Soon after Saddam Hussein’s capture, the debate regarding his disposition and that of his Baath party accomplices began in earnest. A variety of options were discussed, including the use of military tribunals, a trial before the International Criminal Court, special international tribunals, courts sanctioned by international organizations, and an international body to try him. The United States has not participated in the ICC, in part to prevent rogue nations from litigating cases against innocent U.S. servicemembers, thereby inhibiting the ability of the United States to defend itself. It is also doubtful that the United States has the constitutional authority to give an international tribunal jurisdiction over U.S. citizens. Recent events have demonstrated that fears of vexatious litigation were well-founded and that President George W. Bush’s decision not to participate in the ICC was a wise one: A year ago President Bush withdrew the U.S. from participation in the treaty that created the ICC — a pact Bill Clinton had signed at the 11th hour of his Presidency, even though Mr. Clinton said it had ‘significant flaws’ and urged his successor not to seek Senate ratification.

If any doubt remains that Mr. Bush did the right thing, the Athens Bar Association — that’s Greece, not Georgia — should put it to rest. The association announced Monday that it plans to file a complaint for “crimes against humanity and war crimes” in connection with the Iraq conflict. The target of the complaint, naturally, is not Saddam Hussein but Tony Blair and other British officials.

Epigraph: We will continue to bring our enemies to justice or bring justice to them.

Epigraph: We will continue to bring our enemies to justice or bring justice to them.

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by the United Nations, or even a hybrid approach. Each has its advantages and disadvantages, but the most significant factor considered by the Coalition was the will of the Iraqi people. The desire of the Iraqi people — first expressed through the Iraqi Governing Council and then through the interim president, Sheikh Ghazi Ajil Al-Yawar — is that the Iraqis be afforded the first opportunity to bring Saddam and the Baathists to justice because they were Saddam’s primary victims. Justice-loving Americans should welcome both the alacrity with which the Iraqis offered to undertake this task, and the United States’ willingness to provide the Iraqis with assistance in collecting and managing the evidence necessary to make these trials a success. Indeed, the

4. Posner & McKay, supra note 2, at 16 (discussing the possibility of a U.N. sponsored judicial body trying upper-level Iraqi officials).

5. Editorial, MILWAUKEE J. SENTINEL, supra note 2 (suggesting that a hybrid approach would be best).

6. The Coalition is composed of over twenty-five nations, with the United States supplying the majority of troops, capital, and support. Other Coalition partners include the United Kingdom, Italy, Poland, Ukraine, Australia, Norway, the Netherlands, Romania, Denmark, and Bulgaria. See Coalition Help, MIAMI HERALD, Apr. 22, 2004, at A22.

7. The Iraqi Governing Council was composed of Iraqi nationals of various ethnic and religious groups and served as a quasi-legislature and advisory panel for U.S. Ambassador Paul Bremer. See Sean D. Murphy, Turmoil in Iraq, Transitional Agreements, and the Capture of Saddam Hussein, 98 AM. J. INT’L L. 190, 191 n.9 (2004). Ambassador Bremer recognized the formation of the Iraqi Governing Council in Coalition Provisional Authority Regulation 6, which was promulgated on July 13, 2003, and is available at http://www.cpa-iraq.org/regulations/#Regulations (last visited July 22, 2004). The Iraqi Governing Council dissolved when the interim Iraqi government was formed.

8. Al Yawer is a Sunni Muslim and a former member of the Iraqi Governing Council. Iyad Allawi, a Shi’ite Muslim, was named the interim prime minister. Both will serve until elections are held. See Hannah Allam, Iraq Herald’s New Era; Mission is Complex, Daunting, KANSAS CITY STAR, June 2, 2004, at A1; Editorial, From Occupation to What?, S.F. CHRON., June 2, 2004, at B8.

9. Iraqis Want Hussein Handed Over for Trial: The Former Leader Has Been Declared a Prisoner of War, KANSAS CITY STAR, Feb. 16, 2004, at A13 (“Iraq will ask the United States to remove Saddam Hussein’s status as a prisoner of war and hand him to Iraqis for trial . . .”).

10. Because of the Iraqis’ willingness, Ambassador Bremer enacted a regulation authorizing the Iraqi Governing Council to create an Iraqi Special Tribunal “to try Iraqi nationals or residents of Iraq accused of genocide, crimes against humanity, war crimes or violations of certain Iraq laws . . . .” Delegation of Authority Regarding An Iraqi Special Tribunal, Coalition Provisional Authority Order No. 48, § 1, ¶ 1 (Dec. 10, 2003), at http://www.cpa-iraq.org/regulations/#Regulations [hereinafter Order No. 48]. Pursuant to this regulation, Iraqi leaders have appointed Iraqi judges and prosecutors to prepare the cases for litigation. Iraqi Tribunal to Try Hussein Established, L.A. TIMES, Apr. 21, 2004, at A6 [hereinafter Iraqi Tribunal Established].

Coalition Provisional Authority enacted detailed provisions dealing with the
creation of and procedures for a special tribunal composed primarily of Iraqis,\textsuperscript{12} but which leave the door open for international assistance.\textsuperscript{13} The Coalition
Provisional Authority ceded to the Iraqi tribunal jurisdiction to address the
whole gamut of crimes committed by the Baathists, including crimes of
genocide,\textsuperscript{14} crimes against humanity,\textsuperscript{15} war crimes,\textsuperscript{16} and violations of Iraqi
law.\textsuperscript{17} There are a slew of reasons, both theoretical and pragmatic, why
allowing the Iraqis the first opportunity to prosecute Saddam is the wisest
course of action and why Saddam and his co-conspirators should initially face
justice at the hands of an Iraqi tribunal.

\textbf{I. Discussion}

\textit{A. Justice for Saddam}

In light of the magnitude of the atrocities committed by Saddam Hussein and
his Baath party cronies, members of the Coalition initially may have been
tempted to utilize a summary executive punishment to deal with the vanquished
foes,\textsuperscript{18} particularly because of their notorious and indisputable violations of

\begin{itemize}
  \item \textsuperscript{12} The Regulation permits the appointment of non-Iraqis to the Tribunal. \textit{See id.} \textsuperscript{\#} 2, \textsuperscript{\#} 10.
  \item \textsuperscript{14} Genocide is defined by the Order to include killing members of a group, causing serious bodily or mental harm to a group, deliberately subjecting a group to physical conditions designed to bring about the destruction of a group, imposing measures to prevent births within a group, or forcibly transferring children of a group to another group. These crimes are committed with the intent to destroy any racial, national, ethnic, or religious group. \textit{See id.} \textsuperscript{\#} 3, art. 11.
  \item \textsuperscript{15} Crimes against humanity are defined by the Order to include murder, extermination, enslavement, deportation, imprisonment, torture, rape, abduction, persecution of racial, religious, ethnic, cultural, or political groups or a particular sex, and other inhumane acts causing great suffering or serious physical or mental injury. \textit{See id.} \textsuperscript{\#} 3, art. 12.
  \item \textsuperscript{16} The Order defines war crimes broadly to include such acts as torture, willfully causing great suffering, denying a prisoner of war the right to a fair trial, taking hostages, killing combatants who have surrendered, and physical mutilation. \textit{See id.} \textsuperscript{\#} 3, art. 13.
  \item \textsuperscript{17} \textit{Id.} \textsuperscript{\#} 3, art. 10.
  \item \textsuperscript{18} Indeed, the Coalition kicked off Operation Iraqi Freedom earlier than planned because of a desire to eliminate Saddam, and intelligence that purported to know his location. Because Saddam eventually surrendered to Coalition Forces, and the United States elected to give him enemy prisoner of war status, the Hague and Geneva Conventions precluded summary
\end{itemize}
natural law — sometimes known as crimes against humanity\textsuperscript{19} — and the law of war.\textsuperscript{20} It could be reasoned that because Saddam and his Baath party regularly denied due process rights to Iraqis, he and his cabinet hardly deserve execution of Saddam. See 1907 Hague Convention, Oct. 18, 1907, Regulations Respecting the Laws and Customs of War on Land, art. 23(c), 36 Stat. 2277 (“In addition to the prohibitions provided by special Conventions, it is especially forbidden . . . to kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion.”).

Recently, however, scholars on both the political right and the left have questioned the desirability of the United States complying with aspects of international law that relate to the protection of prisoners of war, particularly in light of global terrorists who swear no fealty to a particular nation. One rationale for complying with the Geneva Conventions — that America’s enemies will do the same — has proven to be unrealistically optimistic:

[It] is difficult to conceive of the United States actually going to war against any country that would honor the Geneva Convention. Despite an enormous groundswell of support for an attack on France, we probably won’t. The only people we go to war with are utter savages.

In World War II, the Japanese tortured and killed American prisoners of war.
In the Vietnam War, the North Vietnamese tortured American prisoners of war.
In the Gulf War, Iraq tortured U.S. prisoners of war — including a female officer who was sexually assaulted by her captors.

So this Geneva Convention thing isn’t really working out for us.


20. The law of war is composed of (1) treaties that the United States has entered with other nations, (2) statutes enacted by Congress, including the Uniform Code of Military Justice, and (3) elements of the law of nations. See, e.g., *Ex parte Quirin*, 317 U.S. 1, 27-28 (1942) (“From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as enemy individuals.”).
such rights for themselves. Executive action also would carry with it the benefits of swiftness, certainty, and economy, and this course of action is akin to the one Winston Churchill and some Pentagon officials proposed for Adolph Hitler and other high-level Nazis following World War II. Due-process-minded Americans, however, quickly persuaded the English government that there was much to be gained from trying Nazi criminals in a judicial forum, and plans for executions quickly fell by the wayside. Similarly, although dispatching Saddam to a swift reunion with his sons might serve the ends of justice and could momentarily gratify desires for revenge, Iraqis and the Coalition understood that gains greater even than those realized at Nuremberg could be obtained by prosecuting Saddam and Baath party officials in an Iraqi forum.

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21. Lubrano, supra note 3 ("When dealing with Nazi war criminals, Winston Churchill said, firing squads, not tribunals, were the appropriate remedy.").

