling for his release.²⁰ In September Hammami was freed on health grounds and eventually went into exile in France, where he stayed until the 2011 revolution. The party was finally legalized on March 16, 2011, the day before Mr. Hammami, its general secretary, met with the Delegation.

The POCT has had an interesting history of cooperation with the moderate Tunisian Islamists which reveals a process of on-going analysis and a capacity for policy adjustment. Whereas other leftists supported or at least did not organize against the government's suppression of Islamists, starting in the early 1990s the POCT abandoned its previous political isolation in favor of a collaborative stance against repression. In 2005, as government repression increased, the political alliance between Islamists, leftists, liberals, and human rights activists was formalized with the formation of the October 18 Coalition for Liberty, Freedom and Human Rights (October 18 Coalition). The agreement reached by the Coalition was set out in two main official documents. The first addressed the role of religion in Tunisia, supporting freedom of religion because religion is a personal matter, calling for equal treatment for women, and condemning polygamy. The second dealt with the nature of Tunisia's future civil democratic regime as one which has the people at its source and respect for private and public human rights as its guiding principles. These documents and the coalition formed around them contributed to the fading of ideological disagreements and eventually facilitated an atmosphere of revolutionary unity that centered on basic shared demands for multi-party democracy, freedom of expression and belief, and equality. While the POCT opposes capitalism and globalization, given the current stage of development of Tunisian society, these shared demands remain at the forefront of its program for the immediate future.

The inclusion of public rights within the notion of human rights reveals the POCT's vision of a future Tunisia. Reminiscent of the debate which engaged developing countries in the 1930s and 1960s–1970s, the supremacy of private property rights is to be limited by a notion of property as fulfilling a public function, the defense of nationalization of key sectors, progressive taxation, and workers' right to free health and education. Such vision also points to a departure from the “Washington Consensus” neo-liberal paradigm embraced by the Ben Ali regime with its emphasis on privatization, the primary function of markets in determining economic processes, and the guiding role of the international financial institutions in the shaping of national development.

The IMF's involvement in Tunisia, argues the POCT's Mr. Hammami, had a destructive effect on the country's economy and the welfare of its people. Mr. Hammami assesses such destructiveness by reference to three aspects. First, although the IMF established a target of foreign debt reduction, in fact, starting in 1986, the country's indebtedness increased by 5.7 times. Second, although job creation was promised, in fact, unemployment rose from 1.3 percent in the late 1980s to between 20 and 25 percent today. If marginalized people are to be included, one may be looking at 43 percent unemployment. Third, an increase in the rate of development was promised. Criteria for assessing rates of development are not straightforward, but Mr. Hammami estimated that the growth rate of the 1960s and 1970s was not matched, let alone increased. Further, IMF's damaging effects went beyond pure economic measurements to encompass the fabric of society in the form of individualization of social relationships, commodification of all aspects of life including education, cultural impoverishment, and marginalization of women through restricted role in the workplace (women occupy 20 to 25 percent of the workforce), female illiteracy between 40 to 45 percent, and prostitution. The combination of IMF-imposed neo-liberal structural reforms and dictatorship, Mr. Hammami concluded, destroyed Tunisia. Whether the POCT ends up governing Tunisia, he said, is a matter for the people of Tunisia to decide; if it does, however, it will retain a commitment to the abolition of indebtedness and its neo-liberal causative roots.

The POCT believes that the revolution has far from ended. It sees two competing strategies at work: (1) the reformist strategy of the current government, old elites, and reactionary elements, with the support of the US and EU, who want to limit the revolution to political liberalization; (2) the revolutionary strategy of civil and political movements, the Islamists, and the leftists, who want to eliminate all vestiges of the old regime and bring in social justice. In the final analysis, POCT sees the people in the street as the only means to control the Interim Government and the ultimate decision-makers.

According to POCT, the elections for Constitutional Council could be a revolutionary moment. Those elections, which were originally scheduled

for 24 July 2011, have been delayed to October 2011, which POCT believes will allow the people and political parties a greater opportunity to organize themselves.* The media and civil administration are both still controlled by the old camp and the political police are still on the streets notwithstanding government claims that they have been disbanded. Therefore, POCT supported the delaying of the elections. Moreover, the party is concerned over the issue of funding of the elections, as the enemies of the revolution are wealthy and it fears that money is coming in from the US and EU to support reactionary elements. Unless there is public funding available and control of illegal funding coming in from the West, the elections will not be fair. Finally, POCT would like the new electoral law to establish proportional voting so that smaller parties might have a voice in the government and the broad spectrum of people involved in making the revolution would continue to be reflected. POCT and other political parties such as Nahda supported a recent decision that any party which offers candidates in the upcoming election must include an equal number of men and women candidates.²¹

POCT sees the Tunisian revolution as a possible model in the region, and also worldwide, of people making peaceful revolution for dignity, freedom, and social justice. The revolution is not Islamist, although Islamists are part of it.

Hizb An-Nahda (Nahda)

Nahda (Renaissance) Party is the largest Islamist party in Tunisia. Its origins can be traced to 1970 with the establishment of Qur'anic Preservation Society (QPS), originally an apolitical organization dedicated to encouraging piety within Tunisian society. The Society's approach to politics began to change in the late 1970s when growing social unrest, particularly among organized labor, politicized the movement's discourse and activities. Though many Islamists initially condemned the trade union UGTT's social action, they nonetheless learned from it the importance of mass mobilisation and street politics. In 1981, the Mouvement de la Tendance Islamique (MTI) was founded by Sheikh Rachid al-Ghannouchi and other former members of the QPS as a loose coalition of Islamist groups seeking political and economic change. The MTI's political platform included calls for equitable economic reform, an end to one-party rule, and a return to the "fundamental principles of Islam."²²

During the course of the 1980s, the MTI gained a large following among the Tunisian youth and adopted a more populist platform. It eventually developed into a well-organized social and political movement and was one of the first Islamist groups in the Arab world to explicitly adopt democratic principles,

* Update: Elections took place October 23, 2011 and resulted in Nahda gaining the vast majority of seats in the Constituent Assembly. (*Ed.*)

with Sheikh al-Ghannouchi's writings on the theological and political basis for Islamist participation in pluralist politics positioning the movement's leader among a handful of well-known Islamist reformists.²³ During this period, Islamists moved to enlarge their social base through activism in the UGTT and other civil society organizations.²⁴

In November 1987, after his bloodless coup, Ben Ali announced his plans for reform and democratization, and Sheikh al-Ghannouchi, who by then sought open participation in Tunisian political life, signed on to the president's "National Pact," which allowed him to run a list of candidates in the 1989 legislative elections. Soon after the signing of the pact, however, Ben Ali changed course and began what would become a long and drawn out period of repression of Islamist movements, beginning with legislation prohibiting the use by any political party of the words "Islam" or "Islamic" in their names. In response, the MTI renamed itself Hizb al-Nahda, the Renaissance Party. However, Ben Ali still refused to allow Nahda to enter the elections as a recognized political party, although he did permit it to field "independent" candidates. By 1992, virtually all of Nahda's leadership was imprisoned or in exile and its organizational capabilities within the country destroyed.²⁵

In the intervening years, during which the movement was forced underground, its leaders had time to reflect on the strengths and weaknesses of its political agenda, strategies, and tactics. In particular, it appears Nahda's leadership took seriously criticism levelled at the movement for relying too heavily on support from the middle class, particularly the student movement, as well as its failure to reach out and form alliances with other social forces, in particular workers and the unemployed.²⁶

Nahda's decision to enter into the October 18 Coalition in 2005, which brought together various political parties and civil society institutions to create a common platform from which to demand political reform and respect for human rights, should be seen within this context. The coalition established a basis on which to work together by agreeing on certain principles including political pluralism, the rights of women, freedom of conscience, and freedom of religion.²⁷ From Nahda's perspective, the coalition was valuable not only in terms of building unity and a common front from which to challenge the culture of impunity for human rights violations that had developed during Ben Ali's rule, but also in terms of demonstrating Nahda's commitment to Tunisia's liberal traditions and thus dispelling government claims of the movement's allegedly extremist Islamist agenda.²⁸

Nahda: from anti-systemic to systemic actor

Over the past year, Nahda seems to have made the successful transition from an anti-systemic movement, or a movement that organizes "against the multiple injustices of the existing system . . . offer[ing] alternatives which

they believed would bring about a fundamental change in . . . the situation,” to systemic actor, albeit within a dramatically transformed system.²⁹ On domestic and international policy, Nahda leaders still maintain a cogent critique of the pre-revolution system, in particular of the Western support that it believes enabled Ben Ali’s brutal repression of political opposition.

Nahda leaders are particularly critical of the role played by the US, especially in the post–Cold War period, during which time they feel Islamists came to replace the superpower’s former communist adversaries as its new enemy in the US struggle for global hegemony. This shift in geo-strategic focus led to the US’ increased collaboration with dictatorial regimes in the region, including Ben Ali’s.³⁰ According to Dr. Ziad al-Doulatli, one of the founding members of Nahda, it was during these years, and in particular in the period since the September 11 attacks, that the US became complicit in Ben Ali’s brutal repression of Tunisian Islamists, including Nahda members.³¹ Ajmi Lourimi, one of the former leaders of the Nahda student movement, argues that this complicity led many young men in the region to the conclusion that the “Bush administration’s war was not against terrorism but against Islam.” As a result, many of them turned to more extremist organizations and, in this sense, the War on Terror created a self-fulfilling prophecy.³²

Dr. al-Doulatli says Nahda leaders began to perceive a shift in US attitudes in early 2010, at which point they were contacted by US Embassy staff to meet to discuss the movement’s vision for the future. This meeting helped to convince many of the movement’s members that, despite evidence of past US duplicity, it might be possible to collaborate with the Americans in the future. There seems to be a belief that the dramatic transformation in the US position *vis-à-vis* Nahda is due to a recent shift in the balance of power in the international system in which the US has “now given up any hope of unilaterally ruling the world” and hence is “bound to have to find partners.” Dr. al-Doulatli thinks Tunisia and the Arab world, especially after undergoing democratic transitions, will have an important role to play in this transformed international order “as we [the Arab world] find ourselves closer to US and Europe than China and East Asia as our [political and economic] goals are the same.”³³

The Nahda leader, Sheikh al-Ghannouchi, has also expressed optimism concerning future Tunisia–EU relations, pointing out that association between the peoples of North and South Mediterranean have long roots, going back to the “era of the Romans, the Carthaginians and in the Islamic era,” that are “not determined by which government is in power” but rather by history and geography.³⁴ According to Sheikh al-Ghannouchi, the post-transition government of Tunisia will not look to avenge the injustices of the past but instead will focus on the future and demand that Tunisia’s post-revolution relations

with Europe be more “balance[d]” and that they be “buil[t] on mutual respect and based on equality, and relations that are not at the expense of the wealth of the people, [or their] freedom and dignity.”³⁵

Unlike many of the former political prisoners and other civil society and political actors the Delegation met, many of whom responded cynically to questions regarding the future role of the US in post-revolutionary Tunisia, Dr. al-Doulatli stated that Tunisia could benefit from strong US support, especially in terms of facilitating foreign direct investment. Dr. al-Doulatli also sees an important role for US and European civil society in supporting “[Tunisian civil] society to make our revolution succeed for the benefit of the Arab world and the West as well.”³⁶

Nahda’s position on the revolution is that it would not have been possible without the broad-based unity that brought together individuals and organizations from various political persuasions and walks of life. Though the solidarity forged among the various sectors of Tunisian civil and political society in the face of Ben Ali’s repression can be traced back to the October 18 Coalition, it was not until Mr. Bouazizi’s dramatic self-immolation that the revolution was catalyzed and the wall of fear which the Ben Ali regime had so carefully constructed over the 23 years of his brutal dictatorship came tumbling down. As Mr. Lourimi said, “If the cold war ended with the fall of Berlin wall, our revolution began with the fall of the wall of fear.”³⁷

This unity was witnessed in the chants and slogans used throughout the revolution, which were non-partisan and avoided political or religious jargon; instead, most crowd chants began with the phrase: “Ash sha’ab-yurid. . .” [“The people want . . .”] Most important for Mr. Lourimi was the role played by Tunisia’s brave youth, many of whom were not affiliated with any political party. “The social movement was well ahead of the political movement and young people were more confident in making change.” Mr. Lourimi says there was a gap that had been created between civil society and the political parties as a result of the imprisonment and exile of so many opposition party leaders, including those of Nahda and the POCT. This gap was filled by the energy and determination of the youth. He stated:

We used to say our young people were apolitical, uninvolved. Then it transpired that these young people managed to create relationships and links between each other through social media. . . . They did not compromise on their demands for dignity and freedom, nor did they give into any attempts from the regime to hold them back.³⁸

Though it is clear Nahda will play an integral role in post-revolution Tunisia politics, the nature and breadth of its constituency is less clear. One is left to wonder what the former political prisoners the Delegation met, many of whom because of their Islamist leanings would seem the most natural supporters of

Nahda in post-transition elections, would make of the party leaders' optimistic assessment of future US–Tunisia relations and the possibility of forgetting the tragedies of the past in order to make way for a more hospitable future. What will happen if Nahda does not fight for recognition and redress for the crimes committed against the thousands of pious young men whose human rights were so patently violated in the context of the War on Terror, crimes that many believe were facilitated by US support for the Ben Ali regime? If the transformed Nahda party does not support their aspirations for an independent, sovereign Tunisia that is more firmly integrated within the broader Muslim/Arab world, then who will? What will happen to this severely damaged generation of War on Terror victims? Will they become disillusioned with the political process and become more radicalized? These are pressing questions that Nahda and other political party leaders must be contemplating at the moment. These issues may have a defining impact upon the potential success of the democratic transition in Tunisia.

From the perspective of political economy, Nahda indicates two broad and inter-related aims: Tunisia's integration in the world order on the one hand and its preservation of sovereign powers to shape domestic political and societal agendas on the other. In this, Nahda may be overlooking the potential for conflict in the interaction between integration and national sovereignty. It is not clear whether this discourse has been shaped by a comprehensive study of the systemic nature of the global eco-political order and, in particular in this context, the global order's negative effect on sovereign powers to regulate and shape internal program. Taking as an example the IMF lending policy—credit that is conditioned on structural adjustments in the direction of market-based, privatized economy—Tunisia remains immersed in this type of external indebtedness and one has yet to hear how Nahda proposes to assert sovereignty over internal economic policies in these circumstances. Similarly, in line with neo-liberal narratives, Nahda links national development to the flow of foreign investment. The flow of foreign investment is in turn associated with the global program of Bilateral Investment Treaties (BITs). These confer on foreign investors the protection of international law. Such protection is enforceable through the instrumentality of investor–state arbitration with potential substantial compensatory awards against the debtor state. The corollary is the introduction of external control over national sovereign policies. To date, Tunisia is a signatory to some 27 BITs including some with the US and a number of European countries.³⁹ Again, it remains to be seen how Nahda proposes to navigate its integration in the global order while simultaneously preserving the full range of sovereign powers necessary to meet the post-revolution aspirations of its people. In this respect, representatives of Tunisian political establishment and civil society, including Nahda, invariably expressed to the Delegation a vision of a future Tunisia that is democratized

and is marked by balanced development, equality, and social justice. Yet, the investor–state arbitration which underpins the BITs program has the effect of weakening democratic choices and undermining the democratic and rule-of-law-related principles of juridical accountability, openness, and independence.⁴⁰ Similarly, economic growth that is driven by foreign investment and the IMF is generally associated with unbalanced development and a growing gap between rich and poor. A case in point is the increase in unemployment, wealth concentration, and developmental gap between coastal areas and the interior that were recounted to the Delegation as consequences visited on Tunisia by IMF indebtedness and neo-liberal policies.

