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# Domestic Counterinsurgency: How Counterinsurgency Tactics Combined With Laws Were Deployed Against Blacks Throughout U.S. History

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**Domestic Counterinsurgency: How  
Counterinsurgency Tactics Combined With Laws  
Were Deployed Against Blacks Throughout U.S.  
History**

WILLIAM Y. CHIN\*

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## ABSTRACT

Long before the United States engaged in counterinsurgency overseas in Iraq and Afghanistan, the United States engaged in counterinsurgency domestically against blacks. The history of America is a history of enduring conflict between black insurgents and white counterinsurgents. This conflict began centuries ago with the forced transport of enslaved blacks to America's shores. From the beginning, whites employed all levers of national power including laws to suppress black resistance. The laws became counterinsurgency weapons launched against blacks in an internal conflict lasting generations.

## I. INTRODUCTION

America's focus in recent years has been on the United States counterinsurgency wars in Iraq and Afghanistan. But America began counterinsurgency operations centuries ago when blacks were forcibly shipped to the New World. Thus began the war on blacks.<sup>1</sup> Whites fought to subjugate blacks; blacks fought to be free.<sup>2</sup> Whites believed their superiority justified their subjugation of blacks; blacks believed

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1. See RANDALL ROBINSON, *THE RECKONING: WHAT BLACKS OWE TO EACH OTHER* 194 (2003).

2. See FRED ANDERSON & ANDREW CAYTON, *THE DOMINION OF WAR*, at xxi, 236-37 (2005).

they too should live as a free people.<sup>3</sup>

White superiority meant whites had to be victorious in their conflict with blacks. White superiority was exemplified by Oliver Wendell Holmes, Sr., born in Cambridge, Massachusetts, and a leading literary figure of his time. He gave a lecture in 1855 describing blacks as an “inferior natural tribe of men.”<sup>4</sup> Between blacks and whites, Holmes declared, “our sympathies will go with our own color first.”<sup>5</sup> Holmes exclaimed, “the white man must be the master.”<sup>6</sup> Not surprisingly, blacks resisted. As the U.S. Army Guerrilla Warfare Handbook explains, resistance is to be expected in a nation internally divided by the “violation of rights” or “oppression of one group by the dominant . . . force.”<sup>7</sup> Blacks resisted the violation of their rights by the dominant white force.

These two opposing forces joined in conflict amidst the backdrop of inveterate white ethnocentrism. The conflict was not a conventional war with large standing armies of black and white soldiers fighting pitched battles.<sup>8</sup> Rather, it was an unconventional war involving black insurgency and white counterinsurgency forces opposing each other over the span of centuries. As the U.S. military’s counterinsurgency manual concedes, counterinsurgency campaigns are often protracted and arduous.<sup>9</sup>

In this unconventional war, whites used the law as a weapon against blacks. In any struggle, law becomes a weapon used by the ruling class to achieve its ends.<sup>10</sup> A successful counterinsurgency requires “bringing all instruments of national power to bear.”<sup>11</sup> White counterinsurgents have used the law as an instrument of national power against black insurgents.<sup>12</sup> This accords with U.S. counterinsurgency doctrine that recognizes the law as a “powerful potential tool” to use

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3. ALFRED MCCLUNG LEE & NORMAN D. HUMPHREY, *RACE RIOT* 10 (Octagon Books 1968) (1943).

4. Oliver Wendell Holmes, *The Pilgrims of Plymouth*, in *DOCUMENTS OF AMERICAN PREJUDICE* 17, 19 (S.T. Joshi ed., 1999).

5. *Id.* at 19.

6. *Id.* at 20.

7. U.S. ARMY GUERRILLA WARFARE HANDBOOK 5 (Skyhorse Publishing 2009).

8. See MERVYN FROST, *ETHICS IN INTERNATIONAL RELATIONS* 199-200 (1996).

9. DAVID H. PETRAEUS & JAMES F. AMOS, *THE U.S. ARMY & THE MARINE CORPS, COUNTERINSURGENCY FIELD MANUAL*, at liv (Univ. Chi. Press 2007) (2006).

10. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 255 (3d ed. 2007).

11. PETRAEUS & AMOS, *supra* note 9, at 77.

12. MARY FRANCES BERRY, *BLACK RESISTANCE/WHITE LAW* 3 (1994).

against insurgents.<sup>13</sup>

The white goal of mastering blacks produced racial conflict.<sup>14</sup> This article does not seek to identify all instances of racial conflict between blacks and whites, but to identify some major aspects that explicate the military nature of this conflict. The nature of this conflict is a white counterinsurgency campaign against black insurgents, as explained in Part II. Part III elucidates how America's founding documents supported the counterinsurgency campaign against blacks. Part IV surveys how counterinsurgency tactics combined with laws were used against blacks from slavery to the current period. Part V examines why the counterinsurgency campaign against blacks is ongoing despite seeming progress in race relations. Part VI proposes policies benefitting blacks who have endured a long-term counterinsurgency campaign waged against them. In the end, the hope is for the racial chasm separating the warring sides to be closed.<sup>15</sup>

## II. A COUNTERINSURGENCY NATION

U.S. history is a history of counterinsurgency. The United States was formed from an insurgent-counterinsurgent struggle between colonial insurgents combating the counterinsurgent British Empire.<sup>16</sup> After gaining independence, white insurgent colonists were the counterinsurgents battling black insurgents who sought their own freedom. Sociologist Gunnar Myrdal, in his seminal work *An American Dilemma*, described blacks as "insurgents."<sup>17</sup> Myrdal's "insurgent" description is apt because an *insurgency* is "a power struggle between a nonruling group and their ruling authority,"<sup>18</sup> and in America there has been an ongoing struggle between the black nonruling group and the white ruling authority.<sup>19</sup> *Counterinsurgency* is military, paramilitary, and other actions taken by a government to defeat insurgents,<sup>20</sup> and whites have used military, paramilitary, and other actions including

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13. PETRAEUS & AMOS, *supra* note 9, at 39.

14. See Richard C. Wade, *Violence in the Cities: A Historical Overview*, in CITIES UNDER SIEGE 277, 285 (David Boesel & Peter H. Rossi eds., 1971).

15. See ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 219 (1992).

16. DOMINIC J. CARACCILO & ANDREA L. THOMPSON, ACHIEVING VICTORY IN IRAQ: COUNTERING AN INSURGENCY 34 (2008).

17. GUNNAR MYRDAL, AN AMERICAN DILEMMA 1004 (1944).

18. CARACCILO & THOMPSON, *supra* note 16, at 29.

19. See DEBORAH MATHIS, YET A STRANGER 2-3 (2002).

20. PETRAEUS & AMOS, *supra* note 9, at 2.

crafting an oppressive legal regime to defeat black insurgents.<sup>21</sup>

### III. THE FOUNDING DOCUMENTS AS COUNTERINSURGENCY DOCUMENTS

America's founding documents, in relation to blacks, were counterinsurgency documents supporting a legal regime constructed to maintain white dominance. The Articles of Confederation was a counterinsurgency document because it permitted states to retain control over domestic institutions such as slavery.<sup>22</sup>

The U.S. Constitution was also a counterinsurgency document because it supported and entrenched slavery within the United States.<sup>23</sup> Like the Articles of Confederation, the Constitution allowed states the prerogative to maintain order within their borders,<sup>24</sup> which meant they retained their authority to control slaves.<sup>25</sup> Moreover, if a state required assistance, the Constitution obligated the national government to assist states in suppressing domestic disorders—including slave insurrections.<sup>26</sup> The Constitution created a union of states bound to support each other against black resistance.<sup>27</sup>

Finally, the Declaration of Independence was also a counterinsurgency document because it did not declare independence for blacks, but instead voiced fears of black insurrection. The Declaration accused King George of “excit[ing] domestic insurrection among us,”— a reference to Lord Dunmore's offer of freedom to pro-British slaves. Lord Dunmore, the royal governor of Virginia, proclaimed in 1775, “I do hereby declare all indentured servants, negroes, or others, (appertaining to Rebels,) free that are able and willing to bear arms, they joining His Majesty's troops.”<sup>28</sup> Slaves throughout the colonies responded and joined British army and navy forces.<sup>29</sup> Thomas Jefferson greatly feared slave rebellions and was

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21. See RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* 8-9 (2000).

22. BERRY, *supra* note 12, at 4.

23. JUNIUS P. RODRIGUEZ, *SLAVERY IN THE UNITED STATES* 492 (2007).

24. BERRY, *supra* note 12, at 7.

25. *Id.* at 8.

26. *Id.*

27. See Paul Finkelman, *The Root of the Problem: How the Proslavery Constitution Shaped American Race Relations*, 4 BARRY L. REV. 1, 19 (2003).