22. One commentator noted:

   Not everyone in the Pentagon was supportive of the trial approach, and some important officers, such as General Hilldring, were still out of step with the direction in which Stimson was heading. In an informal small meeting with Morgentau and Harry Dexter White, it was Hilldring who suggested that the army just be given a list of “2,500 war criminals” and that American troops should then be ordered to shoot them on sight.

BRADLEY F. SMITH, THE ROAD TO NUREMBERG 33-34 (1981) [hereinafter ROAD TO NUREMBERG]. Secretary of State Cordell Hull was of a similar mind:

   Cordell Hull, secretary of state until November 21, 1944, strenuously urged that swift, sure execution be the fate of Axis criminals. As he expressed his opinion at the Moscow Foreign Ministers’ Conference: “If I had my way, I would take Hitler and Mussolini and Tojo and their arch-accomplices and bring them before a drumhead court-martial. And at sunrise on the following day there would occur an historic incident.” The secretary of state promoted this manner of postwar punishment because he felt that the vicious aggressions and atrocities of the Nazis had to be eliminated in a dramatic fashion.


23. Interestingly, it is from the English law that the United States inherited the term “due process.” Stovall v. Denno, 388 U.S. 293, 305 (1967) (Black, J., dissenting) (“The term ‘due process of law’ is a direct descendant of Magna Charta’s promise of a trial according to the ‘law of the land’ as it has been established by the lawmaking agency, constitutional or legislative.”). “Process” comes at a price, however, in terms of both time and money, and thus, in some instances “due process” actually works to the detriment of justice. As Grant Gilmore has wisely noted: “In Heaven there will be no law, and the lion will lie down with the lamb. . . . In Hell there will be nothing but law, and due process will be meticulously observed.” GRANT GILMORE, THE AGES OF AMERICAN LAW 111 (1977).

24. See Editorial, Saddam Hussein’s Trial, WASH. POST, July 2, 2004, at A14 (arguing that the trial of Baathists “can help the Iraqi people confront and understand the tragedy of the past decades”) [hereinafter Saddam Hussein’s Trial].
First, a judicial tribunal has the ability to express society’s moral condemnation of the atrocities committed by Saddam and other Baath party officials,\textsuperscript{25} and there is much to condemn.\textsuperscript{26} Their atrocities include: oppression of the Shiites,\textsuperscript{27} genocide against the Kurds, torture\textsuperscript{28} and systemic rape of the citizenry,\textsuperscript{29} testing biological weapons on prisoners of war,\textsuperscript{30} unprompted invasion of Kuwait,\textsuperscript{31} and looting the Iraqi treasury for personal gain. And that is just the tip of the iceberg. Saddam and his accomplices are socialist tyrants on par with dictators like Hitler\textsuperscript{32} and his Nazi party,\textsuperscript{33} Fidel Castro,\textsuperscript{34} and

\begin{enumerate}
\item \textbf{George F. Will, The Woven Figure: Conservatism and America’s Fabric}, 1994-1997 204 (1997) (“[P]unishment should do more than make offenders suffer; the criminal law’s expressive function is to articulate society’s moral condemnation.”). \textit{See generally Charles Fried, An Anatomy of Values} 125-32 (1970) (criminal law has expressive aspects and implicitly evidences societal ends).

\item John Powers, Mass Graves Testify to Saddam’s Evil, \textit{Insight Mag.}, Mar. 16, 2004, at 39 (“Though Saddam Hussein is only the latest in a long line of history’s worst killers, the extent of his murders is staggering.”).


\item See Erika Niedowski, Iraqi Doctors Acknowledge Rights Abuses: Forced to Sever Ears, Remove Patients’ Organs, \textit{Balt. Sun}, Mar. 24, 2004, at A1 (noting that under orders from Saddam’s henchmen, Iraqi physicians amputated the ears of army deserters, removed organs from patients without their consent, and falsified medical records and death certificates to cover up torture). The removal of ears was a punishment for larceny used in England in the sixteenth century. Roscoe Pound, Criminal Justice in America 103 (Da Capo Press Inc. 1975) (1930) (“For petty larceny the ears were cut off. For other offenses there was branding. Fine and imprisonment were growing into use, but the old punishments held their ground. . . . Already in the seventeenth century the ideas of humanity, which have always gone along with theories of natural law, were making such things revolting.”).

\item See Jeffrey Scott, U.S. Seeks Royal Flush of Iraqi Leadership, \textit{Atlanta J. & Const.}, Apr. 12, 2003, at 13A (Uday Hussein, “commander of Fedayeen, Iraqi Olympic Committee president, older of Saddam’s sons[,] was personally engaged in acts of torture[,] oversaw widespread looting of Kuwait[, and was] accused of frequent serial rape and murder of young women.”).

\item \textit{Irabi Anthrax Bomb Test on Prisoners Reported}, \textit{Atlanta J. & Const.}, Jan. 19, 1998, at 6A (“Iranian prisoners of war died in agony when Iraq tested the deadly biological agent anthrax on them during the 1980s.”).


\item Commentators have noted several parallels between Saddam Hussein and Adolph Hitler:
Joseph Stalin. Like Saddam, these former dictators employed ruthless tactics and cowardly schemes to ensure the enslavement of the citizenry. One purpose of law and legal proceedings is to express society’s disapproval of this type of conduct, and to demonstrate that a basic morality is ingrained in all of humanity—regardless of class, culture, or religion—a morality that the Baathists continuously violated. A trial conducted by Iraqis has the ability to

Saddam, like Hitler, murdered people sadistically and systematically for the crime of being born. Saddam, like Hitler, believed that mass murder should be efficient, with minimal fuss and bother; it is no accident that both were big believers in poison gas. Saddam’s programs, like Hitler’s, attracted all sorts of sadists . . . .


33. The Baathist party appears to be modeled after the Nazi party: In 1941, a pro-Hitler politician named Rashid Ali and his Baath party seized power. The Baathists were an Arab socialist party and after the war became part of a socialist movement promoted throughout the Middle East by the Soviet Union. In 1972 Iraq’s Baath government signed an arms and aid pact with the Soviets. This relationship continued until Saddam’s ouster last spring.

George Melloan, America’s Gamble on Iraq Is a Good Bet, WALL ST. J., Nov. 18, 2003, at A21; see Powers, supra note 26, at 37 (the “Ba’athist Party was based on that of the Nazis”).

34. For a good discussion of the atrocities committed by Castro’s Cuba, along with the economic torture engendered by communism, see Ben Corbett, This is Cuba: An Outlaw Culture Survives (2003); Armando Valladares, Against All Hope: The Prison Memoirs of Armando Valladares (1986).

35. See Montefiore, supra note 31. One commentator noted that Saddam Hussein admired, studied and copied Stalin, the paragon of modern dictators. Here’s one story. Stalin has 15 scenic seaside villas, some of them czarist palaces, on the Black Sea Coast of Abkhazia. In 2002, I visited and photographed these extraordinarily well-preserved Stalinist time capsules. At one point, I asked an old caretaker if any other Westerners had visited them. “No,” she replied, “but there was an Arab gentleman in [the] 1970’s who insisted on visiting every one!” His name? “Saddam Hussein.”

According to Mr. Hussein’s courtiers, he was obsessed with Stalin. Kurdish politicians who visited his apartments recall seeing shelves of Stalin biographies, translated just for him into Arabic.

Id.

36. “Human-rights groups believe that as many as 300,000 Iraqis died as a result of orders by Hussein and his government.” Dan Eggen, Building a Case Against Hussein, PHILA. INQUIRER, Mar. 8, 2004, at A6.

37. “One function of law is expressive; it expresses the community’s core values, and by doing so it can ratify them, and can resist and retard their dissolution.” George F. Will, The Morning After: American Successes and Excesses 1981-1986 172 (1986) [hereinafter Will, The Morning After].

provide a voice to those tormented souls lying in unmarked graves after suffering unspeakable atrocities at the hands of the Baathists. Atrocities of Saddam’s magnitude cry out for justice, and a trial will afford prosecutors the opportunity to give a voice to these victims.

Second, cataloguing Saddam’s crimes and airing Iraqi grievances with his regime will allow Iraqis to demonstrate their understanding that these crimes are serious violations of the most basic moral code. This is particularly important as the Iraqi citizenship forms a new government composed of diverse tribes, interests, ethnicities, and religious beliefs, each with slightly differing notions of justice. A trial of Saddam will allow Iraqis to publicly condemn the evils inflicted on fellow Iraqis of a different tribe, religion, or ethnicity, which is the first step toward forming a cohesive society.

A judicial trial will also serve as an important step toward Iraqis accepting that all of their fellow citizens — whether Shia, Sunni, Christian, Assyrian, — through the legal order that the public status of ethical norms is most decisively affirmed. To make a law is not simply to prohibit or punish something; it is also in a larger sense, to affirm a societal principle, announcing what the community stands for, and thereby educating citizens.


40. Sadly, the majority culture in Iraq still seems to deny some of the key premises necessary for the rule of law, such as the idea of personal responsibility for one’s actions. Bill Broadway, For Iraq Christians, A Shadow of Insecurity, WASH. POST, July 17, 2004, at B7. According to the Roman Catholic Archbishop of Baghdad, Rev.Jean Benjamin Sleiman, the idea of the person as a free, responsible, and autonomous individual is not recognized in Iraq. As Justice Brandeis noted, personal responsibility “is the great developer of men.” St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 92 (1936) (Brandeis, J., concurring); see also MILTON FRIEDMAN, CAPITALISM & FREEDOM 33 (1962) (“Freedom is a tenable objective only for responsible individuals.”).