The international integration envisaged by Nahda is premised and indeed seems to be conditioned on a relationship of equality between Tunisia and other nations, particularly the US. Nahda appears to recognize that the attainment of such equality requires a bargaining position in a US-dominated world order. This recognition of the importance of being able to strike a bargain is not unique to Nahda; however, its discourse seems to circumvent the more prevailing measurements of bargaining powers such as size and natural resources wealth.⁴¹ Rather, Nahda links the realization of international equality to a perceived future world order that is marked by regional competitive tensions —US and Europe on the one hand versus China and East Asia on the other. In this world order, Tunisia will agree to join the US camp provided that such support is accompanied by equality and the preservation of national sovereignty. The difficulties associated with the latter were discussed above. In relation to equality, one cannot but question how precisely does the party intend to achieve equality in a global order that is systemically hierarchical and which has at its core a single superpower whose military power exceeds the military capabilities of all other states combined. Interestingly, having constructed a future globalized order that is shaped by intra-regional competition, Nahda does not appear to have considered the alternative possibility of Middle East and North African regional integration. Rather, as in the past, bargaining power will likely flow from the US' need for allies in the context of newly emerging rivalries.

Human rights in Tunisia before the War on Terror

Throughout his time in power, Ben Ali mounted a widespread attack against those who presented, or were perceived to present, a threat by way of political opposition. Real or perceived political dissent was harshly punished and thousands of Tunisian men and women were detained for decades and subjected to extensive and horrific torture. The extent and nature of the political repression faced by Tunisian society altered during Ben Ali's time in power. While perhaps for tactical reasons the Nahda party was tolerated during the early stages of Ben Ali's rule, that attitude changed significantly in

the early 1990s when Nahda members were arrested and imprisoned. For the last decade, Islamic groups and individuals became the main, though certainly not the sole, target of Tunisian secret police; while many leftists and human rights activists were targeted as well, there is no doubt that religious groups were disproportionately pursued.

The Bush administration's War on Terror begins

The “War on Terror” phrase was first employed by US President George W. Bush five days after the September 11 attacks on US soil, when he pronounced: “This crusade—this War on Terrorism—is going to take a while.”⁴² Bush’s speech, including his deliberate use of “war” terminology along with his not so veiled reference to the medieval crusades launched to conquer lands under Muslim rule, was criticized by legal and international relations experts for its incendiary nature. Unlike traditionally conceived wars fought between sovereign states, the War on Terror lacked a defined and identifiable enemy, thus increasing the likelihood of perpetual military action as well as the chance that it would be used as a pretext to pursue non-terror-related interests.

The War on Terror soon developed into an international military campaign led by the US and the UK with the support of other North Atlantic Treaty Organization (NATO) as well as non-NATO countries, including many US allies in the Middle East and North Africa (MENA) region. Though the campaign was initially waged against al-Qaeda, it came to include as its targets a whole range of purported “terrorist” movements, the large majority of which could be broadly described as Islamist in nature.

From its inception, the Bush Administration’s presentation of the enemy in the War on Terror as somehow exceptional both in their actions and motivations provided the US Government with the necessary justification to employ equally unconventional, and in many cases illegal, methods in its attempts to capture and punish them, even if this meant violating international agreements, including the Geneva Conventions and US domestic law. The counter-terrorism policies associated with the War on Terror resulted in numerous illegal and unethical practices, including torture, extraordinary rendition, detention without trial, and indefinite detention.

Though Afghanistan and Iraq were to become the principal battlefields in this war, President Bush made clear from its inception that the entire world would become susceptible to US intervention in its seemingly existential struggle against terror. In a speech made on September 20, 2001, Bush said: “Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime.”⁴³ The majority of MENA regimes decided that it was

not worth the risk of incurring the US' wrath by placing themselves on the wrong side of the "us versus them" divide. Many also saw in this Manichean construction the possibility of promoting their own narrow interests: a way to gain a new lease on life for their repressive regimes as well as a path to increased economic and military assistance.

Tunisia was among several MENA countries that declared its support for the War on Terror and offered substantial intelligence and strategic cooperation on this front. As a 2009 Congressional Research Service report explained, "The Bush Administration considered Tunisia to be an important ally, a moderate Arab, Muslim state, and a partner in the global War on Terror."⁴⁴ In return for its cooperation in the War on Terror, the US was willing to overlook the well-documented human rights violations of the Ben Ali regime; indeed, political repression actually increased during this period.

According to the shared US and Tunisian narrative, the Tunisian government faced a grave threat from radical Islamists seeking to overthrow the regime and build in its place a theocratic state. Though the government's repression initially focused on the moderate Islamist Nahda party, after the September 11 attacks, and in line with the increasing demands of the US for operational intelligence and evidence of thwarted Islamist conspiracies that could justify increased spending on its ever expanding "war," the Ben Ali regime began to focus less on the threat posed by the Islamo-nationalist movement and more on "salafi-jihadi" movements.⁴⁵

The first Tunisian organization to come under the War on Terror threat rubric was the Tunisian Combatant Group (TCG), which in 2002 was added to the US State Department's Terrorist Exclusion List and was subsequently subject to an assets freeze. Though largely unheard of in Tunisia prior to its terrorist classification, the TGC was accused of being a radical offshoot of Nahda that sought to establish an Islamic state in Tunisia through violent means. The TCG was suspected of plotting, but not carrying out, attacks on US, Algerian, and Tunisian embassies in Rome in December 2001. The US Government also accused the Algerian Salafist Group for Preaching and Combat (GSPC), now known as Al Qaeda in the Islamic Maghreb (AQIM), of actively recruiting Tunisians and maintaining ties with the TCG.⁴⁶

Tunisia's 2003 Anti-Terrorism Law

In 2003 Tunisia enacted the "Anti-Terrorism Law on Support of International Efforts against Terrorism and Money Laundering" (2003 Anti-Terrorism Law). Although Tunisia is party to many international conventions and acknowledges in Article 1 of the 2003 Anti-Terrorism Law the country's respect for international, regional, and bilateral conventions, several provisions of this same law are in fact at odds with Tunisia's international obligations. The 2003

Anti-Terrorism Law's passage and its implementation prompted expressions of serious concern by national and international human rights organizations, including the United Nations.⁴⁷

The Delegation heard numerous accounts and analyses of the implications of this shift in rhetoric on the relationship between the Ben Ali regime and the West. During this crucial time, and by virtue of the extensive criminalization of Islamic groups and Muslims as a whole, Ben Ali aligned himself firmly with the West as an ally in the War on Terror. The perceived targeting of radical Islamists enabled Ben Ali to curry favor with the West, and the Delegation heard that this led to direct and/or indirect financial and political benefits to the Ben Ali regime. But this concentrated effort to target Muslims in Tunisia appears to be far from a legitimate attempt to undermine criminal and/or terrorist activity; instead, it was a discriminatory attack on the political and religious freedoms of Tunisian people.

The arbitrary and unlawful nature of many of the arrests and prosecutions of political prisoners has been detailed in reports by Amnesty International and Human Rights Watch,⁴⁸ and will not be repeated here. It is however worth noting that the evidence gathered by this Delegation, which had access to former political prisoners who were more prepared to speak freely after the fall of Ben Ali's regime, supports the findings of extensive procedural irregularity and impropriety resulting in grave and far-reaching human rights abuses documented in those reports.

Perhaps the most troubling aspect of the War on Terror has been a complete lack of accountability for officials who committed gross violations of human rights. As Bassam Trifi, a lawyer and member of the Organization against Torture, said, "Torture has touched everyone including political prisoners. Torture has impacted trade unionists, leftists, Islamists, and even those accused of ordinary crimes."⁴⁹ In addition, Mr. Trifi noted that:

With regard to the West's attitude to 'terrorists,' we have seen many victims tortured on the basis of the unconstitutional 2003 law, which was enacted in reaction to what happened on 9/11. The name of the act itself references the international attempt to counter terrorism. Many people have been taken to court. They were persecuted for their ideas alone.

The Delegation met with individuals who asserted that the 2003 Anti-Terrorism Law was enacted to curry favor with the US. Despite the long-lasting US Government rhetoric of favoring democracy throughout the world, the US has consistently chosen to support and provide aid to oppressive regimes in the Middle East so long as those regimes cooperated in the so-called War on Terror. Although it is unclear what precise role the US played in the wording or timing of the legislation, it is clear the Bush Administration was happy with its passage. The US State Department called it "a comprehensive law to

‘support the international effort to combat terrorism and money laundering.’⁵⁰ Yet critics, both domestic and international, claimed that the law made the exercise of fundamental freedoms an expression of terrorism.⁵¹

According to former Tunisian Judge Mokhtar Yahyaoui, a founding member of the Association for Support of Political Prisoners who was fired for challenging the government for judicial interference, the 2003 Anti-Terrorism Law was a direct result of US pressure for greater Tunisian cooperation in the War on Terror. Furthermore, Judge Yahyaoui claimed that US military assistance to the Tunisian government was conditioned upon Tunisia’s counter-terror cooperation and accused the Ben Ali regime of “selling our sons to the Americans” as part of this effort.⁵²

Delegation interviews with Tunisian victims of 2003 Anti-Terrorism Law

The years of torture and injustice at the hands of the Ben Ali regime have been recounted by former political prisoners who were released following Ben Ali’s ouster. Again, much of this has been detailed in various NGO reports. The Delegation met with numerous political prisoners; what follows is a summary of some of those interviews.

Interview with Mohammed Elbedi Fathi

The Delegation interviewed Mohammed Elbedi Fathi, a Nahda member, who detailed how as a university student he feared arrest and thus went into hiding. The charge against him was organizing political meetings. After being convicted in absentia the police arrested and tortured him by hanging him like a chicken on a spit to the point that blood was coming out of his fingers. After his arrest he was not able to contact anyone, which left his family and friends wondering about his whereabouts for over ten days. He spent a total of ten years and eight months in prison after which he was given conditional release. The Tunisian authorities moved him seven times from one prison to another, a policy well-known as a means of intimidation.

While in prison, Mr. Fathi was undressed and beaten and not allowed to speak to any other prisoners; any action perceived to be against the regulations meant being placed in a punishment cell. As a result of the blows to his head and the torture, today Mr. Fathi is unable to read and has been diagnosed with depression. Mr. Fathi reported that the conditions within the prison were harsh, with each cell consisting of only one toilet and somewhere between 120 and 300 prisoners. Moreover, only one doctor was assigned to a prison, with the doctor taking instructions from the prison directors; this meant that the discretionary powers were with the prison directors who made the final decision as to whether an inmate received care. Given that Ben Ali’s regime cracked down especially hard on those suspected of being Islamists, abuses came in the form of religious discrimination as well; for instance, prisoners

were forbidden from praying together and were told not to pray morning prayers at the required time.

Interview with Abdallah Hajji

Abdallah Hajji fell into the Tunisian criminal system prior to the events of September 11 but felt the full force of the War on Terror and the 2003 Anti-Terrorism Act. Mr. Hajji was forced from his job on the railways after experiencing continual harassment from the authorities during the 1970s and 1980s for his religious beliefs. He was arrested, imprisoned and tortured on a number of occasions for being an alleged dissident. Due to this harassment, Mr. Hajji decided to leave Tunisia. He lived in Pakistan until 2002 when he was arrested and interrogated by US agents. He was asked by the Americans whether he was against Tunisian foreign policy and whether he intended to fight against the Tunisian government from Pakistan.

Mr. Hajji was eventually transferred by the US authorities to Guantanamo via the US air base in Bagram, Afghanistan. He spent a total of five and one-half years in detention at Guantanamo. During his interrogations there he was asked about the number of Islamists in Tunisia, the names of parties, the leaders and Islamic scholars. Mr. Hajji was also visited by the Tunisian secret police in Guantanamo, but did not receive any consular assistance or welfare checks from the Tunisian Government. The secret police asked him questions about the Tunisian situation and would tell him to comply with the Americans' questioning. The Americans told him that the Tunisians had told them this was the case.

When Mr. Hajji was returned to Tunisia in 2007, he discovered he had been tried and convicted in absentia of terrorism offenses based on fabricated evidence. He began to serve a ten-year sentence. He was continually mistreated in prison and his family was also harassed. After serving three years and eight months in a Tunisian prison, he was released in February 2011 under the provisions of the General Amnesty discussed in the following section. He has now returned to live with his family and children but is unable to work due to poor health and finds himself unable to support his family. He became ill in prison and developed mental health problems that mean he now cannot read, write, or concentrate. Mr. Hajji's case was raised by the US Delegation members in their meeting with a US Embassy official in Tunisia; however, at the insistence of this official, the meeting was off—the record and the Delegation has received no indication from the Embassy that it intends to help Mr. Hajji.⁵³

Interview with attorney for Faisal Barakat

Some members of the Delegation met with Oussama Bouthelja, the attorney for political prisoner Faisal Barakat, whose brother Jamel the Delegation met the day before. Mr. Bouthelja represents the Barakat family on behalf

of Faisal Barakat, a Nahda student leader who was tortured to death while in police custody in 1991 in full view of dozens of other prisoners. Nevertheless, the authorities claimed that his death was the result of a traffic accident. Despite threats by the regime and numerous roadblocks encountered in court, the family has bravely fought for years to get the government to acknowledge this wrongful death. They pursued the case before the UN Committee against Torture (CAT), submitting reports by international forensic experts and naming the officers involved in his murder, including the officer in charge, Captain Abdelfattah Ladib. The CAT concluded in 2000 that the state of Tunisia had violated its obligation under articles 12 and 13 of the Convention against Torture, to pursue an impartial investigation of a credible complaint of torture and asked it to take appropriate follow-up action. Ten years later, only after the revolution, the case has been reinstated by the Tunisian court.⁵⁴

Recent developments: the General Amnesty

Since the fall of the Ben Ali regime in January 2011, the Interim Government has been at pains to publicize the apparent blanket amnesty of January 19, 2011 (the General Amnesty). The amnesty purportedly resulted in the release of all prisoners detained as a result of their membership in and activism for the broad range of political groups banned under the former regime.

The Delegation established that hundreds, if not thousands, of prisoners of conscience have indeed been released since the fall of the Ben Ali government. The Delegation was invited by the International Association of Solidarity with Political Prisoners (AISPP) to attend and address a public meeting at the Congress Palace to celebrate the release of political prisoners under the General Amnesty. However, the clear message from the meeting was that many individuals are still unaccounted for. Many of those may simply have been “disappeared” by the Ben Ali regime; the remainder of those unaccounted for is probably in large part the result of a distinct ambiguity about, and discrepancy between, the interpretation of the term “political prisoner” by the Interim Government and wider civil society.