28. CHARLES R. FOY, *PORTS OF SLAVERY, PORTS OF FREEDOM* 253 (2008).

29. *Id.*

terrified by Lord Dunmore's proclamation. Jefferson's earlier draft of the Declaration was even more emphatic in accusing King George of "exciting those very people [the imported slaves] to rise in arms among us."<sup>30</sup>

#### IV. CENTURIES OF COUNTERINSURGENCY

From the beginning, blacks and whites have lived in a persistent state of conflict because blacks did not accept being enslaved within a white-imposed racial caste system.<sup>31</sup> Constant resistance by blacks "made life a nightmare to those in charge of these Negroes."<sup>32</sup> Whites feared blacks rebelling<sup>33</sup> and thus devised various counterinsurgency stratagems including passing oppressive laws to control blacks.<sup>34</sup> The stage was set for centuries of racial counterinsurgency in America.

##### A. The Slavery Period

White suppression of blacks began in the late 1600s with the introduction of slavery.<sup>35</sup> The slave system was effectively a declaration of war on the black population.<sup>36</sup> Blacks were the only ethnic group that did not arrive in America of its own free will.<sup>37</sup> As Alexis de Tocqueville observed, "[n]o African came in freedom to the shores of the New World."<sup>38</sup> Slavery was a cruel and perverse period in American history.<sup>39</sup> Blacks despised and resisted this cruel system of exploitation.<sup>40</sup> Survival was itself a form of resistance.<sup>41</sup> Other forms of resistance included work slowdowns, destruction of tools, flight, arson, assassinations, and insurrections.<sup>42</sup>

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30. See Sandra L. Rierison, *The Thirteenth Amendment as a Model for Revolution*, 35 VT. L. REV. 765, 774 (2011).

31. LEE & HUMPHREY, *supra* note 3, at viii.

32. *Id.*

33. BERRY, *supra* note 12, at 3.

34. *Id.*

35. *Id.* at 1.

36. Walter Johnson, *Resetting the Legal History of Slavery*, 29 LAW & HIST. REV. 1089, 1093-94 (2011).

37. MATHIS, *supra* note 19, at 223.

38. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 341 (J.P. Mayer ed., 1969).

39. ANDREW WARD, *THE SLAVES' WAR* xii (2008).

40. HERBERT APTHEKER, *AMERICAN NEGRO SLAVE REVOLTS 2* (Int'l Publishers 1969) (1943).

41. *Id.* at 3.

42. *Id.*

Whites constructed an oppressive legal regime to deter black resistance.<sup>43</sup> States enacted slave codes that were a principal deterrent to black rebellion.<sup>44</sup> Slaves could not, among other restrictions, leave plantations without permission, assemble in large numbers, or bear arms.<sup>45</sup> The anti-black legal regime allowed whites to deploy their forces with “*blitzkrieg*-like efficiency” in the counterinsurgency campaign against blacks.<sup>46</sup>

### 1. Outsourcing the Rendition of Blacks

U.S. counterinsurgency strategy calls for capturing the enemy.<sup>47</sup> In the War on Terror, one method the United States used to capture the enemy was outsourcing renditions of suspected terrorists.<sup>48</sup> In the case involving Abd al-Hadi al-Iraqi, a top aide to Osama bin Laden, the United States relied on a foreign intelligence service to capture this senior Al Qaeda operative and deliver him to the Central Intelligence Agency.<sup>49</sup>

Likewise, Europeans and American colonists outsourced the rendition of blacks in Africa. It was impractical for a relatively small number of white sailors in distant lands to capture millions of black slaves, but white demand for slave labor required a solution.<sup>50</sup> The answer was outsourcing the kidnapping of Africans to other Africans in West Africa to sell to European and American traders.<sup>51</sup> Different tribes and villages battled each other to capture slaves to be sold to white slave traders.<sup>52</sup> This outsourced rendition was efficacious. The Atlantic slave trade forcibly transported millions of blacks to the New World with 450,000 shipped to the United States.<sup>53</sup>

This massive rendition program was a lawful enterprise because

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43. See WILLIAM F. CHEEK, *BLACK RESISTANCE BEFORE THE CIVIL WAR* 9 (1970).

44. *Id.*

45. *Id.*

46. *See id.*

47. PETRAEUS & AMOS, *supra* note 9, at 176.

48. Eric Schmitt & Mark Mazzetti, *U.S. Relies More on Aid of Allies in Terror Cases*, N.Y. TIMES (May 24, 2009), <http://www.nytimes.com/2009/05/24/world/24intel.html>.

49. *Id.*

50. DAVID BRION DAVIS, *INHUMAN BONDAGE* 89-90 (2008).

51. *Id.* at 12-13.

52. ROBERT B. SHAW, *A LEGAL HISTORY OF SLAVERY IN THE UNITED STATES* 40 (1991).

53. HENRY LOUIS GATES, JR., *LIFE UPON THESE SHORES* 4 (2011).



the slave trade was enabled by the U.S. Constitution.<sup>54</sup> The Constitution protected the slave trade by stipulating that Congress could not ban the slave trade until 1808<sup>55</sup> and that the ban-prohibition language could not be amended.<sup>56</sup>

## 2. Continuing the Rendition of Blacks

The Atlantic slave trade ended in 1808,<sup>57</sup> but the Constitution's Fugitive Slave Clause continued the rendition of blacks.<sup>58</sup> The Clause declared that a black person "held to Service or Labour" (i.e., enslaved) in one state who escapes to another state remains enslaved and "shall be delivered up on Claim of the Party to whom such Service or Labour may be due."<sup>59</sup> The subsequent Fugitive Slave Act of 1850 strengthened the Fugitive Slave Clause.<sup>60</sup> The 1850 Act appointed federal commissioners who could create a posse or enlist the militia or army to hunt down escaped slaves. Additionally, the Act declared, "all good citizens are hereby commanded to aid and assist in the prompt and efficient execution of this law."<sup>61</sup>

## 3. Suppressing Black Insurrections

Blacks fought against the slave system in various ways including disobedience, petty theft, running away, and insurrection.<sup>62</sup> The highest form of resistance was insurrection because success was unlikely and failure meant death.<sup>63</sup> Despite probable failure, blacks actively resisted with over 200 reported slave insurrections occurring during the two centuries prior to the Civil War.<sup>64</sup> Whites greatly feared black insurrections and brutally repressed them.<sup>65</sup> In one insurrection attempt

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54. See CHARLES J. OGLETREE, *ALL DELIBERATE SPEED* 223 (2004).

55. U.S. CONST. art. I, § 9, cl. 1.

56. U.S. CONST. art. V.

57. U.S. CONST. art. I, § 9, cl. 1.

58. Hans W. Baade, "Original Intent" in *Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1044 n.295 (1991).

59. U.S. CONST. art. IV, § 2, cl. 3.

60. James A. Gardner, *State Courts as Agents of Federalism*, 44 WM. & MARY L. REV. 1725, 1786-87 (2003).

61. Paul Finkelman, *States' Rights, Southern Hypocrisy, and the Crisis of the Union*, 45 AKRON L. REV. 449, 459 (2012).

62. See FRIEDMAN, *supra* note 10, at 156.

63. APTHEKER, *supra* note 40, at 3.

64. LEE & HUMPHREY, *supra* note 3, at viii.

65. FRIEDMAN, *supra* note 10, at 156.

in 1811, Charles Deslondes, a slave, led two hundred other slaves and marched toward New Orleans, burning three plantations and killing a number of whites. White military forces repressed the insurrection and killed up to a hundred slaves.<sup>66</sup>

U.S. counterinsurgency doctrine calls for using all tools of national power to suppress uprisings.<sup>67</sup> Whites during the slavery period used all tools of national power including laws to suppress black uprisings. Alabama's 1833 code, for example, authorized death for any slave who consulted, advised, or conspired to "rebel" or "make insurrection."<sup>68</sup> Georgia's 1845 law stated, "[e]xciting an insurrection or revolt of slaves, or any attempt by writing, speaking, or otherwise, to excite an insurrection or revolt of slaves, shall be punished with death."<sup>69</sup>

The U.S. Constitution also sought to control black insurrections. Constitutional authority for the federal government to "suppress insurrections"<sup>70</sup> included suppressing black insurrections.<sup>71</sup> Likewise, constitutional authority for the federal government to protect states "against domestic violence"<sup>72</sup> included protecting against domestic slave rebellions.<sup>73</sup>

#### 4. Patrolling Blacks

U.S. counterinsurgency doctrine instructs U.S. forces to "[e]stablish patrolling tactics that deter enemy attacks."<sup>74</sup> U.S. forces should constantly patrol day and night to thwart enemy operations.<sup>75</sup> Whites during the slavery period instituted slave patrols to suppress black resistance.<sup>76</sup> Efforts to patrol blacks predate the founding of the United States. By 1671, South Carolina had a Charleston Town Watch staffed by constables and citizens searching for signs of trouble

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66. DAVIS, *supra* note 50, at 208.

67. PETRAEUS & AMOS, *supra* note 9, at 2.

68. 1833 Ala. Laws, Slaves, and Free Person of Color, § 20, 394, *available at* <http://www.archives.state.al.us/teacher/slavery/lesson1/doc1-6.html>.

69. 1845 Ga. Laws pt. 4th, title I, ch. XXVIII, art. III, § III, para. 23, 704.