41. Iraq’s transitional constitution implicitly invites further religious persecution of minorities insofar as it ordains Islam the official religion of Iraq, and at least some brands of Islam call for the death of “infidels.” Law of Administration for the State of Iraq for the Transitional Period, art. 7(A) (Mar. 8, 2004), at http://www.cpa-iraq.org/government/TAL.html (“Islam is the official religion of the State and is to be considered a source of legislation. No law that contradicts the universally agreed tenets of Islam . . . may be enacted during the transitional period.”) [hereinafter Law of Administration]. Thus, the transitional constitution establishes an official religion, an act wisely prohibited in the United States by the First Amendment to the Constitution. See U.S. CONST. amend I. In light of the First Amendment, American taxpayers might question whether the creation of an Islamic state was an effective or constitutional use of their money. The use of American tax dollars to rebuild Iraqi mosques and send Iraqi pilgrims to Mecca is also constitutionally suspect.

42. Christians make up about 3-4 percent of the Iraqi population and are increasingly threatened by the Muslim majority. See Geneive Abdo, Turmoil Endangers Iraq’s Christians,
Chaldean, Yezi, Mandaeans Sabian, Turkman, Armenian, or Kurd — possess inalienable rights that were violated by Saddam and his regime. Moreover, a trial will demonstrate Iraqi progress toward acknowledging a common morality, even among these diverse groups, upon which Iraqis...
hopefully will construct an enduring legal system.\textsuperscript{48} For if this basic consensus is unattainable, little hope exists for a democratic Iraq.

Third, a trial of Saddam and his co-conspirators will serve as a warning to Middle Eastern leaders,\textsuperscript{49} and particularly Iraqi officials, that citizens of these countries expect a radical change in the way their leaders conduct themselves.\textsuperscript{50} The trial of Baath party officials will be a lesson to Iraqi politicians that any trampling of human rights will be done at their own peril\textsuperscript{51} and that the polity is not afraid to put corrupt leaders in the dock.\textsuperscript{52}

In a related vein, trials of Baath party criminals will permit Iraqis to take the initial steps toward implementing the rule of law and the protection of fundamental procedural rights.\textsuperscript{53} The rule of law demands standard judicial procedure for the punishment of criminals and protection of the innocent,\textsuperscript{54}

\begin{itemize}
  \item \textsuperscript{48} “No society can be stable unless there is a basic core of value judgments that are unthinkingly accepted by the great bulk of its members.” Milt\textsuperscript{on} Friedman, Capitalism & Freedom 167 (1962). Similarly, “you cannot have democratic government unless you have a vibrant civil society which believes in democracy and which clings to democratic values.” Rend Rahim, A Message From Iraqis, AM. ENTER., June 2004, at 44, 45.
  \item \textsuperscript{49} “Some Arabs [outside Iraq] were pleased to see a dictator being arraigned, calling the event a stark warning to despots.” Neil MacFarquhar, A Sense of Arab Humiliation, But a Warning to Despotic Rulers, N.Y. TIMES, July 2, 2004, at A8. On the other hand, some Iraqis, including some of Saddam’s victims, were disheartened to see their former ruler humiliated. One such victim, whose body still carries Baathist bullets meant to kill him and who has been asked to testify against Saddam, reflected that after watching Saddam’s initial appearance, “I couldn’t bear to see him in such a miserable condition. He shouldn’t be humiliated, after all he was our president. He was our father.” Rory McCarthy, Shadow of Saddam Still Falls Over Survivors: Two Men Who Cheated Dictator’s Death Squads Describe Their Mixed Feelings at Being Asked to Testify Against Him, THE GUARDIAN (London), July 22, 2004, at 17.
  \item \textsuperscript{50} At least one Iraqi has expressed similar sentiments: “‘They should put Saddam on trial in Tikrit, where he has lots of friends,’ said Ali, a retired barley farmer. ‘That would be a lesson to all of them.’” Mark McDonald, ’88 Gas Attack A Vivid Memory in Iraqi Town, PHILA. INQUIRER, June 18, 2002, at A2.
  \item \textsuperscript{51} Editorial, Standing Back in Iraq, BOSTON GLOBE, Mar. 9, 2004, at A14 (the “aim is to use a carefully prepared prosecution of Saddam to purge Iraqis once and for all of the totalitarian temptation”) [hereinafter Editorial, BOSTON GLOBE].
  \item \textsuperscript{52} This goal is consistent with the general understanding of criminal law, as the primary “purpose of criminal laws is to bring about compliance with desired norms of behavior,” hopefully by shaping behavior and encouraging right conduct before crimes are committed. United States v. Wilson, 159 F.3d 280, 295 (7th Cir. 1998) (Posner, C.J., dissenting).
  \item \textsuperscript{53} Iraq, in particular, needs citizens who are willing to respect the law. Perhaps having grown accustomed to the rule of tyranny, many Iraqis need to practice abiding by laws. See Rajiv Chandrasekaran & Walter Pincus, U.S. Edicts Curb Power of Iraq’s Leadership, WASH. POST, June 27, 2004, at A1 (“Iraq has long been a place where few people pay taxes, where most movies and music are counterfeit, where children often hold down jobs and where traffic laws are rarely obeyed . . . .”).
  \item \textsuperscript{54} The Iraqi transitional constitution, despite its flaws, “guarantees” basic rights such as
regardless of a citizen’s wealth or position in society.\textsuperscript{55} Nobody is above\textsuperscript{56} — or in Saddam’s case, beneath — the law. True, Saddam and his gang were uncommonly vicious criminals whose international syndicate hijacked the government of Iraq to perpetuate its crimes, thereby increasing the conspiracy’s breadth, power, and chances of success. Although this might support the argument that these conspirators do not warrant the protections afforded to less-vicious, “standard” criminals whom the state usually encounters, Iraqis should not forsake a golden opportunity to demonstrate that they are capable of following the rule of law, even when they are dealing with particularly heinous defendants. For a relatively small price,\textsuperscript{57} Iraqis can demonstrate that they are

(1) the right to a fair, speedy, and public trial; (2) the right to counsel of one’s choice; (3) the right to counsel at no expense to defendants if they cannot afford counsel; and (4) the right to remain silent. The transitional constitution also protects against double jeopardy, the use of torture, and ex-post facto laws. See Law of Administration, supra note 41, art. 15; Nicholas Kralev, \textit{U.S. Denies Interference In Saddam’s Trial}, \textit{Wash. Times}, July 2, 2004, at A12.

\textsuperscript{55} \textit{See Charles Fried, \textit{Order and Law: Arguing the Reagan Revolution} 60 (1991)} (“The rule of law is the reciprocal of liberty. Though the laws restrict liberty, without rules liberty cannot exist.”); \textit{see also} \textit{Ry. Express Agency, Inc. v. New York}, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) (“[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.”).

\textsuperscript{56} At Saddam’s initial appearance before an investigative judge of the Central Criminal Court of Iraq, Saddam already was claiming to be above the law. \textit{See Transcript of Saddam Proceedings}, at http://www.cnn.com/2004/World/meast/0701/saddam.transcript/index.html (last visited July 2, 2004) (“Is it allowed to call a president elected by the people and charge him according to a law that was enacted under his will and the will of the people? There is some contradiction.”) (quoting Saddam Hussein); John F. Burns, \textit{Defiant Hussein Rebukes Iraqi Court for Trying Him}, \textit{N.Y. Times}, July 2, 2004, at A1 (“Mr. Hussein’s point, repeatedly, was that it was unthinkable for him to be charged for his actions as Iraq’s leader, since that gave him immunity, and, he implied, the defense that even murder or military aggression was justified if he deemed it in Iraq’s interest.”). The Baathists and their lawyers are expected to mount a host of defenses, including: (1) a challenge to the tribunal’s jurisdiction; (2) self-defense; (3) sovereign immunity; (4) the “I was just following orders” defense; (5) the claim that they had no control over the actions of their subordinates; (6) the claim that they lacked the knowledge or power to prevent atrocities; and (7) the claim that their subordinates acted on their own initiative in violating the natural law and the law of war. \textit{See Saddam Hussein’s Trial}, supra note 24 (“[D]efendants will challenge the legitimacy of the proceedings, as did Mr. Milosevic.”); Alissa J. Rubin & Mary Curtius, \textit{For Iraq, Trial is Balancing Act}, \textit{L.A. Times}, July 2, 2004, at A1 (“[T]here is a fundamental question of whether the Iraqi tribunal law has any legitimacy.”).

\textsuperscript{57} The Iraqi Special Tribunal was given a 2004-05 budget of $75 million. \textit{Iraqi Tribunal Established}, supra note 10; David R. Guarino, \textit{War on Terror; Justice for Saddam has Hefty Price Tag}, \textit{Boston Globe}, Apr. 21, 2004, at A7. Of course, the more crimes the prosecution seeks to present to the tribunal, the greater the costs. For an oil-rich nation like Iraq, it might be worthwhile to spend millions on a thorough prosecution that brings long-secret misdeeds to light. Presently, the U.S. government is using money from American taxpayers to pick up
fully capable of operating fair and efficient judicial proceedings for major criminals like the Baath party officials. Fair judicial processes, more than any other governmental function, demonstrate that a society is prepared to channel it use of force through representatives of the people, and that a careful balancing of the equities is a worthwhile activity.\footnote{Through judicial proceedings, Iraqis can also show that at least some of the population is ready to assume the responsibilities that are inherent in liberty, including the obligation to ensure that the guilty receive punishment commensurate with their crimes.\footnote{This requires use of a proportionality calculus best effected through a judicial process,\footnote{which inherently lends itself to careful deliberation and the balancing of equities.\footnote{That the death penalty is the only penalty of sufficient magnitude to address Saddam’s crimes\footnote{— and frankly even this ultimate punishment falls short of atonement for all of Saddam’s murders — does not militate against a judicial calculation of the tribunal’s tab. Kralev, \textit{supra} note 54 ("[T]he United States has contributed $75 million to the Iraqi government to help fund the Iraqi Special Tribunal."). The Author’s comments should not be construed as an endorsement of this use of U.S. capital.}}}}

The Author’s comments should not be construed as an endorsement of this use of U.S. capital.

