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# A Prescription for Healing a National Wound: Two Doses of Executive Direct Action Equals a Portion of Justice and a Serving of Redress for America & the Black Panther Party

Angela A. Allen-Bell

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# A Prescription for Healing a National Wound: Two Doses of Executive Direct Action Equals a Portion of Justice and a Serving of Redress for America & the Black Panther Party

Angela A. Allen-Bell<sup>\*</sup>

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## I. INTRODUCTION

In 1963, then President John Kennedy addressed the American people concerning the civil rights struggle that was underway in this country. With great passion and sincerity, he pronounced:

We face . . . a moral crisis as a country and as a people. It cannot be met by repressive police action. It cannot be left to increased demonstrations in the streets. It cannot be quieted by token moves or talk. It is a time to act in the Congress, in your State and local legislative body and, above all, in all of our daily lives.

It is not enough to pin the blame on others, to say this is a problem of one section of the country or another . . . A great change is at hand, and our task, our obligation, is to make that revolution, that change, peaceful and constructive for all.

Those who do nothing are inviting shame as well as violence. Those who act boldly are recognizing right as well as reality.<sup>1</sup>

Not long after this call was made, the Black Panther Party (BPP) was founded in Oakland, California.<sup>2</sup> The Black Panther Party would not go down in history as “those who do nothing.”<sup>3</sup> Instead, they “boldly” heeded the President’s call to do something to better the social situation.

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<sup>1</sup> President John F. Kennedy, Report to the American People on Civil Rights (June 11, 1963), *available at* [http://www.jfklibrary.org/Asset-Viewer/LH8F\\_0Mzv0e6Ro1yEm74Ng.aspx](http://www.jfklibrary.org/Asset-Viewer/LH8F_0Mzv0e6Ro1yEm74Ng.aspx).

<sup>2</sup> See BARBARA RANSBY, *Foreword to THE BLACK PANTHERS SPEAK* ix (Philip S. Foner, ed. 2014) (designating 1966 as the starting point of the organization).

<sup>3</sup> The Black Panther Party is hereinafter referred to as the “BPP.” Robert C. Mants, Jr. was a civil rights activist who lived in Lowndes County, Alabama. He helped organize the famous Bloody Sunday march in Alabama. Thereafter, Mr. Mants formed a “black power” movement in Alabama called the Lowndes County Freedom Organization (LCFO) whose purpose was “to promote and place its own candidates in political offices throughout the Alabama Black Belt.” “The movement spread all over the Nation.” “Two black Californians, Huey P. Newton and Bobby Seale, asked for permission to use the Black Panther emblem that the LCFO had adopted for their newly formed Black Panther Party.” “The Oakland-based Black Panther Party became a much more prominent organization than the LCFO.” See 112nd CONG. REC. E226 (daily ed. Feb. 17, 2012) (statement of Rep. Thompson). It is believed that the name was changed to represent an ideological shift to making social programs a top priority. See *id.* at 65. As used herein,

The BPP innovatively acted upon what they saw as a “revolutionary opportunity to transform this country.”<sup>4</sup> “The defenses they sought to provide were against poverty, despair, unemployment, physical illness . . . miseducation [and] . . . police tyranny.”<sup>5</sup> They were very deliberate and direct in their approach to social change. They did this at a time when the practice and custom was to silence, literally or figuratively, dissident voices as a means of deterring repeat offenders. “They radically and idealistically organized thousands of young black people and their white supporters to help create alternatives to existing institutions, a process through which they hoped both communities and individuals would be transformed.”<sup>6</sup> Over the course of their existence, their priorities shifted and evolved from a self-defense and nationalist group to a group with greater emphasis on community service and empowerment.<sup>7</sup> At all junctures, they were highly effective at making their presence known and their desires recognized. “[W]hen a Black Panther spoke, blacks and whites not only listened, they responded.”<sup>8</sup> The government’s reaction to their new style of social change was militaristic, draconian, excessive, inhumane and unconstitutional in nature.<sup>9</sup> In short, they were neutralized by COINTELPRO, a government-initiated and government-run counterintelligence program.<sup>10</sup>

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“BPP” is intended to refer to the Black Panther Party, not the New Black Panther Party. *see also*, *The Black Panthers: Vanguard of the Revolution* (Firelight Films 2015) (selected as an official 2015 Sundance Film Festival documentary).

<sup>4</sup> Commentary, Susie Day & Laura Whitehorn, *Human Rights in the United States: The Unfinished Story of Political Prisoners and COINTELPRO*, 23 NEW POLITICAL SCIENCE 288 (2001) (Congressional Black Caucus Legislative Weekend hosted by Representative Cynthia McKinney D-Ga. Statement made by Kathleen Neal Cleaver).

<sup>5</sup> RANSBY, *supra* note 2, at xiii (designating 1966 as the starting point of the organization).

<sup>6</sup> *Id.*

<sup>7</sup> See CHARLES E. JONES, TALKIN’ THE TALK AND WALKIN’ THE WALK: AN INTERVIEW WITH PANTHER JIMMY SLATER, *THE BLACK PANTHER PARTY RECONSIDERED* 161 (1998).

<sup>8</sup> Cynthia Deitle Leonardatos, *California’s Attempts to Disarm the Black Panthers*, 36 SAN DIEGO L. REV. 947, 964 (1999).

<sup>9</sup> As used herein, the term “government” is intended to mean acts committed by or at the behest of the President of the United States in his official capacity as such or acts committed by or at the behest of any agency, head or instrumentality of the United States government. The Federal Bureau of Investigation is hereinafter referred to as the “FBI.” The FBI operates under Attorney General Guidelines and not by statutory grant of authority. These guidelines were created in 1976 as a result of abuses on the part of the FBI, such as the ones chronicled in this work. *See* The Federal Bureau of Investigation’s Compliance with the Attorney General’s Investigative Guidelines (Office of the Inspector General September 2005), *available at* <http://www.justice.gov/oig/special/0509/chapter2.htm>

<sup>10</sup> “COINTELPRO is the FBI acronym for a series of covert action programs directed against domestic groups. In these programs, the Bureau went beyond the collection of intelligence to secret action designed to ‘disrupt’ and ‘neutralize’ target groups and

“The BPP was one of the most audacious and influential organizations of the 1960s and 1970s, but it is also an organization that has been vastly misread and misunderstood.”<sup>11</sup> The BPP have been victims of a highly successful propaganda campaign branding them as violent, gun-toting thugs and extremists eager to kill police, government and the white race. This is far removed from accurate. While many of the transgressions, missteps, and shortcomings of the BPP have been made public, the profound and long-lasting positive contributions of the BPP have assumed a resting place between unnoticed and concealed. Worse, a contextual understanding of the official excesses and civil and human rights abuses they experienced has not been widely revealed to the American public. Equally as bad is the lack of accountability and the absence of redress for all these years. A multitude of good reasons compel redress and impel that redress be granted immediately.

This article proceeds in seven parts, starting with this introduction. Section II discusses how this national tragedy has created innumerable victims. Thereafter, in Section III, the societal and global benefits of redress is briefly discussed. Subsequently, Section IV identifies the specific type of redress sought: two forms of executive direct action. Section V discusses some of the legal undergirdings and considerations that shape this redress proposal. Section VI explores some likely counterarguments. A conclusion follows in Section VII. In the end, this article offers insights that lead toward justice and healing for the BPP, for impacted communities, as well as for the nation. While this article involves a situation specific to the United States, this discussion is quite transcending. It is intended as a global template for all regions and nations who need to mend chapters in its developmental years where civil rights and/or human rights abuses were endured by groups of people. Specifically, it will help regions shape policies and official

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individuals. The techniques were adopted wholesale from wartime counterintelligence, and ranged from the trivial . . . to the degrading . . . and the dangerous . . .” See Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, Final Report, S.Rep.No.755, 94th Cong., 2d Sess., Book III 3 (1976); “Frustrated by . . . U.S. Supreme Court decisions that made it no longer possible to prosecute people for radical political speech or Communist Party membership . . . [FBI Director J. Edgar Hoover] circumvented the court’s decisions and created COINTELPRO as his secret means of punishing, through harassment and dirty tricks, people who could no longer be punished under the law.” BETTY MEDSGER, *THE BURGLARY: THE DISCOVERY OF J. EDGAR HOOVER’S SECRET FBI* 344 (2014); see also, 1971 (Big Mouth Productions 2014) (documentary directed by Johanna Hamilton inspired on Betty Medsger’s book *The Burglary: The Discovery of J. Edgar Hoover’s Secret FBI*); see also, *The Black Panthers: Vanguard of the Revolution* (Firelight Films 2015) (selected as an official 2015 Sundance Film Festival documentary).

<sup>11</sup> RANSBY, *supra* note 2, at x.

reactions that comport with constitutional and human and civil rights standards.

## II. VICTIMS AND THEIR VICTIMIZATION

The BPP “was eclectic and complex and its story is a nuanced one.”<sup>12</sup> By the time the BPP assumed their place on the world stage, they had already, as spectators, watched Martin Luther King attempt change through nonviolent means. They had witnessed some Southern States proudly pledge allegiance to racism and segregationists practices before a world audience of onlookers that included the federal government itself.<sup>13</sup> They had observed the Deacons for Defense take a stand in the South and they couldn’t help but internalize those poignant lessons on armed resistance and community protection work.<sup>14</sup> They had observed courts both ignore injustices and issue orders for change that reality stamped null and void.<sup>15</sup> They had surveyed multiple race riots.<sup>16</sup> They

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<sup>12</sup> RANSBY, *supra* note 2, at x.

<sup>13</sup> See *Providing Federal Assistance in the State of Alabama*, Proclamation No. 3645, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=75255> (noting that the State of Alabama, after a court granted an order approving a march from Selma to Montgomery, refused to provide for safety and welfare); see also *Obstructions of Justice in the State of Alabama*, Proclamation No. 3554, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=24115> (stating that Alabama’s Governor and other officials “have been and are willfully opposing and obstructing the execution of the laws of the United States, including the enforcement of orders entered by the United States District Courts in the State of Alabama relating to the enrollment and attendance of students in public schools in that State, and have been and are impeding the course of justice . . . .”); see also *Obstructions of Justice in the State of Mississippi*, Proclamation No. 3497 (Sept. 30, 1962), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=24042> (expressing that the Governor and other Mississippi officials “have been and are willfully opposing and obstructing the enforcement of orders entered by the United States District Court . . . and the United States Court of Appeals . . . Whereas I have expressly called the attention of the Governor of Mississippi to the perilous situation that exists and to his duties in the premises, and have requested but have not received from him adequate assurances that the orders of the courts of the United States will be obeyed and that law and order will be maintained . . . .”).

<sup>14</sup> The Deacons for Defense were a group of African American men in Jonesboro and Bogalusa, Louisiana who took up arms to protect their community and the civil rights workers from the Klu Klux Klan during the civil rights era. They existed from 1964-8. See Olivia McClure, *Bogalusa Civil Rights Leader, Deacon for Defense Bob Hicks’ Honored*, THE ADVOCATE (Nov. 29, 2014) <http://theadvocate.com/news/10943485-123/bogalusa-civil-rights-leader-deacon>; see generally LANCE HILL, THE DEACONS FOR DEFENSE ARMED RESISTANCE AND THE CIVIL RIGHTS MOVEMENT (2004).

<sup>15</sup> See Leonardatos *supra* note 8, at 952 (showcasing ways courts were failing to protect African Americans in the 1960s); see also *Brown v. Board of Educ. of Topeka*, Kan., 349 U.S. 294 (1955) (noting delays amongst certain States in implementing the Supreme Court’s prior ruling ending racial discrimination in schools).

had witnessed the Freedom Riders harmed and many other protesters savagely beaten, killed, and/or jailed for doing nothing more than attempting to make America a just place (and doing so in a nonviolent way and without being armed).<sup>17</sup> They knew that law enforcement often acted to uphold segregationist laws and policies, regularly treated activists, protestors and those practicing civil disobedience as common criminals and many dished out violence in generous portions in the context of civil rights exchanges.<sup>18</sup> They understood that the Declaration of Independence presented civic unrest as a political duty in certain instances.<sup>19</sup> They knew that, as a people, African Americans had already “waited for more than 340 years for [their] constitutional and God-given

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<sup>16</sup> See H.R. REP. NO. 92-470, at 6-7 (1971); see also *Bergman v. U.S.*, 565 F.Supp. 1353, 1367 (May 31, 1983) (making reference to “violence by lawless mobs” taking place during the civil rights era).

<sup>17</sup> The Freedom Riders have been explained accordingly:

Following a Supreme Court opinion requiring the desegregation of public facilities involved in interstate commerce, the Congress for Racial Equality (CORE) decided to see ‘how far south the law applied’ . . . CORE devised a plan to send buses of Freedom Riders through several southern states . . . for the purpose of challenging, by non-violent methods, segregation of the races in public facilities which served persons traveling in interstate commerce. This challenge was to be carried out by a racially mixed group of Freedom Riders who would ride interstate bus systems . . . in an integrated fashion—white citizens sitting together with black citizens at the front of the bus, and not in the back as was then the custom. At the terminal, one white and one black would seek restaurant service, and would integrate waiting rooms, restrooms, and other facilities.

*Bergman v. U.S.*, 565 F.Supp. 1353, 1376-7 (May 31, 1983).

<sup>18</sup> See Leonardatos *supra* note 8, at 949-51 (1999) (discussing brutality at the hands of white police, as well as the apprehension on the part of African Americans that police would not come to their rescue); see also Donald Tibbs, *From Black Power to Hip Hop: Discussing Race, Policing, And The Fourth Amendment Through the War on Paradigm*, 15 J. GENDER RACE & JUST. 47, 52 (2012) (mentioning the excessive number of African Americans killed at the hands of law enforcement during the civil rights era).

<sup>19</sup> The pertinent section reads:

[A]ll Men are created equal, that they are endowed, by their CREATOR, with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness . . . whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.

THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

rights [to be respected].”<sup>20</sup> And they understood that a profound shift in public sentiment was afoot.<sup>21</sup> “It is an axiom of social change that no revolution can take place without a methodology suited to the circumstances of the period.”<sup>22</sup> The BPP was well wedded to this edict. Their methods were shaped by the social realities of their day, which taught them that that resistance was repeatedly meted out to their predecessors who sought equality. It was shaped by their determination to overcome such resistance.

The BPP had a largely reasonable and entirely legal platform, which sought to ensure that African Americans enjoyed equal rights in this country.<sup>23</sup> The BPP built its framework upon a belief in the liberating power of an education<sup>24</sup> and upon the notion that people learn by participation.<sup>25</sup> They promoted education in the community and amongst their members.<sup>26</sup> Members were required to study revolutions in Africa, Europe, Asia, Latin America, and Cuba amongst a host of others

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<sup>20</sup> MARTIN LUTHER KING, JR., *WHY WE CAN’T WAIT* 91 (2000) (referencing his Letter from the Birmingham Jail).

<sup>21</sup> Martin Luther King shared this perspective:

To measure the gains of the summer by doing some social bookkeeping—to add up the thousands of integrated restaurants, hotels, parks and swimming pools; to total the new job openings; to list the towns and cities where the victory banners now float—would be to tell less than the whole story. The full dimensions of victory can be found only by comprehending that change within the minds of millions of Negroes. From the depths in which the spirit of freedom was imprisoned, an impulse for liberty burst through. The Negro became, in his own estimation, the equal of any man. In the summer of 1963, the Negroes of America wrote an emancipation proclamation to themselves. They shook off three hundred years of psychological slavery and said: ‘We can make ourselves free.’

*Id.* at 135.

<sup>22</sup> *Id.* at 27.

<sup>23</sup> BOBBY SEALE, *SEIZE THE TIME THE STORY OF THE BLACK PANTHER PARTY AND HUEY P. NEWTON* 66-69 (1991) (explaining the platform and program as a demand for the following ten things: freedom, employment, no exploitation of the African American community, housing, educational opportunities, exemption of African Americans from military service, end to police brutality, release of African Americans from penal institutions, trials conducted by a jury of peers, and a United Nations-supervised plebiscite for African Americans only); According to an official government report, “[t]he thrust of the Panther program at its inception was to persuade black citizens that they must seek control over the communities in which they already resided.” H.R. REP. NO. 92-470, at 8 (1971).

<sup>24</sup> See JONES, *supra* note 7, at 148.

<sup>25</sup> See *THE BLACK PANTHERS SPEAK* 138 (Philip S. Foner, ed. 2014).

<sup>26</sup> See REGINA JENNINGS, *WHY I JOINED THE PARTY: AN AFRICA WOMANIST REFLECTION, THE BLACK PANTHER PARTY RECONSIDERED* 261 (1998).



materials.<sup>27</sup> They sought to educate adults in the community by holding community discussion groups.<sup>28</sup>

The Black Panthers were not a posse of thugs, degenerates, and undesirables. The group was co-founded by a college student and a law student.<sup>29</sup> “People called the Black Panther Party a street-corner movement . . . [but, it] actually started on the campus of Merritt College in 1966, and the majority of . . . [the] movement involved college students.”<sup>30</sup> There was a diverse cast of characters, including youth, military veterans, and Patriotic Americans,<sup>31</sup> educators,<sup>32</sup> postal workers,<sup>33</sup> some of the “lumpen proletariat”<sup>34</sup> and many others, including those who credit the BPP with reforming them and educating them.<sup>35</sup>

<sup>27</sup> See OLLIE A. JOHNSON, EXPLAINING THE DEMISE OF THE BLACK PANTHER PARTY: THE ROLE OF INTERNAL FACTORS, *THE BLACK PANTHER PARTY RECONSIDERED* 408-9 (1998).

<sup>28</sup> See *THE BLACK PANTHERS SPEAK*, *supra* note 25, at 181.

<sup>29</sup> See generally CHARLES E. JONES & JUDSON L. JEFFRIES, DON’T BELIEVE THE HYPE: DEBUNKING THE PANTHER MYTHOLOGY, *THE BLACK PANTHER PARTY RECONSIDERED* 45-6 (1998); see also H.R. REP. NO. 92-470, at 3-5 (1971) (indicating that BPP Co-founder Huey Newton was a law student and co-founder Bobby Seale was a college student when the organization was formed); Co-founder Huey Newton is believed to have held a doctorate in philosophy. Imani Tate, *Equality, Justice Message of Black Panther*, SAN BERNARDINO COUNTY SUN (CA), Feb. 15, 2008, available at 2008 WLNR 31090120 (citing founding BPP member and chief of staff David Hilliard).

<sup>30</sup> *Id.*

<sup>31</sup> See JOHNSON, *supra* note 27, at 397 (mentioning that BPP member Elmer “Geronimo” Pratt “served in Vietnam as a paratrooper and participated in a series of highly classified missions, garnering some eighteen combat decorations—including Silver Star, Bronze Star (for valor), Vietnamese Cross of Gallantry, and the Purple Heart”); see also Angela A. Allen-Bell, *Activism Unshackled & Justice Unchained: A Call to Make a Human Right Out of One of the Most Calamitous Human Wrongs to Have Taken Place on American Soil*, 7 J. LAW & SOC. DEVIANCE 125, 193-95 (2014) (discussing how many high ranking BPP members were decorated veterans); see also JASMINE GUY, *EVOLUTION OF A REVOLUTIONARY* 199 (2005) (where the author describes the sighting of an American flag outside the home of BPP member Afeni Shakur when she arrived for a visit after the 9/11 tragedy).

<sup>32</sup> See JONES & JEFFRIES, *supra* note 29, at 45.

<sup>33</sup> See Tim Wheeler, *From COINTELPRO to the Patriot Act: The Long Battle for Justice and Civil Liberties*, PEOPLE’S WEEKLY WORLD, Nov. 1, 2004, available at 2004 WLNR 15823377 (reporting that BPP leader Marshall “Eddie” Conway was a postal worker when he joined).

<sup>34</sup> See JONES & JEFFRIES, *supra* note 29, at 45. (offering as a definition—“thieves and criminals of all kinds” and disputing that the BPP was “primarily an organization of the Black criminal class, ex-prisoners, hustlers, and thugs”).

<sup>35</sup> BPP member Afeni Shakur explains her personal transformation:

All . . . I was doing . . . against humanity. Robbing people. Beating people . . . Before I joined the party . . . I would slap a [person] . . . in a minute. I cussed my mama out, disrespected her, left her cryin’ on the kitchen floor . . . I left home and lived with any brother off the

They were not racists, nor were they anti-white or anti-gay.<sup>36</sup> They embraced anyone who supported progress as the BPP defined it. The BPP was made up of both men and women who equally shared duties and responsibilities.<sup>37</sup> The BPP succeeded at forming meaningful alliances and coalitions with countless other organizations.<sup>38</sup> The BPP's reach even extended behind prison walls<sup>39</sup> and beyond the borders of this

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street that would pay my way . . . I'd cut somebody just for the hell of it and never look back . . . So, the Panther Party clarified my situation . . . they took my rage and channeled it . . . With that direction came hope . . . They took me . . . and said . . . you are strong so use your strength to help the weak. You are smart, so use your mind to teach the ignorant.

JASMINE GUY, *EVOLUTION OF A REVOLUTIONARY* 61-2 (2004); *see also* JENNINGS, *supra* note 26, at 259 (This former BPP member reports that the Panthers helped her overcome a drug addiction).

<sup>36</sup> *See* JONES & JEFFRIES, *supra* note 29, at 31-2 (describing the BPP as “a model for genuine multiculturalism”); BPP member Richard Aoki, who was Japanese American, recalled the following exchange between himself and BPP co-founder Huey Newton after he was asked by Newton to join the BPP: “And I said, ‘Say what? I know you two are crazy, but are you colorblind? You know I’m not black.’ He said, ‘I know you’re not black, Richard, but I’m asking you to join because the struggle for freedom, justice and equality transcends racial and ethnic barriers.’” Richard Gonzales, *Did Man Who Armed Black Panthers Lead Two Lives*, (National Public Radio Broadcast Oct. 3, 2012) <http://www.npr.org/2012/10/03/161408561/did-man-who-armed-black-panthers-lead-two-lives>; *see also* WILLIAM BRAND & CECILY BURT, *Behind Fury, Panthers Laid Course for Social Programs*, THE ARGUS (FREMONT-NEWARK, CA), Oct. 7, 2006, available at 2006 WLNR 17418301 (according to Bobby Seale, “[i]t was distortions planted by the FBI that said things like we hated all white people and that we were trying to invade the white community and shoot and kill white people . . . ‘That was not true.’ ‘I truly believe in democracy, real power to the people, and I believe in human equality to all people, white, black, brown,’ ‘When I said things like ‘the bullet or the ballot,’ I preferred the ballot.”); *see* JONES, *supra* note 7, at 166.

<sup>37</sup> *See* THE BLACK PANTHERS SPEAK, *supra* note 25, at 145-65.

<sup>38</sup> *See* THE BLACK PANTHERS SPEAK, *supra* note 25, at 219-55.

<sup>39</sup> *See* THE BLACK PANTHERS SPEAK, *supra* note 25, at 65 (referencing an interview with BPP co-founder Huey Newton where he expressed that “[t]he black prisoners as well as many of the white prisoners identify with the program of the Panthers . . . .The Panthers in jail have been educating them and so we are going along with the revolution inside of the jail.”); *see also* COLETTE GAITER, *WHAT REVOLUTION LOOKS LIKE: THE WORK OF BLACK PANTHER ARTIST EMORY DOUGLAS*, BLACK PANTHER THE REVOLUNTARY ART OF EMORY DOUGLAS 109 (2007) (noting that the Angola 3 organized the Angola prison chapter of the Black Panther Party in 1971); 159 CONG. REC. E1439 (daily ed. Oct. 4, 2013) (statement by John Conyers) (“Mr. Wallace began his struggle for justice back in the 1970s, when he, along with Robert King and Albert Woodfox, organized a prison chapter of the Black Panther Party at the Angola prison.”); *see generally* ROBERT HILLARY KING, *FROM THE BOTTOM OF THE HEAP* (2009); *see also* ORISSA AREND, *SHOWDOWN IN THE DESIRE* 157-163 (The University of Arkansas Press 2009); *see* H.R. REP. No. 92-470, at 8 (1971) (discussing prison recruiting efforts and the start of a BPP chapter in San Quentin).

country.<sup>40</sup> “[T]heir bold defiance to unjust authority was contagious and exhilarating.”<sup>41</sup> “Estimates are that at their peak, the Panthers claimed thousands of members and many more supporters, including a number of prominent celebrities, artists, and intellectuals.”<sup>42</sup>

They were public servants in the truest sense. According to founding BPP member and chief of staff David Hilliard, “It was not a social club. You couldn’t just put on a black beret and sit in the office. Work in the community was mandatory.”<sup>43</sup> They worked, planned and sacrificed like few other groups known to man. Their accomplishments were significant and drastic and has proven to be far reaching and eternal. They operated community schools.<sup>44</sup> “Its Oakland Educational Center was rated No.2 in California, second only to Beverly Hills High School.”<sup>45</sup> Upon the belief that “it is impossible to obtain and sustain any education when one has to attend school hungry,” they operated free breakfast programs for school children.<sup>46</sup> Most did this for no pay and little gain<sup>47</sup> and with great love and personal sacrifice:

Panthers working the breakfast program get out of bed at approximately 6:00 a.m. every school day. They set tables, clean facilities, cook and prepare the food, they direct traffic to see that the children cross the streets safely. After a day’s breakfast has been completed, the Panthers attend to the constant task of procuring food

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<sup>40</sup> See JONES & JEFFRIES, *supra* note 29, at 37 (illustrating how groups in other counties use the BPP as a template for starting local action groups; see also H.R. REP. NO. 92-470, at 8 (1971) (referencing an attempt by BPP members to engage the United Nations in their quest for international support for what they deemed to be human rights violations); see also H.R. REP. NO. 92-470, at 8 (1971) (“[T]he North Korean communist regime joined communist China in public expressions of sympathy for black Americans and the Black Panther Party in particular.”); see also Floyd W. Hayes, III & Francis A. Kiene, III, “All Power to the People”: *The Political Thought of Huey P. Newton and the Black Panther Party*, in *THE BLACK PANTHER PARTY RECONSIDERED*, 170 (1998) (“The BPP officially opened an International Section of the [BPP] . . . in Algiers, the capital of Algeria, on September 13, 1970.”).