The Delegation identified three broad categories. The first is those who have been convicted of crimes directly relating to membership of a political party. The second is those who were not charged or convicted of offenses relating to their membership in a political group but who hold the belief, often based on significant evidence, that their prosecution was politically motivated. For example, an individual may have been prosecuted for matters of financial irregularity, where he believes that the evidence against him was fabricated or incomplete. The third category is those prosecuted for terrorist-related offenses. It appears individuals in the first and third categories have now been released from custody per the Amnesty.

Those who fall into the second category—politically motivated prosecutions but on nonpolitical charges—have not benefitted from the General Amnesty. Moreover, according to those familiar with their cases, many were tried under deeply flawed legal procedures or had confessed as a result of torture, often after being targeted initially for their religious beliefs. Many of these prisoners remain in state custody, often in appalling conditions and suffering from serious physical and psychiatric trauma.⁵⁵ The Delegation also received conflicting evidence about whether all those in the third category had been released, an issue which remains unconfirmed.

The issue of political prisoners in Tunisia is therefore clearly an ongoing one for the above reasons. In addition, the Delegation has great concerns about two Tunisian men who remain detained in Guantanamo, separate from those who have been released. It is clear from the Delegation's experience that there are significant flaws in the procedural bases for many prosecutions and investigations instigated under the guise of fighting terrorism. In addition, there is evidence that those previously detained in Guantanamo were arrested without due process and without sound evidentiary bases.

The Role of the United States

Post–September 11 Financial Support to the Ben Ali Regime

The common thread in conversations with former political prisoners, lawyers, and human rights advocates was the frustration and anger directed not only towards the Ben Ali regime but also at the US Government for its perceived complicity in the abuses. These sentiments were conveyed to the US Government representative with whom the American Delegation members met. We demanded answers, but the representative insisted that the conversation remain off the record.

As Larbi Abid of the National Council of Liberty points out, “the question of whether the US was aware of human rights abuses taking place in Tunisia should not be asked because it simply is not possible for a superpower like the US to not be aware of them.”⁵⁶ This conclusion is buttressed by the recent Wikileaks releases of cables from the US Embassy in Tunis to the US State Department.⁵⁷ The general fears of alternatives to the “secular” regime of Ben Ali resulted in Ben Ali's being treated as a most favorite ally of the West.

While the State Department reports included details of the corruption and abuses of the Ben Ali regime, they conclude by stressing that none of that would affect the strategic relationship between the US and Tunisia. This point was emphasized by Hamma Hammami, the head of the Tunisian Communist Party.⁵⁸ From the opposite end of the spectrum, a member of Nahda, the main Islamist party, also noted that prior to September 11, there was a campaign in France against Ben Ali and the human rights violations committed by his

regime. However, after the September 11 attacks, since Ben Ali responded positively to all US Government demands to take part in the War on Terror, he received assurances from Western governments that human rights violations would be kept quiet.

The acknowledged abuses by the Ben Ali regime had no negative effect on US military and other aid to the regime, as the following table illustrates.

US Aid to Tunisia, FY 2008 to FY 2012

Category*	FY 2008 Actual	FY 2009 Actual	FY 2010 Actual	FY 2011 Request	FY 2012 Request
FMF	\$8.3 million	\$12 million	\$18 million	\$4.9 million	\$4.9 million
ESF	\$1.2 million	\$800,000	\$2 million	–	–
IMET	\$1.7 million	\$1.7 million	\$1.95 million	\$2.3 million	\$1.68 million
INCLE	\$198,000	\$425,000	\$200,000	Unavailable	Unavailable
NADR	\$100,000	–	–	–	–
1206	\$9.8 million	\$8.8 million	Unavailable	Unavailable	Unavailable

*Notes: FMF: Foreign Military Financing; ESF: Economic Support Funds; IMET: International Military Education and Training Funds; INCLE: International Narcotics Control and Law Enforcement Funds; NADR: Non-proliferation, Anti-Terrorism, Demining, and Related Programs funds. PL. 109–163, the National Defence Authorization Act, FY 2006, Section 1206 authorizes the Secretary of Defence to train and equip foreign military and foreign maritime security forces. Section 1206 for Tunisia has supported counterterrorism programs.

Source: Congressional Research Service: Political Transition in Tunisia, March 4, 2011.

US “Democracy Promotion”

Often overlooked in analyses of the “hard” power policies associated with the War on Terror, including the invasions and occupations of Afghanistan and Iraq, are the corresponding “soft” power components of the Bush Administration’s efforts to address the terrorist threat after September 11 including, most important from the perspective of the MENA region, “democracy promotion” programs. Far from aiming radically to transform the Middle East, it seems the US democratization agenda appears to have functioned as a fig leaf for promoting more nefarious interests. This position seems to be confirmed by several of the key actors of the revolution this Delegation met with, most of whom never came into contact with any of these democracy–promotion projects.

There are several reasons to be wary of US democracy–promotion efforts in the region in general and Tunisia in particular. To begin with, the notion that democracy can be achieved through outside intervention, as opposed to developing organically along with the requisite institutions and consciousness on the part of a state’s citizens and rulers, is problematic. It was invalidated by the experience of Western foreign policy in the region over the past century,

with the 2003 Iraqi invasion the case par excellence. Almost none of the dozens of successful transitions to democracy in recent decades (now including in the MENA region) have come from foreign intervention; rather, they have come from democratic civil society organizations engaging in strategic, largely nonviolent, action from within, and employing tactics outside the mainstream political processes of electioneering and lobbying, placing them outside the remit of the “democratization” agenda. As Middle East expert Stephen Zunes has pointed out, in the one area where democracy promotion efforts could have had a real impact, in “training in strategic nonviolent action or other kinds of grassroots mobilization that proved decisive in the struggle,” US democracy promotion efforts through organizations like the National Endowment for Democracy (NED) or MEPI were absent.⁵⁹

The irrelevance of the US democracy promotion projects to the movement behind the democratic revolution in Tunisia is not surprising considering the historical relationship that has existed between rhetorical support for democratization and the promotion of alternative foreign policy interests, especially in the context of the Cold War. For example, NED, the first of these democracy promotion organizations, was established in the early 1980s under President Reagan in the wake of several high-profile CIA, Cold War–related scandals and subsequent Congressional investigations. The context of its origins has led many analysts to conclude that the NED was established as a means of outsourcing the CIA’s clandestine political activities to a seeming more benign and, crucially, independent organization.⁶⁰

Democracy promotion’s neo-liberal agenda

Although ostensibly a not-for-profit organization promoting human rights and democracy, the work of the NED has often been indistinguishable from covert government activities. As Allen Weinstein, its first President, confessed in a 1991 Washington Post interview: “A lot of what we do today was done covertly 25 years ago by the CIA.”⁶¹ The NED’s stated rationale—to spread human rights and liberal (Western) democracy across the world by establishing free market principles—was readily adapted from the Cold War to the War on Terror paradigm. As President Bush stated in January 2004, the NED budget needed to be doubled so it could “focus its new work on the development of free elections, and free markets, free press, and free labor unions in the Middle East.”⁶² Though the organization claims to support the development of independent trade unions, it is clear that its focus is on promoting civil society organizations that privilege “class cooperation and collective bargaining, minimal government intervention in the economy, and opposition to socialism in any shape or form,” that these programs are based upon a very narrow, neo-liberal understanding of growth and the function and rights that should be accorded to labor within society.⁶³

The US democracy promotion agenda has emphasized “economic freedom”—a neo-liberal capitalist economic model which emphasizes open markets and free trade—as at least as important as political freedom. One of the largest single recipients of NED funding for Democracy in recent years has been the Center for International Private Enterprise (CIPE), which has received three times as much NED funding as all human rights, development, legal, and civil society organizations in the region combined.⁶⁴

Far from demonstrating the much-touted link between economic and political liberalization, implementation of the “Washington Consensus” in MENA states has tended to concentrate economic and political power in the hands of elites, resulting in something more akin to the crony capitalism that developed in post-communist Russia than a free-market or open democratic system.

The Middle East Partnership Initiative (MEPI), established in 2002 as an additional foreign policy tool in the US State Department’s democracy promotion arsenal, shared a similarly neo-liberal agenda, including amongst its principal aims: “to foster private-sector development” and encourage the “entrepreneurial spirit” by “work[ing] with government officials, judicial authorities, regulators, legislators and bankers in the region on removing barriers to business” and “promot[ing] a major change in the attitude of local workers—from relying for jobs on the public sector and state-owned companies” to relying on the private sector. MEPI opened its Regional Office in the US Embassy in Tunis in 2004. In its website mission statement, MEPI announces its goal to “advance US foreign policy goals by supporting citizens’ efforts at economic, social, and political empowerment”⁶⁵

Distorted budgetary priorities and bias in funding

The Delegation attempted on numerous occasions to obtain detailed information from MEPI and NED regarding the types of projects funded during the pre-revolution period but to no avail. The information we have gleaned from their websites shows that most spending has been dedicated to training and capacity building workshops for civil society actors. Regardless of the effectiveness of these types of programs in attaining their respective objectives, or of the role (or lack of a role) played by those groups in receipt of MEPI/NED funding in the revolution, one thing is clear: the amount of US dollars spent on military support for the Tunisian government has been grossly disproportionate to that spent on democracy promotion, raising questions about the sincerity of the program’s aims. For example, out of a total of \$69.28 million of US assistance given to Tunisia from 2006–2010, only \$15.69 million, or roughly one quarter, went to democracy and human rights promotion programs, with the rest, \$53.59 million going to “military and security” assistance.⁶⁶ Yet even these figures do not show the whole picture.

In order to understand how US military interests undermine democracy promotion objectives despite the prominence the latter receives in US rhetorical diplomacy, one must look at the amount of military sales approved by the US Government during a similar period. For example, between 1987 and 2009, the US military signed \$349 million in military sales agreements with Ben Ali's government.⁶⁷ Furthermore, in 2010, the Obama Administration asked Congress to approve a \$282 million sale of twelve "excess" Sikorsky military helicopters to Tunisia.⁶⁸ One must question the seriousness with which the US Government took the democratization agenda considering the government was aware, as demonstrated by the US State Department annual human rights reports, that Tunisia's "human rights record remained poor, and the Government continued to commit serious abuses."⁶⁹ Absent any external threats to the country, it was clear that this high-tech military equipment would most likely be used for the internal repression of political dissent and other actions that would clearly undermine any democratization projects undertaken by MEPI and NED.

A further disturbing issue plaguing US democratization policies involves the double standards inherent in the approach of US governments in deciding which states and political parties to target, which to ignore and, perhaps most important, which to undermine in its democratization campaign. For example, in the cases of Lebanon and Palestine, US intervention in the past decade on behalf of particular political factions, rather than more general support for vital state institutions or civil society, have actually diminished prospects for democracy. Bush-era policies aimed at marginalizing Islamo-nationalist movements Hezbollah (in Lebanon) and Hamas (in Palestine) actually had the effect of "promoting failed states rather than encouraging state-building."⁷⁰

In the case of Tunisia, there is understandably a real fear that as the government comes to more adequately reflect the will of the population, shifts in foreign and domestic policy may prompt negative intervention by the US and its European allies or, at the very least, diplomatic and economic isolation which the country can hardly afford in this precarious post-revolution period. As the POCT leader Mr. Hammami told the Delegation, his party advocated that the country adopt "stringent legislation against illegal and illegitimate funding" because they were mindful that the "enemies of revolution," including the US, the EU, as well as the Gulf States "bags of money," could be used for nefarious purposes.⁷¹

President Obama's War on Terror and democracy promotion

The election of Barack Obama as US President in November 2008 on a platform of "change" was welcomed by many in the MENA region and seen to herald a dramatic sea change in US relations with the Muslim world. In

particular, his June 2009 speech in Cairo was taken by many to signify a conscious effort on President Obama's part to transform US–Middle East relations.

“The language we use matters,” President Obama declared, and it is evident that he has made an effort to avoid the most offensive of the Bush era's discursive constructions, including the “War on Terror” label (President Obama claims to view terror as a tactic, “not an enemy”), as well as polemical and poorly defined terms such as “Islamofascism” and “evildoers.” Beyond the shift in language, President Obama has also promised to amend some of his predecessors' more odious foreign and domestic policies vis-à-vis the War on Terror, vowing “to close Guantánamo, and adhere to the Geneva Conventions.”⁷² In his Cairo speech, President Obama indicated that while adopting his predecessor's rhetorical adherence to a policy of “democracy promotion” in the region, he would distance himself from the aggressive manner in which his predecessor pursued this alleged agenda. Not only did he hold the view that democracy is a common aspiration of “all people” in the world, but Americans would promote and protect such mechanisms and institutions associated with this form of governance, as human rights, “everywhere.”

Some, however, question the actual policy significance of President Obama's rhetorical shift. Not only has President Obama been unable to carry out his firm commitment to close Guantánamo, he has also failed to address adequately the detrimental War on Terror legacy, refusing to establish any punitive or deterrence mechanisms, and has proved incapable of investigating and holding accountable those top-level Bush administration officials responsible for implementing illegal policies.⁷³ Moreover, from the perspective of Tunisia's War on Terror, many of the civil society actors we met with shared the perception that the human rights abuses committed in the name of “counter-terrorism” actually increased, along with US complicity in them, in the period after President Obama came to power.⁷⁴

As with the various other areas of President Obama's Middle East agenda, where policy and practice have fallen well short of rhetoric, so too have his actions spoken louder than words when it comes to the issue of democracy in the region. Like administrations before it, President Obama refrained from criticizing the devastating effects of the neo-liberal “reforms” pushed on the country by the IMF/World Bank and other “structural adjustment” gurus, many of which have served as obstacles to meaningful and bottom-up democratization efforts in the region. Their calls to lower tariffs, privatize, reduce food and gas subsidies, focus development strategies on the tourism industry and the creation of free trade zones that produce goods targeted for the European market—all resulted in even greater levels of economic stratification, increased numbers living in poverty and a proliferation of low-skilled jobs unable to meet either the economic needs or life aspirations of a majority of university

graduates. About the only area of state funding that was not reduced as a result of these neo-liberal reforms, and which the Obama Administration did not criticize in the context of its “democracy promotion” agenda, was that of security—despite the knowledge that there was a good chance this funding could be used in the repression of the various groups deemed by the government as constituting national security threats.

Evolving policies in post-revolution Tunisia

Prior to the Tunisian revolution, the US Government never followed through with its occasional calls for reform of Tunisia’s political system and criticism of the state of human rights and declining freedoms in Tunisia contained in the State Department’s own reports. As Mr. Trifi said, “We haven’t seen a change since the Obama Administration came into power. In fact the number of cases has increased since he came into power.” It remains unclear whether the US administration will follow a different path in the aftermath of the revolution.

In addition, civil society has specific demands for the Tunisian Government when it comes to the 2003 Anti-Terrorism Law, transparency, and reforms to the judicial system. Anwar Kousri of the Tunisian League for Human Rights (Ligue tunisienne des droits de l’homme, LTDH) stated that since the removal of Ben Ali, he has noticed a marked shift in the governmental attitude towards human rights organizations in Tunisia and that many democratic procedures, including the right to protest and general amnesty for political prisoners, have been implemented. Perhaps most important, the political police—the secret section of the police that functioned as a domestic spy agency and had wide ranging power to monitor and act against anyone deemed disloyal to the regime and which were accused of torturing detainees as well as manipulating political trials—has been dissolved. However, Mr. Kousri cautioned that disbanding the political police brigade is not enough as there are other police units that have engaged in repressing dissent.