\footnote{In the words of Chief Justice Marshall: “The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws. . . .” \textit{Marbury v. Madison}, 5 U.S. (1 Cranch) 137, 163 (1803) (Marshall, C.J.).}

\footnote{“The idea that sanctions should be proportioned to the gravity of the wrong is fundamental . . . .” United States v. Stefonek, 179 F.3d 1030, 1035 (7th Cir. 1999); Gerard V. Bradley, \textit{Retribution and the Secondary Aims of Punishment}, 44 A.M. JURIS. 105, 115 (1999) (Retribution requires “that sentences within a jurisdiction exhibit a rough proportionality, with the most extravagant usurpations of liberty being punished similarly, and more severely than modest usurpations.”).}

\footnote{The proportionality calculus is such a basic principle of fairness that it was enshrined in Biblical law and in the Eighth Amendment of the U.S. Constitution. \textit{See Exodus} 21:23-24 (King James) (“And if any mischief follow, then thou shalt give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot . . . .”); \textit{Leviticus} 24:19-20; \textit{Deuteronomy} 19:20-21; United States v. Bajakajian, 524 U.S. 321, 334 (1998) (“The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.”).}

\footnote{Laurence H. Tribe, \textit{Constitutional Choices} 290 n.47 (1985) ("Typically, courts are thought to be assigned responsibility for relatively ‘principled’ decision making.").}

\footnote{The Coalition Provisional Authority suspended the use of the death penalty in Iraq. Penal Code, Coalition Provisional Authority Order No. 17, § 3 (June 10, 2003), \textit{at} http://www.cpa-iraq.org/regulations/#Regulations [hereinafter Penal Code]. This suspension remains in effect unless it is rescinded or amended by the Iraqi transitional government according to the mechanism set forth in the transitional constitution. Law of Administration, \textit{supra} note 41, art. 26. Members of the Iraqi interim government have already stated that the new government will reinstate the death penalty. Rajiv Chandrasekaran, \textit{Iraq Plans to Offer a Broad Amnesty}, \textit{WASH. POST}, July 13, 2004, at A12; Carol J. Williams, \textit{The Conflict in Iraq}, L.A. TIMES, July 8, 2004, at A5.}
proportionality. Law entails providing reasons for judicial actions so that a judicial process will entail, at the least, an examination of the reasons for whatever punishment is meted to the Baathists. Moreover, to the extent that some of Saddam’s co-conspirators are less complicit than he, they should enjoy the benefit of a judicial assessment of their proper punishments. Thus, Iraqis will be able to articulate a reasoned standard for imposing capital punishment, which is an important task in a country where the death sentence was previously the punishment of first resort.

Administering punishments proportionate to the particular crimes committed might also further the rule of law by discouraging the “self-help” justice of vigilantism, one of the purposes served by the Nuremberg trials. When citizens feel that justice will not be served by official means, they sometimes take the law — and their enemies — into their own hands. Although some might respect the zeal of those who are willing to become unpaid instruments of justice, vigilantism is prone to abuse, not the least of which is the possibility of mistake because of a lack of forethought, consensus, and considered judgment. Many Baath party officials have already been subject to reprisals, with justification, at the hands of former victims. Unless their thirst for justice is quenched through official channels, these former victims will undoubtedly continue their extrajudicial quest for retribution.

Although “mob justice” may be better than no justice, it hardly comports with notions of fairness normally associated with advanced democracies. Indeed, in such societies, the term “mob justice” entails an inherent

63. One commentator noted:

One of the most important effects of the Nuremberg trials was its role in preventing a general bloodbath. In the angry and violent atmosphere of 1945 there was a very real possibility that thousands of Germans, innocent and guilty alike, could become the victims of lynch justice. Among the American planners, at least Justice Jackson realized this danger, and it was one of the reasons why he contended that a comprehensive trial program needed to be developed quickly. **Road to Nuremberg, supra** note 22, at 247-48.

64. Mark Matthews & Linda Sullivan, *Fledgling Justice System Faces Huge Challenge*, Balt. Sun, June 30, 2004, at A1 (One security concern is the need to protect the Baathists “from those seeking revenge for crimes committed during the Baath Party’s brutal three-decade rule.”).

65. **Pound, supra** note 28, at 69 (“Regulation of summary community self-help, through the imposing of limits upon offhand public vengeance, is one of the earliest forms of criminal law. The spirit which lay behind this institution of summary mob self-help in primitive society is still active. It has its roots in deep seated tendencies of human behavior ...”); cf. **Will, The Morning After, supra** note 37, at 29 (“Let us get the easy part over by saying, straightaway, that it is wrong ‘to take the law into your own hands,’ and that the state should have a monopoly on the use of violence. But such moral near- absolutes wobble when the law seems increasingly unable to cope with crude violence . . .”).
contradiction. Accordingly, the long-oppressed Iraqi people should be allowed to vent their anger in a judicial forum. If Iraqis sincerely seek to join the league of modern nations, they must channel their desire for retribution through government agencies designed to effect justice. When Iraqis ultimately see that such means exist, and that these agencies operate effectively, they will be more likely to leave retribution to the courts. In a country where nearly all men, and some women, own at least one AK-47 rifle, a willingness to allow the government to handle retribution will go a long way toward internal peace. Organized trials are also necessary to generate popular trust in the government, a prerequisite to, and a byproduct of, a functional democracy.

Publicly demonstrating the brutality of Saddam and his Baath party would also show the world — initially via an Iraqi forum — that the Coalition was justified in employing military force to liberate the Iraqi people and would establish this fact for history. The media and other critics of the Iraq war have been so fixated on the lack of weapons of mass destruction that some have failed to consider the other justifications for the invasion of Iraq and the resulting war, the most weighty of which is the emancipation of the long-oppressed Iraqi people. “By overthrowing Saddam, [the United States] stopped a loathsome bloody massacre — a hell-on-earth that would have been all too easily dismissed as fantastic propaganda if we hadn’t seen and heard the


67. “The basic purpose of a trial is the determination of truth,” Tehan v. Shott, 382 U.S. 406, 416 (1966), and truth is a dictator’s worst enemy.

68. A trial “is slow, painful, and expensive, but it takes man one more step away from the jungle. It is as essential to democracy as voting . . . .” LOUIS NIZER, MY LIFE IN COURT 66 (1961).


70. Editorial, MILWAUKEE J. SENTINEL, supra note 2 (“There are compelling reasons why Hussein should receive a scrupulously free, fair and open trial. The world — not just the Iraqi people — needs to know as much as possible about what Hussein did during his 25 years in office. Only a trial conducted according to professional norms of justice can be relied on to portray Hussein’s villainy in an orderly and comprehensive way.”).

71. The key concern about Iraq “was not only what weapons Saddam had but what weapons he was trying to obtain, and how long it might be before containment failed and he was able to obtain them.” Kagan & Kristol, supra note 69.

72. In the words of Jim Prince, president of the Democracy Council, a group that seeks to promote democratic institutions in the developing world: “It’s not a question of weapons of mass destruction, it’s a question of evil, and if you let it continue, you have to take responsibility for what’s happening. You can’t just turn a blind eye.” Powers, supra note 26, at 39.
victims and watched the torturers on videotape. . . . This war was an unmitigated triumph for humanity." 73 “Thus, even if it were definitively shown that Saddam never possessed weapons of mass destruction, 74 aided terrorists, financed destructive weapons, and never would have assisted terrorists in attacking the United States, Operation Iraqi Freedom was still justified to the extent that it freed millions of Iraqis from the yoke of Baathist tyranny. 75 Presumably, most critics of the war would agree that no nobler cause exists than bringing liberty to the oppressed, 76 and the trials of Baathists will show the extent of repression suffered by Iraqis, 77 and the concomitant need for liberation. By affirmatively demonstrating the wickedness of Saddam and the Baath party, judicial trials will lead reasonable people to conclude that the war against Saddam was nothing short of an act of mercy. 78 After hearing first-

73. Gelernter, supra note 32. According to one of Saddam’s victims: “His regime had experts at torture. They are really very good at it.” Dough Struck, Former Victim Watches as a New Trial Begins, WASH. POST, July 2, 2004, at A11 (quoting Kassim Bilasim, an Iraqi Shiite tortured for his religious beliefs).

74. It has already been shown that Saddam previously possessed and used chemical weapons and that he possessed the precursors and means of producing chemical weapons. See Roadside Sarin, WALL ST. J., May 18, 2004, at A18.

75. Besides railing on Saddam’s weapons of mass destruction, President Bush “also made a moral case for war. And that case emphasized the large-scale atrocities Saddam Hussein committed against his own people and surely would have continued to commit if we had decided not to invade Iraq.” Terry Eastland, Bodies of Evidence; Mass Graves Will Show that United States Was Justified in Liberating Iraq, DAILY STANDARD, Apr. 6, 2004, at http://www.weeklystandard.com/Content/Public/Articles/000/000/003/935smrwy.asp.

76. Before Operation Iraqi Freedom, most members of the United Nations apparently did not consider liberation a sufficiently weighty reason for invading Iraq, possibly because of their own complicity in oppression and their opposition to democracy. See Bill Sammon, Bush Backers See Trial Taking Focus Off WMDs, WASH. TIMES, July 2, 2004, at A12 (“[T]he administration had originally considered passing U.N. Security Council resolutions on weapons of mass destruction, human rights abuses and Saddam’s links to terrorism, but only went forward with the weapons resolution because other nations showed little interest in the other two.”).

77. Of course, as the chief Nuremberg Prosecutor and U.S. Supreme Court Justice Robert Jackson explained, liberty in the fullest sense is not simply an absence of restraint; it truly can be achieved only through the rule of law. ROBERT H. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 76 (1955) (“Liberty is not the mere absence of restraint, it is not a spontaneous product of majority rule, it is not achieved merely by lifting underprivileged classes to power, nor is it the inevitable by-product of technological expansion. It is achieved only by a rule of law.”). To the extent that a judicial determination of the Baathists’ fate helps Iraqis implement a rule of law, it advances the liberty of the Iraqi people beyond what could be achieved by military force.

78. A similar purpose was served by the Nuremberg trials: [T]he trial system that the Americans had convinced their Allies to use at Nuremberg was not created simply to punish the Germans. It had also sought to
hand descriptions of the atrocities committed by these tyrants, reasonable people will understand that thousands more Iraqis would have met the same cruel fate had the Coalition not intervened.  

