



THE NYU REVIEW OF LAW AND SECURITY

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Are We Safer?

In New York City? In our states?
In the country at large?

Are We Safer?

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From the Director

THE HEARTS AND MINDS OF AMERICANS: LANGUAGE, FACTS AND A NATION IN FEAR

Strolling down the street, sitting in traffic, listening to campaign slogans, one hears the question daily: “Are We Safer?” Whether we want to or not, we cannot help but bend our ear in the direction of the voice that promises an answer. Rarely is the answer firm or reassuring. Always, it seems these days to be partisan or driven by political concerns. “Yes, we are safer,” the Republicans tell us, except when they want to encourage fear as a basis of support for continuity in the White House or for the war in Iraq. “No,” the Democrats tell us, figuring the image of the Republicans as insufficient protectors cannot but help the Democrats in the coming election. Citizens line up accordingly. But the question of the nation’s safety is only partly a matter of conjecture; it is also a matter of fact.

Since September 11, the country has taken numerous steps legislatively, judicially, militarily and in the Oval Office to ameliorate weaknesses in our security system. Some of these measures have proven effective, some have not. Policymakers continue to scrutinize the efficacy of our border control, our information gathering and other counterterrorism measures in the hopes of assessing these measures. But in the heated political atmosphere, the conclusions on both sides have become suspect.

The relationship between safety and the legitimacy of authoritative analysis is not something to be overlooked. The respect for language is a sign of the authenticity of the relationship between citizen and state. It is, in that sense, fundamental to a functioning democracy. Education, as envisioned by Jefferson and the founding fathers, was first and foremost education of the citizen and at the heart of that education was the proper and learned use of language. In the context of American society, religious doctrine reinforces in theory the sanctity of impeccably used language.

If language is an inviolable basis of the social (and personal) contract, it is also the first tool in the battle for power. As language goes, so goes politics. George Orwell insisted that there is a direct correlation between the integrity of politics and the honesty with which those in power use language. So, too, for the obverse. “Corrupt language leads to corrupt politics.”

Consider, in this context, the use of language by President George W. Bush and his administration. On the one hand, we have the President who displays a disregard for the word so much so that it has become a trademark of sorts. “Nuclear,” not nuclear, “subliminal” not subliminal, “embetter” not improve, “resignate,” instead of resonate. More, he relishes the colloquial, in his case, the slang of American Westerns. When it comes to Osama, his goal is to “Smoke ‘em out,” and when it comes to the insurgents in Iraq, he dares, “Bring ‘em on.”

But while George Bush downplays language as something to respect and pay too much attention to, his administration is busy lobbing terms of great import at the American public. In the battle for the hearts and minds of Americans, Bush’s circle of advisors has created a lexicon of terms aimed at persuading the American mind with the word itself. The terminology which labels the multiplicity of changes on behalf of national security and the war on terror are full of examples: Homeland Security, the Patriot Act, and the Citizens Corps. Not to mention the use of value statements as strategic euphemisms designed to quell further thought, as if to say that he who first labels

the situation, wins the battle of interpretation. Take, for example, the word ‘coalition,’ which in reality consists of U.S. troops with comparably negligible troops from England and a few small countries; or the statement that the U.S. is “bringing democracy and freedom” to the Middle East. This use of words as “euphemism, question begging and sheer cloudy vagueness,” Orwell’s description of politically slanted speech, is a basic technique of language misconstrued for political ends: “liberation” instead of occupation, “military justice” instead of incommunicado detention, “unlawful combatant” instead of prisoner of war, “collateral damage” instead of civilian deaths, “enabling interrogation” instead of torture, and so on.

American policymakers are eminently aware of the firepower of linguistic ammunition and of the importance of George W. Bush seeming like a confused, lost communicator. It is part of the process of spinning the nation. If Orwell were around, he might want, in the case of President Bush and his entourage, to add a new category for the current state of affairs: posing. How could someone as clueless and full of human foibles have an evil plan? He’s just a regular guy, with a regular guy’s language. What he says must be right. It’s just down-home, simple fact. Criticism of the government is treason, lack of support for the President is a lack of support for the troops, spending American lives and money abroad at the rate of 20 million dollars a day is patriotism and love of country.

Yet in contradistinction to the signs of verbal laxity on the part of Bush, the careful selection of words, coordinated at the executive level, to launch the war in Iraq and by extension the war on terror at home, has been a strong and unflagging tactic of the Bush Administration as they have tackled the Axis of Evil and the possibility of unknown terrorists among us. They understand, as the political philosopher Hannah Arendt once wrote that the misuse of facts, the use of “deliberate falsehood,” is “clearly an attempt to change the record, and as such, it is a form of action.” Powell’s insistence before the U.N. that there was “evidence, not conjecture” of WMD’s in Iraq, and that his facts were “true” and “well-documented” has turned into the admission that there did not seem to be weapons of mass destruction. The public denial of any knowledge of torture practices and the subsequent release of documents sanctioning torture would be another case of the use of misinformation as action. The duplicity was intensified by the attack on those who questioned the initial assertions of the government. Rumsfeld, members of Congress and others attacked the media for “hurting our chances,”

by “dwelling upon the mistakes, the ambushes, the soldiers killed, the wounded,” rather than the signs of progress.