In addition, these human rights advocates stressed that while a priority will be to reopen all complaints of torture that were lodged prior to January 14, 2011, the justice system must be reformed first. For example, regarding the independence of the judiciary, the fact that the President of the Republic is also the President of the Higher Council of Judges must be addressed.

In meetings with governmental entities, the Delegation conveyed these demands received from Tunisian interviewees. For example, one of the major questions posed to members of the Interior Ministry was whether they would be willing to repeal the 2003 Anti-Terrorism Law in order to break with its abusive past. In response, a legal representative for the Ministry stated that the problem was not with the law itself but rather was with its implementation,

stating in his defense that the 2003 Anti-Terrorism Law had been drafted by prominent lawyers and that it was modeled after western laws as well as UN norms. Upon informing him that the Patriot Act, a US law, had been challenged in court and that this or similar legislation did not in any sense embody fundamental American values or international human rights norms, another member of the Ministry noted that the 2003 Anti-Terrorism Law would be reviewed by a commission. There was also an acknowledgement on the part of the Interim Justice Ministry that one of two things needs to happen: Either abolish the 2003 Anti-Terrorism Law or abolish the parts that lead to human rights violations. Additionally, the Justice Ministry laid out a larger vision of the judiciary, stressing the need for (1) judicial independence and freedom from interference by other branches of the government, and (2) accountability, namely bringing to trial those who committed abuses. The Ministry conveyed a belief that the judiciary has a completely new shape now. However, the Delegation was surprised to hear them say that in terms of transparency there is no need for a procedure for the release of data regarding torture. The Justice Ministry also stated that former political prisoners will be reinstated in their jobs and can seek compensation.

Summary and conclusions

Mohammed Bouazizi's tragic act of desperation in November 2010 unwittingly produced a spark that lit a conflagration that today is still spreading throughout North Africa, the Middle East, and the rest of the world, threatening decades-long despots and bringing new hope to ancient and proud cultures. Ben Ali has himself become a refugee hiding in Saudi Arabia, and efforts are today underway to bring him home to answer for the crimes of his regime. These flames emboldened the oppressed citizens of Egypt to sweep aside their dictator, and today the politically dispossessed of Yemen, Bahrain, Libya, and Syria are embroiled in popular uprisings in which yesterday's unelected strongmen are desperately clinging to power. Perhaps more significant, these uprisings have demonstrated the power of non-violent direct action, where masses of common people, fed up with tyrannical, unresponsive governments resorting to oppression and torture to achieve silence and submission, have spontaneously taken to the streets to demand justice and a more fair society without fear of arrest, torture, or death.

During the years of the Ben Ali regime, there were clearly opposition forces within Tunisia: human rights NGOs, the trade union federation and labor unions (particularly on the local and regional levels), Islamists, and individual actors such as lawyers representing those arrested and tortured, educators, and students. But as we have discussed, it was difficult for such groups and individuals to voice their opposition when they themselves were subject to arrest and sanction if they challenged the regime. Political parties

also functioned, although barely as their leaders and members were arrested, tortured, and fled to other countries as those parties were declared illegal by the government. The leaders and members of the majority Islamist party, Nahda, paid a particularly high price in terms of discrimination, arrest, and torture. And all of this was happening in the context of state-controlled newspapers and media, making it near impossible to let others know about opposition actions.

It is important, then, not to diminish acts of resistance which did take place: the protests in Gafsa in 2008 and the October 18 Coalition of political parties. The Coalition agreements united political parties and movements with widely divergent attitudes and values in support of the goal of a secular government that would respect political and religious freedoms while protecting individual rights. Yet despite all of these efforts, it would be a mistake to believe that the established opposition movements and institutions led the way to the remarkable events of December 2010 and January 2011 in Tunisia; they did not. Rather, it was mainly the youth—unemployed and underemployed, many with college degrees, supported by those with the technical knowledge to mobilize domestic and international support through their use of social media—that fanned the spark Mr. Bouazizi struck. Once the youth were in the streets, the October 18 Coalition was largely responsible for preventing historic political and religious disagreements and discord from derailing the revolution. The labor unions, political parties, and lawyers followed these young people to the streets. But as we were told, there is no doubt that the social movement led the political movement. The slogan repeated throughout the revolution and now echoed throughout the Arab world was, “Ash sha’ab yurid . . .” [“The people want . . .”]

So perhaps this is the most important lesson our Delegation learned: that meaningful political change often only happens in response to mass movements, to people power. In the United States, social security was enacted in the 1930s in response to mass demonstrations of the unemployed in the streets of Washington, DC. Civil rights legislation was enacted in the 1960s only after mass demonstrations and non-violent protests such as the Freedom Riders. And certainly the Vietnam War would not have ended when it did had it not been for thousands of Americans continually protesting in the streets of Washington, DC, and other cities throughout the US and, indeed, the world. It is this lesson, magnified many times, which the people of Tunisia demonstrated to the world.

We are, however, not naïve about the precariousness of the Tunisian revolution and the transition to a true democracy. How can truly democratic elections occur? How can the government assure access to the electoral process by all political actors, both established and newly-created political parties and groups such as the unemployed and students which may not be part of established

parties? How will the major political parties integrate the victims of the Ben Ali regime, many of whom are disaffected and suspicious of the possibility of any political change?

There have already been signs of trouble brewing. Tunisia's former interim Interior Minister Farhat Rajhi has warned of a coup by the country's former political elite if Islamists win the election. Rajhi, who was appointed to the post in late January and sacked in a surprise move which drew criticism from bloggers in late March, is popularly referred to as "Mr. Clean." He became widely popular for his attempts to open up the Ministry—the center of the former regime's repressive apparatus⁷—to public scrutiny, including creation of an Interior Ministry Facebook page. "If al-Nahda takes power, there will be a coup d'état," he stated in a video posted on Facebook in early May 2011 that captured the attention of Tunisia's lively online sphere, which had been a virtual rallying space for revolutionary forces during the uprising. He warned that a clique of the former regime's most powerful members may ask the head of the country's military, Rachid Ammar, to step in should the Islamists dominate in the election. Mr. Rajhi further accused the clique, which he said included Beji Caid Essebi, the country's interim prime minister, of preparing large funds of money to buy votes to re-establish themselves under the cover of new parties.

On the other hand, Nahda downplayed the coup speculation. "General Rachid Ammar has promised the Tunisian people that he would protect the revolution and we are confident that all will take place in a peaceful environment," said Nahda spokesman Ajmi Lourimi. interim Prime Minister Essebi accused Mr. Rajhi of lying and said he deserved to be prosecuted for making dangerous and irresponsible statements. Mr. Rajhi subsequently backed off from his remarks.⁷⁵

Moreover, the Delegation has been getting troubling reports from contacts on the ground in Tunisia concerning recent incidents of torture in detention. One such case involves a 22-year-old man who was arrested on May 13, 2011 in a café in downtown Tunis and taken to a police station at Bab Bahar. He was reportedly assaulted by two police officers, one of whom held him down while the second one raped him. Witnesses who were arrested with him heard his cries and he was able to obtain an official medical certificate from the treating emergency room physician detailing wounds and tears around the anal region and emotional shock.

A further major question is what role Western governments will play in Tunisia's transition to democracy. Notwithstanding lip service often given to international human and civil rights, most recently by President Obama in his May 19, 2011 speech, the West has a sorry history of supporting North African and Middle Eastern autocrats whose systematic repression and corruption have

robbed their people of freedom, dignity, and opportunity. In Tunisia, the West knew full well that Ben Ali was a tyrannical despot; nonetheless, the West, and particularly the US, tolerated those excesses as the price of “security” and the pursuit of the War on Terror. Tunisians well understand the dichotomy between one’s actions and one’s words. In our many conversations with Tunisians—human rights activists, labor leaders, political party leaders, former political prisoners, bloggers, and people in the streets—there was tremendous suspicion of the motives of Western governments, and particularly the US. The paramount expressed desire was that the West, and particularly the US, end their interference in the affairs of Tunisia.

In his May 19, 2011 speech, President Obama eloquently described the “universal rights” which were fundamental to the Tunisian revolution: free speech, the freedom of personal assembly, the freedom of religion, equality for men and women under the rule of law, the right to choose your own leaders. He went on to state the Western governments such as the US must support those principles not as a secondary interest but as a “top priority that must be translated into concrete actions.” Yet at the same time, the President described the United States’ “core interests in the region” as countering terrorism, safeguarding the security of the region, standing up for Israel’s interests, which are the same interests used to justify US support of brutal dictators such as Ben Ali. One must question, then, whether the US has truly absorbed the lessons of the Tunisian revolution and the one prescription our delegation heard repeatedly: “Hands off our revolution!”

Finally, although the Tunisians we met with consistently affirmed the importance of a democracy premised on transparency and openness and access by all facets of Tunisian society, our Delegation perceived that there was far less discussion regarding Tunisia’s economy and what needs to be done for the country to advance and prosper economically and to produce a more equal sharing of wealth. For example, in our discussions with the Nahda leaders set forth in more detail above, they indicated two broad and inter-related aims from the perspective of political economy: Tunisia’s integration in the world order on the one hand and its preservation of sovereign power to shape domestic political and societal agendas on the other. In this, Nahda may be overlooking the potential for conflict in the interaction between integration and national sovereignty. It is the Delegation’s hope that, since Nahda is likely to be influential in any government formed on the basis of free and fair elections, its analysis in this regard will consider the systemic nature of the global eco-political order and, in particular in this context, the order’s destructive impact on sovereign powers in regulating and shaping internal programs. Taking as an example the IMF lending policy—credit that is conditioned on structural adjustments in the direction of a market-based, privatized economy—Tunisia remains immersed in this type of external indebtedness. One has yet to hear

how Nahda, the UGTT, or other political parties propose to assert sovereignty over internal economic policies in these circumstances.

The ultimate question, then, is how Tunisia will navigate its integration in the global order while at the same time preserving the full range of sovereign power necessary to meet the post-revolution aspirations of its people. In this respect, representatives of Tunisian political establishment and civil society, including Nahda, invariably expressed to the Delegation a vision of a future Tunisia that is democratized and is marked by balanced development, equality, and social justice. However, economic investment through the global program of Bilateral Investment Treaties and economic growth driven by foreign investment under IMF dictates as proposed by President Obama in his May 19 speech are generally associated with unbalanced development and a growing gap between rich and poor. The Delegation heard repeatedly that pre-revolution policies such as IMF indebtedness and neo-liberal economics had caused increases in unemployment, wealth concentration, and the developmental gap between coastal areas and the interior.

Will Tunisia ally itself with the US-dominated world economic order? Will it see the potential opportunities that might arise if it cooperates instead with China and other countries in East Asia? Will it consider the possibility of closer integration into the Middle East and North African region?

This is an exciting time of great possibility in Tunisia, but also a time of many foreboding political and economic challenges. It was a privilege and honor for our Delegation to meet with the Tunisians we did and to feel and absorb their perspectives and aspirations—indeed, just to be present during this amazing transition.

Recommendations

Based on our interviews and discussions while in Tunisia, the Delegation makes the following recommendations to the governments of the three countries the Delegates represent. We do not believe it our role to make recommendations to the Tunisian government and people about how to best realize and implement the principles that underlie the revolution.

1. The US and other Western governments must respect Tunisian sovereignty and end Western interference in Tunisian affairs.
2. There should be no interference by Western governments in the development of genuine Tunisian democracy and, in particular, no provision of funding, either direct or indirect, to political parties. Where any funding is provided to the Tunisian government to promote its transition to democracy, either directly or indirectly, such funding should be provided without conditions or restrictions. Whatever the outcome, the results of the Tunisian election should be honored.

3. There should be an end to US and Western military aid to the Tunisian government.
4. The US and other Western governments should support and comply with any Tunisian requests regarding legal and financial accountability of Ben Ali, his family and their associates. In this regard:
 - a.. Switzerland should immediately release the £41 million of Ben Ali's assets that it has frozen; it should not, for example, wait for 25 years to release such funds as it did in the case of Haiti's former dictator Jean-Claude Duvalier;
 - b. The UK, along with France, should provide an update on their efforts to freeze the assets of Ben Ali, his family and their associates;
 - c. The US should state categorically whether there are any assets of Ben Ali or his family and their associates in the US that are held by any bank or other financial institution; and
 - d. The US and other Western governments should support any request from Tunisia for the return of misappropriated funds held elsewhere.
5. The US and other Western governments should support any request from Tunisia for extradition of Ben Ali and his family and their associates.
6. In the case of former Tunisian Guantanamo detainees, the US should recognize that it committed acts of torture, release all remaining Guantanamo detainees whose detention is based on evidence derived from torture, and provide compensation for all Tunisian Guantanamo detainees.
7. The US and other Western governments must recognize and acknowledge that their activities in pursuing the War on Terror resulted in the repression of people and organizations for their political and religious beliefs and practices as well as other forms of human-rights violations committed by the Ben Ali regime. (The UK government has already promised an inquiry into allegations of UK complicity in past incidents of torture by foreign governments in the context of the War on Terror. In particular, it will look into allegations that British agents benefited from the blatant violations of international law by foreign governments by gathering intelligence gleaned from detainees who were tortured.) Any such inquiry should be both broad and transparent. The US government should also make a transparent inquiry into US complicity in torture inside of Tunisia.

NOTES

1. In this report, we do not use the word "revolution" lightly. Clearly there have been tremendous political changes in Tunisia. An authoritarian regime that used arbitrary surveillance, arrest, imprisonment, and torture has been removed and ministers of that regime no longer hold their positions in the new interim government. However, many of those who carried out the former regime's policies remain in their positions, such as investigative judges. It is also unclear how well the interim government represents

all groups that were instrumental in creating change in Tunisia, particularly young people, students, and many of the new political parties that have emerged as a result. Furthermore, it seems there has not been a revolution, at least to this point, in terms of economic policies either. Although the interim government is actively seeking investment and other economic aid from the West, there is concern about Western domination of Tunisian economic policy, and there is little talk of alternatives to western capitalism or even of promulgating social welfare policies.

2. In this report, we distinguish between the terms Islamic and Islamism. Islamic is an adjective used to describe anything pertaining to the religion. Islamism (also commonly referred to as “political Islam”), is a noun commonly connoting a wide range of ideologies which hold that Islam is not only a religion but also the blueprint for social and political order, and therefore, that the political and legal framework of polities should be anchored in Islamic principles.

It is important to realize that Islamist movements vary greatly in terms of the role each believes religion should play in determining politics. One end of the spectrum believes that Islam should merely be an inspiration and the other end believes the religion should determine all aspects of the political system, including the constitution, the legal system, the economy, foreign policy, etc. Nahda is generally placed somewhere on the former end of that spectrum. See generally International Crisis Group, Understanding Islamism (2005), at <http://www.crisisgroup.org/en/regions/middle-east-north-africa/north-africa/037-understanding-islamism.aspx> (clarifying the different types of Islamic activism, including Islamism, and explaining terms such as moderate and extreme in this context).