B. Justice for Iraq

Of course, there are a few objections to using a judicial forum to punish the Saddamites. First, the great volume of evidence available to prosecutors poses substantial problems in deciding which evidence, and how much evidence, to present to the court, especially considering the time and expense involved in unearthing the many mass graves of Iraq. The prosecutors must also decide

provide the victorious peoples with a feeling that their cause had been just and their prodigious sacrifices worthwhile, giving “meaning to the war against Germany.”

Road to Nuremberg, supra note 22, at 250-51. Also, the Allies thought it necessary to make a historical record of the atrocities of Nazism. Id. at 63 (Stimson thought “that a broadly based war-crimes trial was necessary ‘so as to make a dramatic record of the whole Nazi system which we have been fighting.’”).

79. Legal proceedings in Iraq were tainted by the culture of torture that pervades the Middle East. Before the liberation of Iraq, confessions induced by torture were admissible in Iraqi criminal proceedings, so long as they could be “corroborated” by some additional evidence. The Coalition banned the use of such confessions. Penal Code, supra note 62, § 3 (“Torture and cruel, degrading, or inhuman treatment or punishment is prohibited.”).

The trials Saddam and his cronies will also demonstrate that any abuse by American forces at Abu Ghraib pales in comparison to the systemic torture factories operated by the Baathists. Consider seven Iraqi men whose arms had been amputated by Saddam’s secret police:

Nine years ago the seven men were in Abu Ghraib, awaiting the terrifying moment when they’d be placed on a gurney so a surgeon could slice off their limbs while Saddam’s secret police videotaped the mutilation. The men say they were arrested by the regime at a time when the economic embargo of Iraq by the United Nations and Saddam’s mismanagement had wrecked the country’s economy. They were picked to serve as scapegoats by Saddam, they said. The men, small business owners in various precincts of Baghdad, were charged with currency manipulation, given a cursory 30-minute trial and thrown into Abu Ghraib.


These trials will also serve as an indictment of world leaders who condemned the abuse of Iraqis by a few U.S. soldiers, but stood silent for decades while Saddam raped and pillaged Iraq, opposed the liberation of the Iraqi people, and whose own secret police regularly tortured their own citizens. Frida Ghitis, Where Was Indignation During Hussein’s Regime?, MIAMI HERALD, May 9, 2004, at L5 (“Throughout the Arab world — from Saudi Arabia to Egypt and Syria, countries where a call for democracy can land you in jail — government officials and regime-controlled newspapers have spoken of their deep disgust at what they have seen.”).

80. Eggen, supra note 36 (“It is not clear which of the alleged atrocities Hussein and others would be charged with in a trial. Among the leading possibilities, according to those who have compiled and studied the records, are the government’s Anfal campaign in 1987 and
which of the rapes, mass murders,\textsuperscript{81} or disappeared prisoners will be the focus of the trial.\textsuperscript{82} Further, the Iraqi prosecutors will have to decide how to address the torture chambers, the gruesome procedures that magnified human suffering,\textsuperscript{83} the videotaped torture sessions created for Saddam’s pleasure,\textsuperscript{84} and the brutality of the secret police.\textsuperscript{85} Because of limitations on time and money, the prosecutors must also consider whether to delve into the dire poverty of the Iraqis who struggled to survive, while Baath party members maintained a kleptocracy that raided the national treasury to fund terrorism in Israel and luxury living for Iraqi elites.\textsuperscript{86} Each of these involves serious violations of

\begin{footnotesize}
1988, in which many thousands of Kurds died, and, in particular, a chemical weapons attack on the Kurdish town of Halabja that killed 5,000.’”).


82. Editorial, \textit{BOSTON GLOBE}, supra note 51 (Saddam was “responsible for killing more than a million people, looting Iraq’s wealth, and ruining the lives of entire generations.”).


84. “Saddam also savored in a pornographic way the images of his victims; he derived psychological gratification from pictures and videotapes of enemies — real and perceived — tortured and killed at his behest.” Jonathan Gurwitz, \textit{Not Even a Glance At Saddam’s Crimes}, \textit{SAN ANTONIO EXPRESS-NEWS}, June 27, 2004, at 3H. Saddam’s videotapes contain “savage scenes of decapitation, fingers chopped off one by one, tongues hacked out with a razor blade all while victims shriek in pain and the thugs chant Saddam’s praises.” \textit{Id.; see also} Hedges, \textit{supra} note 79 (describing the amputation of prisoners’ limbs, which was videotaped); \textit{Destroying the Spectre of Saddam}, \textit{TAMPA TRIB.}, Dec. 14, 2003, at 4 (“[T]he bloody nature of Saddam’s rule eventually will be exposed in a courtroom for the people of the world to see. Eyewitnesses will testify. Video tapes widely available in Iraq showed state executions Saddam had ordered while in power. One even shows him watching the torture and death of someone he suspected of disloyalty.”).

Apparently Saddam’s sons also enjoyed watching torture tapes. \textit{See} Saddaam’s Torture Tapes Aired, \textit{N.Y. DAILY NEWS}, Oct. 30, 2003, at 6 (“The Pentagon called yesterday for the release of more videotapes depicting brutal torture sessions conducted by henchmen of former Iraqi dictator Saddam Hussein . . . . The torture scenes seemed to take place in a public square crowded with people, even children. Similar tapes have been found among the belongings of Saddam’s dead sons, Uday and Qusay, and in former Iraqi military facilities and prisons.”).

85. Powers, supra note 26, at 39 (“Saddam’s methods included using hammers to break bones, ripping out fingernails, amputating limbs with a chain saw, crucifixion, throwing live victims in acid baths and ovens, cutting loose wild dogs to attack victims, raping women in the presence of their children and husbands, cutting off a penis or a breast, and stripping children naked and forcing their parents to watch as they were stung by hornets and scorpions.”).

86. \textit{Id.; Newt Gingrich, Perpetuating Repression: The U.N. Oil for Food Scandal, WASH. TIMES}, Apr. 5, 2004, at A19 (Through Saddam’s greed and U.N. mismanagement, “billions of dollars were stolen from the people of Iraq through the ‘Oil for Palaces’ program, causing Iraq’s basic health infrastructures to deteriorate to the point where innocent people, many of whom were children, became sick and died from a lack of food and medicines.”); \textit{see also} CLARENCE MANION, THE KEY TO PEACE 65 (1951) (“When we permit our neighbor to starve
for want of food he cannot obtain while we are in a position to supply it, we kill him just as effectively as if we had hit him with a club.
). To add insult to injury, after assisting Saddam in looting the Iraqi treasury, the United Nations refuses to permit Iraq to vote in the General Assembly because it is in arrears on its payment of dues to the U.N. See Iraq Far Behind on U.N. Dues, Wash. Post, July 2, 2004, at A10.

87. See David McDowall et al., A People Without a Country: The Kurds and Kurdistan 224 (Gerard Chaliand ed., 1993) (“Beginning in the spring of 1987,” Iraq “increasingly resorted to indiscriminate use of chemical weapons, hitting rebel positions as well as civilians in towns and villages.”). The Philadelphia Inquirer recently recounted one such attack:

Nobody’s sure what kind of nerve gas was in that first bomb, the one that flattened the House of Charity mosque. It collapsed the dome and toppled the minaret, and within minutes hundreds of people were twitching and blistering to death in the dust of Mokhtar Street. About 5,000 people — more than half of them children — died in Halabja on that warm morning in the late winter of 1988. On that day, Saddam Hussein’s air force was nothing if not thorough.

The terrible clouds of cyanide, mustard gas and sarin caught up with 15,000 other Halabjans, unwiring their nervous systems or forever clouding their minds. Even today, this little Kurdish hill town is full of the slow, the blind, the lame, and the halt.

McDonald, supra note 50.

88. See Transcript of Saddam Proceedings, supra note 56. The investigative judges have not handed down any formal indictment because the investigative stage of the case has just begun. At least one commentator has noticed one obvious omission from the list of charges: the chemical attacks on Iranian soldiers and the invasion of Iran. See Afshin Molavi, Missing From Saddam’s Indictment, Wash. Post, July 11, 2004, at B1 (“[I]n that dramatic moment when a young judge faced the battered dictator, reading the charges against him in an Iraqi courtroom, there was no mention of Iraq’s 1980 invasion of Iran, nor of the chemical attacks on Iranians.”). One possible explanation for this omission is that some of the evidence necessary to prosecute these crimes is in the possession of the Iranian theocratic government, which continues to meddle in Iraqi internal affairs, and which might refuse to cooperate in the Iraqi prosecution. Also, a full judicial consideration of the atrocities committed by the Baathists would require a decade, which would thwart the need for swift justice. Finally, Iran’s support for Moslem insurgents seeking to topple the new Iraqi government probably did not encourage prosecutors to vindicate crimes against Iranians. See Howard LaFranchi, Anti-Iran Sentiment Hardening Fast, Christian Sci. Monitor, July 22, 2004, at 1.

89. See McDowall et al., supra note 87, at 183 (discussing how Kurds in an “Arabization zone” were expelled from their homes); Abdullah, supra note 31, at 190 (“The state responded by broadening the practice of confiscating the properties of anyone deemed
undesirable. Those who benefitted most from the re-distribution of these properties were usually supporters of the regime from the Arab Sunni provincial regions such as the Tikritis, Kubaysis and Jubur.


91. Eastland, supra note 75 (“270 mass graves have been reported, and 53 graves have been confirmed.”); Powers, supra note 26, at 37 (“[S]ince Saddam was ousted 270 sites of mass graves have been reported.”).

92. Simons, supra note 11 (“Like the courts of Rwanda and Yugoslavia, Iraq’s will face vast amounts of evidence, stretching over many years.”).

93. Although the legitimate desire for swift justice might curb the presentation of some evidence, this desire for promptness should not lead to an abandonment of fundamental procedural rights. Unfortunately, delays are often necessary for the protection of criminal rights. “[D]elays and little inconveniences in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters.” Neder v. United States, 527 U.S. 1, 40 (1999) (Scalia, J., concurring in part and dissenting in part) (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND).