And what of the Democrats? It seems they have lost their dictionaries and have ceded to the Republicans the role of wordsmiths, as if one of the perks of power is the right to control language. One can only assume either that they agree with the Republicans on some level, or that they are scared. The Republicans, they know, will label their words propagandistic and they want to avoid that, it seems, at all costs. But what about taking an oath to use language simply as it is used in the dictionary? Killing is killing, whether it is by a terrorist or an American soldier. From that, they could graduate to facts. The numbers of dollars spent and Americans killed is not an abstraction; it is not a matter of debate. It is a fact. As is the relationship between the Saudis and the Bush family, whether harmful or benign. And so on.

The press has not always been helpful. They have helped spread the factual errors of the Bush Administration by refusing to fact-check, as if unwilling to put themselves in the position of pointing to errors of fact. There was no yellow cake uranium sent to Niger. There were no weapons of mass destruction. There was little to no chance that the oil in Iraq would be able to be sold on the market until after a complete rehaul costing vast sums of time and money reengineered them for producing crude oil.

The fact is that Democrats and Republicans alike have ceded to the Bush Administration's unspoken conviction that all words, all use of facts are ideology. In this, there is tremendous victory. No words are valuable; no facts, it seems, are without spin. Everything, it is agreed, is opinion.

How do we find a language of honesty? Vaclav Havel had some advice. The first premise is to look at the facts. The U.S. invaded Iraq, for example. For what reasons it did so is interpretation. What we should do now is a matter of conjecture. And so on. If we start with the facts and keep listing facts, self-consciously and with restraint, perhaps we will eventually have a firmer, less ideological ground upon which to make judgments. “Conceptually we may call truth what we cannot change. Metaphorically, it is the ground on which we stand and the sky that stretches above us,” wrote Hannah Arendt.

This issue represents an attempt to look at the facts as stepping stones to grounded conclusions, or at least as windows of information rather than opinion for inclusion in our store of opinions. We have included the debates on the safety of the country, on the Patriot Act and on Homeland Security but we have tried to present these within the context of knowledge about the terms used, the statistics available and the goals achieved or missed. In acknowledging the degree to which language has become the prisoner of ideology, the issue is an attempt to return to basics: first the information, later the interpretation. Perhaps in answer to the question, “Are We Safer?” we should be asking, “Do We Feel Safer?” The answer is apparently no. It is hard to feel safer when we know at heart that we are proceeding along the lines of duplicity in our means of communicating and assessing our current status. The hope is that eventually more knowledge will yield more trust. When we trust that there are facts without spin, perhaps then we can make some conclusions.

First the ground, then the sky.

— KAREN J. GREENBERG





The View from New York

OVERVIEW

The NYPD

On November 15, 2003, the Center on Law and Security hosted a conference entitled: “Are We Safer?: Transformations in Security After 9/11.” The goal of the conference was to look at the structural and tactical changes in counterterrorist strategies that followed September 11. The Center’s intent was to begin by documenting those shifts in policy and determining their influence on other areas of law enforcement. The event included representatives from law enforcement, from the Bush Administration, from the legal community and from policy think tanks. Participants had two charges. Their first mandate was to address the facts—to see themselves as documenting changes—even as they made assertions about our nation’s safety. While opinion was divided, as many expected, between Republicans and Democrats, *there was general consensus that we were not safer and that the reasons lay more in managerial problems and incompetence than in a lack of procedures and policies on the books.* A second mandate was to consider ways in which the changes in law enforcement policy that had resulted from the new emphasis on counterterrorism had spread into the policies and procedures of crime fighting generally. In regard to this second topic, there was little disagreement. *The challenge of fighting terrorism has substantively changed the priorities and methods of law enforcement.*

The panel on security in New York City and New York State set parameters for understanding the security of the nation. In counterterrorist circles, there is much agreement that New York City continues to be the most likely target of terrorist plans for attack. With that threat in mind, the New York City Police Department (NYPD), under the direction of Commissioner Ray Kelly (see Profile, page 11), Deputy Commissioner of Intelligence David Cohen (see Profile, page 11) and Deputy Commissioner of Counterterrorism Michael Sheehan (see Profile, page 11) has reconfigured its practices to be in a constant state of preparation.