<sup>41</sup> RANSBY, *supra* note 2, at x.

<sup>42</sup> *Id.*

<sup>43</sup> Tate, *supra* note 29 (referencing founding BPP member and chief of staff David Hilliard).

<sup>44</sup> See *THE BLACK PANTHERS SPEAK*, *supra* note 25, at 170.

<sup>45</sup> See Tate, *supra* note 29.

<sup>46</sup> See *THE BLACK PANTHERS SPEAK*, *supra* note 25, at 169.

<sup>47</sup> See Gun-Barrel Politics: *The Black Panther Party, 1966-71*, p. 87 Report by the Committee on International Security, House of Representatives, H.R. Rep. 92470, 92nd Cong., 1st Sess., 43 (1971), *reprinted from the collections of the University of California Libraries* (“Party membership was the sole occupation of many Panthers, but the standard of living was far from luxurious, and the income was unreliable.”).

from the merchants who do business in the community, to see that the program is constantly supplied with the necessary food.<sup>48</sup>

The BPP operated a free escort service for senior citizens,<sup>49</sup> free medical clinics,<sup>50</sup> a free ambulance service,<sup>51</sup> a free distribution of food, shoes and clothes service,<sup>52</sup> free pest control and plumbing services<sup>53</sup> and offered free transportation to visit loved ones in prisons.<sup>54</sup> “BPP members secured donations of personal hygiene items and non-perishable foods and sent care packages to prisoners.”<sup>55</sup> “The party pioneered . . . testing for sickle-cell anemia that evolved into the Sickle Cell Anemia Research Foundation, [provided] assistance to homeless families and [created] programs that are now social policy, institutional standards and presidential campaign platforms.”<sup>56</sup> They prepared materials to help people understand their legal rights<sup>57</sup> and materials to help welfare recipients in their pursuit of benefits.<sup>58</sup> They did job training<sup>59</sup> and engaged themselves in the democratic and legislative process by advocating within the political structure for changes.<sup>60</sup> They

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<sup>48</sup> THE BLACK PANTHERS SPEAK, *supra* note 25, at 169 .

<sup>49</sup> See JONES & JEFFRIES, *supra* note 29, at 30.

<sup>50</sup> See THE BLACK PANTHERS SPEAK, *supra* note 25, at 173-175 .

<sup>51</sup> See JONES & JEFFRIES, *supra* note 29, at 30..

<sup>52</sup> See JONINA M. ABRON, “SERVING THE PEOPLE”: THE SURVIVAL PROGRAMS OF THE BLACK PANTHER PARTY, THE BLACK PANTHER PARTY RECONSIDERED 183 (1998).

<sup>53</sup> See JONES & JEFFRIES, *supra* note 29, at 13

<sup>54</sup> *Id.* at 30

<sup>55</sup> ABRON, *supra* note 52, at 187.

<sup>56</sup> See Tate, *supra* note 29 (referencing founding BPP member and chief of staff David Hilliard).

<sup>57</sup> See THE BLACK PANTHERS SPEAK, *supra* note 25, at 176-177 .

<sup>58</sup> See GUY, *supra* note 31 (as recalled by BPP member Afeni Shakur).

<sup>59</sup> *Id.*

<sup>60</sup> See THE BLACK PANTHERS SPEAK, *supra* note 25, at 179 (showcasing a BPP proposed amendment to the city charter that would provide greater oversight where police misconduct was at issue); see also “Gun-Barrel Politics: The Black Panther Party, 1966-71,” p. 124 Report by the Committee on International Security, House of Representatives, H.R.Rep. 92470, 92nd Cong., 1st Sess., 43 (1971), *reprinted from the collections of the University of California Libraries* (discussing their advocacy for a new U.S. constitution); see also Chip Johnson, *Bobby Seale Back Home, Ideals Intact / Panther Co-Founder a Weary ‘Humanist’*, SAN FRANCISCO GATE, Oct. 21, 2002 (mentioning that co-founder Bobby Seale ran for mayor of Oakland, California in 1973), available at <http://www.sfgate.com/bayarea/johnson/article/Bobby-Seale-back-home-ideals-intact-Panther-2781086.php>; see also Richard Valdemar, *Inside the Black Panther Party*, POLICE THE LAW ENFORCEMENT MAGAZINE (Sep. 6, 2012) <http://www.pollicemag.com/blog/gangs/story/2012/09/the-black-panther-party-1-of-2.aspx> (“In May of 1967, a group of Panthers surprised the California State Assembly by appearing in the

even utilized international tribunals to help broker change.<sup>61</sup> They served as watch dogs over the police to ensure that police were not violating rights.<sup>62</sup> Their community projects were self-funded, which meant more service was required of them in order to sustain their free programs. Funds were generated through the sale of their newspaper;<sup>63</sup> from groups, organizations and affluent supporters;<sup>64</sup> speaking engagements;<sup>65</sup> fundraisers; and, by soliciting donations from business owners in the communities they served.<sup>66</sup>

While they believed in the constitutional right to bear arms and they staunchly embraced the legal notion of self-defense, they did not subscribe to violence as a form of recreation.<sup>67</sup> They explained:

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legislative chamber in Sacramento armed with shotguns openly displayed in their hands. This shocking but legal protest against anti-gun legislation drew national attention.”).

<sup>61</sup> See THE BLACK PANTHERS SPEAK, *supra* note 25, at 219-255 (discussing the BPP’s Petition to the United Nations to end genocide against minorities in America).

<sup>62</sup> See JIM HASKINS, POWER TO THE PEOPLE THE RISE AND FALL OF THE BLACK PANTHER PARTY 27 (1997). After a detailed study of the BPP, the government explained the patrols as follows:

Open carrying of loaded weapons was not expressly forbidden by California law. Newton’s research into the law and instructions to Panthers on how to handle weapons and ammunition within legal limits enabled the patrols to function for many months before authorities adopted measures putting an end to the practice . . . The equipment . . . included cameras and tape recorders. If a police officer stopped a ghetto resident for questioning or search . . . the militants might photograph or record the encounter, advise the black citizen of his rights, intercede in his behalf, and, in the case of an arrest, follow along to the police station to see that due process was observed without so-called ‘brutality.’ The . . . patrol[s] . . . tapped grievances found to be commonplace in black communities where residents were often in violent upheaval in the mid-sixties. Hostility toward police, a Presidential commission of inquiry reported, was widespread in such areas, where not only actual misconduct but even acceptable law enforcement procedures were subject to interpretation as part of a police campaign to ‘brutalize’ the residents.

Gun-Barrel Politics: The Black Panther Party, 1966-71, p. 18, Report by the Committee on International Security, House of Representatives, H.R.Rep. 92470, 92nd Cong., 1st Sess., 43 (1971), available at <http://babel.hathitrust.org/cgi/pt?id=uc1.b3891226#view=1up;seq=1> (footnotes omitted).

<sup>63</sup> See JONES & JEFFRIES, *supra* note 29, at 29 (mentioning that the newspaper, *The Black Panther*, was produced on a weekly basis for more than ten years and, during its peak distribution period, sold at a rate of a hundred thousand copies weekly).

<sup>64</sup> See JOHNSON, *supra* note 27, at 401.

<sup>65</sup> *Id.*

<sup>66</sup> See JONES, *supra* note 7, at 148.

<sup>67</sup> See H.R. REP. NO. 92-470, at 18 (1971); Leonardatos *supra* note 8, at 952.

We do not claim the right to indiscriminate violence. We seek no bloodbath. We are not out to kill up white people. On the contrary, it is the cops who claim the right to indiscriminate violence and practice it every day. It is the cops who have been bathing black people in blood and who seem bent on killing off black people. . . .<sup>68</sup>

Along these same lines, co-founder Bobby Seale explained their official stance on the use of the guns some of them possessed:

[N]o Panther can break a gun law unless his life is in danger . . . . If he does so we will expel or suspend him depending on the seriousness of the offense. Panther party training in the area of self-defense includes a study of gun laws, safe use of weapons and there is a strict rule that no party member can use a weapon except in the case of an attack on his life—whether the attacker be a police officer or any other person. In the case of police harassment the party will merely print the offending officer's picture in the newspaper so the officer can be identified as an enemy of the people . . . no attempt on his life will be made.<sup>69</sup>

Another unprecedented aspect of the BPP was their inclusion of the “frustrated undisciplined and sometimes ingenious Black men trapped by rural out-migration from the South into a state of permanent ghettoization and underemployment in the North.”<sup>70</sup> It seems a strategic decision was made to extend membership to and mobilize this population so they would not become a threat to the BPP who operated in the very communities that these men transgressed in.<sup>71</sup> Some feel accepting this population with an inconsistent and uneven rehabilitation plan in place left the BPP vulnerable to internal lapses.<sup>72</sup> And it is possible that those did occur. The BPP has been accused of using extortion methods in

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<sup>68</sup> THE BLACK PANTHERS SPEAK, *supra* note 25, at 19 (citing to a March 23, 1968 edition of The Black Panther newspaper).

<sup>69</sup> THE BLACK PANTHERS SPEAK, *supra* note 25, at 85-6.

<sup>70</sup> NIKHIL PAL SINGH, THE BLACK PANTHERS AND THE “UNDERDEVELOPED COUNTRY” OF THE LEFT, THE BLACK PANTHER PARTY RECONSIDERED 63 (Charles E. Jones. ed., 1998).

<sup>71</sup> See JONES, *supra* note 7, at 160.

<sup>72</sup> See CHRIS BOOKER, LUMPENIZATION: A CRITICAL ERROR OF THE BLACK PANTHER PARTY, THE BLACK PANTHER PARTY RECONSIDERED 341 (Charles E. Jones. ed., 1998).

soliciting funds and food for their community programs<sup>73</sup> and of irresponsibly using vehement slurs.<sup>74</sup> And there were times when the inclusion of this element blurred the lines between bad conduct of bad individuals and bad conduct of the BPP.<sup>75</sup> It also did not help in terms of public relations.

The government declared war on the BPP and undertook aggressive efforts to neutralize or eliminate them.<sup>76</sup> Much of this effort was initiated and coordinated by then FBI Director J. Edgar Hoover who served in this capacity from 1924 until his death in 1972.<sup>77</sup> Mr. Hoover had a well-documented disdain for African Americans<sup>78</sup> and he discriminated against many others, such as the employees he is said to have fired for having pear-shaped heads or sweaty palms<sup>79</sup> and activists.<sup>80</sup> “He secretly punished people he regarded as wrong-thinking . . . .”<sup>81</sup> Mr. Hoover demonstrated an “inability, or refusal, to differentiate people as

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<sup>73</sup> See H.R. REP. NO. 92-470, at 63 (1971); see also Memorandum from SAC, Omaha (157-272) to FBI Director (100-448006) (June 27, 1969) (on file with the author) (claiming the BPP extorted food for its local breakfast program).

<sup>74</sup> See BOOKER *supra* note 72, at 354-56 (citing BPP member David Hilliard).

<sup>75</sup> See H.R. REP. NO. 92-470, at 63 (1971); see BOOKER *supra* note 72, at 355 (citing BPP member David Hilliard); see also JOHNSON, *supra* note 27, at 406-8 (discussing the troubled nature of BPP co-founder Huey Newton).

<sup>76</sup> By no means does this author wish to convey that the BPP were the only casualties of the government’s war on activists and in no way does this author intend to suggest that the BPP are the only social and/or political action groups deserving of redress. Countless other groups were also targets; see *Human Rights In The United States: The Unfinished Story Current Political Prisoners-Victims of COINTELPRO*, Congressional Black Caucus Legislative Weekend (Sept. 14, 2000) (hosted by Representative Cynthia McKinney, D-Ga.) (statement of Nkechi Taifa, available at <http://www.ratical.org/globalize/CynthiaMcKinney/news/if000914HR.htm>) (“Although the Black Panther Party was not among the original black nationalist targets, by 1969 the [BPP] had become a primary focus of the program, and was ultimately the target of 233 of the total 295 authorized black nationalist COINTELPRO operations. Now, that figure came from the FBI, the 295 authorized. I don’t know how many more unauthorized there were . . . .”); see also FBI memorandum to “Personal Attention to All Offices,” captioned “Counterintelligence Program Black Nationalist-Hate Groups Internal Security,” (August 25, 1967) available at <http://vault.fbi.gov/cointel-pro/cointel-pro-black-extremists/cointelpro-black-extremists-part-01-of/view>; see also WARD CHURCHILL & JIM VANDER WALL, *THE COINTELPRO PAPERS: DOCUMENTS FROM THE FBI’S SECRET WARS AGAINST DISSENT IN THE UNITED STATES* 91-2 (1990).

<sup>77</sup> See BETTY MEDSGER, *THE BURGLARY: THE DISCOVERY OF J. EDGAR HOOVER’S SECRET FBI* 251 (2014); see also, 1971 (Big Mouth Productions 2014) (documentary directed by Johanna Hamilton inspired on Betty Medsger’s book *The Burglary: The Discovery of J. Edgar Hoover’s Secret FBI*).

<sup>78</sup> See MEDSGER, *supra* note 77, at 226-7.

<sup>79</sup> See *id.* at 240.

<sup>80</sup> See *id.* at 247.

<sup>81</sup> See *id.* at 345.

individuals rather than as stereotypes of either race or an ideology.”<sup>82</sup> To say Mr. Hoover was an official who lacked honor would be an understatement.

J. Edgar Hoover rose to prominence. He was viewed by many as a credible leader. “No part of the government or American life was outside his reach.”<sup>83</sup> He “acted as his own boss.”<sup>84</sup> “The combination of no oversight of his operations and his larger and successful public relations operations led to his achieving the distinction of being one of the most powerful appointed officials—many have said *the* most powerful—who ever served in the federal government.”<sup>85</sup> What was revealed after his death is that, under Mr. Hoover’s leadership, “there were two FBIs—the public FBI Americans revered as their protector from crime, arbiter of values, and defender of citizens’ liberties, and the secret FBI. This FBI . . . usurped citizens’ liberties, treated black citizens as if they were a danger to society, and used deception, disinformation, and violence as tools to harass, damage, and . . . silence people whose political opinions the director opposed.”<sup>86</sup> The secret FBI devoted only a minority of its time and attention to crime fighting or protecting national security.<sup>87</sup> Tragically, during the majority of Mr. Hoover’s administration, congress exercised no oversight.<sup>88</sup>

The government, led by FBI Director Hoover, used an array of tactics in its war upon the BPP. It utilized the secret internal relations arm of the FBI<sup>89</sup> and it enlisted the media.<sup>90</sup> The impact of this was

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<sup>82</sup> See *id.* at 226.

<sup>83</sup> See BETTY MEDSGER, *THE BURGLARY: THE DISCOVERY OF J. EDGAR HOOVER’S SECRET FBI* 345 (2014).

<sup>84</sup> See *id.* at 30.

<sup>85</sup> See *id.* at 260.

<sup>86</sup> See *id.* at 7.

<sup>87</sup> See *id.* at 246..

<sup>88</sup> See *id.* at 201.

<sup>89</sup> See *id.* at 259.

<sup>90</sup> See Memorandum from SAC, Boston (157-531) to FBI Director (Feb. 2, 1968) (on file with author) (referencing a confidential source who could assist with a derogatory article that the FBI would author and have released in the *Globe*); see also Memorandum from FBI Director to SAC, New Orleans (105-3138) (March 28, 1968) (on file with author) (mentioning “a trusted source in one of the national wire services such as the AP or UPI”); see also Memorandum from FBI Director to SAC, Philadelphia (157-2371) (Oct. 11, 1968) (on file with author) (“On a national scope, it is suggested that established Bureau contacts, in the news media, both of publications and radio and TV broadcasting networks . . . be requested to decrease the amount of coverage given BPP activities and relegate what coverage is given to the ‘back pages’”); see also Memorandum from FBI Director to SAC, Miami (157-2514) (Oct. 21, 1968) (on file with author) (divulging that it assisted a local outlet with production of a story and acknowledging confidential sources in place at two local stations); see also Memorandum from SAC, Seattle (157-721) to FBI Director (Nov. 4, 1968) (on file with author) (discussing plans to secretly



distorted reporting, which painted the BPP as violent criminals, the American public as being in need of protection from the BPP and the government as heroic in its attempts to protect the people from a rival faction hell bent on carrying out harm.<sup>91</sup> In addition, “the FBI organized

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collaborate with a media contact as was successfully done in the past and suggesting that that media person “[c]omment about [BPP] leaders’ new cars, new clothes, and living style” in an attempt to “neutralize them with the rank and file membership.”).

<sup>91</sup> BPP member Kathleen Neal Cleaver explained:

[P]eople . . . don’t really believe the government but they kind of are influenced. Just about how important it has been for the police agencies, the intelligence agencies, particularly the FBI, to control what people think.

They have rosters of reporters working in different major newspapers, in different wire services and on television, that will put out the stories that they want them to put out or will actually just take their stories and put them out as news. So we have active disinformation campaigns, active apparent news items that are coming directly from intelligence services, so that people will believe.

For example, most people believe the Black Panther Party was a violent organization, the Black Panther Party were thugs, or things like this. Where do they get this information? They get it from government intelligence information that is put through the media over years and years and years, to the point that they believe it.

You will hear, I think it was Walter Cronkite, say ‘The FBI released a report today claiming the Black Panther Party is the most dangerous threat to the internal security of the United States.’ So people sitting at home, they watch this, they believe Walter Cronkite and they believe that this is true.

So we are still, to this day, trying to get out from under that kind of media propaganda, and many of the people who are in prison, political prisoners or political exiles, have been targeted and tarnished by that, so no one wants to—’Why should I support them? They’re just criminals. They’re just thugs. They’re just cop killers.’ Or whatever.

So my point is that if you have these kind of Independent Media Centers, there is tremendous work to be done in overturning and eliminating and restoring some kind of honesty and openness to what goes on in what they call the public airwaves.

*Human Rights In The United States: The Unfinished Story Current Political Prisoners-Victims of COINTELPRO*, Congressional Black Caucus Legislative Weekend (Sept. 14, 2000) (hosted by Representative Cynthia McKinney, D-Ga.) (statement of Kathleen Neal Cleaver), available at <http://www.ratical.org/co-globalize/CynthiaMcKinney/news/if000914HR.htm>; see also Tate, *supra* note 29 (founding BPP member and chief of staff

a vast network of political spies who infiltrated thousands of political, religious and civil organizations, and trained and coordinated similar operations by other law enforcement agencies at every level of government.”<sup>92</sup> The FBI engaged in “excessive manipulation of informers to produce desired results.”<sup>93</sup> “The information gathered by the FBI’s informant network was augmented by activities such as illegal wiretaps, letter openings, burglaries of homes and offices, secret examination of bank records, physical surveillance, [and] arranged murders . . . .”<sup>94</sup> The FBI was also known to instigate feuds that would lead to fights, arrests or killings.<sup>95</sup> There were some suspicious deaths

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David Hilliard asserted that the media inflamed whites by constantly showing the image of Bobbie Seale with a rifle and Panther party founder Huey P. Newton beside him, but they didn’t show the law book that was always under Huey’s arm.); *see also* Carl Bernstein, *The CIA and The Media*, available at [http://carlbernstein.com/magazine\\_cia\\_and\\_media.php](http://carlbernstein.com/magazine_cia_and_media.php) (this former Washington Post reporter stated that, “[t]he history of the CIA’s involvement with the American press continues to be shrouded by an official policy of obfuscation and deception . . . .”); *see also* JOHN POTASH, *THE FBI WAR ON TUPAC SHAKUR AND BLACK LEADERS*, 2 (Progressive Left Press 2007) (“A subtext of this book also examines how wealthy, prejudicial conservative forces have controlled virtually all of mainstream media in order to veil or hide . . . information . . . .”); *see also* JULIAN BOND, *Preface to THE BLACK PANTHERS SPEAK* xiv (Philip S. Foner, ed. 2014) (“Only rarely does the press report what the Panthers are actually saying and doing and how they view the problems of black people in our society. The result is that most Americans have obtained their impression of the Panthers from statements issued by those who wish to see them eliminated as a facet in American life.”).

<sup>92</sup> Commentary, Susie Day & Laura Whitehorn, *Human Rights in the United States: The Unfinished Story of Political Prisoners and COINTELPRO*, 23 NEW POLITICAL SCIENCE 288 (2001) (Congressional Black Caucus Legislative Weekend hosted by Representative Cynthia McKinney D-Ga statement of Nkechi Taifa).

<sup>93</sup> *See* BETTY MEDSGER, *THE BURGLARY: THE DISCOVERY OF J. EDGAR HOOVER’S SECRET* FBI 218 (2014).

<sup>94</sup> *Id.*; *see generally* Handschu v. Special Services Division, 349 F.Supp. 766 (1972); *see also* Handschu v. Special Services Division, 605 F.Supp. 1384 (1985) (wherein a settlement was reached in a class action suit brought by activist alleging they were victims of constitutional violations, such as illegal break-ins, use of informants and infiltrators and electronic surveillance); *see also* WINSTON A GRADY-WILLIS, *THE BLACK PANTHER PARTY: STATE REPRESSION AND POLITICAL PRISONERS, THE BLACK PANTHER PARTY RECONSIDERED* 371 (1998).

<sup>95</sup> BPP member Geronimo Ji Jaga Pratt explained:

[T]hey used what was called fratricidal attempts to get us to kill each other, and one example . . . was the US organization and the Black Panther Party of Southern California, which resulted in the death of Bunchy Carter and John Huggins, in which the FBI sent agents into both groups in order to get the groups to fight each other. But in the case of Bunchy, that agent took the form of a Black Panther, contrary to what people believe, that that agent took the form of a US member.

and/or intentional killings of BPP members and/or their associates, which have been attributed to the government.<sup>96</sup> Another tactic employed in the war on the BPP was the deliberate manufacturing of criminal cases where it was known that the BPP defendant was innocent when criminal charges were instituted and throughout prolong periods of incarceration,<sup>97</sup> a frequent arrest campaign<sup>98</sup> and/or baseless or pretextual

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So all this truth . . . you will see that people who people today think were straight-up Panthers, legitimate Panthers, were in fact agents . . .

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And the response to Bunchy's death was so tremendous that a lot of people were killed thinking that it was US members, only to find out years later that it was an actual member, a person posing as a Panther who went and slapped a US member, and then the US member responded to that slap, and then the shooting ensued. So these kind of things really boggled our mind, because people for years have been hating the wrong people, and it continues.

Commentary, Susie Day & Laura Whitehorn, *Human Rights in the United States: The Unfinished Story of Political Prisoners and COINTELPRO*, 23 NEW POLITICAL SCIENCE 288 (2001) (Congressional Black Caucus Legislative Weekend hosted by Representative Cynthia McKinney D-Ga Statement of Kathleen Neal Cleaver).

<sup>96</sup> See generally ELIZABETH B. BAZAN, CONGRESSIONAL RESEARCH SERVICE, ASSASSINATION BAN AND E.O. 12333: A BRIEF SUMMARY (2002), available at <http://fas.org/irp/crs/RS21037.pdf> (discussing the history of assassination bans in this country and, in doing so, revealing there was no such ban in place before 1976); see also *United States Foreign Intelligence Activities*, Exec. Order No. 11905 (1976), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=59348> (stating: "[n]o employee of the United States Government shall engage in, or conspire to engage in, political assassination." One has to question the inspiration for such an order to have to be issued.); see also Bobby Hutton (from *A Huey P. Newton Story*), PBS.ORG, available at [http://www.pbs.org/hueypnewton/people/people\\_hutton.html](http://www.pbs.org/hueypnewton/people/people_hutton.html) ("Bobby Hutton was shot more than twelve times after he had already surrendered and stripped down to his underwear to prove he was not armed."); see also POTASH, *supra* note 91, at 41 (making reference to BPP member Assata Shakur's lead trial attorney, Stanley Cohen, dying from a physical attack); see also CHURCHILL & VANDER WALL, *supra* note 76, at 142. (discussing the mysterious murder of Sandra Lane "Red" Pratt, then wife of BPP member Geronimo Pratt); see generally Jeffrey Haas, *THE ASSASSINATION OF FRED HAMPTON* (2010) (discussing the murders of Fred Hampton and Mark Clark); see also *It's About Time*, ITSABOUTTIMEBPP.COM, available at <http://www.itsabouttimebpp.com/index.html> (featuring a report, which is captioned "Nineteen Men The Panthers Listed as 'Murdered'"); GEORGE JACKSON, SOLEDAD BROTHER x (1994) (quoting James Baldwin as questioning the veracity of the official account of BPP George Jackson's death).