94. Lewis & Johnston, supra note 11 (noting that a broad trial “might give Saddam an opportunity to grandstand in a way that would win favor with Arab audiences”).

95. Anthony Deutsch, Milosevic Genocide Case Lags, HOUSTON CHRON., Feb. 29, 2004,
use a protracted trial to gain political capital throughout the Arab world. At 31 (noting that the “U.N. prosecutors opened their case against Slobodan Milosevic two years ago . . . [and] after calling 296 witnesses, prosecutors abruptly rested their case earlier than planned, seeking to avoid further delays”); Adam LeBor, Milosevic ‘May Escape Conviction for Genocide,’ LONDON TIMES, Feb. 25, 2004, at 15 (noting that Milosevic has “proved combative and pugnacious” in his trial, which “could stretch well into 2006, with a verdict as late as 2007”). “This may be scrupulous justice, but such crawler-lane catharsis offers, at best, the scenic route to reconciliation.” Mary Riddell, Justice on Trial: In a Courtroom in Baghdad, There Are Two Defendants — Saddam and the Occupying Force, THE OBSERVER, July 4, 2004, at 24.

96. See TRANSCRIPT OF SADDAM PROCEEDINGS, supra note 56 (“I am originally a man of law.”) (quoting Saddam Hussein).

97. Considering the lessons learned from Milosevic’s trial, “Iraqis said they were determined to keep Mr. Hussein on a far tighter leash.” Simons, supra note 11.

98. See TRANSCRIPT OF SADDAM PROCEEDINGS, supra note 56.

99. But see Riddell, supra note 98, at 24 (“The power of pity is available even to monsters, if they are seen to be suitably ill-treated by their captors. Saddam clanking in chains is a more persuasive figure, for all his viciousness, than a tyrant offered the protective panoply of the laws.”).
Other critics contend that the Baathists will not receive a fair trial because of American involvement in the process of gathering evidence and the discussion of Saddam’s conviction and execution as a fait accompli. These critics contend that the triers of fact and their American advisors lack the objectivity and impartiality necessary to a fair resolution of the cases. But the laws relating to the Iraqi Tribunal guarantee the defendants extensive rights, both procedural and substantive, and include such basic rights as the right to be informed of the charges by indictment, the presumption of innocence, and the right to counsel.

100. See Peter Maguire, The Undoing of International Justice, NEWSDAY, May 2, 2004, at A66 (“Few are as deserving of a major war crimes trial as Saddam Hussein and his cohorts like ‘Chemical Ali,’ but the trials in Baghdad are shaping up to be little more than primitive political justice.”). Other criticisms of Iraqi-run trials include objections that (1) Iraqi judges and prosecutors are inexperienced; (2) Iraqi judges and prosecutors are not learned in international law and the law of war; (3) U.S. involvement makes the trials simply a form of “victor’s justice”; (4) the charges are complex; (5) it will be difficult to obtain witnesses to the many atrocities; (6) in light of the present state of security in Iraq, many witnesses will be reluctant to testify because of fear of reprisals; (7) court proceedings can be easily disrupted by mortar and rocket attacks; (8) it will be difficult to connect the defendants with crimes committed by subordinates; (9) there is a large volume of evidence to be presented by the prosecutors and considered by the tribunal; (10) some of the evidence has already been destroyed or tainted; and (11) the law pertaining to the tribunal is incompatible with elements of Iraqi law. See Saddam Hussein’s Trial, supra note 24 (opining that Iraqi judges and prosecutors have little experience with international law); Rubin & Curtius, supra note 56 (noting that criticism of the trial include complexity of the case; difficulty of connecting defendants and subordinates; witnesses’ fear of reprisal; volume of evidence; tribunal law incompatible with Iraqi law).

101. See Sharon Behn, Iraq Officials Seek Death By Hanging for Saddam, WASH. TIMES, June 18, 2004, at A1. Although use of the death penalty was suspended in Iraq by the Coalition Provisional Authority, that suspension will be lifted by the interim or subsequent government. Peter Landesman, Who v. Saddam?, N.Y. TIMES, July 11, 2004 (Magazine), at 34 (“[T]here seems to be little doubt that Iraq’s new government will reverse the order [suspending capital punishment] and that eventually Hussein will be executed . . . .”). In line with this, the Iraqi investigative judge who conducted the initial appearances of Saddam and the senior Baathists advised them that their crimes were potentially punishable by death. Burns, supra note 56. According to one poll, 56% of Iraqis want to see Saddam convicted and executed. Carol J. Williams & Ashraf Khalil, Hussein Still Divides Iraqi Opinion, L.A. TIMES, July 2, 2004, at A10. Recently Iraqi-Kurds staged public demonstrations calling for the execution of Saddam and co-defendant Ali Hassan al Majid, known as “Chemical Ali.” Angry Kurds Demanding Saddam Death Penalty, BIRMINGHAM POST, July 6, 2004, at 10.

102. See Robert Collier, “Human Rights Shortcomings” in Hussein Tribunal; Concern Grows that Trial Will Be Seen as a Kangaroo Court, S.F. CHRON., Apr. 22, 2004, at A13 (“An Iraqi tribunal created to try Saddam Hussein is gathering force — and so are warnings from human rights groups that a failure to provide impartial justice after long years of savage dictatorship could cause the body to be perceived as a kangaroo court.”).

103. Other rights include the right to a public trial, notice of the charges and an opportunity
At his initial appearance, Saddam parroted the critics’ claims of unfairness when he implied that the Iraqi judge was simply an extension of the U.S. government, and thus, that he could not obtain justice. These critics apparently misunderstand, perhaps intentionally, the nature of the trials and U.S. involvement. True, the results of the trials of Saddam and upper echelon Baathists are probably a foregone conclusion, not because the jurists who will try the case are close-minded or want to appease the United States, but because of the overwhelming evidence of guilt. After all, the Iraqi mass graves did not create themselves, and all of the evidence points to the Baathist as they alone had the ability to carry out such large-scale atrocities over an extended period. Considering this overwhelming evidence, one author has plainly stated that “only diehard Baathists and fantasists would argue that Hussein is innocent.”

The fact that the mountain of evidence ineluctably leads to one conclusion — even Saddam’s lawyers predict that he will be convicted and executed — this neither diminishes the fairness of the trials nor makes them unnecessary. It is the trial process itself that is frequently essential to justice. Trial results are often predetermined in cases where the trier of fact is fully neutral and impartial. Whenever evidence lopsidedly demonstrates that particular defendants committed the crimes charged, divine foreknowledge is not required to predict accurately the outcome of the case. Not surprisingly, then, before the first Nuremberg trial, Allied Prosecutor and U.S. Supreme Court Justice Robert Jackson, among others, accurately prophesied that because of the overwhelming evidence to prepare a defense and be heard by the court, the right to a speedy trial, the right to confront and cross examine witnesses, the right to remain silent and not to incriminate oneself, and the right to an impartial trier of fact. Order No. 48, supra note 10, § 7, arts. 18-20.

104. See Rubin & Curtius, supra note 56 (Saddam Hussein “implied that the judge and the court were under the control of the United States.”).

105. Cf. Jonathan D. Glater, How to Defend Saddam Hussein (Blame the U.S.), N.Y. TIMES, Apr. 4, 2004, at 4-5 (“Establishing that Mr. Hussein committed crimes against humanity — that is, systematic murder, enslavement, imprisonment, torture, rape or other crimes directed against civilians — may be fairly straightforward . . . . The crimes that could be the basis for such charges are well documented . . . .”).

106. Landesman, supra note 101, at 34.

107. Id. (Two of Saddam’s lawyers, Issam Ghazawi and Mohammed Rashdan, “believe that no matter what case they present, Hussein will be convicted and eventually executed.”).


109. “Nine-tenths, perhaps more, of the cases that come before a court are predetermined — predetermined in the sense that they are predestined — their fate preestablished by inevitable laws that follow them from birth to death.” BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 60 (1924).
evidence, most of the defendants would be convicted by the tribunal.\textsuperscript{110} Thus, even in cases with overwhelming evidence, democracies with advanced judiciaries dispense justice through trials; they do not dispense with the trials simply because everyone knows the defendant is guilty. Rather, the defendant is afforded the opportunity to present evidence at trial to convince the court that he is innocent, or to show that his guilt or responsibility for the crimes is mitigated in some way.\textsuperscript{111} The rule of law requires that even obviously culpable defendants receive the same rights, procedures, and opportunities as defendants of less-obvious guilt to present evidence tending to mitigate guilt or punishment.\textsuperscript{112} Accordingly, the Baathists could receive due process before the Iraqi tribunal, despite the fact that the chances of a full acquittal are relatively slim for most of the defendants.

The malevolence of the Baathists is so great that, once convicted, their crimes will call for a steep penalty; for some, this means death. For this reason alone, trials in a U.N. or international forum, a course suggested by some,

\textsuperscript{110} See Richard H. Minear, Victors’ Justice: The Tokyo War Crimes Trial 18 (1971). In the words of Mr. Minear:

\textit{[H]ad there been any real chance of acquittal, the [Nuremberg] trials would never have taken place. At least three of the four parties to the London Conference explicitly presupposed the conviction of the accused. The British Government began an early aide-memoire: “H.M.G. assume that it is beyond question that Hitler and a number of arch-criminals associated with him (including Mussolini) must, so far as they fall in Allied hands, suffer the penalty of death for their conduct leading up to the war and for the wickedness which they have either themselves perpetrated or have authorized in the conduct of the war.” The Soviet representative at the London Conference stated: “We are dealing here with the chief war criminals who have already been convicted and whose conviction has been already announced by both the Moscow and Crimea declarations. . . .” And Robert H. Jackson, while attacking the assumption behind the Soviet representative’s statement, nevertheless felt “bound to concede” that “there could be but one decision in this case.”}

\textit{Id. (internal citations omitted).}

\textsuperscript{111} “The fundamental requisite of due process of law is the opportunity to be heard.” Grannis v. Ordean, 234 U.S. 385, 394 (1914).