3. The *Al Arabiya News* has reported that U.S. Ambassador to Tunisia Robert F. Godee called Tunisia a police state with little freedom of expression or association and serious human rights problems that is ruled by a dictator whose family was hated for their venality. See generally, *Wikileaks Might Have Triggered Tunis' Revolution*, AL ARABIYA NEWS, Jan. 15, 2011, at <http://www.alarabiya.net/articles/2011/01/15/133592.html>.
4. BUREAU OF NEAR E. AFFAIRS, U.S. DEP'T. ST., BACKGROUND NOTE: TUNISIA (Sept. 22, 2011), at <http://www.state.gov/r/pa/ei/bgn/5439.htm>.
5. CNN.com, *Bush Says It Is Time for Action*, CNN, Nov. 6, 2001, at <http://edition.cnn.com/2001/US/11/06/ret.bush.coalition/index.html>.
7. *Id.*
8. See *id.* for more information on the post-Sept. 11, 2011 discussion between Ben Ali and his U.S. and European Union counterparts.
9. ANANYA ROY, POVERTY CAPITAL: MICROFINANCE AND THE MAKING OF DEVELOPMENT, (Routledge 2010), available at mepi.state.gov.
10. BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, U.S. DEP'T. ST., 2004 COUNTY REPORTS ON HUMAN RIGHTS PRACTICES: TUNISIA (Feb. 28, 2005), at <http://www.state.gov/g/drl/rls/hrrpt/2004/41733.htm>.
11. Amnesty Int'l, *Tunisia: Submission to the U.N. Universal Periodic Review, First Session of the UPR Working Group*, at <http://www.amnesty.org/en/library/asset/MDE30/011/2007/en/925742b4-a71b-11dc-bf49-a1e867231d5c/mde300112007en.html>, Apr. 7-11, 2008.
12. ANDY WORTHINGTON, THE GUANTANAMO FILES: THE STORIES OF THE 774 DETAINEES IN AMERICA'S ILLEGAL PRISON (2007), available at <http://www.andy-worthington.co.uk/the-guantanamo-files/>.

13. BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, U.S. DEP'T. ST., 2004 COUNTY REPORTS ON HUMAN RIGHTS PRACTICES: TUNISIA (Mar. 11, 2010) at <http://www.state.gov/g/drl/rls/hrrprt/2009/nea/136081.htm>.
14. Andrew Hammond, *Tunisia looks to recast ties with West after Ben Ali*, REUTERS.COM, Jul. 13, 2011, at <http://www.reuters.com/article/2011/07/13/us-tunisia-economy-idUSTRE76C30D20110713>.
15. Int'l Monetary Fund, *Tunisia: 2010 Article IV Consultation—Staff Report; Public Information Notice on the Executive Board Discussion; and Statement by the Executive Director for Tunisia*, Country Report No. 10/282, at <http://www.imf.org/external/pubs/ft/scr/2010/cr10282.pdf>, Sept. 8, 2010.
16. Associated Press, *World News: 147 Killed, 510 Injured in Tunisian Uprising, U.N. Mission Says*, THE STAR, Feb. 1, 2011, at <http://www.thestar.com/News/World/article/931299>.
17. Amnesty Int'l, *supra* note 11.
18. Corinna Mullin, *Post-Wikileaks Lessons From the Tunisian "Intifada"*, OPEN DEMOCRACY, Jan. 17, 2011, at <http://www.opendemocracy.net/corinna-mullin/post-wikileaks-lessons-from-tunisian-'intifada'>.
19. *See generally* Tunisian General Union of Labor Structure of the Union, at <http://www.ugtt.org.tn/en/structures1.php> (last visited Oct. 24, 2011).
20. *See generally*, *Radhia Nasraoui Suspend Her Hunger Strike*, REPORTERS WITHOUT BORDERS, Aug. 2, 2002, at <http://en.rsf.org/tunisia-radhia-nasraoui-suspend-her-02-08-2002,02801.html>.
21. *See generally*, *Tunisian Gender-Parity 'Revolution' Hailed—Africa*, AL JAZEERA ENGLISH, Apr. 21, 2011, at <http://english.aljazeera.net/news/africa/2011/04/2011421161714335465.html>.
22. Susan Walsh, *Islamist Appeal in Tunisia*, 40 MIDDLE E. J. 651, 653 (1986).
23. JENNIFER NOYON, ISLAM, POLITICS, AND PLURALISM: THEORY AND PRACTICE IN TURKEY, JORDAN, TUNISIA, AND ALGERIA 99 (Royal Institute of International Affairs 2003).
24. *See* EMAD EL DIN SHAHIN, POLITICAL ASCENT: CONTEMPORARY ISLAMIC MOVEMENTS IN NORTH AFRICA 95 (1997); *see also* ANTOINE SFEIR, VOYAGE AU SEIN DE ISLAMISME TUNISIEN 30 (Les Cahiers de l'Orient 1987).
25. NOYON, *supra* note 23, at 103.
26. SALWA ISMAIL, RETHINKING ISLAMIST POLITICS: CULTURE, THE STATE AND ISLAMISM (2006); Said Ferjani, Founding Member, Nahda, Lecture at the London School of Oriental and Africa Studies (Feb. 4, 2011).
27. Interview by *Financial Times* with Rachid Ghannouchi, Exiled Leader of Tunisia's Nahda party, in London, England (Jan. 18, 2011), (transcript available at <http://www.ft.com/intl/cms/s/0/24d710a6-22ee-11e0-ad0b-00144feab49a.html#axzz1bjLi2Rc>).
28. Interview with Dr. Ziad al-Doulatli and Ajmi Lourimi, Delegation Leaders, Nahda, at Hotel Carlton (Mar. 17, 2011).
29. SAMIR AMIN, G. ARRIGHI, A.G. FRANK & I. WALLERSTEIN, TRANSFORMING THE REVOLUTION: SOCIAL MOVEMENTS IN THE WORLD SYSTEM (Monthly Review Press 1990).
30. Interview with Dr. Ziad al-Doulatli and Ajmi Lourimi, *supra* note 28.
31. Mr. al-Doulatli himself spent 14 years in prison for his association with the banned movement. Ajmi Lourimi spent 16 ½ years in prison for the same offense.

32. Interview with Dr. Ziad al-Doulatli and Ajmi Lourimi, *supra* note 28.
33. *Id.*
34. Interview by Financial Times with Rachid Ghannouchi, *supra* note 27.
35. *Id.*
36. Interview with Dr. Ziad al-Doulatli and Ajmi Lourimi, *supra* note 28.
37. *Id.*
38. *Id.*
39. *See generally* <http://www.unctadxi.org/templates/docsearch.aspx?id=779>, for a list of Bilateral Investment Treaties to which Tunisia is a signatory party.
40. Gus Van Harten, *Investment Treaty Arbitration and Public Law 5* (Oxford University Press 2007).
41. Tunisia's lack of bargaining powers due to its small size and lack of substantive resources was raised, for example, in a conversation with a group of Tunisian lawyers. The proposed solution to the country's perceived power deficit centered on the availability of a highly educated workforce.
42. Ron Suskind, *Faith, Certainty and the Presidency of George W. Bush*, N.Y. TIMES MAGAZINE, Oct. 17, 2004, *available at* http://www.nytimes.com/2004/10/17/magazine/17BUSH.html?_r=1.
43. George W. Bush, President of the U.S., Declaration of the War on Terrorism (Sept. 20, 2001) *available at* <http://www.britannica.com/presidents/article-9398253>.
44. CAROL MIGDALOVITZ, FOREIGN AFFAIRS, DEF., & TRADE DIV., CONG. RESEARCH SERV., TUNISIA: CURRENT ISSUES *available at* <http://congressionalresearch.com/RS21666/document.php?study=Tunisia+Current+Issues>.
45. These are composed of people with a Salafi outlook who have been radicalized and have abandoned the non-violent activism of the da'wa to enlist in the armed jihad. *See* Int'l Crisis Group, *Understanding Islamism*, MIDDLE EAST/NORTH AFRICA REP., No. 37, March 2, 2005 (providing a detailed explanation of the nature and history of these types of movements).
46. *Id.*
47. *See* Martin Scheinin, *Human Rights Council, Sixteenth Session: Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, U.N. Doc. A/HRC/16/51/Add.2 (Dec. 28, 2010) *available at* <http://www2.ohchr.org/english/issues/terrorism/rapporteur/srchr.htm>; *see also* Amnesty Int'l, *Tunisie, Le projet de loi «antiterroriste» porte un nouveau coup aux droits humains. Note d'Amnesty International à l'Union Européenne. Conseil d'Association UE-Tunisie* (Sept. 30, 2003) *available at* <http://www.amnesty.org/fr/library/info/MDE30/021/2003/fr>; Human Rts. Watch, *Universal Period Review of Tunisia, Human Rights Watch's Submission to the Human Rights Council, Counterterrorism measures* (2008) *available at* <http://www.hrw.org/en/news/2008/04/06/universal-periodic-review-tunisia>; Human Rts. Watch, *World Report Chapter: Country Summary Tunisia, Counterterrorism measures* (2009) *available at* <http://www.hrw.org/en/world-report-2009/tunisia>; Human Rts. Watch, *World Report Chapter: Country Summary Tunisia, Counterterrorism measures and Human Rights* (2010) *available at* <http://www.hrw.org/en/world-report-2010/tunisia>.
48. *Id.* *See also* Amnesty Int'l, *Annual Report: Tunisia 2010* (May 2010) *available at* <http://www.amnestyusa.org/research/reports?country=327>; Amnesty Int'l, *Annual Report: Tunisia 2009* (May 2009) *available at* <http://195.234.175.160/en/region/>

- tunisia/report-2009; Human Rts. Watch, *Tunisia: End Arbitrary Restrictions on Ex-Political Prisoners: Post-Prison Regime Robs Dissidents of Normal Lives* (March 2010) available at <http://www.hrw.org/en/news/2010/03/23/tunisia-end-arbitrary-restrictions-ex-political-prisoners>; Human Rts. Watch, *Tunisia: Crushing the Person, Crushing a Movement* (April 2005) available at <http://www.hrw.org/en/reports/2005/04/19/tunisia-crushing-person-crushing-movement>.
49. The Organization Against Torture, established in 2003, has been prevented from doing its job and its founders were even kept from submitting an application for the organization to be recognized. Interview with Mr. Bassam Trifi, Lawyer, Member of the Organization Against Torture at the Tunisian Bar Association (Mar. 14 2011). See Posting of Bassam Trifi—Judges Complicit in Covering Up Torture, at <http://tunisiahrdelegation.wordpress.com/?s=judges+complicit> (Mar. 14, 2011).
 50. U.S. State Dep't, *Patterns of Global Terrorism 2003* (Apr. 29, 2004) quoted in CONG. RESEARCH SERV., TUNISIA: CURRENT ISSUES (Jun. 29, 2009) available at <http://www.state.gov/s/ct/rls/crt/2003/>.
 51. See AMNESTY INT'L REPORT, IN THE NAME OF SECURITY: ROUTINE ABUSES IN TUNISIA (June 2008) available at <http://www.amnesty.org/en/library/info/MDE30/007/2008/en>.
 52. Interview with Judge Yahyaoui Mokhtar in Carlton Hotel (Mar. 17, 2011).
 53. Because the meeting with the US diplomat was off the record, the American members of the Delegation submitted written questions and requested a response for this report. No response has been received at the writing of this report.
The questions are set forth below in italics:
 1. *The United States has just pledged to give \$20 million to to support the democratic transition in Tunisia. As tax payers, we would like to know where that money is going. Could you specify the amounts and recipients of this aid? Will the United States agree not to give funds in a partisan manner, i.e., to specific political parties or candidates?*
 2. *Is there an understanding that the United States' War on Terror was a major factor in the unwarranted arrest, torture, prosecution, and imprisonment of thousands of innocent Muslims in Tunisia?*
 3. *After the adoption of the Tunisian anti-terrorism law in 2003, the United States State Department in many annual human rights reports noted that Tunisia was engaging in numerous severe violations of human rights. Why did the United States take no action, such as withholding military aid?*
 4. *Does the United States acknowledge that it engaged in ex parte communications with investigative judges handling the prosecution of terrorism suspects under the 2003 anti-terrorism act?*
 5. *Will the United States publicly agree to assist in the extradition of Ben Ali and his family back to Tunisia for prosecution if requested by the Tunisian government?*
 54. U.N. Comm. Against Torture, 23rd Sess. 8-19 (November 1999) Communication No. 60/1998:Tunisia 24/01/2000.
 55. The information in this paragraph was derived from personal interviews in Tunisia.
 56. Interview with Mr. Larbi Abid, Member of the National Council of Liberty (NCL), at the Tunisian Bar Association (Mar. 14, 2011).
 57. *US embassy cables: Tunisia—a US foreign policy conundrum*, THE GUARDIAN (Dec. 7, 2010) available at <http://www.guardian.co.uk/world/us-embassy-cables->

- documents/217138?INTCMP=SRCH. *See also* Petition: Hours for Palestine, at <http://www.ramynasr.com/2011/> (Sept. 23, 2011).
58. *See supra*, Part III-B.
 59. Stephen Zunes, *Credit the Egyptian People for the Egyptian Revolution*, TRUTHOUT, (Feb. 17, 2011) at <http://www.truthout.org>.
 60. William Blum, Int'l Endowment for Democracy, *Trojan Horse: The National Endowment for Democracy*, http://www.iefd.org/articles/trojan_horse.php (last visited Oct. 24, 2011).
 61. *Id.*
 62. *Id.* The NED had four key recipients of funds: the International Republican Institute; the National Democratic Institute for International Affairs; an affiliate of the AFL-CIO (e.g., American Center for International Labor Solidarity), and an affiliate of the Chamber of Commerce (such as the Center for International Private Enterprise). These institutions then disburse funds to other institutions in the US and all over the world, which then often disburse funds to yet other organizations.
 63. *Id.*
 64. Stephen Zunes, Editorial, *The United States and the Prospects for Democracy in Islamic Countries*, HUFFINGTON POST, Jan. 27, 2011, at http://www.huffingtonpost.com/stephen-zunes/post_1617_b_812666.html.
 65. U.S. Dep't of State, <http://mepi.state.gov/about-us.html> (last visited Oct. 24, 2011).
 66. STEPHEN MCINERNEY, PROJECT ON MIDDLE EAST DEMOCRACY, THE FEDERAL BUDGET AND APPROPRIATIONS FOR FISCAL YEAR 2011: DEMOCRACY, GOVERNANCE, AND HUMAN RIGHTS IN THE MIDDLE EAST (April 2010) available at <http://pomед.org/mcinerney-appropriations-fy11/>.
 67. *Tunisia Before Riots: \$631 Million in US Military Aid*, WAR IS BUSINESS, Jan. 14, 2011, at <http://www.warisbusiness.com/2488/news/tunisia-before-the-riots-631-million-in-us-military-aid/>.
 68. *Id.*
 69. BUREAU OF DEMOCRACY, HUMAN RTS. & LABOR, U.S. DEP'T OF STATE, TUNISIA 2004 (Feb. 28, 2005) available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41733.htm>.
 70. Amal Saad-Ghorayeb, Editorial, *Washington in Lebanon and Palestine: Fatal Manipulation*, CONFLICTS FORUM, Aug. 14, 2007, available at http://www.opendemocracy.net/article/conflicts/middle_east/washington_hizbollah.
 71. Interview with Mr. Hammami in Carleton Hotel (Mar. 17, 2011).
 72. Peter Baker, *Obama's war over terror*, N.Y. TIMES, January 17, 2010, available at <http://query.nytimes.com/gst/fullpage.html?res=9806E3D61230F934A25752C0A9669D8B63&ref=inaugurations>.
 73. MARJORIE COHN, THE US AND TORTURE: INTERROGATION, INCARCERATION, AND ABUSE (2011).
 74. Interview with Mr. Trifi, *supra* note 49.
 75. Yasemine Ryan, *Former Tunisia minister warns of coup risk*, AL JAZEERA ENGLISH, May 5, 2011, available at <http://english.aljazeera.net/news/africa/2011/05/2011551812282786.html>.
 76. Jonathan Rugman, *Sidi Bouzid: roots of the Tunisia revolution*, CHANNEL 4 NEWS, Jan. 20, 2011, available at <http://www.channel4.com/news/sidi-bouzid-roots-of-the-tunisia-revolution>.