<sup>97</sup> See GUY, *supra* note 31, at 115-119 (wherein BPP member Afeni Shakur discusses the Panther 21 trial where thirteen Panthers stood trial for nine months and were acquitted in two hours); see also Susie Day, *Real, Real Comrades: What 43+ Years of Prison Mean to Eddie Conway and Paul Coates*, available at <http://truth-out.org/opinion/item/24342-real-real-comrades-what-43-years-of-prison-mean-to-eddie-conway-and-paul-coates> (discussing Marshall "Eddie" Conway, a BPP leader, who was falsely implicated in the

murder of a Baltimore City police officer and falsely imprisoned for over forty-three years); *see also* Elmer “Geronimo” Pratt, a BPP leader, falsely imprisoned for over twenty-seven years; *see generally*, *In re Pratt*, 112 Cal.App.3d 795 (Cal. Ct. App. 1980); Richard Moore Diruba was falsely imprisoned for nineteen years; *see City Settles With Panther*, ORLANDO SENTINEL, Dec. 9, 2000, at [http://articles.orlandosentinel.com/2000-12-09/news/0012090285\\_1\\_black-panther-richard-moore-trial-in-federal](http://articles.orlandosentinel.com/2000-12-09/news/0012090285_1_black-panther-richard-moore-trial-in-federal) (disclosing a \$490,000 settlement made on the eve of a trial); *see generally* CHURCHILL & VANDER WALL, *supra* note 76, at 44-52; *see also* ORISSA AREND, *SHOWDOWN IN THE DESIRE* 137-138 (2009) (quoting William M. Kunstler, an attorney for a high ranking BP, as he referred to this as “legal lynching”); *see also* AREND, at 140 (Former BPP member Angela Davis was the victim of false criminal charges); *see also* CHURCHILL & VANDER WALL, *supra* note 76 (mentioning J. Edgar Hoover’s suggestion that a “deliberate false arrest” campaign be used a method of neutralization); *see also* Alan Feuer, *Defiant Ex-Black Panther Sues Defiant New York Police*, N.Y. TIMES, Dec. 4, 2000, available at <http://www.nytimes.com/2000/12/04/nyregion/defiant-ex-black-panther-sues-defiant-new-york-police.html> (discussing two failed attempts to convict BPP member Richard Moore (also known as Dhoruba al-Mujahid bin Wahad) for shooting two New York Police before he was finally convicted at the third trial in 1973 and noting that he served nearly nineteen years before having that conviction overturned and revealing a subsequent civil settlement in 2000); *see also* AREND, at 140 (referencing a \$400,000.00 settlement that took twenty years between the FBI and BPP member Richard Moore who serve nineteen years in prison after being framed for murder); *see also* Bobby Seale, *Founding Chairman & National Organizer of the Black Panther Party, To Produce A Film Portraying His Life Story*, BLACKNEWS.COM, March 21, 2013, available at [http://www.blacknews.com/news/bobby\\_seale\\_black\\_panthers\\_seize\\_the\\_time\\_film101.shtml#.VLmGeE05CUk](http://www.blacknews.com/news/bobby_seale_black_panthers_seize_the_time_film101.shtml#.VLmGeE05CUk) (quoting BPP co-founder as saying “most people don’t know that we won 95 % of our courtroom cases”).

<sup>98</sup> *See* Memorandum from FBI Director to Sac, Albany (Aug. 25, 1967) (instructing FBI agents to follow “on a continuous basis” so they would be in a “position to promptly take advantage of all opportunities for counterintelligence and to inspire action . . .”); BPP attorney Charles R. Garry shared his perspective on the war on the BPP:

In . . . 1969, the records of the Panthers who had been murdered and harassed since its early years were compiled. Unfortunately, the Party did not begin to keep records at its inception of the men and women who were harassed and killed . . . even incomplete records tell a story of systematic arrest and harassment of men and women in Los Angeles County alone for a period of almost two years. A man or a woman or a group . . . would be charged with murder, be held in jail for five or ten days, or twenty days, and all at once, the charges against them would be dropped. The familiar buzz-saw would be “attempted murder” or “resisting arrest.” The pattern . . . emerged throughout the United States whenever the [BPP] has set up chapters and commenced operation. In a period of two years . . . the [BPP] expended in bail-bond premiums alone—just the premiums, that is, money that would never be returned—a sum in excess of \$200,000! How many breakfasts or lunches for hungry children, how much medical attention sorely needed in the ghetto communities would that \$200,000 have furnished? In the same two-year period, twenty-eight Panthers were killed . . . In over thirty years of practicing law, I have never experienced the type of persecution faced by the Black

raids, often conducted with large scale weaponry and an exaggerated amount of law enforcement officers who would shoot indiscriminately on arrival and later claim the Panthers shot at them first.<sup>99</sup> Often times,

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Panthers . . . Whenever a Panther speaks in public, agents . . . are present taking notes on what is said, and then they proceed to take sentence out of context . . . The telephone lines of the [BPP] and of anyone who regularly converses with that organization are constantly being tapped. The authorities know, before the members know, why the [BPP] is going to do next . . . [I]n the case of the Panthers the old rules simply do not apply. Any methods will be resorted to, in defiance of the constitutional rights of the Panthers, in the drive to destroy that [BPP] . . . .

THE BLACK PANTHERS SPEAK, *supra* note 25, at 257-62.

<sup>99</sup> See *id.* at 261 (BPP attorney Charles R. Garry recalled a raid on a BPP location in Connecticut: “The arrests were made without warrants. A heavily armed squad of police broke down doors at party headquarters, entered bedrooms where woman and children were sleeping, ransacked the office, seizing personal items as well as money collected for the children’s breakfast programs.”); see also JIM HASKINS, POWER TO THE PEOPLE THE RISE AND FALL OF THE BLACK PANTHER PARTY 59 (1997) (“Between July 1968 and December 1969, there were at least twenty-nine raids and confrontations between the police and the BPP.”); see also THE BLACK PANTHERS SPEAK, *supra* note 25, at 83 (BPP co-founder Bobby Seale recalled a particular raid in Los Angeles, as follows: “Despite police reports to the contrary that they knocked on the door and asked the brothers to come out, the brothers were sleeping when the police riddled the office with bullets and when they broke down the door and came in shooting the brothers had no choice but to defend themselves.”); see also *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. (Ill.) (Apr. 23, 1979, *Rev’d in part*, 446 U.S. 754 (U.S. Ill. Jun. 2, 1980) (concerning the raid on the residence of BPP member Fred Hampton); see generally ORISSA AREND, SHOWDOWN IN THE DESIRE 157 (2009) (Concerning raids upon the New Orleans, Louisiana BPP headquarters); On this point, a court observed:

Plaintiffs’ affidavits . . . reveal a series of incidents between police and members of the Black Panther Party or vendors of the Black Panther newspaper. In December 1969 and January 1970, persons selling the Black Panther newspaper were taken to the police station and told either to stop selling the paper or to obtain a license, and then were released without charges. One such vendor, Bruce Johnson, was charged with violating Chapter 31, pleaded guilty and on January 7, 1970, received a conditional discharge for one year. Although city officials now claim that, at some point in the period between Johnson’s conviction and filing of this action, the corporation counsel ruled that Chapter 31 did not apply to selling newspapers, that information was never conveyed to Bruce Johnson or the Black Panther Party, nor was it publicly announced.

In the ensuing months, threats to invoke Chapter 31 ceased, but there is some indication that the police established surveillance of persons selling the paper. Joseph Campbell, a police officer, revealed that he ‘purchased nearly every issue of the said paper,’ and was able to give the names of persons who sold the paper on several different

FBI-paid lawyers infiltrated defense teams for the Panthers<sup>100</sup> and caused marital discord between BPP members.<sup>101</sup> The government is also believed to have engaged in psychological profiling of the select panthers as a way of injecting people in their lives who could cause or contribute to their demise.<sup>102</sup> Amazingly, when the government ended up in court over their misdeeds, they often engaged in subterfuge or dilatory practices in an effort to suppress the truth. The government picked up the tab for this, even so much as paying contempt fines.<sup>103</sup> In contrast, the

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occasions. On April 29, 1970, Black Panther Party members were arrested for putting up a poster setting forth their political ideas, and charged with violating chapter 4(1) of the Ordinances of Mount Vernon which requires a permit for posting ‘commercial or business advertising matter’ and thus was plainly inapplicable. One of those arrested, Leo Woodberry, claims that he was threatened by police officers and that approximately fifty copies of the Black Panther newspaper were confiscated. On May 25, 1970, after the present action was filed, the charges were dismissed. Finally, Leo Woodberry claims that on June 5, 1970, while he was selling the paper, two police officers told him to keep moving and then watched him walk up and down the block.

The alleged incidents, taken together, could be construed to establish a campaign of harassment directed against sales of the Black Panther newspaper.

Hull v. Petrillo, 439 F.2d 1184, 1187 (2nd Cir.1971).

<sup>100</sup> See POTASH, *supra* note 91, at 40 (mentioning that a FBI-paid lawyer had infiltrated Jeronimo Pratt’s defense team, leading to his false conviction and over twenty-five years of incarceration).

<sup>101</sup> See also Memorandum from SAC, El Paso (157-126) to FBI Director (100-448006) (Oct. 24, 1968) (on file with author) (“[N]othing has occurred in the NYU area which would highlight any infidelity upon the part of the members . . . consideration can be given to placing discreet pretext phone calls, using a Negro accent, to the spouse suggesting various things concerning her husband . . .”).

<sup>102</sup> See POTASH, *supra* note 91, at 44-6 (asserting that Kenneth “Legs” Saunders, who had ties to the CIA, began a live-in relationship with Afeni Shakur and thereafter began her addiction to crack cocaine. And later claiming the same with BPP founder Huey Newton who he alleges was introduced to his drug addiction by Elaine Brown, a suggested BPP infiltrator.); see also Memorandum to FBI Director from SAC, San Francisco (157-601)(P) (Oct. 10, 1968) (on file with author) (“In this connection, this office will endeavor to create the situation in Newton’s mind that he is being exploited by the Party leadership.”).

<sup>103</sup> See generally *Indemnification of Department of Justice Employees*, 10 Op. Att’y Gen 6 (1986), available at 1986 WL 213232; see also *Socialist Workers Party v. Attorney General of U.S.*, 642 F.Supp. 1357, 1405 (S.D.N.Y.1986) (The FBI filed interrogatory responses, which the court deemed “grossly deceptive” and further noted that they were “not good-faith dissemination of information.”); see generally *Stern v. F.B.I.*, 737 F.2d 84, 86-97 (D.C. Cir. 1984) (referencing a 1980 report of FBI Director William H. Webster to Attorney General Benjamin Civiletti wherein it was determined that FBI officials failed to discover and report instances of surreptitious entry); see also

BPP never got an indemnification package. They picked up the tab for what they did, what they did not do and for what was done to them.

In short, the FBI “conducted a sophisticated vigilante operation aimed squarely at preventing the exercise of First Amendment rights of speech and association, on the theory that preventing the growth of dangerous groups and the propagation of dangerous ideas would protect the national security and deter violence.”<sup>104</sup> “By the beginning of 1970, the BPP had been severely damaged by arrests, trials, shootouts and police and FBI harassment which had jailed, killed or exiled most of the top leadership of the party.”<sup>105</sup> There is no disputing that the government’s response to the BPP was harsh and extreme. During that day, credible voices called it so.<sup>106</sup> And in the period between then and now, more imaginative descriptions have been offered, such as the BPP

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In re Kirk, 641 F.2d 684, 689 (9th Cir. 1981) (J. Tang dissenting) (“In order to keep that information from [Black Panther Geronimo] Pratt, they also kept it from the court, leading the court to believe records did exist and delaying the discovery . . . I find that [the DOJ’s] pervasive lack of candor amounts to a contumacious obstruction of the administration of justice”); *see also* Bergman v. U.S., 565 F.Supp. 1353, 1382- 1383 (W.D. Mich.1983) (wherein sanctions were imposed against the Government for failure to comply with discovery orders).

<sup>104</sup> *Human Rights In The United States: The Unfinished Story Current Political Prisoners-Victims of COINTELPRO*, Congressional Black Caucus Legislative Weekend (Sept. 14, 2000) (Hosted by Representative Cynthia McKinney, D-Ga.) (statement of Geronimo Ji Jaga Pratt), *available at* <http://www.ratical.org/co-globalize/CynthiaMcKinney/news/if000914HR.htm>.

<sup>105</sup> CHURCHILL & VANDER WALL, *supra* note 76; *see also* RANSBY, *supra* note 2, at xi.

<sup>106</sup> THE BLACK PANTHERS SPEAK, *supra* note 25, at 263-265 (citing a 1969 news release wherein the American Civil Liberties Union stated that “law enforcement officials are waging a drive against the [BPP] . . . resulting in serious civil liberties violations” and concluded that a “pattern of harassment exists.”).

being “political prisoners,”<sup>107</sup> and victims of “something akin to domestic terrorism.”<sup>108</sup>

The government’s position is that its actions were warranted because the BPP was both violent and a threat to the security of the country.<sup>109</sup> While high-ranking officials lured lower ranking officials into the belief that the safety of this country depended on them protecting us from the BPP, official accounts call this into question. After extensive congressional hearings, the government itself concluded that “[n]ot all local leaders and members of the Black Panther Party chapters approved of violent, confrontations with law enforcement . . . .”<sup>110</sup> This same committee concluded that the BPP had not “at any time constituted a clear and present danger to the continued functioning of the United States government or any other institutions of our democratic society.”<sup>111</sup>

The harm did not end in the Civil Rights Era. Many BPP members suffered years of adverse housing realities, unemployment or underemployment, educational, and/or financial shortcomings due to their former affiliation with the BPP. Coupled with this, many of the surviving members of the BPP are senior citizens with diminished security or limited income earning potential due to their activism, age and/or the criminal records they got in exchange for their activism. Similarly situated seniors or disabled persons might look to retirement or social security income as a means of surviving, but this option comes with particular challenges for BPP members who sometimes find themselves unable to satisfy wage requirements (for the aforesaid

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<sup>107</sup> See generally J. Soffiyah, *The Reality of Political Prisoners in the United States: What September 11 Taught Us About Defending Them*, 18 HARV. BLACKLETTER L.J. 129 (2002); see also ORISSA AREND, *SHOWDOWN IN THE DESIRE* INTRO xxii (2009); see also Nkechi Taifa, Kathleen Neal Cleaver, et al., *Human Rights: U.S. Political Prisoners and COINTELPRO Victims*, STATES OF CONFINEMENT POLICING, DETENTION, AND PRISONS 333 (Joy James ed., 2000) (citing then Congressional Representative Cynthia McKenney mentioning the “necessity for . . . an examination and for the release of all U.S.-held political prisoners” speaking at the 9/14/2000 forum entitled, “Human Rights in the United States: The Unfinished Story of Political Prisoners/Victims of COINTELPRO” (part of the CBCs annual legislative conference); see also JEFFREY HAAS, *THE ASSASSINATION OF FRED HAMPTON* 161 (2010) (the author tells that he represented political prisoners); see also Winston Grady-Willis, *Political Prisoners*, BLACK PRISON MOVEMENTS USA, THE NOBO JOURNAL OF AFRICAN AMERICAN DIALOGUE, v. 11 n.1, 126, 128 (Africa World Press 1995) (claiming the existence of as many as 150 political prisoners).

<sup>108</sup> See generally Angela A. Allen-Bell, *Activism Unshackled & Justice Unchained: A Call to Make a Human Right Out of One of the Most Calamitous Human Wrongs to Have Taken Place on American Soil*, 7 J. LAW & SOC. DEVIANCE 125 (2014).

<sup>109</sup> See H.R. REP. NO. 92-470, at 135 (1971).

<sup>110</sup> *Id.*

<sup>111</sup> H.R. REP. NO. 92-470, at 135 (1971).



reasons)<sup>112</sup> or for others who are still incarcerated as a result of their activism<sup>113</sup> or for those having outstanding warrants for felony offenses attributable to their activism.<sup>114</sup>

The list of victims is quite expansive when the far-reaching impact of this national tragedy is understood. In addition to what has already been discussed, some BPP members express that they are still targeted by the government.<sup>115</sup> Worse—“there are still Panthers locked away in prisons across the country doing hard time on charges manufactured by the government.”<sup>116</sup> Then there are those BPP members who are no longer

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<sup>112</sup> See 42 U.S.C. 1382.

<sup>113</sup> See 42 U.S.C. 1382(10)(1)(A).

<sup>114</sup> See 42 U.S.C. 1382 (J)(4)(A).

<sup>115</sup> In 2014, Mariama Curry, reportedly the youngest female member of the New Orleans BPP chapter, expressed “Of course we remain under surveillance . . . Once you are on that list, you never come off.” E-mail from BPP member Mariama Curry to author (June 23, 2014 CST) (on file with the author); see also POTASH, *supra* note 91, at 44 (discussing the FBI’s continuing targeting of Afeni Shakur over the years); see also *Former Black Panther Details Brutal Police Torture to Extract Confession in 1971 Murder Case*, DEMOCRACYNOW.ORG (Nov. 30, 2007) available at [http://www.democracynow.org/2007/11/30/former\\_black\\_panther\\_details\\_brutal\\_police](http://www.democracynow.org/2007/11/30/former_black_panther_details_brutal_police) (Interview with BPP member Harold Taylor as he describes being taken into custody by police in New Orleans and tortured in conjunction with the murder of a police sergeant in 1975, which is commonly referred to as the San Francisco Eight case. A Court dismissed the charges in 1975, but they resurfaced in 2007. Most of these charges were dismissed again in 2009; see Tamara Barak Aparton, *Public Defender Jeff Adachi seeks \$2 million reimbursement for City in San Francisco 8 case*, SAN FRANCISCO BAY VIEW (Dec. 9, 2009) <http://sfbayview.com/2009/12/public-defender-jeff-adachi-seeks-2-million-reimbursement-for-city-in-san-francisco-8-case/>. The final charge, against BPP and San Francisco Eight member Cisco Torres, was dismissed in 2011; see *Cisco Torres of the SF8 Cleared of all Charges*, EXAMINER.COM (Sept. 18, 2011) <http://www.examiner.com/article/cisco-torres-of-the-sf8-cleared-of-all-charges>).

<sup>116</sup> BOBBY SEALE, *Introduction to SEIZE THE TIME THE STORY OF THE BLACK PANTHER PARTY AND HUEY P. NEWTON* 59 (1991); see also WINSTON A. GRADY-WILLIS, *THE BLACK PANTHER PARTY: STATE REPRESSION AND POLITICAL PRISONERS, THE BLACK PANTHER PARTY RECONSIDERED*, 377-81 (1998) (discussing the high volume of BPP members currently held as political prisoners) see also National Jericho Movement, *THEJERICHO MOVEMENT.COM* available at <http://thejerichomovement.com/prisoners.html> (setting forth a list of political prisoners); see also Black Panther Organization For Pan’Liberation, *BLACKPANTHERORGANIZATION.COM*, [blackpantherorganization.com/26.html](http://blackpantherorganization.com/26.html) (setting forth a list of political prisoners and prisoners of war); see also Angela A. Allen-Bell, *Perception Profiling & Prolonged Solitary Confinement Viewed Through The Lens of The Angola 3 Case: When Prison Officials Become Judges, Judges Become Visually Challenged and Justice Becomes Legally Blind*, 39 HASTINGS CONST. L.Q. 763, 781-8 (Spring 2012) (discussing Albert Woodfox, the last incarcerated member of the Angola 3); see also *Hurt v. United States*, No. C-1-13-432, 2014 WL 184238 (Jan. 14, 2014) (Wherein it was alleged, on behalf of incarcerated BPP members, that they are in custody without receiving a formal indictment and are the victims of prosecutorial misconduct. Immediate release of BPP members was sought).

incarcerated, but were once wrongly withheld in custody.<sup>117</sup> There are BPP members whose deaths were accelerated by or caused by prison conditions. Some BPP members were driven underground.<sup>118</sup> Others developed mental health and/or substance abuse problems as a result of the tensions that resulted from the government's response. As if this were not enough harm done, there are those who sustained collateral damage because of their associations with BPP members.

Harm extended to families, friends, associates and far beyond. Their loved ones were left to raise children when they were killed, traumatized, or incarcerated. Their loved ones were left with legal fees, incarceration, and/or funeral costs and other expenses needed to maintain them during the historical period at issue. Loved ones and associates were frequently harmed or harassed by government officials and plagued with worries and stresses that took great emotional tolls upon them. There was also unmitigated harm visited upon the children of BPP members—some born in prison, others rendered homeless or parentless<sup>119</sup> and more

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<sup>117</sup> Due to the previously discussed frequent arrest campaign, there is no way to provide an accurate count of mass number of BPP members who were wrongly held in custody on false charges. Some of the more noteworthy and documented cases include BPP members Geronimo Pratt, Angela Davis, Bobby Seale and Afeni Shakur; *see also Freed Ex-Black Panther Marshall "Eddie" Conway on 44 Years in Prison & FBI Surveillance*, DEMOCRACYNOW.ORG (March 5, 2014) [http://www.democracynow.org/2014/3/5/exclusive\\_freed\\_ex\\_black\\_panther\\_marshall](http://www.democracynow.org/2014/3/5/exclusive_freed_ex_black_panther_marshall) (discussing the 2014 release of BPP member Marshall "Eddie" Conway after forty-four years of incarceration).

<sup>118</sup> *A Panther in Africa* PBS (Sept. 21, 2004) available at [http://www.pbs.org/pov/ap/pantherinafrica/film\\_description.php](http://www.pbs.org/pov/ap/pantherinafrica/film_description.php) (discussing BPP member Peter O'Neal's exile to Algeria then Tanzania); Joanne Chesimard (Assata Shakur) "eventually fled to Cuba where she was granted political asylum." Even with such dubious evidence of guilt, the FBI recently raised the bounty on the head of this former BPP member and activist from \$1 million to \$2 million dollars. *See FBI Most Wanted Terrorists List: Who Is Assata Shakur?*, NPR.ORG, available at <http://www.npr.org/2013/05/07/181914429/fbi-most-wanted-terrorists-list-who-is-assata-shakur>; ) *see also* ASSATA SHAKUR, ASSATA AN AUTOBIOGRAPHY XI (Lawrence Hill Books 1987) (providing then director of the National Conference of Black Lawyers, Lennox Hinds', account of the evidence). Redress has become even more important given a recent policy change involving Cuba. In a December 2014 address, President Obama normalized relations between Cuba and the United States. *See Address to the Nation on United States Policy Toward Cuba* (Dec. 17, 2014), available at <http://www.whitehouse.gov/issues/foreign-policy/cuba>.

<sup>119</sup> Fred Hampton, Jr., the son of BPP member Fred Hampton was in utero, resting in his mother's stomach as she lay in bed besides Fred Hampton on the night he was shot him in the back of the head. *See* JEFFREY HAAS, THE ASSASSINATION OF FRED HAMPTON 77 (2010) and JIM HASKINS, POWER TO THE PEOPLE THE RISE AND FALL OF THE BLACK PANTHER PARTY 70-1 (1997); Afeni Shukur spent the latter months of her pregnancy in jail awaiting trial in a case that arose from her BPP activities, one which she eventually won. "She petitioned for a daily glass of milk and an egg to keep her fetus healthy as she studied law books" in preparation for trial. Her trial was in progress during the last

impacted by emotional problems and mental health challenges. The fate of BPP member Afeni Shakur's daughter illustrates this point.<sup>120</sup> Sekyiwa Shakur recalled a suicide attempt and years of rage, anger, and depression due to her childhood struggles that came about as a result of her mother's BPP involvement and her subsequent addiction to crack cocaine.<sup>121</sup> Sekyiwa Shakur says she developed post-traumatic stress syndrome.<sup>122</sup>

In addition to the BPP, their family and associates, the nation also suffered harm. J. Edgar Hoover laid the groundwork for some of the racially discriminatory law enforcement policies we currently see manifested in our daily lives. Additionally, "COINTELPRO essentially destroyed the infrastructure of grassroots activism . . . particularly the uncompromising and uncorrupted youth leadership that the [BPP] represented."<sup>123</sup> "By destroying this strand of leadership, COINTELPRO paved the way for the rise of the civic and political leadership that was at the helm of [minority] . . . communities during the 1970s and 80s when the proliferation of gangs and the drug trade was emerging . . . COINTELPRO created a social and political vacuum . . . that . . . was filled by career politicians more interested in middle class aspirations, while criminals filled the vacuum in the streets."<sup>124</sup> Further harm came to the nation through the loss of life and destruction of families that followed the deaths of some of the local level law enforcement officers killed, having no idea that their deaths were set in motion by high ranking federal officials who involved informants and plots that ended in harm to them. The nation also suffered as a result of the distrust of the police and the government that partly resulted from this unsettled historical episode.

For purposes of this work, a victim is a "person harmed by a crime, tort, or other wrong."<sup>125</sup> Deciphering victimhood, in this instance,

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trimester of her pregnancy with her son, Tupac. POTASH, *supra* note 91, at 31. These two illustrations are in no way the only representative cases. There are countless others.