70. U.S. CONST. art. I, § 8, cl. 15.

71. PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS* 7 (2d ed. 2001).

72. U.S. CONST. art. IV, § 4.

73. Finkelman, *supra* note 27, at 8.

74. PETRAEUS & AMOS, *supra* note 9, at 295.

75. *Id.*

76. KRISTIAN WILLIAMS, *OUR ENEMIES IN BLUE: POLICE AND POWER IN AMERICA* 36 (2007).

including slave gatherings.<sup>77</sup> Later, South Carolina's 1690 Act for the Better Ordering of Slaves required all persons to "arrest and chastise any slave out of his home plantation without a proper pass."<sup>78</sup> In 1704, South Carolina formed its first official slave patrols to suppress insurrections.<sup>79</sup> In 1721, the law was modified to "prevent all caballings amongst negros, by dispersing of them when drumming or playing, and to search all negro houses for arms or other offensive weapons."<sup>80</sup>

Slave patrols in Virginia began when the Virginia legislature in 1691 required sheriffs to raise posses to capture runaway slaves.<sup>81</sup> This duty was transferred to the Virginia militia in 1727, thus creating Virginia's first slave patrol. After a failed black rebellion in 1730, sporadic patrols turned into regular patrols conducting reconnaissance two or three times a week.<sup>82</sup>

Other colonies enacted similar laws.<sup>83</sup> During the antebellum period, all Southern states had white patrols. Slaveowners were obligated to serve on patrols. Each patrol had four to twelve members with one designated as the captain. Each slave patrol member usually rode at least once every two weeks.<sup>84</sup> They "scoured the countryside day and night, intimidating, terrorizing, and brutalizing slaves into submission and meekness."<sup>85</sup> Former slave Ida Henry recalled a white patrol who assaulted her mother:

De patrollers wouldn't allow de slaves to hold night services, and one night dey caughtme mother out praying. Dey stripped her naked and tied her hands together wid a rope tied to de handcuffs and threw one end of de rope over a limb and tied de other end to de pummel of a saddle on a horse. As me mother weighed 'bout 200, dey pulled her up so dat her toes could barely touch de ground and whipped her.<sup>86</sup>

The laws sanctioned such use of violence by white patrols. The

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77. *Id.* at 37.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 39.

82. *Id.*

83. *Id.*

84. SHAW, *supra* note 52, at 181.

85. WILLIAMS, *supra* note 76, at 40.

86. *Id.*

laws of some states—North Carolina, South Carolina, and Georgia—allowed slave patrols to seize slaves traveling without a pass or after curfew and to summarily whip them.<sup>87</sup>

### 5. Disarming Blacks

U.S. counterinsurgency doctrine calls for the controlling power to monopolize the use of force.<sup>88</sup> Disarming the targeted population is the “most vital step” to ensure tranquility.<sup>89</sup> The laws should forbid the targeted population from possessing weapons and punish those who violate the weapons ban.<sup>90</sup> The objective is for counterinsurgents to control the entire legal supply of weapons.<sup>91</sup> This objective was attempted during the Iraq War. Disarming the Iraqi population was a major goal of U.S. forces early on in post-Saddam Iraq.<sup>92</sup> Paul L. Bremer, head of the Coalition Provisional Authority in Iraq, sought to pacify Iraq by disarming enemy militias.<sup>93</sup>

Likewise, whites sought to pacify blacks by disarming them. A 1723 Virginia law prohibited blacks from keeping or carrying “guns, gunpowder, shot, or clubs”—even for self-defense.<sup>94</sup> The slave code of the District of Columbia declared: “No negro or other slave within this province shall be permitted to carry any gun, or any other offensive weapon, from off their master’s land without license from their said master . . . .”<sup>95</sup> Violation of this provision entailed whipping and seizure of the weapons.<sup>96</sup> An Alabama law stated: “No slave shall keep or carry any gun, powder, shot, club, or other weapon whatsoever,

87. SHAW, *supra* note 52, at 179.

88. PETRAEUS & AMOS, *supra* note 9, at 56.

89. U.S. MARINE CORPS, SMALL WARS MANUAL CH. XI DISARMAMENT OF POPULATION 2 (1940). Although the U.S. Army & Marine Corps’ *Counterinsurgency Field Manual* was written in 2006 for U.S. military forces fighting in Iraq and Afghanistan, the 1940 *Small Wars Manual* remains a centerpiece for U.S. counterinsurgency operations. CARACCILO & THOMPSON, *supra* note 16, at 34.

90. CARACCILO & THOMPSON, *supra* note 16, at 5.

91. *Id.* at 13.

92. *Id.* at 34.

93. JAMES DOBBINS, SETH G. JONES, BENJAMIN RUNKLE, & SIDDHARTH MONHANDAS, OCCUPYING IRAQ 315 (2009).

94. JOSEPH W. SCOTT, THE BLACK REVOLTS: RACIAL STRATIFICATION IN THE U.S.A. 5 (1976).

95. The Slavery Code of The District of Columbia 21 (1862), *available at* <http://memory.loc.gov/cgi-bin/query/r?ammem/llst:@field%28DOCID+@lit%28llsc002div2%29%29>.

96. *Id.*

offensive or defensive, except the tools given him to work with . . . .”<sup>97</sup> Under the slave codes of Kentucky, Virginia, and Missouri, a slave was subject to thirty-nine lashes for keeping a gun or other weapons.<sup>98</sup>

Whites shuddered at the thought of large numbers of armed blacks.<sup>99</sup> George Washington, who commanded the Continental Army during the Revolutionary War, banned all blacks, both free and slave, from enlisting.<sup>100</sup> When Congress suggested that states recruit slaves to help fight the British, Christopher Gadsden, a leader of the Revolution from South Carolina, wrote, “We are much disgusted here at Congress recommending us to arm our Slaves.”<sup>101</sup> According to Gadsden, “It was received with great resentment, as a very dangerous and impolitic Step.”<sup>102</sup>

## 6. Prohibiting Assemblies

U.S. counterinsurgency doctrine calls for restrictions on “unlawful assembly.”<sup>103</sup> All potential enemy assemblages are to be scrutinized and, if necessary, disbanded.<sup>104</sup> In the counterinsurgency campaign against blacks, whites sought to keep blacks from assembling. Alabama’s slave code of 1833 mandated that “unlawful assemblies . . . by a slave or slaves, shall be punished with stripes . . . .”<sup>105</sup> Similarly, the District of Columbia’s slave code stated: “All secret or private meetings or assemblages whatsoever, and all meetings for religious worship beyond the hour of ten o’clock at night, of free negroes, mulattoes or slaves, shall be, and they are hereby declared to be unlawful . . . .”<sup>106</sup>

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97. 1833 Ala. Laws, Slaves, and Free Persons of Color, § 7, 391, *available at* <http://www.archives.state.al.us/teacher/slavery/lesson1/doc1-3.html>.

98. WILLIAM GOODELL, *THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE* 229 (Negro U. Press 1968) (1853).

99. GREGORY D. MASSEY, *JOHN LAURENS AND THE AMERICAN REVOLUTION* 140 (2000).

100. RAY RAPHAEL, *FOUNDING MYTHS: STORIES THAT HIDE OUR PATRIOTIC PAST* 176 (2004).

101. *Id.* at 177.

102. *Id.*

103. U.S. MARINE CORPS, *supra* note 89, at 9.

104. *Id.*

105. 1833 Ala. Laws, Slaves, and Free Person of Color, § 9, 392, *available at* <http://www.archives.state.al.us/teacher/slavery/lesson1/doc1-4.html>.

106. *The Slavery Code of The District of Columbia* 34 (1862), *available at* <http://memory.loc.gov/cgi-bin/query/r?ammem/llst:@field%28DOCID+@lit%28llsc002div2%29%29>.

## 7. Suppressing Speech

The U.S. counterinsurgency manual avoids specifically calling for restricting free speech and instead euphemistically instructs military commanders to “shap[e] the information environment.”<sup>107</sup> Whites in the antebellum South attempted to shape their information environment by passing laws to suppress antislavery speech. Georgia passed legislation providing that a person could face the death penalty for “circulating any publication for the purpose of exciting a revolt among the slaves.”<sup>108</sup> North Carolina imposed penalties on any person who wrote or distributed publications “to excite insurrection, conspiracy, or resistance in the slaves or free negroes.”<sup>109</sup> Virginia made it a felony for a person to print or distribute any writing “for the purpose of persuading slaves to rebel.”<sup>110</sup> Louisiana imposed imprisonment or death on any person whose statements or actions tended to produce discontent among free blacks or insubordination among slaves.<sup>111</sup>

## 8. Eliminating Education

U.S. counterinsurgency strategy in the War on Terror includes initiatives involving education such as pressing Pakistan to counter radical religious schools, called madrasas, which may teach a new generation of students to fight against America.<sup>112</sup> During the slavery period in the United States, whites also included education in its counterinsurgency campaign. Whites frequently prohibited blacks from receiving an education. North Carolina’s 1831 slave code preamble explained that “teaching slaves to read and write tends to *dissatisfaction* in their minds, and to produce insurrection and rebellion.”<sup>113</sup> It was a crime to give a slave any type of book, including the Bible.<sup>114</sup> South Carolina’s 1740 slave code stated that teaching slaves to write may lead to “great inconveniences” and thus made it

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107. PETRAEUS & AMOS, *supra* note 9, at 160.