**Cheri J. Deatsch &
Heidi Boghosian**

**BRIEF OF *AMICUS CURIAE* IN
SUPPORT OF WARD CHURCHILL**

Summary of Argument

The purpose of 42 U.S.C. § 1983, Section 1 of the Civil Rights Act of 1871, is undermined when a jury is precluded from considering whether an employer's investigation into all of a professor's writings and public speech constitutes an adverse employment action, the University is given absolute immunity from liability for firing a professor in retaliation for First Amendment protected expression, and all equitable remedies are denied.

For nearly half a century, §1983 has shaped civil rights litigation and ensured the protection of constitutional rights in the United States. The specifics of §1983 practice have evolved over time, yet its significance to the protection of fundamental constitutional rights is firmly rooted and continues to be recognized by courts around the country. The Civil Rights Act was enacted with the express purpose of empowering the federal courts to respond to unlawful abuse of African Americans in the South; it now serves to expose and redress a host of civil rights violations spanning a broad spectrum of issues and touching the lives of diverse groups of people.

One such group is employees of public academic institutions, whose First Amendment activities may provoke disagreements and even retaliatory action by state university officials. Allowing a state university to conduct retaliatory investigations or terminate employees for exercising their First Amendment rights tarnishes the Act's record of protecting fundamental rights from overreaching state action. It also represents a resounding reversal of efforts to move forward from an era in this nation's history when constitutional rights were violated with impunity.

It is axiomatic that state officials sworn to uphold the United States Constitution must answer for their actions under the time-cherished protections of §1983. This Court has the opportunity to restore these protections and to send a cautionary message to those who would intentionally violate fundamental rights.

Statements of Interest of *Amici Curiae*

The National Lawyers Guild, Inc. is a non-profit corporation formed in 1937 as the nation's first racially integrated voluntary bar association, with a

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mandate to advocate for human and civil rights, including those guaranteed by the United States Constitution. Since then the Guild has been at the forefront of efforts to develop and ensure respect for the rule of law and basic legal principles.

The Guild has championed the First Amendment right to unpopular speech for over seven decades. During the late 1940s to 1950s the Guild defended individuals—including educators—accused by the government of being disloyal or subversive in hearings conducted by the House Un-American Activities Committee. Since then, it has represented thousands of Americans critical of government policies, from anti-war activists during the Vietnam era to current anti-globalization and anti-war activists. The Guild has student members at over 100 U.S. law schools and thus has a special interest in ensuring that the academic freedom of both students and their professors continues to flourish, especially during times of national crisis.

The Center for Constitutional Rights (CCR) is a national non-profit legal, educational, and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international law. CCR has actively protected the rights of marginalized political activists for over 40 years and litigated historic First Amendment cases including *Dombrowski v. Pfister*, *Texas v. Johnson*, and *United States v. Eichman*.¹

Since 1915 the American Association of University Professors (AAUP) has assumed the responsibility of protecting the freedom of university professors to teach, research, and speak without fear of retaliation. Academic freedom ensures that universities remain havens for the expression of ideas, even controversial ones, and as such is necessary for the very preservation of democracy. The AAUP's 1915 Declaration of Principles on Academic Freedom and Academic Tenure states that trustees of public institutions

cannot be permitted to assume the proprietary attitude and privilege, if they are appealing to the general public for support. Trustees of such universities or colleges have no moral right to bind the reason or the conscience of any professor. All claim to such right is waived by the appeal to the general public for contributions and for moral support in the maintenance, not of a propaganda, but of a non-partisan institution of learning.²

The Colorado Conference of the AAUP joins this brief because if faculty have no viable recourse to challenge decisions of trustees, academic freedom—including the tenure system on which it rests—will be no stronger than a university's will to protect it in the face of political pressure from trustees, legislators, and the public who may not understand the necessity of the free exchange of ideas in sustaining a vital democracy.

Latina/o Critical Legal Theory, Inc. (LatCrit) is a non-profit community of scholars with 503(c) status that seeks to further LatCrit theory, an “outsider jurisprudence” committed to the principle of anti-subordination and the promotion of social justice domestically and globally. Since 1995, LatCrit’s basic twin goals have been: (1) to develop a critical, activist and inter-disciplinary discourse on law and policy towards Latinas/os, and (2) to foster both the development of coalitional theory and practice as well as the accessibility of this knowledge to agents of social and legal transformation. LatCrit joins the amicus brief to honor the fundamental importance of the constitutionally-derived free speech values necessary to support our anti-subordination, social justice objectives and to support the view that universities cannot be allowed to disregard the First Amendment with impunity when seeking to silence critical voices of outsider scholars.

The National Conference of Black Lawyers is an association of lawyers, scholars, judges, legal workers, law students and legal activists. Its mission is to serve as the legal arm of the movement for Black Liberation, to protect human rights, to achieve self-determination of Africa and African Communities in the Diaspora and to work in coalition to assist in ending oppression of all peoples.

The Society of American Law Teachers (SALT), incorporated in 1974, is an independent organization of law teachers, deans, law librarians, and legal education professionals working to make the profession more inclusive, to enhance the quality of legal education, and to extend the power of legal representation to underserved individuals and communities. It joins this amicus brief because academic freedom is critical to the ability to speak out as individual faculty, and as an organization, in defense of the rule of law and to advocate for and promote the core values of SALT.

Amici curiae Law Professors and Attorneys are legal scholars and practitioners from a diverse range of U.S. law schools, law firms and organizations whose scholarship, teaching, and/or practice involve the protection of legal and constitutional rights. *Amici* are aware that the protections of the First Amendment and academic freedom are often threatened in times of perceived national emergency and that, when constitutional rights are violated, access to the courts is essential to ensuring the rule of law. *Amici* are concerned that the preclusion of legal review for credible claims of retaliatory investigation and termination, particularly the granting of absolute immunity to university regents, will undermine the ability of 42 U.S.C. § 1983 to ensure that state officials comply with the United States Constitution, and will allow state universities to violate with impunity the protections afforded faculty members under the First Amendment as well as the Constitution’s guarantees of due process and equal protection.

Statement of facts

Amici hereby adopt and incorporate by reference the Statement of Facts, with citations to the record, set forth in the Opening Brief of the Petitioner, as well as the Standards of Review set forth, under separate headings, in the Opening Brief of the Petitioner. The following facts, as supported in the Opening Brief of the Petitioner and by the record below, are particularly relevant to the concerns expressed by *Amici curiae* in this brief.

In late January 2005, in response to belated media coverage of an essay written by Professor Ward Churchill about the events of September 11, 2001, the University of Colorado—his employer of almost 30 years—came under intense political pressure to fire Professor Churchill. On January 31, 2005, Professor Churchill stepped down as Chair of the Ethnic Studies Department; at an emergency meeting four days later, several Regents demanded that the University discharge Professor Churchill and they unanimously called for an investigation of all of his writings and public speeches.

In March 2005, University officials concluded that all of Professor Churchill's writings and public speech were protected by the First Amendment. The acting chancellor then brought allegations of research misconduct against Professor Churchill. After two years of internal investigations, the investigative committees did not recommend dismissal. Nonetheless, on July 24, 2007, the Regents voted 8-to-1 to fire Professor Churchill from his position as a tenured full professor of Ethnic Studies.

Professor Churchill filed this action under 42 U.S.C. § 1983, claiming that (1) the investigation into his writings and public speech violated the First Amendment and (2) he was fired in retaliation for the exercise of his First Amendment rights. The trial court entered a directed verdict dismissing Professor Churchill's first claim on the grounds that the investigation into his writings and speech was not an adverse employment action.

On April 2, 2009, after a month of trial, the jury returned a verdict against the University of Colorado and its Regents (collectively, the "University") and in favor of Professor Churchill on his claim of retaliatory termination. The jury unanimously agreed that Professor Churchill's protected speech activity was a substantial or motivating factor in the decision to fire him and that he would not have been dismissed but for his protected speech.

The University then moved for judgment as a matter of law, claiming that the Regents had quasi-judicial immunity when they terminated Professor Churchill's employment. The trial court vacated the jury's verdict on that ground. The court of appeals affirmed the decision.

Argument

I. The Purpose of 42 U.S.C. § 1983 is to deter violations of constitutional rights by providing effective remedies

A. Congress intended §1983 to preserve the rule of law

The purpose of 42 U.S.C. § 1983 is to ensure the rule of law throughout the United States by providing legal redress for those whose constitutional rights have been violated by state officials. As Chief Justice John Marshall stated in *Marbury v. Madison*, “The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”³

As Justice Harlan emphasized in 1904, the “[c]ourts of justice are established not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government. . . .”⁴ In *U.S. v. Lee* the Court explained why this is critical to the rule of law:

[T]he rights of the citizen, when brought in collision with the acts of the government, must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government. . . . There remains to him but the alternative of resistance, which may amount to crime.⁵

In keeping with these fundamental principles and, more specifically, to prevent state officials from violating the federal Constitution with impunity, Congress passed 42 U.S.C. § 1983.⁶ Justice William Brennan noted that § 1983 provides private citizens with “a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and the laws of the Nation.”⁷ Thus, “[t]he very purpose of § 1983 was . . . to protect the people from unconstitutional acts under color of state law, “whether that action be executive, legislative or judicial.”⁸

A primary purpose of § 1983 is to “give a remedy to parties deprived of constitutional rights, privileges and immunities by an official’s abuse of his position.”⁹

Further, § 1983 is intended “to serve as a deterrent against future constitutional deprivations.”¹⁰ Thus, the Court has identified “two of the principle policies embodied in § 1983 as deterrence and compensation.”¹¹ The purpose of § 1983 cannot be fulfilled without legal recourse against state officials for those denied equal protection of the laws or the right to freedom of expression.

In this case the lower courts ruled that the investigation into Professor Churchill’s speech was not independently actionable under § 1983; that he had no recourse for wrongful termination because the Regents of the University

of Colorado are shielded by absolute, quasi-judicial immunity; and that, even if the jury verdict had not been vacated, Professor Churchill should not be awarded any equitable remedies. Each of these holdings expands the ability of state officials to violate the constitutional rights of all persons under their jurisdiction, in direct contravention of the purpose of §1983. In turn, the lack of legal recourse for such abuses of state power undermines the rule of law.

B. §1983 Protections are particularly significant in public schools and universities

The need to protect free speech from state control is perhaps nowhere as important, both for practical and symbolic purposes, as in academic institutions.¹² The interest of justice and a long line of cases brought under §1983 require that state officials who engage in retaliatory investigations or terminations in violation of the First Amendment “be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.” 42 U.S.C. § 1983. Thus, preventing a jury from deciding Professor Churchill’s claim of retaliatory investigation and shielding the University from liability for firing him in violation of the First Amendment undermines the purpose of §1983 in a setting where freedom of expression is of paramount importance.

Responding to McCarthy era attempts to limit academic freedom, the United States Supreme Court declared:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.¹³

In the late 1960s—a decade informed by activism and criticism of governmental policies on campuses around the country—the Supreme Court reiterated: “Our Nation is deeply committed to safeguarding academic freedom which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment.”¹⁴

Just a few years later, at the apex of student protests against the Vietnam War, the Supreme Court again emphasized the importance of free speech on college campuses: “[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”¹⁵

The bulk of §1983 cases defining academic freedom have involved administrators limiting or retaliating against students’ and professors’ expressive activities. In *Monell*, where the New York City Board of Education was sued, the Court cited “a score of cases brought under §1983 in which the principal defendant was a school board.”¹⁶

More recent §1983 cases include *Rosenberger v. Rector and Visitors of University of Virginia*, where the Court noted that in a university setting, “the

State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.”¹⁷

Federal courts have recognized that the purpose of tenure is to ensure the protection of academic freedom. “The real concern is with arbitrary or retaliatory dismissals based on an administrator’s or a trustee’s distaste for the content of a professor’s teaching or research, or even for positions taken completely outside the campus setting,” and the purpose of tenure is “to eliminate the chilling effect which the threat of discretionary dismissal casts over academic pursuits.”¹⁸

Academic freedom encourages teachers, and therefore their students, to think critically and to examine problems from all perspectives; without its protection, teachers are more likely to limit students’ education by presenting only those views reflective of mainstream discourse. If university officials are allowed to engage in retaliatory investigations or fire professors for expressing politically unpopular opinions, the chilling effect will be long-lasting and potentially devastating to the intellectual growth of our youth—and, ultimately, to democratic government.¹⁹

“The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”²⁰ As a general rule, public education is controlled by state rather than federal officials.²¹ Thus, the vigilance emphasized by the Court requires that §1983 continue to be available to enforce the constitutional rights of employees of public universities, especially with respect to investigations and terminations implicating First Amendment rights.

II. Investigations in retaliation for protected speech are actionable under §1983

The purpose of 42 U.S.C. § 1983 is to deter unconstitutional action by state officials, and to provide remedies for those whose rights have been violated. Investigations launched in retaliation for the exercise of First Amendment rights can constitute such violations and are therefore actionable under §1983. “The public employee surely can associate, and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so.”²²

“The threat of sanctions may deter the exercise [of First Amendment freedoms] almost as potently as the actual application of sanctions.”²³ As a result, “[a]ny form of official retaliation for exercising one’s freedom of speech, including . . . bad faith investigation, . . . constitutes an infringement of that freedom.”²⁴

As Justice Souter noted in *Waters v. Churchill*, even “an objectively reasonable investigation that fails to convince the employer that the employee actually engaged in . . . unprotected speech does not inoculate the employer against constitutional liability.”²⁵ Thus, a jury should have been allowed to

consider whether the University of Colorado's investigation into all of Professor Churchill's writings and public speech violated the First Amendment.

An employer's conduct—even if it does not relate to the terms and conditions of employment—is actionable under Title VII if it might dissuade an employee from bringing a discrimination complaint.²⁶ Federal courts have consistently applied this standard to First Amendment retaliation claims.²⁷

Whether an investigation would have a chilling effect on the exercise of constitutional rights is a “contextual determination.”²⁸ The employee need not show that it actually had a chilling effect, but that it would deter similarly situated persons of ordinary firmness.²⁹ Except in cases of clearly trivial claims, this is a question for the jury.³⁰

The Supreme Court has recognized that the danger of “the chilling of individual thought and expression” is “especially real in the University setting.”³¹

[a] public employer violates the Free Speech Clause . . . by invoking a third-party report to penalize an employee when the employer . . . believes or genuinely suspects that the employee's speech was protected . . . or if the employer invokes the third-party report merely as pretext to shield disciplinary action taken because of protected speech.³²

Internal investigations stemming from a professor's expression of politically controversial views must be closely scrutinized precisely because they readily provide this kind of pretext for discipline.