<sup>120</sup> This is but one family's story, selected for illustrative purposes. It is in no way the only case of descendant tragedy. There are countless others.

<sup>121</sup> See GUY, *supra* note 31, at 147-55.

<sup>122</sup> See GUY, *supra* note 31, at 147.

<sup>123</sup> Letter from Robert Saleem Holbrook to the author, Angela A. Allen-Bell (Nov. 3, 2014) (on file with the author).

<sup>124</sup> *Id.*

<sup>125</sup> BLACK'S LAW DICTIONARY (9th ed. 2009); The "racial empathy gap" should not be overlooked. The "racial empathy gap" goes further than merely disregarding the pain of African Americans; it actually translates into the pain of African Americans not even being felt. See Jason Silverstein, *I Don't Feel Your Pain: A failure of empathy perpetuates racial disparities*, SLATE.COM, (June 27, 2013) [http://www.slate.com/articles/health\\_and\\_science/science/2013/06/racial\\_empathy\\_gap\\_people\\_don\\_t\\_perceive\\_pain\\_in\\_other\\_races.html](http://www.slate.com/articles/health_and_science/science/2013/06/racial_empathy_gap_people_don_t_perceive_pain_in_other_races.html).

requires one to be wedded, committed and loyally devoted to the notion of context. No honest assessment can be made if deeds, actions and responses of one group is viewed in isolation. It is only when the situation is viewed against the social, political and psychological climate that existed can the truth be discerned and healing commenced. Against this historical backdrop, a solitary picture emerges. The BPP volunteered to be social change agents; they became victims of a legal and political massacre and of official governmental excesses. Collaterally, so did their associates and the nation. Redress is due.

### III. THE SOCIETAL AND GLOBAL BENEFITS OF REDRESS

There are a manifold of societal and global benefits to redress. The first benefit of redress involves the timely ability to shape good policy where issues of race are concerned. In the dawn of his life, as he reflected on his life's work, Martin Luther King posited that when a new stage in the civil rights struggle has been reached, new policies and new practices must follow.<sup>126</sup> We are at a new stage in our civil rights struggle so it is fitting that new policies and practices be erected. The need for redress presently and immediately could not be overstated:

It is the 50<sup>th</sup> anniversary of the Civil Rights Act of 1964. It is the 50<sup>th</sup> anniversary of Freedom Summer. And it is the 60<sup>th</sup> anniversary of the Supreme Court's decision in *Brown v. Board of Education* . . . .What that means . . . in all of our diversity, in all of our cosmopolitan sophistication . . . is that this country as you and I have been privileged to know it, is less than 60 years old. As a society in which the principle of equality has true legal meaning, a society without a legally enforced racial caste system, we are less than 60 years old . . . America is, in essence, an equality teenager. And you remember how you were when you were a teenager. Given to outbursts of frustration and anger. Questioning and not fully appreciating the values that shaped you. Engaging in magical and grandiose thinking – believing that you could be successful without hard work. And underneath it all insecurity and fear of the future. This is America when it comes to race and equality. We are immature, but most assuredly growing up . . . .It is not, as some have said, because we are going backward. It is precisely

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<sup>126</sup> See KING, *supra* note 20, at 183-84.

because we are going forward and because that way  
forward is new and uncharted territory for this country  
that our conflicts have arisen . . . .<sup>127</sup>

Redress at this juncture will aid in setting the nation's course in the right direction. South Africa serves as a poignant example of a country seizing a timely opportunity to set good policy in motion.

South Africa, through its policy of apartheid, mandated the complete physical and political separation of the races.<sup>128</sup> Much like the tide shift in America's civil rights movement, in the late 1950s, the fight to dismantle apartheid changed from peaceful petitioning to one led by more militant nationalists.<sup>129</sup> Nelson Mandela was a part of the African National Congress (ANC) who, much like the BPP, did not subscribe to a pacifist political strategy.<sup>130</sup> The ANC was outlawed in 1960.<sup>131</sup> Strikingly similar to America's reaction, historians recall the following about this period in South Africa's history:

The ruthless use of police power . . . has had a shattering effect. Most of the principal black leaders are dead,

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<sup>127</sup> Sherrilyn A. Ifill, *President and Dir.-Counsel, NAACP Legal Def. and Educ. Fund, N.Y. Univ. Law Sch. Convocation: We're All Civil Rights Lawyers Now* (May 22, 2014), available at <http://www.naacpldf.org/press-release/ifill-addresses-nyu-law-school-graduates> (last visited June 3, 2014); see also RACIAL JUSTICE NOW!, STATUS OF DESCENDANTS OF AFRICANS ENSLAVED IN THE UNITED STATES: RESPONSE TO THE PERIODIC REPORT OF THE UNITED STATES OF JUNE 12, 2013 TO THE UNITED NATIONS COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION, 17 (2014) (presenting this most impactful illustration of this point relative to African Americans).

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African American Legal Experience* 1619 to 2014			
Professor Vernellia R. Randall			
Time Span	Years	% US Experience	Legal Experience
1619 to 1864	246	62.1%	Chattel Slavery
1865 to 1870	6	1.5%	Reconstruction
1871 to 1963	93	23.5%	Legal Apartheid (aka Jim Crow)
1964 to 1979	16	4.0%	Affirmative Action Era
1980 to 1992	13	3.3%	Racial Re-entrenchment Era
1993 to 2014	22	5.6%	New American Apartheid (aka Implicit Bias Era)
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<sup>128</sup> See DERRICK A. BELL, *RACE, RACISM AND AMERICAN LAW* 101 (4th. ed. 2000).

<sup>129</sup> See John F. Burns, *South African Blacks Gain Almost Nothing*, *GLOBE AND MAIL*, Mar. 21, 1978, available at 1978 WLNR 159559.

<sup>130</sup> See generally *Life & Times of Nelson Mandela*, NELSON MANDELA FOUNDATION <http://www.nelsonmandela.org/content/page/biography>.

<sup>131</sup> *Id.*

imprisoned or in exile. Others have been released from jail only to be reduced to political impotence by Government banning orders.”<sup>132</sup>

Nelson Mandela, as one of South Africa’s social change agents, was convicted of sabotage and conspiracy to overthrow the Government by force and he was imprisoned for life.<sup>133</sup> He remained imprisoned from 1961 to 1990.<sup>134</sup>

“The United States imposition of economic sanctions on South Africa was the decisive factor in the apartheid regime’s releasing of Mandela and a handful of other political prisoners . . . .”<sup>135</sup> Following democratic elections, “[i]n July 1995, South Africa’s new parliament passed a law authorizing the formation of the Truth and Reconciliation Commission.”<sup>136</sup> “The central purpose of the Commission was to promote reconciliation and forgiveness among perpetrators and victims of apartheid by the full disclosure of truth.”<sup>137</sup> During the process, “[w]rongdoing was addressed by a mechanism designed to reintegrate victims and offenders into the same political community.”<sup>138</sup> “Although South Africa’s Truth and Reconciliation Commission was far from perfect, it is internationally hailed for exposing apartheid’s atrocities and evoking a spirit of reconciliation that helped the country transcend decades of racial hatred and violence.”<sup>139</sup>

The second benefit to the instant redress proposal involves accountability. “Accountability is the cornerstone of good

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<sup>132</sup> Burns, *supra* note 129.

<sup>133</sup> *Id.*

<sup>134</sup> See 139 Cong. Rec. E1788-03 (July 15, 1993) (statement of Kweisi Mfume).

<sup>135</sup> 136 Cong. Rec. H415-02 (daily ed. Feb. 22, 1990) (statement of Rep. Owens).

<sup>136</sup> *The Truth and Reconciliation Commission (TRC)*, APARTHEID MUSEUM, <http://www.apartheidmuseum.org/truth-and-reconciliation-commission-trc>; see generally JEREMY SARKIN, CARROTS AND STICKS: THE TRC AND THE SOUTH AFRICAN AMNESTY PROCESS (2004).

<sup>137</sup> *The Truth and Reconciliation Commission (TRC)*, *supra* note 136 (“The Commission was charged with three specific tasks: to discover the causes and nature of human rights violations in South Africa between 1960 and 1994; to identify victims with a view to paying reparations; and to allow amnesty to those who fully disclosed their involvement in politically motivated human rights violations.”).

<sup>138</sup> Antje du Bois-Pedain, *Accountability through Conditionally Amnesty: The Case of South Africa*, AMNESTY IN THE AGE OF HUMAN RIGHTS ACCOUNTABILITY 262 (2012).

<sup>139</sup> Fania Davis, *The US Needs a Truth and Reconciliation Process on Violence Against African Americans*, TRUTHOUT (Dec. 4, 2014) <http://truth-out.org/opinion/item/27806-the-us-needs-a-truth-and-reconciliation-process-on-violence-against-african-americans>; see also du Bois-Pedain, *supra* note 138, at 260 (South Africa’s process “succeeded in a fair and effective ascription of responsibility for politically motivated crimes, and it did so by breaking through the criminal law responsibility paradigm that can so easily ground denials of responsibility by anyone beyond the reach of this paradigm.”).

government.”<sup>140</sup> “Accountability exists when power holders must explain and justify their actions or face sanctions.”<sup>141</sup> Evaluating and assessing the ongoing effectiveness of public officials or public bodies instills confidence in the government. “Unless public officials can be held to account, critical benefits associated with good governance—such as social justice, poverty reduction, and development—remain elusive.”<sup>142</sup> This is not an attempt to unveil a new idea. In the United States, accountability is deeply engrained in the political and governance tradition.<sup>143</sup> “A fundamental principle of democracy is that citizens have both the *right* and the *responsibility* to demand accountability and to ensure that government acts in the best interests of the people.”<sup>144</sup> There are outward manifestations of this. There is a Government Accountability Office<sup>145</sup> and a Government Accountability and Transparency Board.<sup>146</sup> There has also been a transition in the global community from a former era of impunity to what has been termed the new age of accountability.<sup>147</sup>

A lack of accountability results in the elusiveness of critical benefits associated with good governance. Action on this redress proposal would create a newfound confidence in the United States government at a time when this is desperately needed. We must not be persuaded by voices suggesting the passage of time as a reason redress is somehow moot. Doing something late in such a situation, is better for the greater good than doing nothing at all. It is for this reason that accountability legislation regarding Civil Rights Era injustices was recently enacted<sup>148</sup>

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<sup>140</sup> Carmen Malena & Mary McNeil, *Social Accountability in Africa: An Introduction*, DEMANDING GOOD GOVERNANCE: LESSONS FROM SOCIAL ACCOUNTABILITY INITIATIVES IN AFRICA 1 (Mary McNeil & Carmen Malena eds., 2010) <http://issuu.com/world.bank.publications/docs/9780821383803>.

<sup>141</sup> *Id.* at 4.

<sup>142</sup> Malena & McNeil, *supra* note 140, at 1.

<sup>143</sup> See Allan Rosenbaum, *Good Governance, Accountability and the Public Servant*, available at <http://unpan1.un.org/intradoc/groups/public/documents/NISPAcee/UNPAN005698.pdf>.

<sup>144</sup> Malena & McNeil, *supra* note 140, at 5.

<sup>145</sup> See *About GOA*, [www.gao.gov](http://www.gao.gov), <http://www.gao.gov/about/index.html>.

<sup>146</sup> See Press Release, The White House, White House Launches Gov’t Accountability and Transparency Bd. to Cut Waste and Boost Accountability (July 28, 2011) <http://www.whitehouse.gov/the-press-office/2011/07/28/white-house-launches-government-accountability-and-transparency-board-cu>.

<sup>147</sup> See Kathryn Sikkink, *The Age of Accountability: The Global Rise of Individual Criminal Accountability*, AMNESTY IN THE AGE OF HUMAN RIGHTS ACCOUNTABILITY 19 (Francesca Lessa & Leigh A. Payne eds., 2012).

<sup>148</sup> In 2008, the Emmett Till Unsolved Civil Rights Crime Act was signed into law. It assigns powers and allocates funds to the Civil Rights Division of the United States Department of Justice to investigate and prosecute unsolved Civil Rights Era crimes.

and other forms of accountability have recently been sought for a number of other Civil Rights Era injustices.<sup>149</sup>

The third benefit to redress is that it will further human rights goals and objectives. The United States was founded on human rights principles.<sup>150</sup> It logically follows that it is the official policy of the United States that “promotion of human rights is an important national interest.”<sup>151</sup> We have done several symbolic things. We have pledged to honor human rights domestically,<sup>152</sup> actively celebrated Human Rights Day and Human Right Week annually.<sup>153</sup> We have also been a participant in the global human rights arena. In addition to being signatories on a number of treaties that advance human rights

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Emmett Till Unsolved Civil Rights Crime Act of 2007, Pub.L. No. 110-344, 122 Stat. 3934 (28 U.S.C. § 509 Note).

<sup>149</sup> The Criminal Section of the Civil Rights Division houses a cold case unit. *U.S. Dept. of Justice, Civil Rights Division, Criminal Section*, JUSTICE.GOV, [http://www.justice.gov/crt/about/crm/cold\\_case\\_ini.php](http://www.justice.gov/crt/about/crm/cold_case_ini.php); “In 1994, Mississippi won the conviction of Byron de la Beckwith for the 1963 sniper killing of NAACP leader Medgar Evers. In Alabama, Bobby Frank Cherry was convicted in 2002 of killing four black girls in the bombing of a Birmingham church in 1963. In 2001, Thomas Blanton was convicted. And Edgar Ray Killen, an 80-year-old former Ku Klux Klansman, was convicted last June of manslaughter in the killings of three civil rights workers in Mississippi in 1964.” *FBI: No Federal Charges to Be Filed in Emmett Till Killing*, FOXNEWS.COM (March 16, 2006) <http://www.foxnews.com/story/2006/03/16/fbi-no-federal-charges-to-be-filed-in-emmett-till-killing/>. In addition, there was a race riot in Oklahoma on May 31, 1921 when an African American teenager was accused of assaulting a white woman. Fearing a lynching, a crowd of African Americans gathered outside the courthouse where a fight erupted being African Americans and whites. The fight escalated into a riot, which decoyed what had become known as Black Wall Street. Years later (in 1997), the legislature appointed the Tulsa Race Riot Commission to establish some form of redress. See *Tulsa-Greenwood Race Riot Claims Accountability Act of 2007: Hearing on H.R. 1995 Before the H. Comm. on the Judiciary*, 110th Cong. 2-4 (2008). Also, the city of Pasadena allowed an 83-year-old African American beauty queen, who had not been allowed to ride in the 1958 Tournament of Roses Parade, to participate in the 2014 parade in an attempt to correct the earlier injustice. *Woman to Ride in Rose Parade Nearly 60 Years After Being Denied Honor Because of Her Race*, KTLA.COM, Dec. 26, 2014, available at <http://ktla.com/2014/12/26/woman-to-ride-in-rose-parade-nearly-60-years-after-being-denied-honor-because-of-her-race/>.

<sup>150</sup> See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>151</sup> *United States Department of State*, STATE.GOV, <http://www.state.gov/j/drl/hr/index.htm>.

<sup>152</sup> See *U.S. Pledge to Support Nations with Genuine Commitment to Human Rights*, US FED. NEWS, April 14, 2006, available at 2006 WLNR 6814415 (referencing a written pledge by then Secretary of State Condoleezza Rice and a call to other member states to undertake similar pledges).

<sup>153</sup> See *Human Rights Day and Human Rights Week, 2014*, Proclamation No. 9219 (Dec. 9, 2014) available at <http://www.presidency.ucsb.edu/ws/index.php?pid=108014> ; see also *Human Rights Day and Human Rights Week 2013*, Proclamation No. 9069 (Dec. 9, 2013) available at <http://www.presidency.ucsb.edu/ws/index.php?pid=104464>.



standards<sup>154</sup> and upon instruments that support redress for victims of human rights violations,<sup>155</sup> the United States recently became one of the forty-seven member-states that form the Human Rights Council.<sup>156</sup>

But policies without practice don't amount to much. In practice, we promote human rights abroad, but show very little commitment to human rights at home. Redress would serve to rectify this very serious shortcoming. In addition, it would go a long way in gaining global credibility for the United States and would, thereby, enhance our ability

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<sup>154</sup> The United States signed on to the Universal Declaration of Human Rights, the foundational document expressing our collective will to advance human rights. Of note, it denounces: cruel, inhumane and degrading treatment or punishment; the lack of a remedy where fundamental rights have been violated; arbitrary arrest, detention or exile; arbitrary interferences with privacy; suppression of freedom of opinion, expression, and peaceful assembly and association; and, exclusion of persons from partaking in government. See United Nations Human Rights, Universal Declaration of Human Rights (Dec. 10, 1948) available at <http://www.ohchr.org/EN/UDHR/Pages/Language.aspx?LangID=eng>; The International Convention on the Elimination of All Forms of Racial Discrimination commits member states to the elimination of racial discrimination and the promotion of understanding among all races. The United States signed on September 28, 1966 see International Convention on the Elimination of All Forms of Racial Discrimination, UN.ORG, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>; see also United Nations Treaty Collection, International Convention on the Elimination of All Forms of Racial Discrimination, UN.ORG, available at [https://treaties.un.org/Pages/ViewDetails.aspx?mtsg\\_no=IV-2&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?mtsg_no=IV-2&chapter=4&lang=en); see Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Nov. 29, 1985) available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/VictimsOfCrimeAndAbuseOfPower.aspx>; International Covenant on Economic, Social and Cultural Rights (Oct. 5, 1977) available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>; see International Covenant on Civil and Political Rights (Oct. 5, 1977) available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>. This is not intended as an exclusive listing.

<sup>155</sup> See United Nations Human Rights, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (Dec. 16, 2005); Office of the High Commissioner for Human Rights, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx> ("The Human Rights Council is an inter-governmental body within the United Nations system responsible for strengthening the promotion and protection of human rights around the globe and for addressing situations of human rights violations and mak[ing] recommendations on them"); see United Nations Human Rights, *Welcome to the Human Rights Council*, Office of the High Commissioner for Human Rights, available at <http://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx>.

<sup>156</sup> See Obama Wants UN Human Rights Seat, AUSTL. BROAD. CORP. (ABC) NEWS (April 1, 2009) available at WLNR 6049763 (Former President George Bush did not wish involvement; however, President Barack Obama did, thus membership was realized); see *Current Membership of the Human Rights Council, 1 January - 31 December 2015*, OHCHR.ORG, available at <http://www.ohchr.org/EN/HRBodies/HRC/Pages/CurrentMembers.aspx> (The United States' three-year term ends in 2015).

to act out a global leadership role. It would also serve as justification for us demanding equal treatment for our citizens when they are abroad. Ironically and by way of illustration, the United States has seen fit to remove Nelson Mandela and other anti-apartheid activists associated with the ANC, a group comparable to the BPP in its time, from our terrorist watch list, correcting a historical wrong.<sup>157</sup> Yet, we have done nothing comparable where our own national injury is concerned.

A fourth benefit to redress is to prevent history from repeating itself. Redress could stop history from repeating itself by changing the official response to the BPP or anything in any way associated with the BPP. The official response to the BPP or anything in any way associated with it is negative and exaggeratedly so. As a result, Black Panthers exist in a state of political purgatory and social shame. And the same for anything associated with the BPP. A recent illustration bears this out.

Debo Patrick Adegbile, a respected lawyer who was never a Black Panther, recently suffered the same ostracizing that they have. “As head of the Legal Defense Fund, Adegbile filed a ‘friend of the court’ brief alleging that former Black Panther Mumia Abu-Jamal’s conviction for the 1981 murder of a Philadelphia policeman was tainted by racial discrimination.”<sup>158</sup> “The relentless courtroom efforts . . . resulted in an appeal in 2012 that reduced Abu-Jamal’s death sentence to life imprisonment without parole.”<sup>159</sup> In January of 2014, The National Fraternal Order of Police penned a letter to President Barack Obama expressing “extreme disappointment, displeasure and vehement opposition to the nomination” of Mr. Adegbile because of his legal involvement with the appeal of “our country’s most notorious cop-killer.”<sup>160</sup> In March of 2014, over thirty years since the BPP became

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<sup>157</sup> See Robyn Dixon, *South Africa Demands Apology Over U.S. Detention of Xx-officialat*, LOS ANGELES TIMES (Oct. 28, 2013) available at <http://articles.latimes.com/2013/oct/28/world/la-fg-south-africa-us-20131029>; see also *Bush Signs Bill Removing Mandela From Terror Watch List*, USA TODAY (July 1, 2008) available at [http://usatoday30.usatoday.com/news/washington/2008-07-01-bush-mandela\\_N.htm](http://usatoday30.usatoday.com/news/washington/2008-07-01-bush-mandela_N.htm).

<sup>158</sup> John Gizzi, *Senate Showdown Looms Over Obama’s Civil Rights Nominee*, NEWSMAX (Feb. 5, 2014) available at <http://www.newsmax.com/Newsfront/Debo-Adegbile-Abu-Jamal-civil-rights/2014/02/05/id/551045/>.

<sup>159</sup> *Id.*

<sup>160</sup> *Judicial Watch*, [www.judicialwatch.org/wp-content/uploads/2014/01/FOP-Opposition-to-Adegbile-Nomination.pdf](http://www.judicialwatch.org/wp-content/uploads/2014/01/FOP-Opposition-to-Adegbile-Nomination.pdf); see AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA A LIFE IN THE BALANCE THE CASE OF MUMIA ABU-JAMAL (Feb. 2000) (Many have alleged that BPP member Mumia Abu-Jamal, sentenced to death for the murder of a police officer in 1982, was not afforded a fair trial); see also *Mumia, the Long Distance Revolutionary: an Interview Wit’ Documentary Producers Stephen Vittoria and Noelle Hanrahan*, SAN FRANCISCO BAY VIEW (Sep. 28, 2012) available at <http://sfbayview.com/2012/09/mumia-the-long->

extinct, Senators blocked President Obama's nomination of Mr. Adegbile to lead the Justice Department's civil rights division, leaving the nation to suffer the loss of a great talent.<sup>161</sup> Redress would result in a corrected version of history being established and would prevent future instances such as this. As a result, perceptions and responses to the BPP would no longer encourage or excuse negative perceptions of them or their affiliates.

#### IV. REDRESS SOLUTION: TWO FORMS OF EXECUTIVE DIRECT ACTION

COINTELPRO officially "lasted from 1956 to April 1971."<sup>162</sup> In the aftermath, after an extensive federal fact-finding, it was determined that various United States intelligence agencies "exceeded their authority through abusive surveillance and disruption of political activity at home" and it further found that "the most serious breaches of duty were those of presidents and other senior executive branch officials."<sup>163</sup> While the Church Committee condemned the FBI's counterintelligence program as an illegal and unconstitutional abuse of power by the FBI, the committee failed to establish remedies for those who were victims of COINTELPRO. This redress proposal humbly attempts to fill this void.

"The purpose of redress (beyond the immediate relief for the victims or even exoneration for the perpetrators) is to bring about reconciliation in the face of gross violations of human rights."<sup>164</sup> Redress is the aim because it is broader than justice.<sup>165</sup> Redress is also the goal because, when delivered, it has the impact of bringing distant human rights aspirational goals to a local and identifiable place in our society.<sup>166</sup> There are different types of redress. "Restorative redress is ultimately

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distance-revolutionary-an-interview-wit-documentary-producers-stephen-vittoria-and-noelle-hanrahan/.

<sup>161</sup> See Stephen Dinan, *Cop-killer Case Sinks Obama Justice Nominee*, THE WASHINGTON TIMES (March 5, 2014) available at <http://www.washingtontimes.com/news/2014/mar/5/senate-blocks-obamas-civil-rights-nominee/>.

<sup>162</sup> FREDERICK A.O. SCHWARZ JR. AND AZIZ Z. HUQ, *UNCHECKED AND UNBALANCED PRESIDENTIAL POWER IN A TIME OF TERROR* 25 (2008); see generally WARD CHURCHILL & JIM VANDER WALL, *THE COINTELPRO PAPERS DOCUMENTS FROM THE FBI'S SECRET WARS AGAINST DISSENT IN THE UNITED STATES* (1990).

<sup>163</sup> SCHWARZ, *supra* note 162, at 5.

<sup>164</sup> Elazar Barkan, *Historical Reconciliation: Redress, Rights and Politics*, 60 COLUMBIA UNIVERSITY SCHOOL OF INTERN' PUBLIC AFFAIRS 1, 8 (Sept. 22, 2006).

<sup>165</sup> *Id.* at 3 ("[R]edress is wider than the rapidly growing field of transitional justice. Its goal is broader than the identification of past perpetrators or the discussion of reparation and restitution for immediate victims.").

<sup>166</sup> *Id.* at 4.

voluntary, where the parties pursue reconciliation through negotiation.”<sup>167</sup> Restorative justice asks: “Who has been hurt? What do they need? Whose obligations and responsibilities are these? Who has a stake in this situation? What is the process that can involve the stakeholders in finding a solution?”<sup>168</sup> “In contrast to restorative redress, retributive measures are actively enforced . . .”<sup>169</sup> The goal is to achieve restorative redress—for America in general and the BPP in particular—through executive direct action correcting official history by way of a proclamation and an executive order granting amnesty—with a focus on healing for the nation, victims and perpetrators (as opposed to focusing on the limiting notion of punishing the perpetrator).<sup>170</sup> This mechanism offers an expedient and potent solution.<sup>171</sup> An added benefit to this

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<sup>167</sup> *Id.* at 3 (“It includes reparation, restitution of property, restitution of cultural property, historical commissions and apologies as a form of atonement.”).