108. Patrick Cronin, *The Historical Origins of the Conflict Between Copyright and the First Amendment*, 35 COLUM. J.L. & ARTS 221, 237 n.90 (2012).

109. *Id.*

110. *Id.*

111. GOODELL, *supra* note 98, at 322-23.

112. Polly Nayak, *The Impact of Pakistan’s and Bangladesh’s National Strategies on U.S. Interests*, in STRATEGIC ASIA 2008-09: CHALLENGES AND CHOICES 297, 314 (Ashley J. Tellis, Mercy Kuo & Andrew Marble eds., 2008).

113. GOODELL, *supra* note 98, at 321.

114. *Id.*

unlawful for slaves or free blacks to assemble for “mental instruction.”<sup>115</sup> Virginia’s 1819 slave code deemed it an unlawful assembly when slaves gathered to learn to read or write.<sup>116</sup> In 1832, a Virginia state legislator, Henry Berry, conceded that every attempt had been made to deny blacks an education. The reason, explained Berry, was that blacks “would then be on a level with the beasts of the field, and we should be safe!”<sup>117</sup>

## 9. Dividing and Conquering

U.S. counterinsurgency doctrine advocates a divide-and-conquer strategy that seeks “signs of division within an insurgent movement.”<sup>118</sup> Rifts are to be exploited. Those within the movement are to be turned into informers. The divided insurgents become demoralized and ineffectual.<sup>119</sup>

Whites implemented a divide-and-conquer strategy against blacks.<sup>120</sup> Slave plantations in the South were located great distances from each other. Kinship groupings were dissolved. Slaves speaking different African languages were grouped together on plantations. Slave owners set up a spy network to report on conditions in the fields and the slave quarters. They recruited blacks to spy on other blacks.<sup>121</sup> Whites created a slave hierarchy of personal servants, household servants, drivers, and field workers that were pitted against each other.<sup>122</sup> The nineteenth-century black leader Frederick Douglass learned early on to “trust no man” and that “a still tongue makes a wise head.”<sup>123</sup>

White slave owners deployed divide-and-conquer and other practices described above against blacks for over a century-and-a-half to the end of the Civil War.<sup>124</sup> But the Civil War did not portend the end of the war between whites and blacks; rather, it was merely

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115. *Id.* at 319-20.

116. *Id.* at 320.

117. *Id.* at 323.

118. PETRAEUS & AMOS, *supra* note 9, at 33.

119. *Id.* at 34.

120. CHEEK, *supra* note 43, at 8.

121. *Id.*

122. SCOTT, *supra* note 94, at 40.

123. CHEEK, *supra* note 43, at 8.

124. Richard H. Kohn, *Using the Military at Home: Yesterday, Today, and Tomorrow*, 4 CHI. J. INT’L L. 165, 168-69 (2003).

another phase in the much longer counterinsurgency conflict between blacks and whites.<sup>125</sup>

### B. The Civil War Period

According to U.S. counterinsurgency doctrine, “insurgents may engage in conventional operations after the insurgency develops extensive popular support and sustainment capabilities. The insurgents can then generate a conventional force . . . .”<sup>126</sup> Blacks did generate a conventional force—the Northern army—by developing sufficient support from anti-slavery whites to battle pro-slavery forces. The Civil War can be considered the “greatest and most successful slave revolt.”<sup>127</sup> But the Civil War victory was not decisive for blacks. In the post-Civil War period, white aggression against blacks would continue.<sup>128</sup>

### C. The Post-Civil War Period

The Civil War ended *de jure* slavery, but blacks still had to fight for equality. In the immediate post-slavery period, Southern states passed legislation that turned slave codes into black codes that continued suppressing blacks. Southern resurgence was supported by President Andrew Johnson who permitted Southern states to reenter the Union on their own terms.<sup>129</sup> Congress passed the Fourteenth Amendment in 1866 granting legal equality to all U.S. citizens,<sup>130</sup> but President Johnson opposed the Fourteenth Amendment and advised Southern states to not ratify it.<sup>131</sup> These efforts against blacks were a harbinger of more conflicts in the continuing racial counterinsurgency war.

#### 1. Race Riots

U.S. counterinsurgency doctrine advises counterinsurgents to engage in “offensive” operations.<sup>132</sup> Whites engaged in offensive

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125. *See Id.*

126. PETRAEUS & AMOS, *supra* note 9, at 110.

127. LEE & HUMPHREY, *supra* note 3, at ix.

128. *Id.*

129. WYN CRAIG WADE, THE FIERY CROSS 21-22 (1987).

130. *Id.* at 25.

131. *Id.*

132. PETRAEUS & AMOS, *supra* note 9, at 152.



operations against blacks despite *de jure* equality for blacks.<sup>133</sup> The Civil War freed blacks, but it did not succor lasting protection against white aggression.<sup>134</sup> One instance of white aggression occurred in Wilmington, North Carolina, where blacks had established a thriving, independent community.<sup>135</sup> Whites became fearful as prosperous blacks gained political clout. On Election Day in 1898, whites threatened blacks who sought to vote. After the election, whites threatened a black activist with lynching. The Wilmington Light Infantry and Naval Reserve marched through town looking for him. When he was not found, a white mob attacked black residents by shooting them and burning their homes.<sup>136</sup> An estimated 120 to 150 people died—most of them black.<sup>137</sup> This was but one of many instances of racial violence that occurred after the Civil War. From 1866 to the end of World War II, race riots flared in New Orleans, Atlanta, Springfield, East St. Louis, Washington, Chicago, Mobile, Beaumont, Detroit, and Harlem. These were large-scale riots involving millions of dollars in property damage and many deaths.<sup>138</sup>

## 2. Racial Cleansings

U.S. counterinsurgency doctrine states that one effective method of combating the enemy is to “clear” an area.<sup>139</sup> To “clear” is to remove enemy forces from an area by capturing or forcing the withdrawal of insurgents.<sup>140</sup> In the war on blacks, whites engaged in “clear” operations through “racial cleansing” campaigns that cleared entire counties or towns of blacks.<sup>141</sup> Even after slavery was abolished, racial cleansings were possible because white laws and courts still advantaged whites and disadvantaged blacks.<sup>142</sup> Between the Civil War and the 1920s, whites in many areas forced out the entire black population.<sup>143</sup> Cleansings occurred throughout America, especially in

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133. See Wade, *supra* note 14, at 286.

134. *Id.*

135. MATHIS, *supra* note 19, at 161.

136. *Id.* at 161-62.

137. *Id.* at 162.

138. Wade, *supra* note 14, at 286.

139. PETRAEUS & AMOS, *supra* note 9, at 174.

140. *Id.* at 175-76.

141. ELLIOT JASPIN, BURIED IN BITTER WATERS: THE HIDDEN HISTORY OF RACIAL CLEANSING IN AMERICA 5 (2007).

142. *Id.* at 37.

143. *Kentucky Town Re-Examines Its Racial History*, NAT'L PUBLIC RADIO, Mar. 10,

the North, Midwest, and South.<sup>144</sup>

Racial cleansing differed from other kinds of white violence in that the intent was to purge entire areas of blacks.<sup>145</sup> Census data illustrates sharp drops in the black population in racially-cleansed areas.<sup>146</sup> One newspaper's account of a racial cleansing episode in Missouri read: "MISSOURI MOB'S WORK, Kills Three Negroes, Burns Their Homes and Drives Every Negro Out of Pierce City." The story reported that for nearly fifteen hours, a mob of armed whites seized control of the city to drive out every black person.<sup>147</sup> In another episode in 1919 in Corbin, Kentucky, the racial cleansing began due to allegations of two black men mugging a white man. A white mob drove out nearly all blacks. A few months after the racial cleansing, a black resident stated in a signed affidavit, "They swore at us and said: 'By God we are going to run all Negroes out of this town tonight.'"<sup>148</sup> Areas that were racially cleansed remain cleansed to this day.<sup>149</sup>

### 3. The Ku Klux Klan (KKK) Versus Blacks

The U.S. counterinsurgency manual explains that counterinsurgency operations include the application of paramilitary actions.<sup>150</sup> Whites applied paramilitary actions against blacks by using the Ku Klux Klan to terrorize blacks.<sup>151</sup> The KKK is a paramilitary organization with a military hierarchy.<sup>152</sup> Former Confederate general Nathan Bedford Forrest was the Klan's Grand Wizard in 1867.<sup>153</sup>

After the Civil War, Klan violence spread throughout the South.<sup>154</sup> In one attack in 1871 in South Carolina, Klan members in disguise terrorized Elias Hill, a black Baptist preacher they considered "uppity" because he forcefully advocated Union policies.<sup>155</sup> The Klansmen broke through his door at night, carried him outside, accused

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2007, <http://www.npr.org/templates/story/story.php?storyId=7772527>.