\textsuperscript{112} See, e.g., Holden v. Hardy, 169 U.S. 366, 389-90 (1898) (“It is sufficient to say that there are certain immutable principles of justice, which inhere in the very idea of free government . . . as that no man shall be condemned in his person or property without due notice, and an opportunity of being heard in his defense.”). It is also true that the notion of due process “is flexible and calls for such procedural protections as the particular situation demands.” Greenholtz v. Neb. Penal Inmates, 442 U.S. 1, 12 (1979). Thus, because of the enormity of Saddam’s crimes, and the extensive period over which they were committed, the court may loosen the strictures of due process without running afoul of the rule. Exceptional cases sometimes warrant exceptional rules, such as modification of the rules of evidence pertaining to mass homicide.
113. A U.N. forum would also be inappropriate for a host of other reasons, including its complicity in the “Oil for Food” program, also known as the “Oil for Palaces” scam. See Gingrich, supra note 86 (“There is mounting credible evidence that the U.N. utterly failed in its responsibility to manage the [oil for food] program. . . . Worse, it may be revealed that high-ranking U.N. officials were willing participants” in the fraud); see also Editorial, Oil for Fraud?, WASH. POST, Mar. 26, 2004, at A22. Furthermore, some members of the United Nations have been known to “spread falsehoods, encourage hostilities, and deplore and restrict the growth of freedom, while excusing and indirectly encouraging the increase in terrorism.” WILLIAM F. BUCKLEY, JR., HAPPy DaYS WeRe HeRe A gaIN: REfLECTIONS oF A LIBERTARIAN JOURNALIST 251 (1993).


114. Recall that “retribution must be the central aim of a morally justified system of punishment.” Bradley, supra note 59, at 105 (emphasis added).

As to “crimes” that warranted the death penalty during Saddam’s reign, Saddam himself admitted that “his son Uday had beaten to death someone who had annoyed him by playing music too loudly.” Lewis, supra note 31. Also, telling certain jokes was a punishable offense under Hussein’s regime. Ambassador Bremer recounted a dinner conversation with an Iraqi woman. In tears, the woman told him her younger brother had been taken away from his school by secret police agents after a “prank” in which he had mildly criticized Mr. Hussein. The boy was never seen again, and the woman told Mr. Bremer she was so fearful of betrayal by her own family that she waited more than 20 years, until Mr. Hussein’s capture by American troops last December, before telling her own children that she had a brother who was lost.

reject,\textsuperscript{115} this is a substantial reason to recommend trying Saddam in an Iraqi forum.

Other critics might contend that Saddam should be tried in an American forum, whether military or civilian, rather than an Iraqi tribunal. There is something to be said for this proposal, as an American trial would prevent Saddam’s supporters from disrupting the proceedings with attacks, could afford the defendants the full panoply of rights provided to criminals in America,\textsuperscript{116} could result in imposition of the death penalty, and would be conducted by experienced jurists and career prosecutors familiar with international and criminal law. An American forum would also permit U.S. victims of the Baathists to have their rights vindicated by U.S. prosecutors who represent American interests.\textsuperscript{117} To the extent that the United States has courthouses and transportation facilities superior to those in Iraq, a trial in America could permit a greater number of participants, both for the prosecution and the defense. The United States would also be safer and more convenient for all involved, including witnesses who otherwise face reprisals by Saddam loyalists, the defendants, and their attorneys.

A trial in an American forum, however, would not bear the same fruit as a trial in Iraqi courts. An American trial, despite having the guarantees of fairness and impartiality that are generally part of the American system of justice, might not be perceived as fair, particularly in the Arab world. Accusations of bias, “victor’s justice,” and a rigged trial would be bandied about,\textsuperscript{118} regardless of the Herculean efforts the United States might take to ensure fairness, especially considering that such charges are presently being leveled at the tribunal even though the United States has a limited role in assisting with the investigation. The Arab and Iranian press would almost certainly cast aspersions on the entire trial process,\textsuperscript{119} ensuring Arab refusal to

\begin{footnotesize}
\begin{enumerate}
\item The Coalition suspended the death penalty in Iraq, but the interim Iraqi government could reimplement this form of punishment. Lubrano, \textit{supra} note 3.
\item Some rights the Baathists would enjoy in America, if tried in a civilian court, and which apparently are not guaranteed to them in the Iraqi Tribunal, include the right to (1) grand jury indictment only upon a demonstration by the prosecution that a crime was probably committed; (2) trial by jury; (3) unanimous verdict; (4) verdict of guilty beyond a reasonable doubt; and (5) nonappealable acquittal. It is unlikely, however, that these additional rights would make any difference to the outcome of these cases.
\item Appearances by Iraqi, Israeli, and Kuwaiti prosecutors would also allow these nations to ensure that their interests are also represented in the prosecution, perhaps obviating the need for successive trials in these countries.
\item Cf. Editorial, \textit{Iraq’s Archives}, \textit{Wash Post}, Jan. 30, 2004, at A20 (opining that as long as documents incriminating Saddam and the Baath party “are solely under U.S. control, they will serve as a focus for rumors and conspiracy theories”).
\item Insofar as much of the Arab press seems to be out of touch with reality and unconcerned with the truth, it is a safe bet that much of the reporting will be shaded against
\end{enumerate}
\end{footnotesize}
place any stock in its outcome, which ultimately would negate some of the value of trying Saddam in the first place. 120  “Wise observers have long understood that,” at least in some contexts, “the appearance of justice is as important as its reality.” 121 Therefore, ensuring that the trials appear fair might require some accommodation of an Arabic media infected with hatred for Americans. 122 Although the United States should not kowtow to the irrational fears and prejudices prevalent in the Middle East, 123 if Americans seek to demonstrate Saddam’s evil to the world, they would be wise to do so in an Iraqi forum. 124

Importantly, an initial Iraqi proceeding would not preclude another trial of Saddam by the United States, 125 Kuwait, 126 or Israel. 127 While there may be

the United States no matter what:

For weeks after the U.S. seized Iraq, the average Iraqi relied on one source of news: Al Alam, an Arab all-news channel broadcast from transmitters Iran had constructed along its frontier with Iraq. The channel regaled its captive audience with graphic tales of U.S. “atrocity”s and a promo with superimposed shots of a U.S. Marine firing a weapon and an Iraqi mother cradling a blood-soaked infant.


120. Editorial, The World vs. Saddam, DENVER POST, Mar. 12, 2004, at B6 (“No matter which court gets jurisdiction, the trial must be perceived as being fair in both Iraq and the region.”) [hereinafter Editorial, DENVER POST]. Some members of the press will continue to denounce vehemently the tribunal process and would do so even if there was no U.S. involvement.

121. J.E.B. v. Alabama, 511 U.S. 127, 161 n.3 (1994) (Scalia, J., dissenting). As others have noted, appearances are everything in the Middle East.

122. Because of the pervasive hatred of America in the Arab world and distorted notions of justice, it is unclear whether Middle Eastern Arabs (who are not exactly known for their punctilious observance of the fundamentals of justice and due process) would ever consider a trial of Saddam to be fair. In a recent poll of Arabs in Saudi Arabia, Egypt, Jordan, Lebanon, Morocco, and the United Arab Emirates, “Saddam Hussein and Osama bin Laden tied for fourth place on a list of most admired world leaders. . . . Most Arabs polled said they believe that the Iraq war has caused more terrorism and brought about less democracy, and that the Iraqi people are far worse off today than they were while living under Hussein’s rule.” Dafna Linzer, Poll Shows Growing Arab Rancor at U.S., WASH. POST, July 23, 2004, at A26.

123. A favorite pastime in the Arab world seems to be blaming the “great Satan” and the “Zionist conspiracy” for all of the world’s ills, including the attacks of September 11, 2001. Robert L. Pollock, Mideast Peace? Let’s Start With The Rule of Law, WALL ST. J., Nov. 27, 2002, at A10 (“Arabs have too often been content to blame their consequent economic decline on others, be it a Zionist conspiracy or mere lack of First World aid.”).

124. Editorial, Mystery Trial, WASH. POST, Apr. 5, 2004, at A16 (“This tribunal has to be seen as neutral and objective, in Iraq and around the world, if it is to be perceived as legitimate.”). It would be foolish to try to address all of the irrational fears and prejudices. Regardless of the measures taken to ensure fairness, for some Arabs even “the presence of the Americans as advisers will be controversial.” Matthews & Sullivan, supra note 64.

125. Saddam and his cohorts could be made to answer for the numerous violations of the
some overlap, the crimes Saddam and his cabinet committed against the Iraqis are not the same as those committed against the United States, Kuwait, and Israel. Under the doctrine of multiple sovereignty, each sovereign nation is entitled to justice for violations of their respective laws. There is no reason, other than a desire to expedite the process, why these powers could not also

126. Saddam violated international law by making aggressive war on Kuwait, along with the looting, rape, and atrocities that occurred in conjunction with the war, including the systemic burning of oil wells when the Iraqi Army retreated. See Abdullah, supra note 31, at 194 (“[T]he retreating Iraqi troops set fire to most of Kuwait’s oil wells, which continued to burn several weeks after the cessation of hostilities, causing a great environmental disaster.”).

127. The Baathist crimes against Israel include financial support of Palestinian terrorists and the Scud missile attacks launched against Israel during the first Persian Gulf War. Landesman, supra note 101, at 34 (mentioning the Scud missile attacks on Israel); Evan Smith, The World According to Bob Inman, Tex. Monthly, Mar. 2004, at 145 (mentioning Iraq’s support of terrorism).

128. Indeed, “Kuwait wants to charge Hussein for crimes committed in the 1991 war, including killing, kidnapping and raping civilians. Kuwait, though, may agree to wrap its case into an Iraqi trial.” Editorial, Denver Post, supra note 120.

129. Abdullah, supra note 31, at 194 (In the first Gulf War, “Iraq offered little resistance but tried to win support within the Arab world by firing a number of modified Scud missiles into Israel.”).