<sup>168</sup> HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 25 (2002).

<sup>169</sup> Barkan, *supra* note 164, at 3 (“Some examples of retributive redress include trials for gross violations of human rights . . . international tribunals, and the establishment of the International Criminal Court.”).

<sup>170</sup> This redress proposal should be viewed against the backdrop of three very important considerations. Initially, consideration should be given to the challenges victims face in actually proving a causal connection when one party holds all access to the documents that are needed to prove what took place. This obstacle exists in this instance. Being mindful of this, one should observe that the instant redress proposal involves a verifiable attack upon a group of people. On a prior occasion, the government, in an effort to “assist in national reconciliation,” agreed to a settlement where the plaintiffs could not even prove a causal connection between their injuries and the government. *See In re Agent Orange Product Liability Litigation*, 597 F. Supp. 740, 858 (1984). This litigation started in 1979 (in conjunction with pesticides that were sprayed in Vietnam between 1962 and 1970) and the settlement was reached in 1984, largely because of the prolonged cries of innocent Veterans and their families. The court found that these Vietnam Veterans had been “abused, rejected and humiliated after serving bravely” and pronounced that their “voices should be heeded by the government and the public for whom they fought.” *Id.* at 857. There is no opposition to the redress fashioned for these Vietnam Veterans. It is also noted that this case of redress came about as a result of litigation, which is contrary to the instant proposal. Despite these things, the redress plan is cited as an illustration showing that a solution can be fashioned even in the face of obstacles and shortcomings in terms of proof on the part of the victims. Another point to consider is that this humble redress proposal seeks far less for the BPP than they would conceivably be eligible for under many traditional compensation schemes (such as a compensation scheme for a crime victim, soldiers injured at war, employees injured on the job or victims of a terrorist attack). Lastly, readers should be mindful that a version of what this article seeks to accomplish on a national level has been successfully tested on a local level. On September 17, 2003, a panther forum/reunion took place in New Orleans, Louisiana. Many of the players in the local saga were present to listen to each other. Thereafter, local BPP members received official certificates of appreciation; *see also* ORISSA AREND, *SHOWDOWN IN DESIRE* 204-8 (2009).

<sup>171</sup> This is not to suggest this tool is void of structure. A post-issuance process does exist. *See Preparation, Presentation, Filing, and Publication of Executive Orders and*

proposal is that there is no financial obstacle involved in this solution being brought to fruition.

The Constitution expressly vests executive power in the President of the United States of America.<sup>172</sup> The Constitution was drafted such that the President has both express and implied powers.<sup>173</sup> These dual powers afford the President the ability to execute laws. “[T]he presidency is an institution.”<sup>174</sup> “Institutions are not merely mechanisms to accomplish particular purposes; they are repositories and maintainers of values.”<sup>175</sup> No other body or maneuver could lay the groundwork for sustainable conflict resolution strategies in the way executive action could and no other body or maneuver could aim the trajectory more precisely in the direction of healing as the President could.

## V. LEGAL UNDERGIRDINGS AND CONSIDERATIONS

Many avenues for redress were considered, but quickly dismissed given the unique history and perplexities of this situation, the age of the survivors, the pathology of the collective racial traumas upon the nation and the continuing legacy of racial injustice in America. Hearings and commissions involve extreme politics and bureaucracy so they were rejected.<sup>176</sup> Moreover, both have been employed in the saga of the BPP and none have yielded justice or healing.<sup>177</sup> Legislation was rejected as

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*Proclamations*, Exec. Order No. 11030 (June 19, 1962), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=58969> (Serving as the starting point for the process that has been amended over the years concerning the preparation, presentation, filing and publication of executive orders and proclamations); see also 44 U.S.C.A. § 1505 (explaining which documents must be published in the Federal Register); KENNETH R. MAYER, WITH THE STROKE OF A PEN EXECUTIVE ORDERS AND PRESIDENTIAL POWER 60 (2001) (One should be mindful that “[t]here is no penalty for avoiding this process”); see also *Vincent v. Schlesinger*, 388 F.Supp. 370 (1975) (Arising after President Gerald R. Ford’s Proclamation granting clemency to Vietnam Era military deserters and discussing the limits to judicial review in the instance of a non-justiciable political question).

<sup>172</sup> See U.S. CONST. art. II, § 1, cl. 1.

<sup>173</sup> See *In re Nagel*, 135 U.S. 1, 81 (1890) (holding that the President has implied and express executive powers that are in no way dependent on legislation for their existence).

<sup>174</sup> PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT THE USE & ABUSE OF EXECUTIVE DIRECT ACTION 9 (2002).

<sup>175</sup> *Id.*

<sup>176</sup> See 42 U.S.C.A. § 1975(a)(1)(A) (The Civil Rights Commission was considered but declined for the above reasons and upon the beliefs that it lacks jurisdiction—given that this situation is more one of politics than it is about “color, race, religion, sex, age, disability, or national origin”).

<sup>177</sup> COINTELPRO was not brought to the attention of the American public until 1975 when a senate subcommittee called for an investigation. The full name of this committee was, “The United States Senate Select Committee to Study Governmental Operations With Respect to Intelligence Activities.” See Senate Select Comm. to Study

solution because of the years involved in seeing a result and because it would depend on the people who are victims of the situation to correct it. Executive action on the state level was considered, but rejected due to: the time involved in attempting a coordinated response; the array of logistical obstacles this would present; and, the almost certain potential for a response lacking in uniformity.

Relief through the courts was considered, but quickly rejected. It too requires time that simply is not available. Also, “[t]he administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt.”<sup>178</sup> These words have proven true in this instance. Cases concerning this scenario and other civil rights-related matters has been tried to an extent and has not yielded justice, healing or a full account of the truth.<sup>179</sup>

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Governmental Operations with Respect to Intelligence Activities, Final Report, S.Rep.No.755, 94th Cong., 2d Sess., Book III 185-223 (1976). This committee, chaired by Senator Frank Church of Idaho, came to be known as “The Church Committee.” It produced a report that was “based on a staff study of more than 20,000 pages of Bureau documents, depositions of many of the Bureau agents involved in the programs, and interviews of several COINTELPRO targets.” *Id.* The work of this committee was remarkable in terms of exposing excesses in general. It did not, however, specifically make any findings as to the BPP in particular (nor was it tasked to do such). Given this reasoning about the Church Committee, I opine that the only official fact-finding of the BPP was done by way of congressional hearing (before the Committee on Internal Security) in 1971. This culminated into a report. *See* “Gun-Barrel Politics: The Black Panther Party, 1966-71” Report by the Committee on International Security, House of Representatives, H.R.Rep. 92470, 92nd Cong., 1st Sess., 43 (1971), *reprinted from the collections of the University of California Libraries*. In the view of this author and of several dissenting committee members, this report is flawed in too many meaningful ways to be accepted as credible; thereby making a compelling case for the redress sought herein. Specifically, the author takes issue with the following aspects of the report: its failure to address how much of the violence it attributed to the BPP was actually done by paid infiltrators; the unfounded and contradicted suggestion that the BPP’s primary aims was to provoke the police; its inattention to the FBI’s role in the supposed feud between the BPP and the United Slaves (U.S.) organization; its failure to truthfully explain what happened inside Fred Hampton’s apartment on the night he was assassinated; its inattention to the arrest versus conviction rate of the BPP; its silence as to the government’s role in the wrongful incarceration of Elmer “Jeronimo” Pratt; and, its silence as to the government’s role in the demise of the BPP.

<sup>178</sup> Ex parte Grossman, 46 S.Ct. 332, 337 (1925).

<sup>179</sup> *See generally* JEFFREY HAAS, THE ASSASSINATION OF FRED HAMPTON HOW THE FBI AND THE CHICAGO POLICE MURDERED A BLACK PANTHER (2010) (discussing the litigation involving the raid upon the home of BPP member Fred Hampton); *see generally* ROBERT HILLARY KING, FROM THE BOTTOM OF THE HEAP (2009) (discussing the Angola 3, BPP members who started a prison chapter and who were held in solitary confinement for 29 years, 42 years and longer, prompting national and international outcries and years of ongoing litigation); *see generally* JOHNNIE L. COCHRAN, JR. & TIME RUTTEN, JOURNEY TO JUSTICE (1996) (discussing representation of BPP member Geronimo Pratt); ASSATA SHAKUR, ASSATA AN AUTOBIOGRAPHY xiv (1987) (illustrating the disposition of the

Additionally, a one-time, direct monetary payout to individual victims would offer a degree of solace to particular individuals, but it would do nothing in the way of addressing the historical inaccuracy that must be dismantled or in the way of healing a nation. There are a few additional reasons against redress through the courts. A monetary payout would inherently involve a determination of the class of victims, a valuation of losses, challenges establishing causation between their victimization and COINTELPRO, assessments of damages and some apportionment of fault. This has been concluded an impossibility because these findings would call for the piercing of complex levels of official secrecy and the furnishing of information that likely can't be produced due to death, destruction, subterfuge, loss of time and/or immunity protections.<sup>180</sup> Another adverse aspect to a monetary payout lies in its potential to ultimately be returned to the paying source, leaving the payer to reap the benefits of the payout. Furthermore, no amount of money could be enough to make victims whole given the large-scale emotional, psychological, societal, personal and developmental losses at issue. "To afford a remedy, it has always been thought essential . . . to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments."<sup>181</sup> "Our Constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it."<sup>182</sup> It is for these collective reasons that executive direct action is advanced as the sole option for redress.

"[T]hroughout U.S. history presidents have relied on their executive authority to make unilateral policy without interference from either Congress or the courts."<sup>183</sup> In this instance, Presidential direct action would achieve these tangible outcomes: (1) a correction of history; (2) amnesty; and, (3) release of BPP members whose incarceration is directly or indirectly attributable to that inmate's membership in, support

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many cases brought against her); *see also* *Bergman v. U.S.*, 565 F. Supp. 1353, 1366 (W.D. Mich. 1983) (wherein sanctions were awarded in a case brought by certain Freedom Riders and the court stated that "trial in this case was not permitted to proceed solely because of the flagrant disobedience of the government"); *see also* *Ellsberg v. Mitchell*, 807 F.2d 204 (D.C. Cir. 1986) (involving the Los Angeles Chapter of the BPP); *see* *Black Panther Party v. Smith*, 661 F.2d 1243 (D.C. Cir. 1981); *writ denied* *Smith v. Black Panther Party*, 458 U.S. 1118 (1982) (A suit brought by the BPP alleging an unlawful conspiracy ended in dismissal).

<sup>180</sup> *See* *Jones v. F.B.I.*, 41 F.3d 238, 249 (6th Cir. 1994) (wherein the government admitted to destroying certain COINTELPRO documents); *see also* *CHURCHILL & VANDER WALL*, *supra* note 76, at xi ("The full story of COINTELPRO has not yet been told. The Bureau's files were never seized by congress or the courts. Many files have been destroyed. Others remained hidden or were released with . . . heavy deletion . . .").

<sup>181</sup> *Ex parte* Grossman, 46 S.Ct. at 337.

<sup>182</sup> *Id.*

<sup>183</sup> *MAYER*, *supra* note 171, at 4.

of, involvement or association with the BPP. Each will be addressed in greater detail below.

*A. Executive Direct Action Correcting History*<sup>184</sup>

This aspect of the redress proposal seeks a proclamation, which would propel the correction of history. When it comes to an accurate understanding of the BPP, America has been a victim of “heroification, a degenerative process . . . that makes . . . [certain] individuals into pious, perfect creatures without conflicts, pain, credibility, or human interest.”<sup>185</sup> When one group is falsely elevated to such a sanctimonious status, the other group is, by default, caste into the role of villain and wrongdoer. In truth, neither the BPP or the government actors are free of culpability in all respects. This is a story not in need of a hero or a villain; healing will come when it is told as one simply involving a cast of characters.

The official recitation of history must reveal: the true intentions of the BPP; the positive attributes of its founders and leadership; the years of service, planning and labor expended by the BPP; the accomplishments of the BPP; the government’s counterintelligence strategy to neutralize them; the low conviction rate of the BPP (as compared to their high arrest rate); the profound role high ranking federal officials and their informants played in this national tragedy; and, the actual failures of the BPP versus the failures that COINTELPRO crafted to appear to be the failures of the BPP.<sup>186</sup> Doing this will lead to the correction of history and the varnishing of images that have unjustly been blemished. Until there is an official pronouncement to this effect, social progress will be hindered and false impressions will fester, causing societal divisions. Under his constitutionally granted executive powers, the President is equipped with the legal authority to deliver this result with the simple stroke of a pen.

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<sup>184</sup> In a situation such as this where facts, to an extent, have been officially suppressed and an exact precedent simply does not exist, a combination of inferential, deductive, equitable and policy-based reasoning was employed as a method of analysis. This required the fusion of contrasting sources, the amplification of theoretical concepts, the extraction of the substantive meanings of and the spirit behind documents, and the diminution of subtle nuisances in sources.

<sup>185</sup> JAMES W. LOEWEN, *LIES MY TEACHER TOLD ME EVERYTHING YOUR AMERICAN HISTORY TEXTBOOK GOT WRONG* 19 (1995).

<sup>186</sup> See e.g., *Freed Ex-Black Panther Marshall “Eddie” Conway on 44 Years in Prison & FBI Surveillance*, DEMOCRACYNOW.ORG (March 5, 2014) [http://www.democracynow.org/2014/3/5/exclusive\\_freed\\_ex\\_black\\_panther\\_marshall](http://www.democracynow.org/2014/3/5/exclusive_freed_ex_black_panther_marshall) (“It . . . emerged the Baltimore chapter of the Black Panthers was actually founded by undercover officers from the Baltimore Police Department.”).



“A proclamation is an instrument that states a condition, declares the law and requires obedience, recognizes an event, or triggers the implementation of a law . . . .”<sup>187</sup> Proclamations “carry force in the same sense as executive orders.”<sup>188</sup> They are “aimed at those outside of government.”<sup>189</sup> There are three proclamations to consider for insight on how to bring this aspect of the redress proposal to life. The first one was recently issued and it involves an activist and an organizer, much like the BPP. This proclamation proclaimed March 31, 2014 as Cesar Chavez day.<sup>190</sup> Before doing so, the proclamation explains, in honest terms, what his life’s work was about and it identified the many injustices he sought to dismantle. It memorialized the fact that he was disrupting the system that was in place at the time and it commended him for doing so because his intentions were good and time proved that the system needed to be dismantled and improved. Mr. Chavez led massive rallies and protests and did so during the very era the BPP did their work. His tactics, at the time, were unconventional and radical. Yet, the proclamation declares him a “champion of social justice,” says his values “guide us still” and it even praised his “resilience through setbacks.”<sup>191</sup>

The second, concerning the Office of Presidency of the United States, concludes with this statement:

In this spirit . . . let us . . . devote ourselves, through our appropriate organizations, societies, publications and through our public discussions, to fostering a new understanding of the First Office of the American Government . . . .<sup>192</sup>

The third, issued in conjunction with the centennial anniversary of the Emancipation Proclamation, reads, in part:

I call upon the Governors of the States, mayors of cities, and other public officials, as well as private persons, organizations, and groups, to observe the centennial by appropriate ceremonies.

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<sup>187</sup> COOPER, *supra* note 174, at 117.

<sup>188</sup> *Id.* at 118.

<sup>189</sup> *Id.* at 119.

<sup>190</sup> See Barack Obama, 216 - Proclamation 9092 - Cesar Chavez Day 2014, THE AMERICAN PRESIDENCY PROJECT (March 28, 2014) available at <http://www.presidency.ucsb.edu/ws/index.php?pid=104859><http://www.presidency.ucsb.edu/ws/index.php?pid=9064>.

<sup>191</sup> *Id.*

<sup>192</sup> Lyndon B. Johnson, 304 - Proclamation 3589 - Commemoration of the Beginnings of the Office of the Presidency of the United States, THE AMERICAN PRESIDENCY PROJECT (April 30, 1964) available at <http://www.presidency.ucsb.edu/ws/index.php?pid=26204>.

I request the United States Commission on Civil Rights to plan and participate in appropriate commemorative activities . . .

I call upon all citizens of the United States and all officials of the United States and of every State and local government to dedicate themselves to the completion of the task of assuring that every American, regardless of his race, religion, color, or national origin, enjoys all the rights guaranteed by the Constitution and laws of the United States.<sup>193</sup>

A proclamation bearing a resemblance to these three illustrations could launch the production of fact sheets, films, news reports, training manuals, ethics and professionalism lessons and scholarship; the creation of new and/or revised history books better explaining this aspect of history; and, the establishment of museums and historical markers. The beauty of such a plan lies in the tremendous scope of creative possibilities that could result.

#### *B. Executive Direct Action Correcting the Historical Trauma & Injustice*<sup>194</sup>

This aspect of the redress proposal seeks an executive order, which grants amnesty.<sup>195</sup> The Constitution grants the President authority to “grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.”<sup>196</sup> This grant has been interpreted as

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<sup>193</sup> John F. Kennedy, 555 - *Proclamation 3511 - Emancipation Proclamation Centennial*, THE AMERICAN PRESIDENCY PROJECT (Dec. 28, 1962) available at <http://www.presidency.ucsb.edu/ws/index.php?pid=9064>.

<sup>194</sup> In a situation such as this where facts, to an extent, have been officially suppressed and an exact precedent simply does not exist, a combination of inferential, deductive, equitable and policy-based reasoning was employed as a method of analysis. This required the fusion of contrasting sources, the amplification of theoretical concepts, the extraction of the substantive meanings of and the spirit behind documents, and the diminution of subtle nuisances in sources.

<sup>195</sup> Amnesty has been successfully used in other contexts. See e.g., *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 404 (1981) (amnesty for strikers); 26 U.S.C. 108(a)(1)(E) (2006 ed. Supp. IV) (federal income tax provision allowing homeowners to omit from gross income newly forgiven home mortgage debt); *United States v. Martin*, 523 F.3d 281, 284 (4th Cir. 2008) (state tax amnesty program); *Horn v. Chicago*, 860 F.2d 700, 704 n. 9 (7th Cir. 1988) (city parking ticket amnesty program); Jessica Lagacé, *Gun Amnesty Programs*, COALITION FOR GUN CONTROL, <http://guncontrol.ca/gun-amnesty-programs>.

<sup>196</sup> U.S. CONST. art. II, § 2, cl. 1.

including the authority to grant amnesty.<sup>197</sup> Amnesty can be granted to a particular individual or to an entire group.<sup>198</sup> “The main criterion for amnesty is the overall good of the Nation.”<sup>199</sup> “It is granted after a war, rebellion, or civil disorder, and the chief purpose is to unify the Nation.”<sup>200</sup> Stated plainly, amnesty is the equivalent of “burying the hatchet.”<sup>201</sup>

“Executive orders are directives issued by the president to officers of the executive branch, requiring them to take action, stop a certain type of activity, alter policy, change management practices, or accept a delegation of authority under which they will henceforth be responsible for the implementation of laws.”<sup>202</sup> Executive orders “are often used because they are quick, convenient and relatively easy mechanisms for moving significant policy initiatives.”<sup>203</sup> “Working from their position as chief executive and commander in chief, presidents have used executive orders to make momentous policy choices, creating and abolishing executive branch agencies, reorganizing administrative and regulatory processes, determining how legislation is implemented, and taking whatever action is permitted within the boundaries of their constitutional or statutory authority.”<sup>204</sup>

Executive orders have been referred to as “presidential legislation.”<sup>205</sup> The Supreme Court has viewed them, when based upon a legitimate constitutional or statutory grant, as the equivalent as laws.<sup>206</sup> “The president’s authority to issue executive orders comes from three sources: grants of constitutional power, congressional delegations of its legislative authority through statutes, and the possibility that there exists inherent prerogative powers within the office.”<sup>207</sup> Executive orders are

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<sup>197</sup> See *United States v. Klein*, 80 U.S. 128, 147 (1871); see also *U.S. v. Hughes*, 175 F.238, 242 (1892) (“Pardons are granted to individual criminals by name; amnesty to classes of offenders or communities. They differ, not in kind, but solely in the number they severally affect.”); see also *Brown v. Walker*, 161 U.S. 591, 602 (1896) (“[T]he distinction between them is one rather of philological interest than of legal importance”).

<sup>198</sup> See *Amnesty—Power of the President*, 20 U.S. Op. Atty. General. 330, 339 (1892), available at 1892 WL 269.

<sup>199</sup> THE NATIONAL GOVERNORS’ ASSOCIATION CENTER FOR POLICY RESEARCH, GUIDE TO EXECUTIVE CLEMENCY AMONG THE AMERICAN STATES 6 (March 1988).

<sup>200</sup> *Id.*

<sup>201</sup> *Knote v. U.S.*, 10 Ct.Cl. 397, 407 (1874); see also *Brown v. Walker*, 161 U.S. 591, 602 (1896) (describing amnesty as “an act of the sovereign power granting oblivion”).

<sup>202</sup> COOPER, *supra* note 174, at 16.

<sup>203</sup> *Id.* at 58.

<sup>204</sup> MAYER, *supra* note 171, at 4-5.

<sup>205</sup> *Id.* at 35.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 36; see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 586 (1952).

best issued when there is a statutory grant of authority upon which the President can rest.<sup>208</sup> “When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.”<sup>209</sup> “When the President acts in the absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.”<sup>210</sup> “Therefore, congressional inertia, indifference or quiescence may sometimes . . . enable, if not invite, measures of independent presidential responsibility.”<sup>211</sup> “In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.”<sup>212</sup> At times of no congressional support or opposition, “the analysis becomes more complicated, and the validity of the President’s action . . . hinges on a consideration of all the circumstances which might shed light on the views of the Legislative Branch toward such action, including ‘congressional inertia, indifference or quiescence.’”<sup>213</sup> “When the President acts in contravention of the will of Congress, ‘his power is at its lowest ebb,’ and the Court can sustain his actions ‘only by disabling the Congress from acting upon the subject.’”<sup>214</sup> Notwithstanding this, executive orders have been successfully issued in absence of an applicable statute or without any reference to specific enabling legislation.<sup>215</sup> Executive orders are severable such that a portion can remain intact if a portion is struck down.<sup>216</sup> This effort to achieve amnesty rests on firm legal grounds. The various legal undergirdings and considerations will now be explored.

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<sup>208</sup> COOPER, *supra* note 174, at 21-5.

<sup>209</sup> Youngstown, *supra* note 207, at 636 (Jackson, J., concurring).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> Dames & Moore v. Reagan, 453 U.S. 654, 668 (1981) citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952).

<sup>214</sup> *Id.* citing Youngstown, 343 U.S. 579, 637-8.

<sup>215</sup> See, e.g., *Establishing the Office of Homeland Security and the Homeland Security Council*, Exec. Order No. 13228 (Oct. 8, 2001), available at <http://www.presiden cy.ucsb.edu/ws/index.php?pid=61509> (The post 9/11 executive order President George W. Bush issued to create the Office of Homeland Security includes the following statement of authority: “By the authority vested in me as President by the Constitution and the laws of the United States of America.”).

<sup>216</sup> COOPER, *supra* note 174, at 25.

### C. The Framers

The first avenue of support involves the intent of the framers. The framers contemplated the risks and benefits surrounding the President's ability to exempt people from judicial pronouncements. There was concern over an abuse of power, the blow to come from judicial findings not having permanency and those rare occasions when the public interest and the tranquility of the Country called for creative solutions brought about through executive actions.<sup>217</sup> These early insights make it clear that the vision was to carefully guard pardons and to use them selectively when the greater good of society would be advanced by its issuance.<sup>218</sup> This aspect of the redress proposal compliments the objectives of the framers in a few ways. It would be a tool used in those cases they envisioned in that it follows a season of rebellion and insurrection and follow years of attempts to achieve resolution through the other branches of government. Thus, it would not be a case of a President being too

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<sup>217</sup> In 1788, Alexander Hamilton expressed:

Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel. As the sense of responsibility is always strongest, in proportion as it is undivided, it may be inferred that a single man would be most ready to attend to the force of those motives which might plead for a mitigation of the rigor of the law, and least apt to yield to considerations which were calculated to shelter a fit object of its vengeance. The reflection that the fate of a fellow-creature depended on his *sole fiat*, would naturally inspire scrupulousness and caution; the dread of being accused of weakness or connivance, would beget equal circumspection, though of a different kind. On the other hand, as men generally derive confidence from their numbers, they might often encourage each other in an act of obduracy, and might be less sensible to the apprehension of suspicion or censure for an injudicious or affected clemency. On these accounts, one man appears to be a more eligible dispenser of the mercy of government, than a body of men.

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[I]n seasons of insurrection or rebellion, there are often critical moments, when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall.

THE FEDERALIST NO. 74 (Alexander Hamilton), *available at* 1788 WL 488.

<sup>218</sup> See *Hoffa v. Saxbe*, 378 F.Supp. 1221, 1231 (1974).

eager to use powers or of one side-stepping the other branches. Additionally and most importantly, it offers the potential of advancing the public welfare and restoring tranquility.