Investigations undertaken in retaliation for speech protected by the First Amendment are likely to dissuade reasonable university employees from engaging in speech that may be unpopular but is protected by the First Amendment.³³ The First Circuit has noted that formal investigations, particularly those entailing threats of further disciplinary action, could “well dissuade a reasonable [employee] from making or supporting a charge of discrimination.”³⁴ Such investigations can reasonably be expected to deter the exercise of free speech in other settings as well.

Highly publicized investigations of professors' controversial or politically unpopular speech have chilling effects on their colleagues. For this reason, the Constitution protects tenured professors from the threat of discipline, even in the form of “advisory” committees created to investigate their work, based on their politically controversial speech.³⁵

If professors subjected to retaliatory investigations have no legal recourse except after they are terminated, those considering taking controversial positions will think long and hard before risking their livelihoods and reputations. Few scholars are likely to believe the entire corpus of their publications and public statements could withstand the scrutiny of a politically-motivated investigation.³⁶

Because of this chilling effect, *Amici* urge this Court to recognize that retaliatory investigations, regardless of whether they lead to termination, can constitute adverse employment actions that violate the First Amendment, and to allow Professor Churchill's §1983 claim of retaliatory investigation to be decided by a jury.

III. Absolute Immunities Undermine the Purpose of §1983

Congress enacted 42 U.S.C. § 1983 to ensure that state officials could not violate the United States Constitution with impunity. Immunizing these officials from liability for unconstitutional conduct directly contravenes this purpose and undermines the rule of law. The granting of absolute, quasi-judicial immunity to the University of Colorado for firing a tenured professor in violation of the First Amendment sets a dangerous precedent with implications far beyond Professor Churchill's case.

The Supreme Court has "clearly established that a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech."³⁷ Neither public nor private employers may discriminate on the basis of race, ancestry or ethnic characteristics.³⁸ Granting a state university absolute immunity from liability for knowingly violating the First Amendment's guarantee of freedom of expression, or the Fourteenth Amendment's equal protection clause, renders these constitutional protections meaningless in the context of public employment and education. Thus, for example, in 1950 the Supreme Court laid the foundation for its landmark decision in *Brown v. Board of Education* by prohibiting the University of Texas and its regents from discriminating on the basis of race in law school admissions.³⁹ Had the University of Texas and its regents been granted quasi-judicial immunity, this decision would not have been possible.

It is for these reasons that the Supreme Court has emphasized that immunities must be narrowly construed: Aware of the salutary effects that the threat of liability can have . . . as well as the undeniable tension between official immunities and the ideal of the rule of law, this Court has been cautious in recognizing claims that government officials should be free of the obligation to answer for their acts in court.⁴⁰

Where the independence of officials may be compromised by the prospect of personal liability, immunity may be appropriate because "the threat of liability can create perverse incentives that operate to inhibit officials in the proper performance of their duties."⁴¹ However, when university officials are credibly alleged to have deliberately violated the Constitution in order to fire a tenured professor, the possibility of judicial review does not inhibit but "encourages these officials to carry out their duties in a lawful and appropriate manner," thereby "accomplish[ing] exactly what it should."⁴²

Because of the importance of protecting constitutional rights, federal courts have rarely extended quasi-judicial immunity to school boards or trustees taking adverse action against students or faculty in public institutions. *Wood v. Strickland* involved claims of quasi-judicial immunity by school board members responsible for determining whether school regulations had been violated and, if so, what sanctions would be imposed.⁴³ The Supreme Court concluded that “absolute immunity would not be justified since it would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner to warrant the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations.”⁴⁴

Similarly, if there are benefits to granting absolute immunity to the University and its Regents in this case, their value is dwarfed by the absence of a remedy for professors subjected to intentional deprivations of fundamental constitutional rights. This conclusion has been reached in numerous cases involving faculty members.⁴⁵

Absolute immunity is to be granted only when public policy requires it.⁴⁶ “Officials who seek exemption from personal liability have the burden of showing that such exemption is justified by overriding considerations of public policy.”⁴⁷

Generally, the public interest in vigorous exercise of official authority is satisfied by qualified immunity, which shields officials from liability when “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”⁴⁸ Even where a common law tradition of absolute immunity for a given function may not be sufficient if “§1983’s history or purposes nonetheless counsel against recognizing the same immunity in §1983 actions.”⁴⁹

In this case no overriding considerations of public policy justify providing absolute immunity to university officials who “violate clearly established . . . constitutional rights of which a reasonable person would have known.”⁵⁰

U.S.C. § 1983 require that there be some recourse for intentional violations of fundamental constitutional rights.⁵¹ If officials of the University of Colorado can intentionally fire a tenured professor in violation of the First Amendment without incurring any liability, they will similarly be empowered to fire professors because of their race, ethnicity, religion, or gender. Moreover, this precedent may well encourage other state actors to employ similar processes to terminate employees in violation of the most fundamental constitutional protections.

IV. Denying Equitable Remedies for Unconstitutional State Action Undermines the Purpose of §1983

After a jury finds that a constitutional deprivation has occurred, the trial court must make the injured party whole and may not reconsider the existence of the violation, even when determining the appropriate equitable remedy.⁵² In this case a jury found that Professor Churchill was fired in retaliation for speech protected by the First Amendment, and that he would not have been fired in the absence of that protected speech. To deny him any equitable remedy under these circumstances violates both the compensation and deterrence purposes of 42 U.S.C. § 1983.

It is a venerated premise that “where federally protected rights have been invaded, . . . courts will be alert to adjust their remedies so as to grant the necessary relief.”⁵³ Injured parties should be placed, to the extent possible, in the same situation they would have been had the violation not occurred.⁵⁴ Federal circuits “have repeatedly emphasized the importance of equitable relief in employment cases.”⁵⁵

It is “clearly established” that state employees may not be terminated for reasons infringing upon the First Amendment.⁵⁶ Even a probationary employee who “could have been discharged for any reason or for no reason at all . . . [may] be entitled to reinstatement if she was discharged for exercising her constitutional right to freedom of expression.”⁵⁷ The trial court’s ruling, if allowed to stand, would afford such probationary employees, or nontenured professors who have no property interest in their employment, greater access to the courts for redress of First Amendment violations than tenured faculty fired by the Regents of the University of Colorado. Such a result is irrational on its face, and undermines the protections of academic freedom that tenure is intended to protect.

In wrongful termination cases, reinstatement is the preferred remedy.⁵⁸ A party found to have violated the constitution, in this case by terminating employment in retaliation for the exercise of First Amendment-protected activity, cannot be allowed to dictate the remedy for his or her unconstitutional conduct. To allow the “employer’s dislike of the employee’s returning” to preclude reinstatement “reward[s] the employer for the very attitudes that precipitated his violation of the law.”⁵⁹

As the Tenth Circuit noted with respect to the defendants in *Jackson*, denying reinstatement to Professor Churchill would permit the University officials who deliberately violated the Constitution to “accomplish their purpose.”⁶⁰ However, as the Supreme Court noted in *Rutan v. Republican Party of Illinois*, “To the victor belong only those spoils that may be constitutionally obtained.”⁶¹ In this case, the “spoils” were unconstitutionally obtained and §1983 requires that the constitutional violation be remedied.

The importance of reinstatement has been recognized in Title VII cases “because it ‘most efficiently’ advances the goals of Title VII by making plaintiffs whole while also deterring future discriminatory conduct by employers.”⁶² The same is true with respect to advancing the goals of §1983. Reinstatement is the preferred remedy because it places the party whose rights have been violated, “as near as may be, in the situation he would have occupied” had the violation not occurred.⁶³ Moreover, it is acknowledged to be the remedy most likely to deter state officials from willful violations of federally guaranteed rights.⁶⁴ Both of these reasons comport with Congress’ intent to ensure that §1983 provide a remedy that both makes the injured party whole and deters state officials from violating federally guaranteed rights.

Conclusion

For the foregoing reasons, *Amici curiae* believe the trial court’s refusal to allow Professor Ward Churchill’s claims of retaliatory investigation to be heard by the jury, its granting of quasi-judicial immunity to the Regents of the University of Colorado, and its denial of equitable relief for wrongful termination undermine the protection of all fundamental rights under 42 U.S.C. § 1983. The trial court’s rulings in this case are particularly detrimental to academic freedom and the First Amendment tenets that the Supreme Court has deemed “vital” to democracy and “the future of our Nation.”⁶⁵ *Amici curiae* are concerned also that the trial court’s decision sets a perilous precedent by allowing state university officials to violate fundamental principles of the United States Constitution with impunity. This precedent will apply not only to the First Amendment, but to all of the Constitution’s guarantees of fundamental rights, including equal protection. Therefore, we ask this court to reverse the judgment below.

NOTES

1. *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. Eichman*, 496 U.S. 310 (1990).
2. American Association of University Professors, Declaration of Principles on Academic Freedom and Academic Tenure para. 5 (1915).
3. 5 U.S. 137, 163 (1803); see also Akil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1505 (1987) (“far from justifying a gap between constitutional right and remedy . . . federalism abhors a remedial vacuum”).
4. *International Postal Supply Co. v. Bruce*, 194 U.S. 601, 609-610 (1904) (quoting *United States v. Lee*, 106 U.S. 196, 220 (1882) (Harlan, J., dissenting)).
5. *United States v. Lee*, 106 U.S. at 218-19.
6. Derived from § 1 of the Civil Rights Act of 1871, § 1983 says: “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any . . . person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and

- laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.” 42 U.S.C. § 1983 (2010).
- 7 Aldinger v. Howard, 427 U.S. 1, 33 (1976) (Brennan, J., dissenting) (quoting Mitchum v. Foster, 407 U.S. 225, 238-39 (1972)).
 - 8 *Id.* at 34 (quoting Mitchum, 407 U.S. at 242 (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1879))).
 - 9 Monroe v. Pape, 365 U.S. 167, 172 (1961), *overruled on other grounds by* Monell v. Dep’t of Soc. Serv. of New York, 436 U.S. 658, 663 (1978).
 - 10 Owen v. City of Independence, 445 U.S. 622, 651 (1980) (citing Robertson v. Wegmann, 436 U.S. 584, 590-91 (1978), Carey v. Phipus, 435 U.S. 247, 256-57 (1978)).
 - 11 Board of Regents of University of State of New York v. Tomanio, 446 U.S. 478, 488 (1980).
 - 12 *See* Healy v. James, 408 U.S. 169, 180-181 (1972) (noting the heightened importance of First Amendment protections in state colleges and universities).
 - 13 Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957). *See generally* William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 LAW & CONTEMP. PROBS. 79 (1990).
 - 14 Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).
 - 15 Healy, 408 U.S. at 180 (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)). *See also* Widmar v. Vincent, 454 U.S. 263, 268-269 (1981) (“our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities”).
 - 16 Monell v. Dep’t of Soc. Serv. of New York, 436 U.S. 658, 663 (1978); *see also id.*, 436 U.S. at 663 n.5 (citing Brown v. Board of Education, 347 U.S. 483 (1954), and 22 other cases involving school officials).
 - 17 515 U.S. 819, 835 (1995). *See also* Christian Legal Soc’y Chapter v. Martinez, 561 U.S. ___ (2010) (holding university’s antidiscrimination policies did not violate the First or Fourteenth Amendment).
 - 18 Browzin v. Catholic University of America, 527 F.2d 843, 846 (D.C. Cir. 1975) (citing the American Association of University Professors’ 1940 Statement of Principles on Academic Freedom and Tenure); *see also* Otero-Burgos v. Inter-American University, 558 F.3d 1, 10 (1d Cir. 2009) (tenure is intended to protect academic freedom as well as economic security).
 - 19 *See generally* Cary Nelson, *No University Is an Island: Saving Academic Freedom* (NYU Press 2010); *Academic Freedom after September 11* (Beshara Doumani ed., 2006).
 - 20 Shelton, 364 U.S. at 487.
 - 21 *See* Brown, 347 U.S. at 493 (“education is perhaps the most important function of state and local governments”).
 - 22 Minnesota State Board for Comm. Colleges v. Knight, 465 U.S. 271, 286 (1984) (internal citations omitted).
 - 23 NAACP v. Button, 371 U.S. 415, 433 (1963).
 - 24 Worrell v. Henry, 219 F.3d 1197, 1212 (10d Cir. 2000), *cert. denied*, 533 U.S. 916 (2001) (internal citation omitted).
 - 25 511 U.S. 661, 683 (1994) (Souter, J., concurring).

- 26 Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53, 68-70 (2006).
- 27 *See, e.g.,* Zelnik v. Fashion Inst. of Tech., 464 F.3d 217, 227 (2d Cir. 2006), cert. denied, 549 U.S. 1342 (2007); Nair v. Oakland County Cmty. Mental Health Auth., 443 F.3d 469, 478 (6d Cir. 2006); Matrisciano v. Randle, 569 F.3d 723, 730 (7d Cir. 2009); Couch v. Board of Trustees of the Mem. Hosp., 587 F.3d 1223, 1238 (10d Cir. 2009).
- 28 Zelnik, 464 F.3d at 226.
- 29 *Id.* at 226 n.2.
- 30 *See* Burlington, 548 U.S. at 71 (finding sufficient facts for jury to reasonably conclude that reassignment of duties could have been materially adverse); Williams v. W.D. Sports, N.M., Inc., 497 F.3d 1079, 1090 (10d Cir. 2007) (to warrant trial, plaintiff need only show that a jury could conclude that the employer’s conduct would dissuade a reasonable employee from bringing a discrimination claim).
- 31 Rosenberger, 515 U.S. at 835.
- 32 Waters, 511 U.S. at 683 (Souter, J., concurring).
- 33 *See* Sweezy, 354 U.S. 234 (finding legislative investigation of a professor’s lectures unconstitutional).
- 34 Billings v. Town of Grafton, 515 F.3d 39, 54 (1d Cir. 2008) (quoting Burlington).
- 35 *See* Levin v. Harleston, 966 F.2d 85, 89-90 (2d Cir. 1992) (creation of ad hoc committee to investigate professor’s speech had a judicially cognizable chilling effect).
- 36 *See* Keyishian, 385 U.S. at 683 (“[i]t would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living”); Shelton, 364 U.S. at 487 (the “inhibition of freedom of thought, and of action upon thought, in the case of teachers . . . has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice”) (quoting Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring)).
- 37 Rankin v. McPherson, 483 U.S. 378, 383 (1987) (citing Perry v. Sindermann, 408 U.S. 593, 597 (1972)).
- 38 *See* Saint Francis College v. Al-Khazraji, 481 U.S. 604, 609-613 (1987).
- 39 Sweatt v. Painter, 339 U.S. 629 (1950).
- 40 Forrester v. White, 484 U.S. 219, 223-224 (1988).
- 41 *Id.* at 223.
- 42 *Id.*
- 43 420 U.S. 308 (1975).
- 44 *Id.* at 320; *see also* Cleavinger v. Saxner, 474 U.S. 193, 204-205 (1985).
- 45 *See, e.g.,* Harris v. Victoria Independent School District, 168 F.3d 216, 224 (5d Cir. 1999), cert. denied, 528 U.S. 1022 (1999) (relying on *Wood* to deny trustees quasi-judicial immunity with respect to faculty member’s §1983 claim of First Amendment violation); Stewart v. Baldwin County Board of Education, 908 F.2d 1499, 1508 (11d Cir. 1990) (*Wood* precluded extension of absolute immunity to school board members for discharge of employee in retaliation for exercise of constitutional rights).
- 46 *See* Harlow v. Fitzgerald, 457 U.S. 800, 807-808 (1982).
- 47 Forrester, 484 U.S. at 224.
- 48 Buckley v. Fitzsimmons, 509 U.S. 259, 268 (1993) (quoting Harlow, 457 U.S. at 818).
- 49 Buckley, 509 U.S. at 269 (quoting Tower v. Glover, 467 U.S. 914, 920 (1984)).