144. JASPIN, *supra* note 141, at 5.

145. *Id.* at 6.

146. *Id.* at 3.

147. *Id.* at 4.

148. *Kentucky Town*, *supra* note 143.

149. JASPIN, *supra* note 141, at 7.

150. PETRAEUS & AMOS, *supra* note 9, at 151.

151. J. MICHAEL MARTINEZ, *COMING FOR TO CARRY ME HOME* 181 (2012).

152. *Id.* at 195.

153. *Id.*

154. *Id.* at 181.

155. *Id.* at 179.

him of starting fires in the community, struck him with their fists, pointed pistols at him, and threatened to shoot him. The leader of the Klan group then whipped Hill. "He had a horsewhip, and he told me to pull up my shirt, and he hit me . . . I made a moan every time he cut me with the horsewhip," recounted Hill.<sup>156</sup> He survived only because he told his attackers he would renounce the Union cause and no longer vote or preach.<sup>157</sup>

The Grant administration initially prosecuted Klansmen, but curtailed its efforts toward the end of 1872 when Northern sentiment shifted towards forging peace with the South and avoiding continuing federal interference in Southern affairs.<sup>158</sup> Other white supremacist groups formed, including the White League in Louisiana, the White Man's Party in Alabama, the South Carolina Red Shirts, and numerous rifle clubs in Southern towns.<sup>159</sup> Violence against blacks was not restricted to the South. White hate groups assailed blacks in both Southern and Northern states.<sup>160</sup> Their tactics included cross burnings and lynchings.<sup>161</sup>

The KKK was resurgent in the post-World War I period of the 1920s, and at its height had three million members including lawyers, judges, and professors. Supreme Court Justice Hugo Black and Senator Robert F. Byrd had been Klan members, and President Harry Truman before he was president almost joined the Klan.<sup>162</sup> The Klan continues to exist. Reporter Elliot Jaspin recounts visiting the town of Berryville, Arkansas in 1998 and not seeing one black person for days.<sup>163</sup> He saw white shoppers, white sales clerks, white drivers and passengers, but no blacks. On his last day in Berryville, he finally asked a person if there were blacks in the area. "Oh no," she replied, "the Klan keeps them out."<sup>164</sup> The Klan persists as an American institution because of its ability to adapt to each age and to recruit willing members in every generation.<sup>165</sup>

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156. *Id.* at 180.

157. *Id.* at 180-81.

158. Robert J. Kaczorowski, *The Chase Court and Fundamental Rights*, 21 N. KY. L. REV. 151, 164 (1993).

159. MARTINEZ, *supra* note 151, at 201.

160. *Id.* at 191.

161. WADE, *supra* note 129, at 144.

162. CAROL M. SWAIN, *THE NEW WHITE NATIONALISM IN AMERICA* 82 (2002).

163. JASPIN, *supra* note 141, at 1.

164. *Id.* at 2.

165. WADE, *supra* note 129, at 402-03.

#### 4. The Police Versus Blacks

Developing an effective police force “is one of the highest priority COIN [counterinsurgency] tasks,” explains the U.S. counterinsurgency manual.<sup>166</sup> In the Iraq War, U.S. forces sought to create an effective, well-equipped Iraqi police force to help defeat insurgents.<sup>167</sup> Domestically, the United States has sought to create an effective, well-trained domestic police force to control blacks.<sup>168</sup> The first modern police force was South Carolina’s Charlestown Guard and Watch, organized in 1785 to mainly control slaves.<sup>169</sup> One guard member explained his job was “keeping down the ni[ll]ers.”<sup>170</sup>

More recently, Congress passed the Omnibus Crime Act of 1968 in part to control “ghetto disorders.”<sup>171</sup> The Act established a national training center to instruct local police in riot control techniques and provided funding to local law enforcement agencies seeking to bolster their anti-riot capabilities.<sup>172</sup> Also, between 1966 and 1969, California and twenty other states passed anti-riot statutes to quell “ghetto disorders.”<sup>173</sup>

White fears of blacks have infiltrated the police force.<sup>174</sup> In one study in the late 1960s on racial attitudes, a white respondent conceded that predominantly white police departments believe their mission is to protect whites from blacks.<sup>175</sup> She felt white fears of blacks was a serious force in the white community.<sup>176</sup> White fears were manifested in the police targeting black Muslims in the 1960s. A secret Los Angeles Police Department report regarded black Muslim men as “extremely dangerous.”<sup>177</sup> According to the report, they are “a type of fanatic, and are willing to die for their cause, content if they can take a caucasian, preferably a police officer (and this includes Negro police

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166. PETRAEUS & AMOS, *supra* note 9, at 235.

167. L. PAUL BREMER, MY YEAR IN IRAQ 128 (2006).

168. DOUG MCADAM, POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY, 1930-1970, at 223 (1982).

169. WILLIAMS, *supra* note 76, at 45-6.

170. *Id.*

171. MCADAM, *supra* note 168, at 223.

172. *Id.*

173. *Id.* at 223-24.

174. *See* DAVID T. WELLMAN, PORTRAITS OF WHITE RACISM 131 (2d ed. 1993).

175. *Id.* at 126.

176. *Id.* at 131.

177. NELSON BLACKSTOCK, COINTELPRO: THE FBI’S SECRET WAR ON POLITICAL FREEDOM 103 (4th ed. 2001).

officers too), with them when they are killed.”<sup>178</sup>

With such views of blacks, police violence against blacks is not surprising. In one case, an immigrant from Guinea, Amadou Diallo, was shot nineteen times in 1999 by four undercover police officers because of Diallo’s blackness.<sup>179</sup> Also, a 1999 study found that blacks were 11.4 percent of the population but 22.6 percent of police brutality victims.<sup>180</sup> In one police brutality case in 1998 in Riverside, California, a nineteen-year-old black woman was shot twelve times by police officers. The officers screamed racist comments at the victim and later celebrated her murder.<sup>181</sup> Additionally, of those killed in encounters with the police from 1976 to 1998, forty-two percent were black.<sup>182</sup>

The numerous cases of police violence against blacks could lead to the conclusion that the U.S. government is conducting a “secret” war against blacks.<sup>183</sup> Author James Baldwin viewed police officers as soldiers in a race war when he wrote about black hatred of the abusive white police force and how the white policeman “moves through Harlem, therefore, like an occupying soldier in a bitterly hostile country, which is precisely what, and where, he is.”<sup>184</sup> For blacks, white police officers are “mercenaries of the white establishment” rather than beneficent public servants.<sup>185</sup>

## 5. The Federal Bureau of Investigation (FBI) Versus Blacks

The failure of the FBI to protect black citizens is part of a larger history in which the United States has for many centuries been at odds with blacks and their fight for equal rights under the law.<sup>186</sup> J. Edgar Hoover, FBI director from 1935 to 1972, cared little about black equality and instead fixated on the communist threat.<sup>187</sup> Hoover was obsessed with rooting out communists and feared blacks could be

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178. *Id.*

179. MATHIS, *supra* note 19, at 186.

180. WILLIAMS, *supra* note 76, at 15.

181. ELISA EDWARDS, RACE, ALIENS, AND THE U.S. GOVERNMENT IN AFRICAN AMERICAN SCIENCE FICTION 86 (2011).

182. WILLIAMS, *supra* note 76, at 15.

183. EDWARDS, *supra* note 181, at 86.

184. James Baldwin, *Fifth Avenue, Uptown*, ESQUIRE (Oct. 16, 2007, 7:04 AM), <http://esquire.com/features/fifth-avenue-uptown>.

185. LEE & HUMPHREY, *supra* note 3, at xiv.

186. KENNETH O'REILLY, “RACIAL MATTERS:” THE FBI’S SECRET FILE ON BLACK AMERICA, 1960-1972, at 8 (1989).

187. *Id.* at 6.

manipulated to serve the communist cause.<sup>188</sup> In 1969, the FBI focused most of their counterintelligence operations on the Black Panthers—the FBI conducted 295 counterintelligence operations and 233 were directed against the Black Panthers.<sup>189</sup> Hoover issued a report in 1970 declaring the Black Panther Party “the most dangerous and violence prone of all extremist groups.”<sup>190</sup>

The FBI engaged in a pattern of systematic sabotage against black activists.<sup>191</sup> The FBI surveilled black activists and placed the information in the “Racial Matters” file.<sup>192</sup> The FBI nominally investigated thousands of skirmishes between black civil right advocates and white segregationists, but for the most part, federal agents stood by and in effect allied themselves with segregationist forces.<sup>193</sup> The FBI was able to contest the black struggle for equality only because presidents and other administration officials allowed and encouraged the FBI to do so.<sup>194</sup> The executive branch’s support of FBI misconduct makes the history of the FBI “the history of a government at war with its own citizens.”<sup>195</sup>

## 6. The Military Versus Blacks

U.S. counterinsurgency doctrine envisions military forces supporting other institutional actors, such as the police, in carrying out counterinsurgent missions.<sup>196</sup> Whites did use the military to help overcome the black insurgency. The Fugitive Slave Act of 1850 authorized the use of federal troops to advance into Northern states to pursue blacks escaping slavery.<sup>197</sup> The Act appointed federal commissioners throughout the nation who could call on the army to pursue escaping slaves.<sup>198</sup>

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188. *Id.*

189. Richard Delgado, *Explaining the Rise and Fall of African American Fortunes—Interest Convergence and Civil Rights Gains*, 37 HARV. C.R.-C.L. L.REV. 369, 382 (2002).