#### *D. Plain Language of the United States Constitution*

Another avenue of support is the plain language of the United States Constitution. It requires the President to take an oath and or affirmation swearing that he will, to the best of his ability, “preserve, protect and defend the Constitution.”<sup>219</sup> This is not optional. It is a condition of office. The Constitution also states that the President “shall take care that the laws be faithfully executed.”<sup>220</sup> This dictate is backed by the force of mandatory statutory language. And this has been previously recognized:

[I]t has been the will of the people that the office of the American Presidency be used in the work of perfecting our national unity, establishing justice, insuring domestic tranquility, providing for the common defense, promoting the general welfare, and securing the Blessings of Liberty to ourselves and our posterity by seeking a world of peace, freedom and opportunity. The office of the Presidency is . . . “pre-eminently the people’s office.” The President himself is . . . “the steward of the public welfare.”<sup>221</sup>

These provisions suggest redress, in this instance, would definitely not be a gratuitous deed. Given the well-documented constitutional and human rights abuses that the BPP fell prey to, the President would be derelict in his duties if he did not act towards the ends of this redress plan.

#### *E. Consistent With Prior Executive Direct Actions*

A further avenue of support is that this redress plan aligns itself well with a number of prior executive direct actions, the first of which involves some of the players in the COINTELPRO program at issue herein. Only two FBI officials were ever convicted for COINTELPRO abuses: Mark Felt and Edward Miller.<sup>222</sup> They never served any jail time,

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<sup>219</sup> U.S. CONST. art. II, § 1, cl. 7.

<sup>220</sup> U.S. CONST. art. II, § 3.

<sup>221</sup> *Commemoration of the Beginnings of the Office of the Presidency of the United States*, Proclamation No. 3589 (April 30, 1964) available at <http://www.presidency.ucsb.edu/ws/index.php?pid=26204>.

<sup>222</sup> Making an even more compelling case for accountability for the BPP, it should be noted that Mr. Felt and Mr. Miller were not convicted for what was done to the BPP.

however.<sup>223</sup> Despite not applying for executive clemency, they were subsequently granted full and unconditional pardons by Ronald Reagan.<sup>224</sup> President Reagan felt “putting all of this behind us” and forgiving “those who engaged in excesses” during the Civil Rights Era was the right thing to do for the nation.<sup>225</sup> Former President Ronald Reagan, in his further explanation, unintentionally, made a compelling case for redress for the BPP:

To punish them further—after 3 years of criminal prosecution proceedings—would not serve the ends of justice. Their convictions . . . grew out of their good-faith belief that their actions were necessary to preserve the security interests of our country . . . they acted not with criminal intent, but in the belief that they had grants of authority reaching to the highest levels of government. America was at war in 1972 . . . [these]two men . . . acted on high principle to bring an end to the terrorism that was threatening our nation.<sup>226</sup>

As did Mr. Miller and Mr. Felt, the BPP felt “their actions were necessary to preserve the security interests of our country.” Similarly, the BPP “acted not with criminal intent.” It logically follows that we “can be no less generous to [individuals] . . . who acted on high principle to bring an end to the terrorism that was threatening our nation.”

A second executive action to consider was issued by President George Bush in 1992. In the 1980’s, efforts were underway by Contra insurgents to disrupt the Sandinista government in Nicaragua. A select group of United States government officials secretly lent support to the

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They were convicted for violating constitutional rights during the COINTELPRO era (authorizing break ins to the homes of friends and relatives of members of an activist organization and for conspiracy to injure and oppress United States citizens). *See* U.S. v. Gray, 502 F. Supp. 150 (D.D.C. 1980); *see also* CHURCHILL & VANDER WALL, *supra* note 76, at 315.

<sup>223</sup> *See* Ward Churchill, *Have We “Put It All Behind Us”? Wages of COINTELPRO Still Evident in Omaha Black Panther Case*, BAD SUBJECTS (Dec. 2004), <http://bad.eserver.org/issues/2004/71/churchill.html>.

<sup>224</sup> Presidential Statement on Granting Pardons to Mr. Felt & Mr. Miller, RONALD REAGAN PRESIDENTIAL LIBRARY & MUSEUM (April 15, 1981), *available at* <http://www.reagan.utexas.edu/archives/speeches/1981/41581d.htm> (referencing Ronald Reagan’s official statement); *see also* Robert Pear, *President Reagan Pardons 2 Ex-F.B.I. Officials in 1970’s Break-Ins*, N.Y. TIMES (Apr., 16, 1981) <http://www.nytimes.com/1981/04/16/us/president-reagan-pardons-2-ex-fbi-officials-in-1970-s-break-ins.html>.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

Contra insurgents.<sup>227</sup> One way of doing that was through funds. These were not small players. It was “President Ronald Reagan, Vice President George Bush, Secretary of State George Shultz, Secretary of Defense Casper W. Weinberger, Director of Central Intelligence William J. Casey, and national security advisor Robert C. McFarlane and John Poindexter.”<sup>228</sup>

In an effort to avoid a formal allocation and all the checks and balances that goes with such, these United States officials devised a scheme to launder money (at a time when money laundering was a crime).<sup>229</sup> They then put the scheme into action by selling weapons to Iran (which was a crime), diverting those profits to the Contra insurgency in Nicaragua (which was a second crime) then shredding documents so the scheme would not be discovered (yet another crime).<sup>230</sup> Oliver North<sup>231</sup> was indicted along with twelve others.<sup>232</sup> This came after a five-year investigation that cost over thirty million dollars.<sup>233</sup> Through the use of Presidential direct action (in the form of a proclamation), then President George Bush granted executive clemency to six high-ranking government officials who were involved in the Iran-Contra scandal and he did so shortly before leaving office and before he could be called to testify.<sup>234</sup>

The proclamation is detailed. In the beginning, it calls attention to the fact that many of these government officials had, before accepting their respective posts, served the country in the military.<sup>235</sup> In the words of then President George Bush, this made them patriots.<sup>236</sup> The next valued aspect of the proclamation is its placement of this conduct in historical context (versus looking at it in isolation as purely criminal conduct).<sup>237</sup> It explains that these transgressions happened at a time

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<sup>227</sup> See Greg Grandin, *The Iran-Contra Lesson*, L.A. TIMES (Oct. 18, 2006) available at 2006 WLNR 18046058.

<sup>228</sup> COOPER, *supra* note 174, at 140.

<sup>229</sup> See Grandin, *supra* note 227.

<sup>230</sup> See 133 CONG. REC. H6248-04 (daily ed. July 14, 1987) (statement of Mr. Penny) 1987 WL 942105; see also David Lauter, *Iran Contra Affair: The Final Report, Panel Findings Leave Little Doubt Laws Were Violated*, L.A. TIMES (Nov. 19, 1987) available at [http://articles.latimes.com/1987-11-19/news/mn-22537\\_1\\_iran-contra-affair](http://articles.latimes.com/1987-11-19/news/mn-22537_1_iran-contra-affair).

<sup>231</sup> See *U.S. v. North*, No. 88-0080-02, 1988 WL 148494 (D.D.C. 1988).

<sup>232</sup> See Thomas Galvin, *A Long and Winding Probe*, CQ WEEKLY (June 6, 1992) available at 1992 WLNR 5006501.

<sup>233</sup> See *A Very Troubling and Very Sad Thing*, 102D CONG. REC. S8434-01 (June 18, 1992), available at 1992 WLNR 135604.

<sup>234</sup> See *Grant of Executive Clemency*, Proclamation No. 3589 (Dec. 24, 1992), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=20265>.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Grant of Executive Clemency*, *supra* note 234.



where there were several pressing world matters that were in need of resolution and there was no exact blueprint for success.<sup>238</sup> The President suggestively hailed them heroes for serving in the midst of such turmoil.<sup>239</sup> Next, the President expressed his view that policy differences should not be criminalized and he alluded to that happening to these six individuals.<sup>240</sup> It is very telling that the proclamation is silent as to the financial impact and the public harm done by these individuals. As a matter of convenience, these very serious things simply are ignored in the document. Yet, critics of the BPP quickly assert that they harmed the public at large and cost the government money (associated with the funds used to neutralize them). And they certainly never excuse their acts as mere “policy differences.”

Some may hope to distinguish the BPP from these high ranking government officials, arguing that the BPP was just ordinary citizens who did not have a charge to act whereas these individuals were acting pursuant to an official grant of authority. This is misleading for one reason. These individuals were not called to act in furtherance of a criminal conspiracy; they were called to act in service to the American people. When they stepped outside of that role to pursue a private, unauthorized agenda, they were doing the same as the BPP—self-appointing themselves to solve a problem in the way they thought best. It is also significant that, of these three groups (the BPP, the COINTELPRO officers, and the Iran-Contra players), two groups were charged with holding the public trust and both groups broke it. The BPP is not one of the offending groups.

#### *F. The Tradition & Duty of the President Concerning Civil Rights*

Another basis of support is rooted in the tradition and duty of the President to play an active role in civil rights. John F. Kennedy served at a time where the civil rights crisis had reached a boiling point. It was his position that executive powers were expansive and should be used at times of national need such as this.<sup>241</sup> “Executive action formed the core of Kennedy’s civil rights platform.”<sup>242</sup> This “strategy was based on a

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<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> MAYER, *supra* note 171, at 195.

<sup>242</sup> *Id.* at 197; *see also* *Establishing the President’s Committee on Equal Employment Opportunity*, Exec. Order No. 10925 (Mar. 6, 1961) available at <http://www.presidency.ucsb.edu/ws/index.php?pid=58863> (intended to “promote full equality of employment opportunity” with the Federal Government and on government contracts).

combination of political necessity and moral imperatives.”<sup>243</sup> The tradition of the executive playing a role in civil rights did not start with President Kennedy. The armed forces was integrated by way of an executive order.<sup>244</sup> Direct action was also used to ensure integration of schools<sup>245</sup> and to achieve affirmative action.<sup>246</sup> And, during much of the Civil Rights Era litigation, administrations filed briefs declaring their positions before the courts.<sup>247</sup> Presidents have even played a role through their judicial appointments.

More than tradition and custom, there is a duty on the part of the President to use his authority to enforce civil rights as a result of the passage of the Civil Rights Act of 1964.<sup>248</sup> His enforcement powers compel action. Because the legislation has already been enacted, there is no risk of him being accused of making law. “The use of executive action in response to civil rights voids did not originate spontaneously in a political vacuum: they were spurred by a complicated mix of moral arguments, raw political calculations, cultural and demographic shifts in the populace, and particular pressure strategies adopted by those who wanted the orders issued.”<sup>249</sup>

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<sup>243</sup> MAYER, *supra* note 171, at 197.

<sup>244</sup> See *Establishing the President's Committee on Equality of Treatment and Opportunity in the Armed Services*, Exec. Order No. 9981 (July 26, 1948) available at <http://www.presidency.ucsb.edu/ws/index.php?pid=60737>.

<sup>245</sup> See, e.g., *Providing Federal Assistance in the State of Alabama*, Proclamation No. 3645 (Mar. 20, 1965), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=75255> (concerning the state of Alabama); see also *Obstructions of Justice in the State of Mississippi*, Proclamation No. 3497 (Sept. 30, 1962), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=24042> (concerning the state of Mississippi).

<sup>246</sup> See Exec. Order No. 10925, *supra* note 242 (issued by President John F. Kennedy); see also *Equal Employment Opportunity*, Exec. Order No. 11246 (Sept. 24, 1965) available at <http://www.presidency.ucsb.edu/ws/index.php?pid=59153> (issued by President Lyndon B. Johnson).

<sup>247</sup> See Brief for the United States as Amicus Curiae, *Shelley v. Kraemer*, 334 U.S. 1 (1948) (Nos. 72, 87, 290, 291) 1947 WL 44159 (“The Federal Government has a special responsibility for the protection of the fundamental civil rights guaranteed to the people by the Constitution and laws of the United States.”); see also Brief for the United States as Amicus Curiae at 2, *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955) (No. Nos. 1, 2, 3, 4, 5) 1952 WL 82045 (“Recognition of the responsibility of the Federal Government with regard to civil rights is not a matter of partisan controversy, even though differences of opinion may exist as to the need for particular legislative or executive action. Few Americans believe that government should pursue a *laissez-faire* policy in the field of civil rights, or that it adequately discharges its duty to the people so long as it does not itself intrude on their civil liberties. Instead, there is general acceptance of an affirmative government obligation to insure respect for fundamental human rights”).

<sup>248</sup> See The U.S. National Archives and Records Administration, *Civil Rights Act of 1964* (July 2, 1964), <http://research.archives.gov/description/299891>.

<sup>249</sup> MAYER, *supra* note 171, at 216.

### G. Expanding National Security Powers

Another avenue of support can be found by closely observing a trend where the President is concerned. That trend involves broadly enhanced powers when it comes to matters of national security. This has been carried out by policies that do not involve checks and balances,<sup>250</sup> laws or policies that broaden the realm of military affairs (so the judicial branch can be bypassed)<sup>251</sup> and, the executive branch attempting to

<sup>250</sup> See 18 U.S.C. 3132 (allowing for pen registers and trap and trace devices—which applies to devices attached to telephone lines to identify telephone numbers called—to be obtained ex parte); see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 538-539 (2004) (discussing the use of combat review panels); Juxtapose the Patriot Act, which allows for warrantless domestic surveillance in broad instances; see generally *U.S. v. U.S. Dist. Court for Eastern Dist. of Mich.*, 407 U.S. 297 (E.D. Mich. 1972); see also *Federal Bureau of Investigation: Hearing Before Committee on the Judiciary House of Representative*, 112th Cong. 112-151, 46 (2012) (statement of FBI Director Robert S. Mueller, III) (explaining that domain management “looks at your particular division or your district and identify[ies] the threats and the existence of those threats and how you are going to address that threat.”) available at [http://judiciary.house.gov/hearings/printers/112th/112-151\\_74121.PDF](http://judiciary.house.gov/hearings/printers/112th/112-151_74121.PDF); see also *10 Most Shocking Things the FBI Has Done Since 9/11*, <http://www.alternet.org/10-most-shocking-things-fbi-has-done-911> (“[T]he FBI mapped entire Chinese and Russian communities in San Francisco on the theory that they might commit organized crime, all Latino communities in New Jersey and Alabama because a street gang has Latino members, African Americans in Georgia to find “Black separatists,” and Middle-Eastern communities in Detroit for terrorism investigations. The FBI’s racial and ethnic mapping program is simply racial and religious profiling of entire communities.”).

<sup>251</sup> Congress enacted the Patriot Act with the purpose of deterring and punishing terrorist acts in the United States and around the world and to enhance law enforcement investigatory tools. The formal name is “Uniting and Strengthening America By Providing Appropriate Tools Required To Intercept And Obstruct Terrorism.” *USA Patriot Act*, Pub. L. 107-56, Stat. 272 (2001), available at <http://www.gpo.gov/fdsys/pkg/PLAW-107publ56/html/PLAW-107publ56.htm>; The Patriot Act massively increased government secrecy and criminalized many innocent activist and dissenters; On May 26, 2011, President Barack Obama signed the PATRIOT Sunsets Extension Act of 2011, a four-year extension of three key provisions in the USA PATRIOT Act: roving wiretaps, searches of business records (the “library records provision”), and conducting surveillance of “lone wolves”—individuals suspected of terrorist-related activities not linked to terrorist group. PATRIOT SUNSETS EXTENSION ACT OF 2011 (2011) available at <https://www.govtrack.us/congress/bills/112/s990>; Section 1021(b) of the National Defense Authorization Act for Fiscal Year 2012 (NDAA) provides for indefinite military detention of anyone—including U.S. citizens—without trial. See *National Defense Authorization Act for Fiscal Year 2012*, Pub. L. No. 112-81, 125 Stat. 1298 (Dec. 31, 2011), available at <http://www.gpo.gov/fdsys/pkg/PLAW-112publ81/pdf/PLAW-112publ81.pdf>; see also *The Detainees Treatment Act of 2005*, Pub. L. 109-163, available at <http://jurist.law.pitt.edu/gazette/2005/12/detainee-treatment-act-of-2005-white.php> (requiring military interrogations to be performed according to the U.S. Army Field Manual for Human Intelligence Collector Operations and directs the Department of Defense to establish Combatant Status Review Tribunals (CSRTs) for persons held in Guantanamo Bay); see also Richard Falk, *Encroaching on the Rule of Law: Post-9/11*

escape judicial review by indiscriminately waiving the shield of national security (and thereby claiming it can't disclose its affairs in court).<sup>252</sup>

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*Policies Within the United States*, in NATIONAL INSECURITY AND HUMAN RIGHTS DEMOCRACIES DEBATE COUNTERTERRORISM 14 (Alison Brysk & Gershon Shafir, eds. 2007) (explaining that "Guantanamo Bay is situated on Cuban territory leased on a long-term basis by the United States. It was apparently deliberately chosen as a major site for detention of captured suspects precisely because it was thought to be beyond the reach of American courts and not subject to the rule-of-law constraints."); *see also USA Patriot Act*, 147 CONG. REC. S10990-02 (2001), available at 2001 WL 1297566 (statement of Patrick Leahy):

While I recognize that appropriate officials in the executive branch of government should have access to wiretap information that is important to combating terrorism or protecting the national security, I proposed allowing such disclosures where specifically authorized by a court order. Further, with respect to information relating to terrorism, I proposed allowing the disclosure without a court order as long as the judge who authorized the wiretap was notified as soon as practicable after the fact. This would have provided a check against abuses of the disclosure authority by providing for review by a neutral judicial official. At the same time, there was a little likelihood that a judge would deny any requests for disclosure in cases where it was warranted. On Sunday, September 30, the Administration agreed to my proposal, but within two days, it backed away from its agreement. I remain concerned that the resulting provision will allow the unprecedented, widespread disclosure of this highly sensitive information without any notification to or review by the court that authorizes and supervises the wiretap . . . The Administration offered three reasons for reneging on the original deal. First, they claimed that the involvement of the court would inhibit Federal investigators and attorneys from disclosing information needed by intelligence and national security officials. Second, they said the courts might not have adequate security and therefore should not be told that information was disclosed for intelligence or national security purposes. And third, they said the President's constitutional powers under Article II give him authority to get whatever foreign intelligence he needs to exercise his national security responsibilities. I believe these concerns are unfounded.

*see also* Padilla v. Yoo, 678 F.3d 748 (9th Cir. 2012) (wherein an American citizen detained as an enemy combatant for two years alleged he was held incommunicado in military detention, subjected to coercive interrogation techniques and detained under harsh conditions of confinement, all in violation of his constitutional and statutory rights); *see generally* Stuart Streichler, *The War Crimes Trial That Never Was: An Inquiry Into The War on Terrorism, The Laws of War, and Presidential Accountability*, 45 U.S.F. L. REV. 959 (2011).

<sup>252</sup> *See* Hedges v. Obama, 890 F.Supp.2d 424, 430 (S.D.N.Y. 2012) (This suit was brought by writers, journalists, and activists whose work regularly requires them to engage in writing, speech, and associational activities protected by the First Amendment. They pursued this litigation out of fear that their official activities will subject them to indefinite military detention. The executive branch unsuccessfully argued jurisdiction was lacking.); *see also* Islamic Shura Council of Southern California v. F.B.I., 779 F.Supp.2d 1114, 1125 (C.D. Cal. 2011) ("The Government argues that there are times

During President Reagan's administration, there was a tendency to not only shield information from the public, but efforts were also made to withhold information from congress via the liberal use of security classifications.<sup>253</sup>

The instant situation developed as an exercise of national security power.<sup>254</sup> In an August 25, 1967 memo, J. Edgar Hoover instructed the FBI "to expose, disrupt, misdirect, discredit, or otherwise neutralize the activities of black-nationalist, hate-type organizations."<sup>255</sup> A second memo, dated February 29, 1968, calling for expanded counterintelligence efforts followed.<sup>256</sup> This memo expressed as a goal:

To prevent the coalition of militant black nationalist groups, prevent the rise of a leader who might unify and electrify these violence-prone elements, prevent these

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when the interests of national security require the Government to mislead the Court."); *see also* Hamdi v. Rumsfeld, 296 F.3d 278, (4th Cir. 2002), *cert. granted*, 542 U.S. 507 (2004) (Yaser Hamdi, born to Saudi Arabian parents in Louisiana, subsequently returned to Saudi Arabia where Hamdi was also considered a citizen. After being taken into indefinite custody by the United States, he sued. The government claimed his case to be a matter of national security); *see also* Alliance to End Repression v. City of Chicago, 91 F.R.D. 182, 188 (N.D. Ill. 1981) (In a class action by churches, political groups and activists alleging unlawful infiltration, surveillance and harassment, the government resisted discovery requests on the grounds of "state secrets"); *see also* Burkhardt v. Saxbe, 448 F.Supp. 588, 591-92 (E.D. Pa. 1978) (defending the use of warrantless wiretaps on national security grounds); *see also* Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2007: Hearing Before The Select Committee on Intelligence, 110th Cong. 110-209, p.25 (2007), available at 2007 WL 5334390 (statement by Chairman John D. Rockefeller) "Efforts by the four congressional oversight committees to fully understand the surveillance program's scope, legal basis, and operational effectiveness have been continually frustrated over many years by an impenetrable cloak of secrecy and a Bush Administration mantra that falsely equates congressional oversight as anathema to national security.").

<sup>253</sup> See National Security Information, Exec. Order No. 12356 (April 2, 1982) available at <http://www.presidency.ucsb.edu/ws/index.php?pid=42356>.

<sup>254</sup> See Pratt v. Webster, 673 F.2d 408, 422 (D.C. Cir. 1982) (indicating that the investigative file on BPP member Geronimo Pratt was a national security file.); *see also* Jones v. F.B.I., 41 F.3d 238, 243 (6th Cir. 1994) (wherein a national security exemption was asserted in responses to a request for COINTELPRO documents); *see also* Ellsberg v. Mitchell, 807 F.2d 204 (D.C. Cir. 1986) (wherein the government asserted a defense of qualified immunity in a national security context to a suit brought by certain members of the BPP).

<sup>255</sup> See FBI memorandum to "Personal Attention to All Offices," captioned "Counterintelligence Program Black Nationalist-Hate Groups Internal Security," August 25, 1967 at <http://vault.fbi.gov/cointel-pro/cointel-pro-black-extremists/cointelpro-black-extremists-part-01-of/view>. See generally CHURCHILL & VANDER WALL, *supra* note 76.

<sup>256</sup> See FBI Memorandum for G.C. Moore to C. Sullivan (Feb. 29, 1968), [http://www.aarclibrary.org/publib/church/reports/vol6/html/ChurchV6\\_0198b.htm](http://www.aarclibrary.org/publib/church/reports/vol6/html/ChurchV6_0198b.htm).

militants from gaining respectability, and prevent the growth of these groups among America's youth.<sup>257</sup>

Following hearings and an official investigation, it was revealed that various aspects of the United States government was used to dismantle the BPP, including the United States Postal Service, the United States Internal Revenue Service, and the United States federal employment application and screening process.<sup>258</sup> The government created special units to assist with federal-local cooperation.<sup>259</sup> "Along with its growth

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<sup>257</sup> *Id.*

<sup>258</sup> See *Gun-Barrel Politics: The Black Panther Party, 1966-71 Report by the Committee on International Security*, House of Representatives, H.R.Rep. 92470, 92nd Cong., 1st Sess., 139-40 (1971), available at <http://babel.hathitrust.org/cgi/pt?id=uc1.b38.91226;view=1up;seq=5>.