130. Heath v. Alabama, 474 U.S. 82, 88 (1985) (noting that when “a defendant in a single act violates the ‘peace and dignity’ of two sovereigns by breaking the laws of each, he has committed two distinct ‘offenses’”); United States v. Wheeler, 435 U.S. 313, 317 (1978) (holding that prosecution in Indian tribal court followed by trial in district court did not violate the Double Jeopardy Clause); United States v. Langa, 260 U.S. 377, 382 (1922) (“Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.”); Moore v. Illinois, 55 U.S. (14 How.) 13, 20 (1852) (observing that where a crime offends the laws of two states or nations, “either or both may (if they see fit) punish such an offender”); United States v. Rezaq, 134 F.3d 1121, 1128 (D.C. Cir. 1998) (prior criminal trial in Malta did not prevent subsequent trial in the United States because the defendant’s actions constituted a crime against both countries); United States v. Richardson, 580 F.2d 946, 947 (9th Cir. 1978) (per curiam) (discussing sequential prosecutions in Guatemala and the United States).
subject the Baathists to justice in their own tribunals at some later date.\footnote{Of course, this requires holding off on imposing the death penalty until each nation has had an opportunity to bring Saddam to trial. It is questionable, however, whether the additional quantum of justice to be obtained by serial trials is worth the delay.} By allowing the Iraqis to have the first crack at Saddam and the Baathists, the United States and its Coalition partners can demonstrate that they trust this budding democracy to afford Iraqis the justice they deserve.\footnote{After finishing off Saddam and his henchmen, the Iraqis should set their prosecutorial sights on the French, Russian, and U.N. officials who helped Saddam loot the Iraqis through the U.N. sponsored “Oil for Palaces” program. \cite{See Gingrich, supra note 86 (“The people of Iraq deserve the truth, and they deserve to have their money back. All those involved who are found to have illegally received money through the Oil for Food program, which was intended for the people of Iraq, should face criminal prosecution and be forced to return their ill-gotten gains.”).} But should the Iraqis fail in this endeavor, or shrink from the responsibilities of justice, the United States would be free to exercise its own right to redress Baathist crimes against U.S. victims in an American forum.

\section*{II. Conclusion}

Iraq still has a long way to go before it joins the club of free democracies, and even the most starry-eyed optimist must entertain doubts about whether Iraqis are up to the task.\footnote{“Americans cannot make Iraq a liberal democracy. But only Americans can give Iraq a chance at liberal democracy.” \citeDavid Frum, Our Man for Iraq, Nat’l Rev., Mar. 10, 2003, at 56.} Poverty,\footnote{“[T]he most common and durable source of factions has been the various and unequal distribution of property.” \citeTHE FEDERALIST No. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961). But other nations, including the United States, have experienced and survived factional differences. \citeMANION, supra note 86, at 15 (“Soon after the last British army had surrendered, events began to shape up just as the ‘experts’ had predicted. The ‘groups,’ ‘divisions’ and ‘classes’ of the American population began to move against one another. Conflicts and disagreements between regions, races, farmers, merchants, debtors, creditors, soldiers and civilians flared up violently in all parts of the country.”).} inexperience with the rule of law,\footnote{For example, “Iraq has not had a criminal justice system worthy of the name for decades.” \citeEditorial, MILWAUKEE J. SENTINEL, supra note 2.} lack of infrastructure,\footnote{Nicholas Riccardi, Disorder in Iraq’s Courts, L.A. Times, Feb. 23, 2004, at A1 (discussing the problems involved in running Iraq’s courts, including frequent power blackouts); Fred Barnes, The Bumpy Road to Democracy in Iraq, \citeWKLY. STANDARD, Apr. 5, 2004, at 2 (mentioning the primitive banking system of Iraq).} religious strife and a rising tide of Islamic fundamentalism,\footnote{See Barnard, supra note 27 (noting that the attacks on Sunni and Shiite neighborhood} tribal and ethnic feuds,\footnote{\cite} lack of a national identity,\footnote{\cite}}
mosques and religious figures may be the start of wholesale sectarian conflict); see also Borzou Daragahi, *Islamic Parties Outpoliticking Secular Opposition: Religion Takes Head-Start Lead to Fall Elections*, WASH. TIMES, Mar. 27, 2004, at A8 (noting that religious factions in Iraq have “formed well-armed militias”); Mark Magnier, *Iraqis Are Looking for a Strong Leader*, L.A. TIMES, Apr. 4, 2004, at A10 (“Islamic fundamentalism has emerged as a counterforce to democracy, not just in Iraq but throughout the region.”).

138. A large number of small factions are generally more divisive than a few large factions. See Charles Evans Hughes, *Conditions of Progress in Democratic Government* 69 (1910) (“If instead of two great parties we had a large number of little groups, each intent upon its own shibboleth and pressing its own candidate and policies, we should have a series of triumphant minorities, little or nothing would be settled, and the progress and prosperity which depend upon stability of government would be impossible.”).  Iraq is illustrative:

Iraq is a segmented society whose modernity has always been a thin veneer on a tribal society. It is about the farthest thing one can imagine, sociologically speaking, from Germany or Japan circa 1945. That veneer wore away to near nothing thanks to 30 years of Baathist thuggery and terror, so when the terror gave way, the society reverted to its most natural mode of social organization: the tribe, reinforced by religious affiliation.


As a means of maintaining his own power, Saddam also fomented friction among tribal, geographic, religious, and ethnic groups, using the rationale that this would keep these groups from joining forces to oppose him. Magnier, supra note 137 (“Hussein pitted Sunni Muslims against Shiites, the south against the north, the Kurds against the Arabs and his inner circle against everyone else.”); Christopher Hitchens, *Fallujah*, WALL. ST. J., Apr. 2, 2004, at A8 (Baathists played off “tribe against tribe, Arab against Kurd and Sunni against Shiite.”).

139. Faisal I, Iraq’s first king, described his subjects this way:

There is still — and I say this with a heart full of sorrow — no Iraqi people, but an unimaginable mass of human beings devoid of any patriotic ideas, imbued with
sexism,\textsuperscript{140} and corruption\textsuperscript{141} plague Iraq and suggest to many that a dream of an Iraqi democracy may end in a nightmare of civil war.\textsuperscript{142} Still, the United States is affording Iraqis a valuable opportunity to take the reins of justice and participate in the rule of law, which is the primary means of gaining credibility in the free world.\textsuperscript{143} Although the tribunals will undoubtedly resurrect a number of unpleasant memories, they will also have a cathartic effect for Iraqis struggling to purge themselves of the vestiges of Saddam’s regime.\textsuperscript{144} There is

religious traditions and absurdities, prone to anarchy and perpetually ready to rise against any government whatsoever.

Barnes, \textit{supra} note 136; \textit{see also} Smith, \textit{supra} note 127, at 144 (“I looked at Iraq as having a great potential for being like Yugoslavia. You’ve got Sunnis, Kurds, and Shiites. It could easily break apart on religious and ethnic grounds. It’s going to take strong leadership from a strong central government to keep that from occurring.”).

140. \textit{See} Dexter Filkin, \textit{U.S. Envoy Promotes Role of Iraqi Women}, \textit{N.Y. Times}, Feb. 17, 2004, at A8 (noting the inequality women face in Iraq, despite being a clear majority of the population because of the deaths of so many men); \textit{see, e.g.}, \textit{IRAQI PENAL CODE} ¶ 41 (July 19, 1969) (creating a defense to the crime of battery when the assault involves the “punishment of a wife by her husband”).

141. According to one reporter, Saddam leaves a legacy of corruption at all levels of Iraqi society:

\begin{quote}
Under Hussein, public employees were so poorly paid that they demanded bribes from the public to feed their families. Because the totalitarian regime sought total control of its citizens’ lives, payoffs pervaded virtually every level of society. Kickbacks were needed to get a passport for the hajj pilgrimage, evade a police checkpoint, build a house or get out of the army.

Top officials plundered the treasury to the extent that even Hussein’s personal poets were recently arrested by Interpol on the suspicion of financial crimes.

And the corruption has continued since the regime’s ouster.
\end{quote}


142. Notably, there is an inverse correlation between corruption in a society and the amount of democracy and freedom. At first blush, this might suggest that a society like Iraq where corruption flourishes is doomed to totalitarianism. But the chain of causation may actually be reversed: the more intrusive government regulation is — such as existed in the Soviet Union — the more opportunity there are for bureaucrats to seek bribes not to enforce the laws, and the more laws there are to be evaded by unlawful means. \textit{See} John Norton Moore, \textit{Beyond the Democratic Peace: Solving the War Puzzle}, 44 \textit{Va. J. Int’l L.} 341, 350 (2004).

143. “The only way known to history in which people can prevent the state from controlling their lives is for them to control their own.” \textit{FULTON J. SHEEN, ON BEING HUMAN} 262 (1982).

144. “The Iraqis must see this man be tried to finally be freed from him.” Struck, \textit{supra} note 73; Sengupta & Burns, \textit{supra} note 114 (“Many Iraqis say that having a court composed of fellow Iraqis try the former dictator could provide a kind of catharsis that an international tribunal could not.”). \textit{But see} Dexter Filkin, \textit{Iraqis Joyful, Or Stung, To See Ex-Ruler In Dock}, \textit{N.Y. Times}, July 2, 2004, at A1 (“When Rafa al-Dulaimi saw Mr. Hussein’s face on television, he quickly switched off the set, not because he found Mr. Hussein’s arraignment objectionable, he said, but because he felt like the past needed to be forgotten. ‘The Iraqi
people have a new government now, and we are trying to turn the page,” Mr. Dulaimi said. ‘The past is going to cause too much trouble.’”).

145. For this reason, the U.S. Constitution “entitles a criminal defendant to a fair trial, not a perfect one.” Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986).

146. Saddam Hussein’s Trial, supra note 24 (noting that “no trial of Saddam Hussein and his henchmen will satisfy everyone”).

147. Hussein “‘committed crimes against Iraqis first and foremost, and it’s the Iraqi people that will bring him to justice.’” Eggen, supra note 36 (quoting J. Adam Ereli of the U.S. Department of State).