190. ORISSA AREND, *SHOWDOWN IN DESIRE: THE BLACK PANTHERS TAKE A STAND IN NEW ORLEANS* 10 (2009).

191. BLACKSTOCK, *supra* note 177, at 83.

192. O’REILLY, *supra* note 186, at 3.

193. *Id.* at 4.

194. *Id.* at 356.

195. *Id.* at 359.

196. PETRAEUS & AMOS, *supra* note 9, at 233.

197. Finkelman, *supra* note 61, at 460.

198. *Id.* at 459.

The military was also used against blacks in 1919 in Phillips County, Arkansas, when white landlords resisted efforts by black tenant farmers to unionize and seek concessions.<sup>199</sup> Blacks and whites armed themselves and violence ensued. Governor Charles H. Brough and other whites requested federal help to deal with the “negro uprising.”<sup>200</sup> Secretary of War Newton D. Baker authorized full use of federal troops to suppress the disturbance.<sup>201</sup> On arrival, federal troops began to disarm blacks and whites. Later, when investigating reports of black outlaws, federal troops became embroiled in a firefight with armed blacks that resulted in the wounding of some federal troops and roughly fifty blacks.<sup>202</sup> In another encounter, federal troops killed approximately twenty armed blacks ostensibly for refusing to halt or resisting arrest.<sup>203</sup> The total estimated number of blacks killed in Phillips County range from a low of fifty-three to a high of 200.<sup>204</sup>

During the 1967 Detroit riot, National Guard troops were mobilized. One National Guard member announced, “I’m gonna shoot anything that moves and is black.”<sup>205</sup> Tanks were deployed and shot at buildings indiscriminately to hunt for snipers as the death toll rose.<sup>206</sup> The U.S. military regarded any riot requiring federal intervention to be handled like a military operation against a foreign enemy.<sup>207</sup>

### 7. Intelligence Operations Against Blacks

The U.S. counterinsurgency manual discusses collecting intelligence information on insurgents.<sup>208</sup> In the white counterinsurgency campaign, whites collected intelligence on blacks. A case in point is the Mississippi State Sovereignty Commission, an official government agency that surveilled blacks for over two decades from 1956 to 1977.<sup>209</sup> The Commission was a high-level state agency whose members included the governor, attorney general, senate

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199. CLAYTON D. LAURIE & RONALD H. COLE, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1877-1945*, at 292 (1997).

200. *Id.* at 293.

201. *Id.*

202. *Id.* at 294.

203. *Id.* at 296.

204. *Id.*

205. LEE & HUMPHREY, *supra* note 3, at xxi-xxii.

206. *Id.* at xxii.

207. LAURIE & COLE, *supra* note 199, at 348.

208. PETRAEUS & AMOS, *supra* note 9, at 158.

209. JENNY IRONS, *RECONSTITUTING WHITENESS* 16-17 (2010).

president, and house speaker.<sup>210</sup> The Commission was created when Mississippi Governor J.P. Coleman signed House Bill 880 into law in 1956.<sup>211</sup> The law endowed the Commission with “full power and authority to do and perform any and all acts and things deemed necessary and proper” to fulfill its mandate.<sup>212</sup> The law further authorized the Commission to “do and perform any and all acts and things deemed necessary and proper to protect the sovereignty of the State of Mississippi, and her sister states, from encroachment thereon by the Federal Government . . . .”<sup>213</sup>

The mission of this government-funded covert ops agency was to disrupt the civil rights movement.<sup>214</sup> It colluded with local law enforcement agencies and FBI agents to target blacks and civil right activists.<sup>215</sup> One instance of collusion is revealed in a Commission letter addressed to “Honorable Wm. T. Ferrell, Sheriff and Tax Collector” asking the sheriff to “furnish this commission with information on A.C. Curtis, male, colored, . . . as to any information you may have regarding this subject’s activity with the NAACP, if any, or other subversive organizations.”<sup>216</sup> Months later, a Commission operative traveling to Natchez to personally assess the situation wrote in his report that “Deputy Robinson stated he and Sheriff Ferrell were keeping a close watch on any activity that might come from the NAACP . . . .”<sup>217</sup>

## 8. Lynchings

The U.S. military’s counterinsurgency manual discusses “neutralizing” the enemy and ensuring enemy fighters are “killed outright.”<sup>218</sup> Whites neutralized blacks and killed them outright by lynching them. White attackers lynched 3,446 blacks between 1882 and 1968.<sup>219</sup> Lynching was a white tool of violence encompassing not

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210. H.B. 880, § 1 (Ms. 1956), *available at* [http://mdah.state.ms.us/arrec/digital\\_archives/sovcom/result.php?image=/data/sov\\_commission/images/png/cd08/058764.png&otherstuff=7|2|0|1|1|1|1|1|57964#](http://mdah.state.ms.us/arrec/digital_archives/sovcom/result.php?image=/data/sov_commission/images/png/cd08/058764.png&otherstuff=7|2|0|1|1|1|1|1|57964#).

211. IRONS, *supra* note 209, at 16.

212. H.B. 880, *supra* note 210, at § 16.

213. *Id.* at § 5.

214. PAUL HENDRICKSON, *SONS OF MISSISSIPPI* 230-31 (2003).

215. *Id.* at 231.

216. *Id.* at 230.

217. *Id.*

218. PETRAEUS & AMOS, *supra* note 9, at 148.

219. Jesse Norris, *State Efforts to Reduce Racial Disparities in Criminal Justice*, 47



only the rope used to hang a black person, but also the authority to kill without legal repercussions.<sup>220</sup> Allen D. Candler, the governor of Georgia from 1898 to 1902, approved of lynching to control black criminals.<sup>221</sup> Southern states protected lynching by opposing anti-lynching bills throughout the 1920s and 1930s.<sup>222</sup> In one case involving a black suspect alleged to have killed a white family, an editorial declared the crime “so unbearably aggravating that the people cannot be expected to wait with patience on the laggard process of the courts.”<sup>223</sup> It was only in 1946 that a white person was convicted in federal court of lynching.<sup>224</sup> White support for lynching made it an effective weapon of social control over blacks.<sup>225</sup>

### 9. The Death Penalty

The U.S. counterinsurgency manual extols the importance of policing efforts and explains how laws, courts, and the penal system can be helpful props for the police.<sup>226</sup> The current death penalty system can be considered a prop supporting America’s long-term suppression effort against blacks.<sup>227</sup> For example, Louisiana’s Act of 1843 imposed the death penalty on any slave who promoted “insurrection or revolt.” After slavery ended, white southerners believed capital punishment was needed to control primitive blacks.<sup>228</sup> Capital punishment, like lynching, is a tool of control used against blacks.<sup>229</sup>

Racially motivated lynchings have led to racially-biased death penalty executions.<sup>230</sup> Today, key decision makers in death penalty cases are white. A 1998 report revealed that of the chief District Attorneys in counties with the death penalty, almost ninety-eight

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GONZ. L. REV. 493, 502 n.29 (2011-12).

220. CHRISTOPHER WALDREP, *AFRICAN AMERICANS CONFRONT LYNCHING* xv (2009).

221. PHILIP DRAY, *AT THE HANDS OF PERSONS UNKNOWN* 4 (2002).

222. Norris, *supra* note 219, at 502 n.29.

223. DRAY, *supra* note 221, at 5.

224. Norris, *supra* note 219, at 502 n.29.

225. Charles David Phillips, *Exploring Relations Among Forms of Social Control*, 21 *LAW & SOC’Y REV.* 361, 362 (1987).

226. PETRAEUS & AMOS, *supra* note 9, at 229.

227. *See* Phillips, *supra* note 225, at 362.

228. Michael S. Brazao, *The Death Penalty in America*, 4 *MOD. AM.*, Fall 2008, at 26, 31.

229. *See Id.* at 27.