<sup>259</sup> See generally CHURCHILL & VANDER WALL, *supra* note 76; see also Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, Final Report, S.Rep.No.755, 94th Cong., 2d Sess., Book III 57-8 (1976), available at [http://www.intelligence.senate.gov/pdfs94th/94755\\_III.pdf](http://www.intelligence.senate.gov/pdfs94th/94755_III.pdf); see also *Wahad v. F.B.I.*, 813 F.Supp. 224 (S.D.N.Y. 1993) (where a BPP member alleged a federal-local police conspiracy); see also *Pratt v. Webster*, 508 F.Supp. 751, 759 (D.C. Cir. 1981), *reversed by*, 673 F.2d 408, 411 (D.C. Cir. 1982) (In a proceeding to obtain COINTELPRO documents by way a Freedom of Information Act request, the court ruled that the FBI properly deleted the "names of state and municipal police officers from law enforcement reports submitted by their agencies in the course of the FBI investigation" in question.); see also *Alliance to End Repression v. City of Chicago*, 237 F.3d 799, 801 (7th Cir. 2001) ("[T]he intelligence division of the Chicago Police Department contained a unit nicknamed the 'Red Squad' which spied on, infiltrated, and harassed a wide variety of political groups . . . . Most of the groups, including most of the politically extreme groups, were not only lawful, and engaged in expressive activities protected by the First Amendment, but also harmless."); see also *Hampton v. Hanrahan*, 600 F.2d 600, 610 (7th Cir. 1979), *rev'd in part*, 446 U.S. 754 (1980) ("The FBI in Washington urged its offices implementing COINTELPRO to develop liaisons and working relationships with local law enforcement officials to comply with the FBI's mandate to provide information to these agencies as well as to help effectuate the FBI's counterintelligence goals."); see also *Mendocino Environmental Center v. Mendocino County*, 192 F.3d 1283, 1302 (9th Cir. Sep 24, 1999) (finding that the Oakland Police department had a division that monitored the activities of the environmental activist group, Earth First!, and further finding that the FBI cooperated with the Oakland police in a conspiracy against the group's leader); see also *Alliance to End Repression v. City of Chicago*, 91 F.R.D. 182, 189 (N.D. Ill. 1981) (making reference to CIA documents detailing a relationship between the CIA and the Chicago Police Department during the civil rights era); see Memorandum from FBI Director to Sac, Philadelphia (157-2371) (Aug. 30, 1967) (on file with the author) (mentioning that actions were carried out by the Philadelphia Police Department); see also Memorandum from Sac, Chicago (157-2209) to FBI Director (100-448006) (Dec. 3, 1969) (on file with the author) (referencing a collaboration with the Chicago Police Department); see also Memorandum from Chicago to FBI Director (Dec. 13, 1969) (on file with the author) (mentioning that a number of the police officers involved with the raid on BPP member Fred Hampton's apartment were Chicago Police officers); see also Alan Feuer, *Defiant Ex-Black Panther Sues Defiant New York Police*,

came a local, national, and federal response that was ruthless in its efforts to discredit and destroy” the Panthers.<sup>260</sup> “United States law enforcement agencies, from local to state to federal branches, proclaimed the BPP its number one enemy.”<sup>261</sup> It remains a national security issue because the BPP is still largely viewed as a militant, hate group and because the government’s stance towards BPP has never been retracted or corrected though explicit official action.<sup>262</sup>

## VI. COUNTERARGUMENTS

### A. *The BPP Acted Adverse to the Government*

There might be the suggestion that redress is not warranted because the BPP committed the serious offense of acting adverse to the United States government. A few cases of executive direct action suggest this is not a legitimate basis for opposition. The first is a Civil War Era proclamation issued by then President Andrew Johnson in an attempt to achieve reconstruction.<sup>263</sup> This instrument extended a full pardon and amnesty for the offence of treason against the United States or of giving aid and comfort to enemies. The President gave the following reasons for taking this action: “to secure permanent peace, order, and prosperity throughout the land, and to renew and fully restore confidence and

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N.Y. TIMES (Dec. 4, 2000) <http://www.nytimes.com/2000/12/04/nyregion/defiant-ex-black-panther-sues-defiant-new-york-police.html> (referencing orders from the federal government to start a local partnership between the FBI and the New York Police).

<sup>260</sup> ORISSA AREND, *SHOWDOWN IN THE DESIRE* xvii (The University of Arkansas Press, 2006).

<sup>261</sup> JIM HASKINS, *POWER TO THE PEOPLE: THE RISE AND FALL OF THE BLACK PANTHER PARTY 2* (Simon & Schuster Children’s Publishing, 1st ed. 1997).

<sup>262</sup> The FBI currently provides this description: “The . . . (BPP) is a black extremist organization . . . It advocated the use of violence and guerilla tactics to overthrow the U.S. government. In 1969, the FBI’s Charlotte Field Office opened an investigative file on the BPP to track its militant activities, income, and expenses.” See *The Federal Bureau of Investigation, FBI Records: The Vault*, FBI.GOV, available at <http://vault.fbi.gov/Black%20Panther%20Party%20/>; see also *Toston v. Thurmer*, 689 F.3d 828 (7th Cir. 2012) (In 2012, an inmate who wrote the BPP ten point program on a piece of paper was determined to be in possession of gang literature and disciplined); see also AMNESTY INTERNATIONAL, *USA: 100 YEARS IN SOLITARY: THE ‘ANGOLA 3’ AND THEIR FIGHT FOR JUSTICE* 8 (June 2011), <http://www.amnestyusa.org/research/reports/usa-100-years-in-solitary-the-angola-3-and-their-fight-for-justice> (referencing a warden’s statement that housing BPP members in solitary confinement for in excess of thirty years was warranted solely because of the inmate’s refusal to stop practicing “Black Pantherism”).

<sup>263</sup> See *Granting Full Pardon and Amnesty for the Offense of Treason Against the United States During the Late Civil War, Proclamation No. 179*, <http://www.presidency.ucsba.edu/ws/index.php?pid=72360>.

fraternal feeling among the whole people, and their respect for and attachment to the National Government, designed by its patriotic founders for the general good.”<sup>264</sup>

Many years later, then President Gerald Ford reflected on the gravity of the calamities that resulted from the Vietnam War: “[T]he United States suffered great losses. Millions served their country, thousands died in combat, thousands more were wounded, others are still listed as missing in action.”<sup>265</sup> Despite the enormity of the situation, he saw the need to create an amnesty program for those who evaded the draft, which was a criminal act. He provided the following motivation: to further “our national commitment to justice and mercy.”<sup>266</sup> He continued: “Reconciliation among our people does not require that these acts be condoned. Yet, reconciliation calls for an act of mercy to bind the Nation’s wounds and to heal the scars of divisiveness.”<sup>267</sup>

The last example is then President Gerald Ford’s proclamation granting a pardon to Richard Nixon. After referencing an eight month-long impeachment investigation resulting in votes adverse to Richard Nixon on recommended Articles of Impeachment, the proclamation reads: “As a result of certain acts or omissions occurring before his resignation from the Office of President, Richard Nixon has become liable to possible indictment and trial for offenses against the United States.”<sup>268</sup> After expressing concerns that the tranquility of a nation would be disrupted by a trial, the proclamation embodies a concern “over the propriety of exposing to further punishment and degradation a man who has already paid the unprecedented penalty of relinquishing the highest elective office of the United States.”<sup>269</sup> It closes with the grant of “a full, free, and absolute pardon . . . for all offenses against the United States which he, Richard Nixon, has committed or may have committed or taken part in during the period from January 20, 1969 through August 9, 1974.”<sup>270</sup> The timing of this should not go unnoticed. This was taking place at the very time the BPP was being neutralized.

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<sup>264</sup> *Granting Full Pardon and Amnesty for the Offense of Treason Against the United States During the Late Civil War*, *supra* note 252.

<sup>265</sup> *Announcing a Program for the Return of Vietnam Era Draft Evaders and Military Deserters*, Proclamation No. 4313, <http://www.presidency.ucsb.edu/ws/index.php?pid=4714>.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Granting Pardon to Richard Nixon*, Proclamation No. 4311, <http://www.presidency.ucsb.edu/ws/index.php?pid=4696> (last visited Dec. 23, 2014).

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*



These three acts of executive direct action cement the fact that actions adverse to the government does not automatically deem a group ineligible for executive direct action.

### *B. The BPP was a Violent Group*

Some will contend the BPP was a violent group who acted aggressively towards law enforcement and, as such, escalated their encounters with them. Proponents of this view will suggest that the BPP was more of a volunteer for what it is that they got than a victim and, as volunteers, they are not entitled to redress. Conversations about the BPP, violence and law enforcement must be approached with caution. The BPP was formed largely in response to documented problems with police brutality.<sup>271</sup> They were themselves victims of police brutality and excesses.<sup>272</sup> High ranking government officials sent the message that the

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<sup>271</sup> See "Gun-Barrel Politics: The Black Panther Party, 1966-71," p. 17 Report by the Committee on International Security, House of Representatives, H.R. Rep. 92470, 92nd Cong., 1st Sess., 43 (1971), reprinted from the collections of the University of California Libraries; see also, *Inside the Black Panther Party*, <http://www.policemag.com/blog/gangs/story/2012/09/the-black-panther-party-1-of-2.aspx> (last visited Jan. 14, 2015) ("The Panthers were formed to protect and defend African-American neighborhoods from police brutality . . . In the 1950s and '60s, there was some merit to these allegations. I remember growing up in this era . . . where I witnessed some of what passed for normal police procedures that would shock the American conscience of today.").

<sup>272</sup> BPP member Harold Taylor, who was arrested on charges related to the 1971 killing of a police officer, tells of torture he encountered at the hands of police:

And immediately, when we got in the jail, they started beating us. They never asked us any questions in the beginning. They just started beating us . . . they put me a room with Ruben Scott . . . he was laying on the floor in a fetus position, where — and he had urine on him, feces, and his face was scratched up, and he was swollen, and he was trembling . . . They made me take off my clothes, chained me to a chair by my ankles to the bottom of the chair and my wrists to the sides of it, and I just had on my shorts. And at that point, they started beating me.

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So they were beating me and asking me questions. And when they started asking me questions, they started telling me about what I was supposed to have done, that if I didn't cooperate and tell them what happened, they were going to continue to do it. So they put plastic bags over my head and held me back while five or six police officers stood around me, hitting me and kicking at me. They were like kicking each other trying to get their licks in. They were hitting each other trying to hit me. And all I could do was sit there and just try to brace myself and anticipate blows coming. And then they'd take the bag and put it back over my head, and they'd wait 'til I'd just about

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pass out, and they'd snatch it off. [O]ne . . . would stand behind me, and he would take the palms of his hands, and he'd slap my ears, and my ears would just be ringing. He did that a number of times, and fluid began to run down the side of my face, and I couldn't hear anything. It was just ringing. And at that point, they dragged me to another room, and then they take me out of the chair, and they had the chains on my ankles, and they would drag me through like a gauntlet of police on both sides, and they were like kicking me and calling me names. And they continued that and put me in another room, and then I could hear John Bowman and I could hear Ruben Scott, and they were hollering. They were doing basically the same thing to them that they were doing to me. This went on for — you lose conception of time, but it seems like it was forever. And they continued this and continued this.

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Then [the] . . . San Francisco Police Department . . . came . . . .And they took me in a room, and he says, "Mr. Taylor," he says, "we want to talk to you about San Francisco." I told him I had no idea what they were talking about. So they says, "You know what? This is not California. This is a whole different show here."

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So the door flies open, four or five run in there, they start beating me and kicking me. And they just take me out of the room and just drag me down the hallway and take me and slam me back in a chair, chain me back up to the chair and start all over again with the plastic bag, the ear slapping, the slapjacks across the back of my shoulders, all down my legs and on my shins, between my knees. It was so painful that all you could do was try to scream, you know. And they says, "You're going to talk, or we're going to continue. This will go on as long as it takes for you to talk." And I kept telling them the same thing. So later — they did that all day. It went in shifts . . .

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I could hardly talk from screaming so much that my voice was hoarse. And they started probing me with the cattle prod on the back of my ear, down the side of my arm, underneath my arm, all real sensitive areas. And they says, "You know, we can do this all night long. We have nothing to do, you know. And this will continue until you talk to the people from San Francisco."

*see Former Black Panther Details Brutal Police Torture to Extract Confession in 1971 Murder Case*, [http://www.democracynow.org/2007/11/30/former\\_black\\_panther\\_details\\_brutal\\_police](http://www.democracynow.org/2007/11/30/former_black_panther_details_brutal_police) (Interview with BPP member Harold Taylor as he describes being taken into custody by police in New Orleans in 1973). The charges at issue were dismissed in 1975 after a court deemed this torture. These charges resurfaced in 2007. *Id*; *see also* "Gun-Barrel Politics: The Black Panther Party, 1966-71" Report by the Committee on International Security, House of Representatives, H.R. Rep. 92470, 92nd Cong., 1st

BPP was a dangerous terrorist organization.<sup>273</sup> This undoubtedly overshadowed every interaction each group had with the other, as well as caused their responses to be more instinctive than reasoned.<sup>274</sup> More significantly, some individuals who did engage in violence under the guise of being BPP members were actually government informants, causing the false attribution of their violent acts to the BPP.<sup>275</sup> In fact, it has emerged in recent years that the BPP's weapons supplier was a FBI

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Sess., 119 (1971), *reprinted from the collections of the University of California Libraries* (referencing two cases where BPP members were killed without a direct threat to a policemen's life.); *see generally supra* notes 96-99.

<sup>273</sup> *See* FBI Memorandum for G.C. Moore to C. Sullivan (Feb. 29, 1968), [http://www.aarclibrary.org/publib/church/reports/vol6/html/ChurchV6\\_0198b.htm](http://www.aarclibrary.org/publib/church/reports/vol6/html/ChurchV6_0198b.htm) ("The extremist BPP . . . is rapidly expanding. It is the most violence-prone organization of all the extremists groups now operating in the United States. This group has a record of violence and connections with foreign revolutionaries. It puts particular emphasis on not only verbal attacks but also physical attacks on police.").

<sup>274</sup> *See also* *Hampton v. Hanrahan*, 600 F.2d 600, 609 (7th Cir. 1979), *rev'd in part*, 446 U.S. 754 (1980) ("The national COINTELPRO program adopted a variety of tactics which seemingly were aimed not at preventing violence, but at neutralizing the BPP as a political entity.").

<sup>275</sup> *See* Angela A. Allen-Bell, *Activism Unshackled & Justice Unchained: A Call to Make a Human Right Out of One of the Most Calamitous Human Wrongs to Have Taken Place on American Soil*, 7 J. LAW & SOC. DEVIANCE 125, 165-7 (2014) (discussing the violent nature of FBI informants William O'Neal and Melvin Cotton); *see also* *Bergman v. U.S.*, 565 F.Supp. 1353, 1382 (1983) (revealing the use of violent FBI informants during the civil rights era); "Violence was promoted by the FBI in black organizations so often in the late 1960s and early 1970s that it is impossible . . . to know whether any given violent confrontation that took place in that era was instigated by genuine animosities among actual members of the groups or was instigated by FBI agents or informers, many of whom infiltrated such groups and promoted violence." BETTY MEDSGER, *THE BURGLARY: THE DISCOVERY OF J. EDGAR HOOVER'S SECRET* FBI 347-8 (2014); *see also* *Hampton v. Hanrahan*, 600 F.2d 600, 609 (7th Cir. 1979) *rev'd in part*, 446 U.S. 754 (1980):

The evidence presented by plaintiffs indicates that when the local chapter of the BPP opened in Chicago in November 1968, the Chicago FBI was quick to implement the tactics mandated by Washington. One of the key figures in the Chicago FBI's program to disrupt the Panthers was William O'Neal. O'Neal was a paid FBI informant whom Mitchell originally had contacted while O'Neal was incarcerated . . . [the FBI] recontacted O'Neal and instructed him to join the BPP. O'Neal walked into the BPP office . . . the day it opened in November 1968 and joined, soon becoming the local chief of security for the Panthers . . . The local FBI was able to effectuate many of its plans to disrupt the BPP through O'Neal . . . O'Neal . . . encouraged the Panthers to initiate and participate in various criminal activities, to obtain more weapons, and to increase their use of violent tactics.

informant.<sup>276</sup> Yes, violence did occur.<sup>277</sup> However, for the aforesaid reasons, it is misleading and it is also an oversimplification to entertain references to violence that are divorced from this reality.<sup>278</sup>

<sup>276</sup> *Black Panthers' Gun Supplier Was FBI Informant*, POLICEMAG, <http://www.police-mag.com/blog/gangs/story/2012/09/the-black-panther-party-1-of-2.aspx> (identifying Richard Aoki as both an FBI informant and a prominent 1960s Black Panther Party activist who supplied the group with its first firearms that were used in gun battles with Oakland police).

<sup>277</sup> *Id.* ("Between the fall of 1967 to the end of 1970, as a result of confrontations between police and Black Panthers, nine police officers were killed and 56 were wounded. The Panthers lost 10 members killed and an unknown number injured.").

<sup>278</sup> As a point of illustration one might consider the cases of BPP members Jamil Abdullah Al-Amin (commonly known as H. Rap Brown) and Joanne Deborah Chesimard (commonly known as Assata Shakur). In the year 2002, H. Rap Brown was convicted after a deputy was murdered and another deputy injured. It is reported that these officers were attempting to serve a warrant when gunfire erupted. *See Inmate Once Known as H. Rap Brown Transferred to Federal Custody*, AP ALERT – GEORGIA, available at <https://www.wdun.com/detail.php?n=93537&c=2>; H. Rap Brown was a victim of COINTELPRO who experienced years of neutralization attempts at the hands of law enforcement. *See* Memorandum from FBI Director to SAC, New York (100-161140) (Sept. 25, 1967) (on file with author) (exploring sources that provided bond money for H. Rap Brown and indicating that "the Bureau is aware when BROWN is in NY, his activities are followed closely. NY will remain alert to counterintelligence possibilities . . ."); *see also* Memorandum from FBI Director to SAC, New York (100-161140) (Feb. 28, 1968) (on file with author) (seeking permission to place "[a]n anonymous and various other pretextual telephone calls" to H. Rap Brown); *see also* Memorandum to FBI Director from SAC, Kansas City (100-12448) (March 18, 1968) (on file with author) (listing to H. Rap Brown as a leading dangerous black nationalist and discussing a counterintelligence plan to "[p]revent, harass, restrict, and/or discredit" him and other leading black nationalists).

Joanne Chesimard (Assata Shakur) is currently wanted for murder in conjunction with a death that occurred in 1970s. Most murder defendants who become fugitives are wanted for only the actual crime they were convicted of, but not Ms. Chesimard. Ms. Chesimard is listed by the FBI as one of the "Most Wanted Terrorists." The FBI flyer lists the following offenses: "Act of Terrorism - Domestic Terrorism; Unlawful Flight to Avoid Confinement – Murder." It continues:

Joanne Chesimard is wanted for escaping from prison in Clinton, New Jersey, while serving a life sentence for murder. On May 2, 1973, Chesimard . . . and two accomplices were stopped for a motor vehicle violation on the New Jersey Turnpike by two troopers with the New Jersey State Police. At the time, Chesimard was wanted for her involvement in several felonies, including bank robbery. Chesimard and her accomplices opened fire on the troopers. One trooper was wounded and the other was shot and killed execution-style at point-blank range. Chesimard fled the scene, but was subsequently apprehended. One of her accomplices was killed in the shoot-out and the other was also apprehended and remains in jail.

In 1977, Chesimard was found guilty of first degree murder, assault and battery of a police officer, assault with a dangerous weapon,

### C. State Sovereignty, Comity or Federalism Concerns

Another anticipated counterargument involves the view that executive action involving the release of BPP members who are in custody on state charges or exonerating BPP members who were convicted of state charges violates principles of comity, federalism and/or sovereign immunity. The starting point will likely be U.S. Const. art. II, § 2, cl. 1, which authorizes the President “to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.” Jurisprudence explains “offenses against the United States” to mean federal cases that involve violations of federal statutes.<sup>279</sup> These opponents will likely argue that a visible and rigid line of demarcation between federal and state authority exists and they are expected to contend that this redress proposal improperly seeks to disrupt

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assault with intent to kill, illegal possession of a weapon, and armed robbery. She was sentenced to life in prison. On November 2, 1979, Chesimard escaped from prison and lived underground before being located in Cuba in 1984. She is thought to currently still be living in Cuba.

See FBI Most Wanted Terrorists flyer, FBI.Gov, available at [http://www.fbi.gov/wanted/wanted\\_terrorists/joanne-deborah-chesimard/view](http://www.fbi.gov/wanted/wanted_terrorists/joanne-deborah-chesimard/view). She is said to be “the first woman ever to be named to the FBI’s Most Wanted Terrorists List.” Krissah Thompson, *Assata Shakur Was Convicted of Murder. Is She a Terrorist?*, THE WASHINGTON POST, May 9, 2013, available at 2013 WLNR 11323185. In rebuttal, Ms. Chesimard’s former attorney retorts: “Medical evidence proved that it was ‘anatomically impossible for Assata to kill Foerster after being shot by state trooper, James Harper.’” *Congratulations! Chokwe Lumumba Elected New Mayor Of Jackson, Miss.*, NEWSONE.COM, June 5, 2013, available at <http://michronicleonline.com/2013/06/05/congratulations-chokwe-lumumba-elected-new-mayor-of-jackson-miss/>; see also ASSATA SHAKUR, ASSATA AN AUTOBIOGRAPHY XI (Lawrence Hill Books 1987) (providing then director of the National Conference of Black Lawyers, Lennox Hinds’, account of the evidence). Further in her defense, it was stated that “[t]he evidence suggests that there was no gun powder residue on her fingers” and none “of her fingerprints were found on any guns at the scene.” “There’s just no material evidence that suggests that she was involved in this murder.” Ms. Chesimard “herself was shot during the incident.” While in custody in 1973 (before her escape), she was held under abhorrent conditions. She was “the first woman prisoner to ever be confined in a men’s prison.” As to the other criminal acts alluded to in the FBI flyer, one scholar counters: “of them are acquittals and three of them are dismissals. And there’s also a mistrial. Her first charge - the case in which she’s first charged for this May 1973 murder incident is a mistrial.” See *FBI Most Wanted Terrorists List: Who Is Assata Shakur?*, NPR.ORG, available at <http://www.npr.org/2013/05/07/181914429/fbi-most-wanted-terrorists-list-who-is-assata-shakur>; see also ASSATA SHAKUR, ASSATA AN AUTOBIOGRAPHY XI (Lawrence Hill Books 1987) (providing then director of the National Conference of Black Lawyers, Lennox Hinds’, account of the evidence).

<sup>279</sup> See *Ex parte Grossman*, 46 S.Ct. 332, 334 (1925); see also *U.S. v. Gabrion*, 517 F.3d 839, 855 (6th Cir. 2008), *cert denied*, 134 S.Ct. 1934 (2014); see also *Thomas v. U.S. Taggart*, 156 F. 897, 901 (8th Cir. 1907).

it. This is not an entirely wrong position to hold; just a flawed one under this unique set of circumstances.

It is true that in our American system of dual sovereignty, each sovereign—whether the Federal Government or a State—is responsible for the administration of its own criminal justice system.<sup>280</sup> It is also true that “comity between state and federal courts . . . has been recognized as a bulwark of the federal system.”<sup>281</sup> This is where the agreements cease, however. Several premises compel this parting of the ways.

Federal-state collaborations are routinely used, commonly through task forces and commissions. Their use does not, in and of itself, disturb traditional notions of sovereignty, comity or federalism. What is at issue here is an entirely different conversation piece. This involves a unique set of documented facts wherein the federal government declared war on a group of citizens, engaged in unlawful excesses and caused some state-level actors to engage in these practices along with it.<sup>282</sup> Because of this,

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<sup>280</sup> See *Setser v. United States*, 132 S.Ct. 1463, 1471 (2012); This also exists in the education arena. Some states have expressed concerns that, under the Common Core scheme, their receipt of federal education dollars undermines their sovereignty. Specifically, these states complain they are being forced into a federally mandated education curriculum despite the fact that the Constitution and the federal law does not cloak the federal government with authority over state education policy. See e.g., *Jindal v. United States Department of Education et al.*, <http://www.gov.state.la.us/assets/docs/Jindal%20Final%20Complaint.pdf>.

<sup>281</sup> *Allen v. McCurry*, 449 U.S. 90, 96 (1980); see also *Younger v. Harris*, 401 U.S. 37, 44–45 (1971) (Federalism “does not mean blind deference to ‘States’ Rights’ any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, ‘Our Federalism,’ born in the early struggling days of our Union of States, occupies a highly important place in our Nation’s history and its future.”); see also *Bufalino v. Reno*, 613 F.2d 568, 570 (1980) (discussing the exhaustion doctrine).

<sup>282</sup> The Church Committee said COINTELPRO “demonstrate[d] the consequences of a Government agency’s decision to take the law into its own hands for the ‘greater good’ of the country.” The Committee continued: “COINTELPRO began . . . because of frustration with Supreme Court rulings limiting the Government’s power to proceed overtly against dissident groups . . . . Many of the techniques used would be intolerable in a democratic society even if all of the targets had been involved in violent activity, but COINTELPRO went far beyond that. The unexpressed major premise of the programs was that a law enforcement agency has the duty to do whatever is necessary to combat perceived threats to the existing social and political order.” See Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, Final Report, S.Rep.No.755, 94th Cong., 2d Sess., Book III 3 (1976); see also *Pratt v. Webster*, 673 F.2d 408, 422 (D.C. Cir. 1981) (explaining that “COINTELPRO activities included the use of questionable, and at times illegal, methods.”); see also RONALD REAGAN

this situation cannot be viewed through the prism of a traditional federal-state collaboration and cannot be remedied by attempting to apply doctrines that govern routine and lawful state-federal relations. Dissenters must first consider the posture within which these offending States acted. The United States Constitution does not allow States to exercise powers that are federal in nature or powers that are not granted to them by the Constitution.<sup>283</sup> War powers and domestic security powers are federal. Many of the civil rights, which were violated by these offending States, were federal in nature. It can be argued that States, in assisting with violating constitutional, human and civil rights, exceeded their authority, calling the propriety of these convictions and incarcerations into question. Consistent with this, the President is even cloaked with authority to suppress certain conspiracies that exist within states that deprive people of rights, privileges, immunities and/or constitutional protections.<sup>284</sup>

Next, dissenters must understand that the federal and state government are not always mutually exclusive universes divided by an impenetrable wall. This idea is well hemmed into the foundation of our

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PRESIDENTIAL LIBRARY & MUSEUM, <http://www.reagan.utexas.edu/archives/speeches/1981/41581d.htm> (President Ronald Reagan explained that America was “at war” [domestically] when these offenses took place.); In a civil rights action for monetary damages brought by members of the Black Panther Party and the mothers of two deceased party members against federal and state law enforcement officers, a court said that the BPP established a prima facie case under the civil rights statutes for civil liability for conspiracy and remarked that there appeared to evidence of two conspiracies at work, one involving state and federal actors prior to the raid in questions and a second one involving the cover up and both involving legal as well as illegal activities. *See generally* Hampton v. Hanrahan, 600 F.2d 600 (7th Cir. 1979), rev’d in part, 446 U.S. 754 (1980); The following judicial finding was made concerning the Freedom Riders, another civil rights era group: “the FBI learned that Birmingham and Anniston police officers were, on occasion, cooperating with Klan members to achieve the purposes of the KKK. Importantly, the Bureau learned . . . that Birmingham Police Chief . . . might have Klan sympathies . . . Thus, in the early Spring of 1961, the Bureau had excellent reason to believe that the Birmingham officials, vested with the responsibility for enforcing the law, extolled instead the principles of the Klan.” The undisputed facts revealed that the FBI was present, personally or through informants, at critical points during the planning of the attack upon the Freedom Riders and took no measures to alert the Department of Justice of the impending attack or to prevent it. The Court found that “Through its agents, the government not only had knowledge of the far-ranging conspiracy but knew of the acts taken in furtherance of the plot. The United States could have prevented the conspiracy from being carried out, or at least could have taken steps which would have prevented the specific acts of violence.” Liability was found on the part of the federal government. *See* Bergman v. U.S., 565 F.Supp. 1353, 1382-1389 (1983)

<sup>283</sup> *See* U.S. CONST. amend. X.