- 50 Buckley, 509 U.S. at 268.
- 51 See Margaret Z. Johns, *A Black Robe is Not a Big Tent: The Improper Expansion of Absolute Judicial Immunity to Non-Judges in Civil-Rights Cases*, 59 SMU L. REV. 265, 268-269 (2006).
- 52 Squires v. Bonser, 54 F.3d 168, 174 (3d Cir. 1995). See also Williams v. Valentec Kisco, Inc., 964 F.2d 723, 730 (8d Cir. 1992), cert. denied, 506 U.S. 1014 (1992).
- 53 Bell v. Hood, 327 U.S. 678, 684 (1946) (citing Marbury, 5 U.S. at 162).
- 54 Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975).
- 55 Reiter v. MTA New York City Transit Auth., 457 F.3d 224, 230 (2d Cir. 2006), cert. denied, 549 U.S. 1211 (2007) (citing cases from the First, Second, Tenth and Eleventh Circuits).
- 56 Rankin, 483 U.S. at 383.
- 57 Id. at 383-84 (1987) (citing Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 284-85 (1977); Perry v. Sindermann, 408 U.S. 593, 597-598 (1972)).
- 58 See Jackson v. City of Albuquerque, 890 F.2d 225, 233 (10d Cir. 1989).
- 59 Price v. Marshall Erdman & Assoc., Inc., 966 F.2d 320, 325 (7d Cir. 1992).
- 60 890 F.2d at 235.
- 61 497 U.S. 62, 64 (1990).
- 62 Che v. Mass. Bay Transp. Auth., 342 F.3d 31, 43 (1d Cir. 2003) (citations omitted).
- 63 Albemarle, 422 U.S. at 418-19.
- 64 Reeves v. Claiborne County Board of Education, 828 F.2d 1096, 1102 (5d Cir. 1987) (denial of reinstatement would render the deterrent effect of the remedy a nullity).
- 65 Sweezy, 354 U.S. at 250.



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Marjorie Cohn

**BOOK REVIEW: BREEDING GROUND:
AFGHANISTAN AND THE ORIGINS
OF ISLAMIST TERRORISM**

***Breeding Ground: Afghanistan and the Origins of Islamist Terrorism*, by Deepak Tripathi, Dulles, Virginia: Potomoc Books, Inc., 2011. 256 pp.**

After the terrorist attacks on September 11, 2001, the Bush administration rolled out its “Global War on Terror.” Although the Obama White House doesn’t use that moniker, many of its policies are indistinguishable from those of its predecessor. Both administrations have focused on combating the symptoms of terrorism rather than grappling with its root causes. Longtime BBC correspondent Deepak Tripathi was based in Kabul, Afghanistan for 15 months in the early 1990s, where he gained a unique perspective about the genesis of terrorism from his access to Afghan leaders and citizens during the civil war following the expulsion of the communist regime there.

Breeding Ground makes a significant contribution toward understanding the origins and triggers of terrorism. Tripathi traces the development of a ‘culture of violence’ in Afghanistan—largely due to resistance against foreign invasion—from the “U.S.-led proxy war” against the USSR to the current U.S. war. Without such historical insight, efforts to make us safe from acts of terror will prove futile.

Absent from the national discourse after 9/11 was a substantive inquiry into why nineteen men could hate the United States so much they would blow themselves up and take more than three thousand innocents with them. The source of that hatred can be traced to foreign occupation of Afghanistan as well as resentment of the United States for its uncritical support of Israel’s occupation of Palestinian lands.

Tripathi reproduces an October 7, 2001 statement by Osama bin Laden that says, “What America is tasting now is something insignificant compared to what we have tasted for years,” citing “humiliation and degradation.” Bin Laden adds, “Millions of innocent children are being killed as I speak. They are being killed in Iraq [from the blockade and sanctions] without committing any sins.” And he writes, “Israeli tanks infest Palestine . . . and other places in the land of Islam, and we don’t hear anyone raising his voice or moving a limb.”

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Bin Laden's statement mirrors the grievances set forth in a 1998 Al Qaeda declaration, which listed Israel's control over Jerusalem, the Palestinian problem, and Iraq as its three primary complaints. The declaration cited America's "occupying the lands of Islam in the holiest of places, plundering its riches, dictating to its rulers, humiliating its people, terrorizing its neighbors and turning its bases into a spearhead" against Muslims. It complained of "the huge number of those killed" by the blockade of Iraq after the 1991 Gulf War. The declaration described U.S. aims as "religious and economic," with a desire to serve Israel's interests by diverting attention from its occupation of Jerusalem and the murder of Muslims in the occupied Palestinian territories.

Tripathi dialectically traces the rise of radical Islam against communism in Afghanistan, U.S. support for the Islamic forces to repel the Soviets, and the later development of terrorism in opposition to American policies once the Soviet Union was expelled from Afghanistan.

In 1979, the USSR invaded Afghanistan and began a ten-year occupation to prop up the struggling Afghan communist government which had come to power the year before. "The rise of communism radicalized the country's Islamic groups," Tripathi writes. After the invasion, bin Laden moved to the Afghan-Pakistan border to "liberate the land from the infidel invader." Supported by the CIA, he created an organization to fight the Soviets. It became part of the Mujahideen, which was based in Pakistan and backed by the United States.

The U.S. and its allies financed the war against the Soviet Union with billions of dollars worth of weapons. American aid was funneled by the CIA to the Mujahideen via the Inter-Services Intelligence Directorate (ISI) in Pakistan, which received \$3 billion in U.S. assistance for its efforts. President Jimmy Carter began a policy of active confrontation with the communists by authorizing secret support of the Mujahideen. When Ronald Reagan assumed the presidency, he made a conscious decision to increase CIA military aid to the Mujahideen. By 1987, 65,000 tons of arms and ammunition was going through the CIA pipeline to the Afghan resistance. "These fundamentalist fighters were willing to endure extreme hardship and make the ultimate sacrifice—martyrdom," notes Tripathi. Many defectors and prisoners of the Mujahideen were tortured or killed. The ISI had a great deal of influence over Mujahideen leaders.

"Terror was fundamental in the Soviet occupation of Afghanistan," according to Tripathi. The occupation lasted until 1989 when the Soviet Union was forced to withdraw from Afghanistan due to its devastating costs. In the decade of war and brutality, over 1.3 million Afghans were killed and more than a third of the population became refugees.

Bin Laden formed Al Qaeda in the mid-1980s to overthrow corrupt, heretical regimes in Muslim countries and replace them with Islamic law. “Al Qaeda’s ideology was intensely anti-Western,” Tripathi says, “and bin Laden saw America as the greatest enemy that had to be destroyed.” While the United States supported radical Islam against the communists in Afghanistan with money and weapons, it “failed to recognize that the demise of the Soviet empire would leave the United States itself exposed to assaults from groups like al Qaeda,” Tripathi writes. “In time, this failure proved to be a historic blunder.”

After the demise of the USSR, which was partially attributable to its loss in the Afghan war, Afghanistan sank into chaos and civil war. Radical Islamic forces came to the fore. “Helped by America and its allies, the Afghan resistance generated its own culture of terror, which grew in Afghanistan—and beyond—over time.” Afghanistan, which generally had been a peaceful country, became identified with global terror in the 1990s. Toward the middle of that decade, the Taliban rose to prominence. Comprised of young Afghan refugees from the war against the Soviet Union, many grew up in Pakistan. Most of the Taliban leaders hailed from poor backgrounds. Relying on strict Shari’ah law, they promised to restore peace and security to Afghanistan. But it came at a price. Shi’a Afghans, women and ethnic minorities became victims of Taliban atrocities. ISI supplied the Taliban with military equipment and fighters. By 1998, the Taliban controlled most of Afghanistan. “Torture and ill-treatment had become systematic.”

The adage, ‘Be careful what you wish for,’ is nowhere more relevant than in Afghanistan. The CIA gave weapons and copies of the Quran to Afghan and Arab groups. The virulent anti-communism of Carter, Reagan and President George H.W. Bush backfired. “Al Qaeda and the Taliban’s anti-Western ideology was a grotesque mirror image of the Carter and Reagan-Bush administration’s anti-Soviet policy,” Tripathi observes. “The rise of Al Qaeda and its Afghan hosts, the Taliban, was as much a reaction to America’s relentless pursuit of an anti-Soviet policy as it was a symbol of the fundamentalists’ will to advance their brand of Islam.”

George W. Bush launched his “war against terror” after the 9/11 attacks by invading and occupying Afghanistan. The dead include 1,672 Americans, 2,604 coalition troops, and, by the end of 2010, at least ten thousand Afghan civilians. Under the guise of fighting terror, Bush also attacked and occupied Iraq, which had no connection to Al Qaeda. In Iraq, 4,474 Americans, 4,792 coalition troops, and between 101,906 and 111,369 Iraqi civilians have been killed. Those occupations continue to claim lives. Between 9/11 and 2012, the projected cost of these two wars is \$1.42 trillion.

The Bush administration developed a policy of torture and abuse of prisoners, many of whom have been detained for years without evidence of any

connection to terrorism. The U.S. prison at Guantánamo became synonymous with the dehumanization of men of Arab and Muslim descent. Photographs of cruel treatment that emerged from Abu Ghraib prison in Iraq sent shock waves around the world. The Guantánamo prison still operates under the Obama administration, which has also increased attacks by unmanned drones in Pakistan, Yemen and Somalia. More than 90 percent of those killed have been civilians, according to the Brookings Institution.

Rather than endearing us to the people in these countries, those policies incur hatred against the United States, making us more vulnerable to terrorism. Tripathi's excellent work ends with a call to replace the military strategy in Afghanistan and Pakistan with development, reconciliation, and reconstruction. It behooves us to heed his wise counsel.



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corps at the very heart of America's global financial empire—the 'mighty engine of profit' to which the military dimension of U.S. policy has always been enslaved—and they did so both willingly and knowingly."² In January 2005, someone tipped off *Fox News*' Bill O'Reilly that Hamilton College in Clinton, New York, planned to pay Churchill a \$3,500 speaker's fee for an upcoming visit.³ Led by Bill O'Reilly, host of their most popular primetime show, *The O'Reilly Factor*, *Fox News* dredged up and repeated Churchill's "little Eichmanns" quote with salacious vigor, casting the quote in the worst possible light and stoking the fear and rage of its overwhelmingly right-wing audience. Predictably, Hamilton College cancelled the speaking event, "for security reasons,"⁴ shortly after the *Fox News* campaign began. The college had received numerous threats of violence, including a phone call from someone threatening to bring a gun.⁵

The *Fox News* onslaught gathered followers and powerful momentum. Colorado's governor, Bill Owens, publicly called Churchill's views "treasonous"⁶ and repeatedly urged CU to fire Churchill, despite his tenured status.⁷ The Colorado House of Representatives passed a resolution calling the Eichmann quote "evil" and officially condemned him.⁸ The pressure on CU, a state university, to fire Churchill despite his First Amendment right to free speech became too great to withstand. CU began trying to get rid of Churchill while, to the extent possible, maintaining the popular perception that it was committed to free inquiry and expression. The result was a painstaking investigation into the outspoken professor's voluminous bibliography, comprised of countless books, articles, and essays over decades of academic activity, searching for a plausible reason to fire him. They sniffed through every page of his complete works until they found something they could convince themselves and enough of the public smelled like academic misconduct. It came as no surprise that Churchill was ultimately fired as a result.

The Guild has a long and proud tradition of defending academic freedom. Some of our senior members still bear the scars of the academic purges of the 1950s when intellectualism itself was under constant attack in the forms of loyalty oaths, investigative committees, and other such fear-driven instruments of conformity. It was during this time that former Guild President Thomas I. Emerson successfully overturned the conviction of a Marxist academic, Paul Sweezy, for contempt after refusing to answer the New Hampshire attorney general's questions regarding lectures he'd given at the University of New Hampshire. This landmark case, *Sweezy v. New Hampshire*,⁹ was the first in which the Supreme Court¹⁰ expressly recognized a constitutional right to academic freedom. Chief Justice Warren's plurality opinion and Justice Frankfurter concurrence, both underscoring the "almost self-evident"¹¹ necessity of free inquiry and expression in higher education, have since formed the foundation of constitutional jurisprudence on this question. The new amicus brief the Guild has filed in *Churchill v. The Board of Regents of the University of Colorado*, included in this issue, is a continuation of this tradition. It's the second brief

the Guild has filed as this case has wended its way up and down the legal system. The brief argues that the trial court erred by not allowing Churchill to argue that CU conducted its misconduct investigation as retaliation against constitutionally protected speech. The investigation, the brief goes on to argue, was in this context a form of punishment that will lead to self-censorship amongst academics nationwide.

This issue ends with former Guild President Marjorie Cohn's review of a new book titled, *Breeding Ground: Afghanistan and the Origins of Islamist Terrorism*, written by longtime BBC journalist Deepak Tripathi.

—Nathan Goetting, *Editor-in-chief*

NOTES

1. 279 U.S. 644, at 655 (1929).
2. Ward Churchill, "*Some People Push Back*": *On the Justice of Roosting Chickens*, at <http://www.kersplebedeb.com/mystuff/s11/churchill.html> (last visited Jan. 5, 2012).
3. Fox News, *More Controversy Over Univ. of Colorado Professor Churchill*, FOXNEWS.COM, Feb. 1, 2005, available at <http://www.foxnews.com/story/0,2933,146031,00.html>.
4. Patrick D. Healy, *College Cancels Speech Over 9/11 Remarks*, N.Y. TIMES, Feb. 2, 2005, available at <http://select.nytimes.com/gst/abstract.html?res=F00F17FD385F0C718CDAB0894DD404482>.
5. *Id.*
6. CBS News, *Prof: More 9/11s May Be Necessary*, CBSNEWS.COM, Feb. 11, 2009, available at http://www.cbsnews.com/8301-201_162-672507.html.
7. *Id.*
8. Michelle York, *Professor Is Assailed by Legislature and Vandals*, N.Y. TIMES, Feb. 3, 2005, available at <http://www.nytimes.com/2005/02/03/nyregion/03hamilton.html>.
9. 354 U.S. 234 (1957).
10. Albeit in plurality opinion.
11. 354 U.S. 234, at 249 (1957).

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