230. DALE S. RECINELLA, *THE BIBLICAL TRUTH ABOUT AMERICA’S DEATH PENALTY* 258 (2004).

percent were white and only one percent were black.<sup>231</sup> The death penalty system is further biased because blacks are routinely excluded from death penalty juries.<sup>232</sup> Also, one study by Professor David Baldus concluded that a person was 4.3 times more likely to receive the death penalty in Georgia if the person killed a white victim than if the person killed a black victim.<sup>233</sup>

The result is the disproportionate use of the death penalty against black men.<sup>234</sup> One editorial noted that since 1976, thirty-five percent of those executed have been blacks even though they constitute only 12.6 percent of the population.<sup>235</sup> A 2010 article revealed that blacks constituted forty-nine percent of the inmates on federal death row.<sup>236</sup> In Harris County, Texas, twelve of the last thirteen defendants subject to the death penalty were black.<sup>237</sup>

## 10. The Prison System

U.S. counterinsurgency doctrine recognizes the importance of prison officials and detention facilities in supporting efforts to control insurgents.<sup>238</sup> Domestically, efforts to control blacks have led to the United States imprisoning “a larger percentage of its black population than South Africa did at the height of apartheid.”<sup>239</sup> In Washington

231. Richard C. Dieter, *The Death Penalty in Black and White*, DEATH PENALTY INFO. CENTER (1998), <http://www.deathpenaltyinfo.org/death-penalty-black-and-white-who-lives-who-dies-who-decides#ExecutiveSummary>.

232. RICHARD C. DIETER, DEATH PENALTY INFO. CENTER, STRUCK BY LIGHTNING: THE CONTINUING ARBITRARINESS OF THE DEATH PENALTY THIRTY-FIVE YEARS AFTER ITS RE-INSTATEMENT IN 1976, at 22-23 (2011), available at <http://www.deathpenaltyinfo.org/documents/StruckByLightning.pdf>.

233. *Id.* at 20.

234. Phyllis E. Bernard, *Eliminationist Discourse in a Conflicted Society: Lessons for America from Africa?*, 93 MARQ. L. REV. 173, 181 n.30 (2009).

235. *More Evidence Against the Death Penalty*, N.Y. TIMES (Apr. 12, 2012), <http://www.nytimes.com/2012/04/13/opinion/more-evidence-against-the-death-penalty.html>.

236. G. Ben Cohen & Robert J. Smith, *The Racial Geography of the Federal Death Penalty*, 85 WASH. L. REV. 425, 428 (2010).

237. David A. Love, *The racial bias of the US death penalty*, GUARDIAN (Jan. 3, 2012, 3:33 PM), <http://www.guardian.co.uk/commentisfree/cifamerica/2012/jan/03/racial-bias-us-death-penalty>.

238. PETRAEUS & AMOS, *supra* note 9, at 232-33.

239. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 6 (2010).

D.C., it is estimated that three out of four young black men will serve time in prison.<sup>240</sup> Similar numbers exist in other black communities throughout America.<sup>241</sup> More black men are ensnared within the U.S. criminal justice system (i.e., in prison, on probation, or on parole) than were in slavery in 1850.<sup>242</sup> The 2010 Census Bureau numbers show that blacks constitute 13.6 percent of the U.S. population,<sup>243</sup> whereas Federal Bureau of Prison statistics reveal black inmates constitute 37.3 percent of the federal prison population.<sup>244</sup> The racial caste system perdures through a criminal justice system that labels people of color as “criminals,” imprisons them, and deprives them of their rights.<sup>245</sup>

### 11. The War on Drugs

The U.S. counterinsurgency manual posits that the military’s primary function in counterinsurgency is to protect the populace.<sup>246</sup> In the United States, the effort to protect the white populace has produced a war on drugs that is effectively a war on blacks.<sup>247</sup> The Reagan administration promoted its drug war policy through a media campaign involving stories of black crack users and crack dealers in ghetto communities.<sup>248</sup> A study of network television news from 1990 to 1991 found that the drug issue was presented as an “us versus them” story with “us” as white, suburban America and “them” as mostly blacks along with a few errant whites.<sup>249</sup>

Blacks have become the enemy in the war on drugs, and this war disproportionately imprisons blacks and destroys black communities.<sup>250</sup> In the war on drugs, blacks have been investigated, detained, arrested

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240. *Id.* at 6-7.

241. *Id.* at 7.

242. Adam Gopnik, *The Caging of American*, NEW YORKER (Jan. 30, 2012), [http://www.newyorker.com/arts/critics/atlarge/2012/01/30/120130crat\\_atlarge\\_gopnik](http://www.newyorker.com/arts/critics/atlarge/2012/01/30/120130crat_atlarge_gopnik).

243. CENSUS BUREAU, THE BLACK POPULATION: 2010, at 3 (2011), available at [www.census.gov/prod/cen2010/briefs/c2010br-06.pdf](http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf).

244. FED. BUREAU OF PRISONS, U.S. DEP’T OF JUST., INMATE BREAKDOWN, <http://www.bop.gov/news/quick.jsp#1> (last visited Aug. 16, 2012).

245. ALEXANDER, *supra* note 239, at 2.

246. PETRAEUS & AMOS, *supra* note 9, at 54.

247. Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: or Why the ‘War on Drugs’ was a ‘War on Blacks,’* 6 J. GENDER RACE & JUST. 381, 384 (2002).

248. ALEXANDER, *supra* note 239, at 102.

249. *Id.*

250. ROBERT TRIVERS, THE FOLLY OF FOOLS: THE LOGIC OF DECEIT AND SELF-DECEPTION IN HUMAN LIFE 226 (2011).

and charged in disproportionate numbers for using, possessing, and selling illicit drugs.<sup>251</sup> Additionally, the imprisonment rate for drug charges is twenty to fifty times greater for black men than for white men<sup>252</sup> even though people of all colors use and sell illicit drugs at similar rates.<sup>253</sup>

The war on drugs has led to the militarization of police departments and the use of military-style tactics against black communities.<sup>254</sup> President Ronald Reagan's declaration of war on drugs in 1982 included military terms such as "battle," "war," and "surrender."<sup>255</sup> Paramilitary police units called Special Weapons and Tactics (SWAT) teams were created and regularly used in drug raids.<sup>256</sup> Militarization continued with the 1994 Memorandum of Understanding between the Justice Department and the Department of Defense, which allowed police departments access to high-tech military weapons such as grenade launchers and armored personnel carriers.<sup>257</sup> The war on drugs continues despite its deleterious effects on blacks.<sup>258</sup>

## V. SUSTAINING THE COUNTERINSURGENCY

The U.S. counterinsurgency manual advises counterinsurgents to prepare for a long-term commitment and to sustain that commitment against insurgents.<sup>259</sup> Whites have conducted a long-term, sustained campaign against blacks that endures to this day.<sup>260</sup> Racial inequality remains in the legal system.<sup>261</sup> Whites continue to stereotype blacks, especially black males, as violent and dangerous.<sup>262</sup> The number of hate groups continues to rise.<sup>263</sup> White supremacists continue to prepare for

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251. Nunn, *supra* note 247, at 382.

252. ALEXANDER, *supra* note 239, at 7.

253. *Id.*

254. Nunn, *supra* note 247, at 404.

255. *Id.* at 386-87.

256. *Id.* at 405-06.

257. *Id.* at 405.

258. *Id.* at 387.

259. PETRAEUS & AMOS, *supra* note 9, at 43, 255.

260. HACKER, *supra* note 15, at 218-19.

261. Rudolph Alexander, Jr., *Differential Laws for African Americans*, 25 T.M. COOLEY L. REV. 27, 55 (2008).

262. Carolyn Turpin-Petrosino, *Black Victimization: Perception and Realities*, in 2 HATE CRIMES 19, 34 (Barbara Perry ed., 2009).

263. The Southern Poverty Law Center identified 602 hate groups in 2000. In 2011, the number rose to 1,018. Kim Severson, *Number of U.S. Hate Groups Is Rising*,

a race war.<sup>264</sup> They strengthen their capabilities by enlisting in the military or recruiting returning military veterans to capitalize on their military experience.<sup>265</sup>

Anti-black violence is enduring and pervasive.<sup>266</sup> Blacks are likely targets of racially motivated hate crimes.<sup>267</sup> In Arizona from 1992 to 2006, seventy-four percent of racially motivated hate crimes were against blacks, but blacks constituted only 3.6 percent of the Arizona population.<sup>268</sup> In Idaho, in 2003, sixty percent of the racially motivated hate crimes were against blacks, but blacks constituted only 0.6 percent of the Idaho population.<sup>269</sup>

Blacks experience a consistently high pattern of hate crime victimization.<sup>270</sup> In 2003, sixty-six percent of the 3,844 racially motivated hate crimes were against blacks. In 2004, sixty-eight percent of the 4,042 racially motivated hate crimes were against blacks. In 2005, sixty-seven percent of the 3,919 racially motivated hate crimes were against blacks.<sup>271</sup>

The election of President Barack Obama did not end the conflict between blacks and whites. First, Obama himself cautioned that racial problems stemming from a history of oppression against blacks “aren’t just solved by electing a black president.”<sup>272</sup> Second, Barack Obama won not because of racial equality; he won despite racial inequality. His campaign had to overcome doubts about his origins and loyalties, questions about a black person’s ability to lead a nation, resentment of an “uppity” black man, hypercritical critiques of his perceived mistakes, and other “Negrophobia” manifestations.<sup>273</sup> Third, elected black officeholders are not immune from racial discrimination. During

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*Report Says*, N.Y. TIMES (Mar. 8, 2012),

<http://www.nytimes.com/2012/03/08/us/number-of-us-hate-groups-on-the-rise-report-says.html>.