<sup>284</sup> *See* 10 U.S.C.A. §333 (2008).

legal system.<sup>285</sup> This is well illustrated by the fact that some of the BPP members who were convicted on these state charges have been sent to federal facilities to serve out their state sentences.<sup>286</sup> These oppositionist would benefit from a walk back in time to the year 1956 when the legislature in the state of Mississippi created the Mississippi Sovereignty Commission.<sup>287</sup> This body was created to protect the State of Mississippi and her sister states from federal government interference.<sup>288</sup> It “worked

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<sup>285</sup> See *Harbison v. Bell*, 556 U.S. 180 (2009) (holding that a federal statute authorized federally appointed counsel to represent indigent clients in state clemency proceedings); In December 2014, the United States Department of Justice issued new guidelines on profiling. The guidelines apply to Federal law enforcement officers performing Federal law enforcement activities. They continue: “This new Guidance also applies to state and local law enforcement officers while participating in Federal law enforcement task forces.” U.S. DEPARTMENT OF JUSTICE, GUIDANCE FOR FEDERAL LAW ENFORCEMENT AGENCIES REGARDING THE USE OF RACE, ETHNICITY, GENDER, NATIONAL ORIGIN, RELIGION, SEXUAL ORIENTATION, OR GENDER IDENTITY (Dec. 2014), <http://www.justice.gov/sites/default/files/ag/pages/attachments/2014/12/08/use-of-race-policy.pdf>; see also 18 U.S.C. § 3599, which provides for the appointment of federal counsel to federal capital and state and federal post-conviction indigent defendants. This legislation is often used in conjunction with federal filings on behalf of inmates convicted of state charges; state inmates are able to obtain release through the federal courts by way of a vehicle called habeas relief. see 28 U.S.C.A. § 2254. On its face, this scheme can appear to be an assault on federalism and sovereignty principles. However, this type of relief can only be granted upon a showing that the state inmate “is in custody in violation of the Constitution or laws or treaties of the United States.” *Id.* So, in essence, the federal court is not reviewing a state finding of guilt, it is in essence applying the United States Constitution; see also U.S. CONST. amend. IV (referring to the reciprocal relationship between states); state tort law is the source of a cause of action brought under the Federal Tort Claims Act. see *Bergman v. U.S.*, 565 F.Supp. 1353, 1393 (1983); see also 5 U.S.C.A. § 3372 (1994) (Allowing for federal employees to be temporarily assigned to the state or local government to engage in mutually beneficial work); see also 42 U.S.C.A. § 4628 (addressing the acquisition of property by a state at the request of the federal government).

<sup>286</sup> See *Inmate Once Known as H. Rap Brown Transferred to Federal Custody*, AP ALERT—GEORGIA, available at <https://www.wdun.com/detail.php?n=93537&c=2> (mentioning the post-conviction transfer of H. Rap Brown to serve his state time out in the federal prison system); see also *Sundiata Acoli, Political Prisoner for 39 Years, Wins Appeal and Is Up for Parole Again*, available at <http://sfbayview.com/2012/04/sundiata-acoli-political-prisoner-for-39-years-wins-appeal-and-is-up-for-parole-again/> (“In . . . 1979, [BPP member Sundiata Acoli was] . . . declared . . . a political prisoner. A few days later prison officials secretly transferred him during the middle of the night to the federal prison system and put him en route to the infamous federal concentration camp at Marion, Illinois, although he had no federal charges or sentences. Marion is one of the highest security prisons in the U.S., also one of the harshest, and there Sundiata was locked down 23 hours a day. In July 1987 he was transferred to the federal penitentiary at Leavenworth, Kansas.”).

<sup>287</sup> See Facts about Mississippi Sovereignty Commission, available at <http://mdcbowen.org/p2/bh/badco/missSov.htm>.

<sup>288</sup> Facts about Mississippi Sovereignty Commission, *supra* note 276.



to preserve a segregated society and to oppose school integration.”<sup>289</sup> In secret, the commission harassed and spied on activists, branding many of them racial agitators and communist infiltrators.<sup>290</sup> Executive level, State-elected officials served on the commission, which operated with \$250,000.00 in operating expenses allocated from the State.<sup>291</sup> The Commission is suspected of playing a role in the deaths of some southern civil rights workers.<sup>292</sup> This reminder serves as an alert of the dangers posed by endorsing an impenetrable separation between the state and federal branches.

Dissenters must also remember the bedrock notion that a wrongdoer does not escape account just because his actions goes hidden from those he directed to act on his behalf. This notion is both longstanding and prevalent in both government and law (both criminal and civil) where there exists such symbiotic relations.<sup>293</sup> Equally well engrained into the law is the notion that there are mechanisms in place for deciphering between federal and state actors or federal or state claims or causes of action when they are called into question.<sup>294</sup> And, that federal-state

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<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> See *Arar v. Ashcroft*, 585 F.3d 559, 592 (2d Cir. 2009)(Sack, Calabresi, Pooler & Parker, J. concurring in part and dissenting in part) (“[W]e do not think . . . that federal government miscreants may avoid . . . liability . . . through the simple expedient of wearing hoods while inflicting injury.”); see also *Anderson v. Government of the Virgin Islands*, 199 F. Supp.2d 269 (V.I. 2002) (wherein it was determined that a federal employee, while on official assignment agreement duties in a state-level position, was found not to have lost his identify as a federal employee largely because his pay and duties were directed by the federal government.); see also *Andrade v. Chojnacki*, 65 F.Supp.2d 431, 452 (N.D. TX 1999) (discussing what must be alleged to establish a state-federal conspiracy); see generally *Brown v. Stewart*, 910 F.Supp. 1064 (W.D. PA 1996); see generally *Sorenson v. Concannon*, 893 F.Supp. 1469 (D. Or. 1994); see also *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) (The County Prosecutor advised the deputies to enter the premises, which they did (on his instruction, but without him being present and part of the act). The Supreme Court held that municipal liability was appropriate because the law enforcement officers acted at the direction of the County Prosecutor, the final legal decision maker for the county).

<sup>294</sup> In order to invoke the federal officer removal statute, a defendant must show that: (1) it is a “person” within the meaning of the statute; (2) it “acted pursuant to a federal officer’s directions and that a causal nexus exists between the defendants’ actions under color of federal office and the plaintiff’s claims;” and (3) it has averred a “colorable federal defense.” See 28 U.S.C.A. § 1442 (2013); see also *Stearns v. Parker*, 469 F.2d 1090 (9th Cir. 1972), ([A]n inmate was convicted on state charges, but housed in a federal prison. The inmate was granted post-conviction relief in federal court and the state appealed, arguing that his legal remedy was a state court action (since he was a state prisoner) and not a federal court action. The court agreed, reasoning that the state had control over the state inmate despite the housing arrangement. The court further reasoned

conspiratorial or symbiotic-type relationships are both recognized and consequential.<sup>295</sup> What should be gleaned from this discussion is that these determinations follow a very fact-driven process, guided not by rigid forecasts, but by many variables and factors that must be harmonized and reconciled. After this is done, one arrives at a symbolic fork in the road where the options are, on one side, do nothing to correct this injustice for fear of disturbing these several longstanding concepts that are firmly etched into our governmental and legal system or, on the other side, do something to correct this injustice and, in doing so, honor these several longstanding concepts that are firmly etched into our governmental and legal system.

In this vein, the Emancipation Proclamation should be considered.<sup>296</sup> It was issued in 1863, a few years after the United States Supreme Court issued the Dred Scott decision.<sup>297</sup> Dred Scott was an African American slave owned by an army surgeon who brought Dred Scott with him as he lived in the free state of Illinois and the free territory of Wisconsin before moving back to the slave state of Missouri where he initially purchased and housed Dred Scott. After his owner's death, Dred Scott sued, hoping to be declared free. He argued that his time on free soil conferred free

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that him being housed in federal prison a under contract between state and federal government, did not convert him over to a federal inmate. Because the state issued the ruling that sent him to prison, it was determined that the state was the director of the production and, therefore, was the party to be held account. Thus, the court required the inmate to have his battle with the state. What is important here is the court's analysis of the roles played. The court looked to the degree of control that existed in the relationship. The state had total control. They convicted him and they set the length of time he had to serve. The federal government had no hand in that process. They did not undertake any simultaneous actions. In short, they had no role or control. Thus, they could not be brought to account for anything. By inference, when there are actors playing joint roles in a situation (as was the case with the state and federal government in the BPP scenario) and one directs the actors of the other, it stands to reason that an opposite outcome would be warranted; *see generally* Colorado v. Nord, 377 F.Supp.2d 945 (D. Colo. 2005) (wherein a man was convicted on state charges and the state court late ordered return of proper, but federal officers who destroyed his property succeeded in defeating state court jurisdiction); *see generally* Denson v. U.S., 574 F.3d 1318 (11th Cir. 2009); *see generally* Adams v. Springmeyer, 17 F. Supp.3d 478 (2014).

<sup>295</sup> *See, e.g.* Bergman v. U.S., 565 F.Supp. 1353 (W.D. Mich. 1983) (wherein certain Freedom Riders alleged a conspiracy on the part of the government and breach of duty owed by the government).

<sup>296</sup> *See Regarding the Status of Slaves in States Engaged in Rebellion Against the United States*, Proclamation No. 95 (Jan. 1, 1863), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=69880>; *see also Declaring the Objectives of the War Including Emancipation of Slaves in Rebellious States on January 1, 1863*, Proclamation No. 93 (Sept. 22, 1862) available at <http://www.presidency.ucsb.edu/ws/index.php?pid=69782> (issued prior to the actual Emancipation Proclamation).

<sup>297</sup> *See generally* Dred Scott v. Sandford, 60 U.S. 393 (1857), superseded by constitutional amendment, U.S. CONST. amend. XIV.

status upon him. The United States Supreme Court did not see things his way. The Court declared that African Americans—slaves as well as free—could never become citizens of the United States. The court also declared the 1820 Missouri Compromise unconstitutional, thus permitting slavery in all of the country's territories.

While they did not grant him freedom, they did give him something. After establishing blacks to be nothing more than a piece of property, they gave a penetrating understanding of the legal status blacks at that particular time in history:

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it.<sup>298</sup>

What is significant is that this pronouncement predates the Emancipation Proclamation. Through the Emancipation Proclamation, President Abraham Lincoln ordered certain States to free slaves (previously declared property). He was crafty in drafting the proclamation to say that he was undertaking direct action as Commander and Chief of the Army and Navy, but his action of freeing slaves was arguably a social and moral issue and not a purely wartime measure. When all complexities of the day are stripped away, Lincoln told the States what to do with something in its care and control.

In the final analysis, these various authorities aid us in our arrival at the conclusion that: "While the rule of comity between federal and state courts is one of sound public policy and should be applied with a spirit of liberality, its application must depend somewhat on the circumstances of the case before the Court."<sup>299</sup> There is latitude for case-by-case determinations and the facts of this matter present such a unique situation.

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<sup>298</sup> Dred Scott, *supra* note 297, at 407.

<sup>299</sup> Donovan v. Delgado, 339 F.Supp. 446, 453 (D.P.R. 1971); *see also* Plummer v. Louisiana, 262 F.Supp. 1021, 1023 (E.D. La. 1967) (acknowledging that special circumstances can sometimes justify an interference with state court jurisdiction).

#### D. A Departure from Tradition and Precedent

It is anticipated that some will oppose this redress proposal because it calls for a departure from tradition and precedent. Proponents of this view will likely contend there is no history of taking such actions on behalf of activist groups and, for this reason, it should not be done in this instance. A similar objection was asserted in response to a request for the first posthumous Presidential pardon in the United States. It involved Henry Ossian Flipper, the first African American graduate of West Point and the first African American commissioned officer in the regular United States Army who, while an army engineer, created a drainage system that has now become a national landmark.<sup>300</sup>

“Social intolerance and chastisement were . . . common place occurrence[s] for the first black attendant at West Point.”<sup>301</sup> “[O]ne black cadet had the top of his ears ripped off.”<sup>302</sup> In 1881, Mr. Flipper was tried on charges of embezzlement and conduct unbecoming of an officer and a gentlemen in connection with the loss of commissary funds he was delegated to collect.<sup>303</sup> He was given no training for this assignment, however.<sup>304</sup> He was convicted of only one of the charges: conduct unbecoming an officer and a gentlemen.<sup>305</sup> He was discharged as a result of his conviction.<sup>306</sup> There were documented racial prejudices associated with his trial and conviction.<sup>307</sup>

Despite much credible support in favor of executive action, the Pardon Attorney opposed the effort, saying that precedent dictated “that posthumous pardons cannot and should not be granted by the President.”<sup>308</sup> President Bill Clinton choose to depart from tradition. His reasoning lends great insight to the present effort:

Welcome to an event that is 117 years overdue . . . we must acknowledge that our ‘more perfect’ union was created by imperfect human beings - who did not always define freedom in ways that we would . . . Today’s

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<sup>300</sup> See Darryl W. Jackson, Jeffrey H. Smith, Edward H. Sisson & Helen T. Krasnoff, *Bending Toward Justice: The Posthumous Pardon of Lieutenant Henry Ossian Flipper*, 74 IND. L.J. 1251, 1251-52 (1999).

<sup>301</sup> Letter from the descendants of Henry Ossian Flipper to then President William J. Clinton (Sept. 7, 1998), (on file with the William J. Clinton Presidential Library and Museum).

<sup>302</sup> *Id.*

<sup>303</sup> Jackson, *supra* note 300, at 1252.

<sup>304</sup> Jackson, *supra* note 300, at 1259.

<sup>305</sup> *Id.* at 1252.

<sup>306</sup> *Id.*

<sup>307</sup> *Id.* at 1259.

<sup>308</sup> *Id.* at 1251.

ceremony is about a moment in 1882 when our government did not do all it could to protect an individual's freedom. And it is about a moment in 1999 when we correct the error and resolve to do even better for future Americans . . . at the time, there wasn't much justice available for a young African-American . . . the wheels of justice turn slowly at times, [but] they still turn. It teaches us that time can heal old wounds, and redemption comes to those who persist in a righteous cause. Most of all, it teaches . . . that we must never give up the fight to make America live up to its high ideals.<sup>309</sup>

"Restoring [Mr. Flipper's] . . . good name and remedying the injustice he suffered was an important step forward for our nation . . ."<sup>310</sup> Then President Clinton could have done the easy and routine thing. He could have honored precedent and simply denied the request after viewing Mr. Flipper's conduct in isolation and after ceremoniously deferring to the findings of the tribunal. Instead, he had the visionary wisdom that rightly allowed him to place "facts" and "findings" in historical context. He also had the fortitude to acknowledge that official bodies are not always just bodies; he saw the reality that they are at times flawed. These things led to a departure from tradition that stimulatingly amounted to a step toward justice and healing. This provides yet another basis for executive action.

### *E. The Value of Amnesty as a Solution*

Some will not agree that amnesty is the correct method of redress to advance. After a complete purging, victims may realize more harm than initially known and amnesty, after this, could inflame matters. Amnesty also has the potential of making a victim feel as if he was further victimized by virtue of the victim acquiescing to the perpetrator not being punished. Despite this, BPP leader Marshall "Eddie" Conway has called for amnesty.<sup>311</sup> Perhaps that is because amnesty, with all its flaws, is the surest way, given the historical bedlam surrounding this chapter in history, to achieve some hindrance of healing. International statistics bear this out. They show that "over the past thirty years amnesty law

<sup>309</sup> Remarks at Flipper Pardon Event (Feb. 19, 1999), *available at* William J. Clinton Presidential Library and Museum, <http://www.clintonlibrary.gov/>.

<sup>310</sup> Jackson, *supra* note 300, at 1251.

<sup>311</sup> See Tim Wheeler, *From COINTELPRO to the Patriot Act: The Long Battle for Justice and Civil Liberties*, PEOPLE'S WEEKLY WORLD (Nov. 1, 2004).

enactment has continued at a steady rate.”<sup>312</sup> Evidence also establishes, in all its frailties and shortcomings, amnesty has proven to be a sure method of achieving transitional justice globally.<sup>313</sup>

## VII. CONCLUSION

In 2014, President Barack Obama assigned these things as present-day societal challenges in need of correction: “. . . a broken immigration system, . . . the right to unionize, . . . social justice for young men of color, . . . build ladders of opportunity for every American to climb”<sup>314</sup> and aggressive policing in minority communities.<sup>315</sup> Most of these things are exactly what the BPP sought to correct. They were not as far from mainstream as we might have once thought.<sup>316</sup> “Members of the rank and file of the Black Panther Party were a unique group of dedicated warriors who worked years without any recognition, rewards, awards, or monetary inducements to eliminate injustice in America.”<sup>317</sup> While the BPP’s “organizational life span lasted sixteen years . . . “ their contribution to America continues.<sup>318</sup> “A Citizens’ Complaint Board to hear allegations of police abuse was established by the Oakland City Council in 1981—fourteen years after the BPP launched its community patrols of the police.”<sup>319</sup> This model has been replicated and reused. Their effective use of multicultural alliances is a model that has been replicated and reused. “The BPP’s breakfast program and food give always . . . raised public consciousness about hunger and poverty in the United States.”<sup>320</sup> These programs were a precursor to the present free school lunch program.<sup>321</sup> “Indeed, Panther activism provides a model of

<sup>312</sup> Louise Mallinder, *Amnesties’ Challenge to the Global Accountability Norm? Interpreting Regional and International Trends in Amnesty Enactment*, 95 AMNESTY IN THE AGE OF HUMAN RIGHTS ACCOUNTABILITY COMPARATIVE AND INTERNATIONAL PERSPECTIVES (2012).

<sup>313</sup> See generally Elizabeth B. Ludwing King, *Amnesties in a Time of Transition*, 41 GEO. WASH. INT’L L. REV. 577 (2010).

<sup>314</sup> *Cesar Chavez Day*, Proclamation No. 9092 (March 28, 2014), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=104859>.

<sup>315</sup> See *Building Trust Between Communities and Local Police*, THE WHITE HOUSE BLOG (Dec. 1, 2014), available at <http://www.whitehouse.gov/blog/2014/12/01/building-trust-between-communities-and-local-police>.

<sup>316</sup> See Angela A. Allen-Bell, *Activism Unshackled & Justice Unchained: A Call to Make a Human Right Out of One of the Most Calamitous Human Wrongs to Have Taken Place on American Soil*, 7 J. LAW & SOC. DEVIANCE 125, 193-195 (2014).

<sup>317</sup> See JENNINGS, *supra* note 26, at 263-4.

<sup>318</sup> JONES & JEFFRIES, *supra* note 29, at 27.

<sup>319</sup> ABRON, *supra* note 52, at 187.

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

community self-help.”<sup>322</sup> And their efforts where Sickle Cell Anemia was concerned laid the groundwork for our current medical awareness and response. In the immediate aftermath of Hurricane Katrina, it was the ingenuity and the selflessness of some BPP members that saved lives and rendered aid to many New Orleans residents when an official governmental response was still be fashioned.<sup>323</sup> These men used the BPP party platform and organizing strategy to form a highly successful multicultural coalition of national volunteers who assisted for months following Hurricane Katrina.<sup>324</sup>

The late President John F. Kennedy called for the injustices and the inequities of the Civil Rights Era to finally be corrected: “The old code of equity law under which we live commands for every wrong a remedy [is due].”<sup>325</sup> In a petition it filed with the Human Rights Commission of the United Nations, the BPP themselves demanded “that the United States government make reparations to those who have suffered the damages of racist and genocidal practices.”<sup>326</sup> More recently, Former Congressman Cynthia McKinney suggested compensating COINTELPRO victims.<sup>327</sup> Tragically, none of these proposals have been brought to fruition.

“While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.”<sup>328</sup> “It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”<sup>329</sup> “Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.”<sup>330</sup> “Executive action can serve as a spark to ignite a broader dialogue by placing an issue in the national agenda and

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<sup>322</sup> *Id.*

<sup>323</sup> See ORISSA AREND, *SHOWDOWN IN DESIRE* 191-202 (2009) (discussing how BPP member Malik Rahim founded Common Group upon the very tenants of the BPP).

<sup>324</sup> *Id.*

<sup>325</sup> President John F. Kennedy, Report to the American People on Civil Rights (June 11, 1963), available at [http://www.jfklibrary.org/Asset-Viewer/LH8F\\_0Mzv0e6Ro1yEm74Ng.aspx](http://www.jfklibrary.org/Asset-Viewer/LH8F_0Mzv0e6Ro1yEm74Ng.aspx).

<sup>326</sup> THE BLACK PANTHERS SPEAK, *supra* note 25, at 219-255 (discussing the BPP’s Petition to the United Nations to end genocide against minorities in America).

<sup>327</sup> See *Human Rights In The United States: The Unfinished Story Current Political Prisoners-Victims of COINTELPRO*, Congressional Black Caucus Legislative Weekend (Sept. 14, 2000) (hosted by Representative Cynthia McKinney, D-Ga.) (statement of Cynthia McKinney), available at <http://www.ratical.org/co-globalize/CynthiaMcKinney/news/if000914HR.htm>.

<sup>328</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636 (1952) (Jackson J., concurring).

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

extending the envelope of acceptable social policies.”<sup>331</sup> “It can establish an anchor point for political debate, and can help draw Congress and the courts along.”<sup>332</sup> It is the appropriate response in this instance.

While this might seem like a rather unconventional redress request, reality suggests otherwise. “[I]n recent decades, each administration seems to find new devices and new ways of using . . . [executive direct action] to achieve policy goals, including goals they know they are unlikely to accomplish if they call upon Congress for help.”<sup>333</sup> “[T]hese days[,] it is not uncommon for presidents to use several instruments together as a policy mix with which to address a particularly complex situation.”<sup>334</sup>

There is strong legal support and a barrage of societal and global policy benefits in support of this redress proposal. There is also a global transitional justice trend in favor of restorative justice methods.<sup>335</sup> A number of other national social injustices have been corrected in recent times.<sup>336</sup> We have even gone as far as rectifying international injustices recently, yet we have never swept our very own doorsteps.<sup>337</sup> Executive direct action is as creative, bold and innovative a solution as the BPP was so it is a fitting prescription for securing justice and healing of the trauma and wounds that were created during this chapter in our civil rights and human rights journey. This work well documents why the BPP will not go down in history as “those who do nothing.” What remains to be seen is whether the scrolls of history will say this generation, when confronted

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<sup>331</sup> MAYER, *supra* note 171, at 217.

<sup>332</sup> *Id.*

<sup>333</sup> PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT THE USE & ABUSE OF EXECUTIVE DIRECT ACTION *Preface* (University Press of Kansas, 2nd ed. 2002).

<sup>334</sup> *Id.* at 120.

<sup>335</sup> See Sikkink, *supra* note 147, at 19-20 (“Since the 1980s, states have not only initiated prosecutions, but have increasingly used multiple alternative transitional justice mechanisms, including truth commissions, reparations, partial amnesties, lustration, museums and other memory sites, archives, and oral history projects to address past human rights violations.”).

<sup>336</sup> U.S. Dept. of Justice, *supra* note 149; see also *supra* text accompanying note 149.

<sup>337</sup> See Robyn Dixon, *South Africa Demands Apology Over U.S. Detention of Ex-Official*, L. A. TIMES, Oct. 28, 2013, available at <http://articles.latimes.com/2013/oct/28/world/la-fg-south-africa-us-20131029> (discussing the passage of legislation in 2008 that would lift the ban on Nelson Mandela and other members of the African National Congress from entering the United States and remove them from the terrorist watch list.); Hugh Thompson was a helicopter pilot who protested and halted the United States Army’s slaughtering of innocent, unarmed Vietnamese people at My Lai during the Vietnam war in 1968. For his comportment, he faced a threatened court martial, thirty years of ostracism by many fellow soldiers and was branded a traitor. Near the end of his life, Hugh Thompson was awarded a soldier’s medal and his deeds became a part of military ethics training lessons. See TRENT ANGERS, THE FORGOTTEN HERO OF MY LAI 220-230 (1999).



with its own injustice, “d[id] nothing” and “invited shame” or will it record us as “recognizing right as well as reality”?