264. MIKE GERMAN, THINKING LIKE A TERRORIST 4 (2007).

265. U.S. DEP’T OF HOMELAND SECURITY, RIGHTWING EXTREMISM: CURRENT ECONOMIC AND POLITICAL CLIMATE REFUELING RESURGENCE IN RADICALIZATION AND RECRUITMENT 7 (2009), available at [www.fas.org/irp/eprint/rightwing.pdf](http://www.fas.org/irp/eprint/rightwing.pdf).

266. Turpin-Petrosino, *supra* note 262, at 38.

267. *Id.* at 29.

268. *Id.*

269. *Id.*

270. *Id.* at 20.

271. *Id.*

272. RICHARD WOLFE, RENEGADE: THE MAKING OF A PRESIDENT 324 (2010).

273. RANDALL KENNEDY, THE PERSISTENCE OF THE COLOR LINE 9-10 (2011).

the Nixon administration, for example, black elected officials were singled out for investigation by the FBI, the Drug Enforcement Administration, the Internal Revenue Service, federal criminal task forces, and postal inspectors.<sup>274</sup> Fourth, black exceptionalism does not mean racial conflict has ended because individual black success stories existed even during slavery.<sup>275</sup> In fact, black exceptionalism can be manipulated to perpetuate inequality by justifying the mass incarceration of blacks. According to this view, successful blacks mean race is no longer a problem and those blacks in prison are there because they chose their fate and not because of systemic racial bias.<sup>276</sup> Finally, the number of ultra-right-wing militias and white power organizations sharply increased after Obama was elected president in 2008.<sup>277</sup> A 2009 report by the Department of Homeland Security states that the election of President Barack Obama is “a driving force for rightwing extremist recruitment and radicalization.”<sup>278</sup>

The U.S. counterinsurgency advises commanders to gain the advantage by adapting to changing circumstances.<sup>279</sup> Accordingly, whites could perceive Obama’s election as a mere changed circumstance they will adapt to so as to gain an advantage in the continuing conflict between whites and blacks.

## VI. POLICY CONSIDERATIONS

Understanding white and black relations as a white counterinsurgency campaign produces the following policy considerations. First, recognize that the war on blacks has led to blacks suffering from the “Post Traumatic Slave Syndrome.”<sup>280</sup> Second, provide blacks with benefits similar to benefits provided to veterans.<sup>281</sup>

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274. WILLIAM L. CLAY, *JUST PERMANENT INTERESTS* 315 (1992).

275. ALEXANDER, *supra* note 239, at 24.

276. *Id.* at 235-36.

277. James Dao & Serge F. Kovalski, *Music Style Is Called Supremacist Recruiting Tool*, N.Y. TIMES (Aug. 7, 2012), <http://www.nytimes.com/2012/08/08/us/hatecore-music-is-called-white-supremacist-recruiting-tool.html>.

278. U.S. DEP’T OF HOMELAND SECURITY, *RIGHTWING EXTREMISM: CURRENT ECONOMIC AND POLITICAL CLIMATE REFUELING RESURGENCE IN RADICALIZATION AND RECRUITMENT 3* (2009), available at [www.fas.org/irp/eprint/rightwing.pdf](http://www.fas.org/irp/eprint/rightwing.pdf).

279. PETRAEUS & AMOS, *supra* note 9, at 196.

280. JOY DEGRUY LEARY, *POST TRAUMATIC SLAVE SYNDROME: AMERICA’S LEGACY OF ENDURING INJURY AND HEALING* 182, 220 (2005).

281. Naomi Roht-Arriaza, *Reparations Decisions and Dilemmas*, 27 HASTINGS INT’L & COMP. L. REV. 157, 198 (2004).

Finally, establish an African American Redress Commission to thoroughly research the legacies of white oppression.<sup>282</sup> Such efforts are needed to prevent racial conflict from continuing in the twenty-first century.<sup>283</sup>

### A. Recognizing Post-Traumatic Slave Syndrome

Veterans returning from a war environment are susceptible to post-traumatic stress disorder (PTSD), a condition recognized as caused by war-related trauma.<sup>284</sup> Similarly, blacks subjected to continual white violence since slavery are susceptible to “Post Traumatic Slave Syndrome.”<sup>285</sup> This syndrome is caused by white attacks on the black person’s body, mind, and spirit.<sup>286</sup> Generations of such attacks traumatized an entire population and bequeathed damaged legacies to future black generations.<sup>287</sup>

Some stressors that justify the diagnosis of post traumatic stress disorder include a serious threat or harm to one’s life or physical integrity; a threat or harm to one’s children, spouse or close relative; sudden destruction of one’s home or community; or seeing another person injured or killed as a result of physical violence.<sup>288</sup> Blacks have been subjected to these stressors for generations in a white-dominated society.<sup>289</sup> The effect is multigenerational trauma that debilitates blacks today.<sup>290</sup>

### B. Providing Veteran-Type Benefits

Congressman William L. Clay declared that blacks have been engaged in a long and “bloody war” instigated by whites.<sup>291</sup> Accordingly, blacks should be regarded as veterans and receive

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282. Michael F. Blevins, *Restorative Justice, Slavery, and the American Soul*, 31 T. MARSHALL L. REV. 253, 304-05 (2006).

283. See JOHN HOPE FRANKLIN, *THE COLOR LINE* 74-75 (1993).

284. Katherine Dubyak, *Close, But No Cigar: Recent Changes to the Stressor Verification Process for Veterans with Post-traumatic Stress Disorder and Why the System Remains Insufficient*, 21 FED. CIRCUIT B.J. 655, 658 (2012).

285. LEARY, *supra* note 280, at 14.

286. *Id.*

287. *Id.* at 117.

288. *Id.* at 118.

289. *Id.*

290. See OMAR G. REID, SEKOU MIMS, & LARRY HIGGINBOTTOM, *POST TRAUMATIC SLAVERY DISORDER* 9-10 (2005).

291. CLAY, *supra* note 274, at 107.

benefits similar to veterans to restore to blacks their rightful compensation. The G.I. Bill helps veterans pay for the cost of education.<sup>292</sup> Likewise, legislation should be enacted that helps blacks pay for the cost of education. Further, veterans applying for government jobs receive extra points that, while not guaranteeing them employment, do recognize their service defending against America's enemies.<sup>293</sup> Blacks seeking employment should also receive points that recognize their unique struggle defending against abiding individual and institutional racial injustice. Finally, veterans are entitled to low-cost housing loan guarantees.<sup>294</sup> Blacks should also be entitled to this loan-guarantee benefit. If veterans serving years or decades in the military are entitled to benefits, then blacks subjected to targeted attacks for centuries are even more so entitled to benefits.

### C. Establishing the African American Redress Commission

The centuries-long war on blacks took from them their lives, labor, culture, and more.<sup>295</sup> U.S. policymakers are obligated to restore to blacks what has been taken from them.<sup>296</sup> Restorative justice requires the actor who does harm to take action to remedy that harm.<sup>297</sup> Congress can take a step towards remedying the harm to blacks by creating a bipartisan African American Redress Commission comprised of members from the fields of law, social sciences, and economics.<sup>298</sup> This Commission would supervise regional roundtables that research, investigate, and hold public community hearings on the legacy of America's repression of blacks.<sup>299</sup> The information gathered would be used to establish recommendations that could restore to blacks what has been taken from them.<sup>300</sup>

## VII. CONCLUSION

The counterinsurgency campaign against blacks is a reminder that the powerful will always use its might against the less powerful. In

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292. Roht-Arriaza, *supra* note 281 at 198.

293. *Id.*

294. *Id.*

295. ROBINSON, *supra* note 21, at 9, 207, 221.

296. Blevins, *supra* note 282, at 290-91.

297. *Id.* at 291.

298. *Id.* at 304.

299. *Id.* at 304-05.

300. *Id.* at 305.



America, predominant whites used their power against marginalized blacks in an enduring counterinsurgency struggle that attempted to suppress the quest for equality by insurgent blacks. In this counterinsurgency, the controlling whites turned law into another instrument of power against blacks. To prevail, blacks must resist and attain power because “white Americans will only accede to black Americans those rights which [blacks] can negotiate through pressure . . . .”<sup>301</sup> Acquiring the ability to negotiate through pressure will enable blacks to implement policies restoring to them what rightfully belongs to them.

The Global War on Terror with its counterinsurgency campaigns in Iraq and Afghanistan has been termed the “Long War.”<sup>302</sup> The counterinsurgency campaign against blacks spans centuries and thus can be termed the “Longer War.” Just as great effort is being expended to end the long wars in Iraq and Afghanistan, greater effort should be expended to end the longer war at home. Doing so might make it more possible to achieve the end state described in the U.S. counterinsurgency manual—a legitimate and secure society supported by the populace.<sup>303</sup>

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301. CLAY, *supra* note 274, at 7.

302. PETRAEUS & AMOS, *supra* note 9, at xix.

303. *Id.* at 42.