Frequent tabletop exercises are supplemented by constant attention to the practices and policies of other police departments experienced in counterterrorism, notably the counterterrorism forces at New Scotland Yard and in Israel. As former Police Commissioner Howard Safir points out in the following pages, reliable, first-hand information delivered quickly is essential to the effective fight against terrorism. Moreover, as R.P. Eddy posits, the constant vigilance and activity of the largest police force in the nation has set some precedents for law enforcement. Accordingly, the NYPD has stationed its own men at strategic places around the world to interface on counterterrorism with other police departments. In addition, the NYPD has altered its tactics, when advisable, to favor surveillance rather than precipitous arrest and to reconsider the ways and means of penetration as an essential tactic of counterterrorism. And in matters of intelligence gathering and security planning, the NYPD has subsumed some of the work traditionally left to federal law enforcement.

The task of protecting New York City remains a daunting one, often considered akin to a series of baseball games which by definition have to be no-hitters, night after night. But as you will see in the excerpts below, the challenge has garnered the energy of a uniquely experienced and thoughtful group of law enforcement officials.

VIEWPOINTS

In New York City

Expertise in the area of national security often comes down to the local context. Issues of organizational structure, funding, and policies for coordinating with federal and foreign intelligence agencies are prerequisites for the more substantive matters of community relations, penetration and intelligence sharing. Below are some of the suggestions that experts see as necessary for federal and state policies affecting local—and specifically New York City's—counterterrorism.

Contributors to this discussion included:

- **Moderator Daniel Richman**, Professor of Law, Fordham University
- **Mark Cohen**, Deputy Director and Chief Counsel of the New York State Office of Public Security, New York State Homeland Security Office
- **R.P. Eddy**, Senior Fellow for Counterterrorism, Manhattan Institute; Former Senior Policy Officer to United Nations Secretary-General Kofi Annan; and Former Director of Counterterrorism, National Security Council
- **Peter Leitner**, Director, Higgins Center for Counterterrorism
- **Howard Safir**, Chairman and CEO, Safir Rosetti, Omnicom Group Inc., Former Police Commissioner of New York City

DANIEL RICHMAN

A Thoughtful Note

The title of this session, “The View from New York,” can be addressed in a passive sense or in an active sense. In a passive sense, you can understand it as asking what are federal authorities and the people responsible for protecting our homeland doing for us, as New Yorkers?

The better way to understand the title is: What are New Yorkers and localities like New York throughout the country doing as a part of a larger Homeland Security program?

HOWARD SAFIR

Strengths and Weaknesses in the Fight Against Terror

Are we safer since September 11? I think the answer to that is probably not yet. And one reason is that the task that has been put before

us since September 11 (and which should have been addressed way before September 11) is a daunting one.

We talk about the new role of police agencies in the United States. What I find is that once you go outside of major metropolitan areas, the role of law enforcement has not significantly changed. Certainly, the chiefs of departments outside of major metropolitan areas will tell you that they are concerned about biochemical and nuclear disasters.

But when you look at the actual operation of their police departments, things are going on exactly the way they were before, except for the fact that they are now beginning to get a tremendous amount of funding from the federal government, which I think is part of the problem and part of what needs to be addressed here today (see section on Homeland Security page 32).

Funding

Specifically, anti-terrorism funding is distributed in the same manner today as federal funds have been distributed probably since the 1700s. Every Senator and Congressman earmarks something for his constituency; so, per capita, Montana is getting a lot more in terrorist funding than New York City is. One of the things that we really have to change in Washington is the way that we distribute these kinds of funds. The President and the Congress have to step up to the plate and realize that the threat to New York City, Los Angeles, Chicago and Miami is considerably different than the threat to Boise.

Intelligence Gathering

A second thing that I think is very important and which we need to discuss today is intelligence and how that intelligence is distributed, and cooperated with and used.

One of the failures pre-9/11 was the inability or the incompetence, depending on where you are, of our intelligence organizations to use human intelligence, which is something that was really destroyed starting in the '70s with Senator Church (see Facts of Note, page 9) and his successors, who pretty much made our intelligence agencies impotent in their ability to use human resources because you weren't allowed to use “bad terrorists.” As a result of that, we relied tremendously on technical intelligence, which is

not going to tell you when somebody is going to fly something into the World Trade Center.

Another problem of intelligence gathering is the lack of use of open source information, such as public record information. Just

to give you a sense of this problem, the 19 terrorists aboard the 9/11 planes opened 35 bank accounts in this country before September 11 using phony Social Security numbers for every one of those bank accounts. *Had we had a system, which we are now beginning to put in place, where you could check those Social Security numbers to see if they were, in fact, real or connected or used by the wrong person, there might have been a flag that, in fact, there was something wrong here.*

There are billions and billions of public records available, a fact which raises the issue of privacy and civil liberties. Alan Dershowitz and I have probably never agreed on one thing in my entire career, but we do agree on something that he said two years ago in an Op-Ed

statistics

NYPD BUDGET

In its 2005 budget, the New York Police Department has included a total of **\$18,080,016** for counterterrorism resources, including:

\$131,096 for supplies and materials in general in the Patrol Services Bureau

\$15,353,442 for special expenses, other than personnel, in the office of the Police Commissioner

\$2,551,078 for a counterterrorism helicopter

and **\$44,400** for special expenses in the office of the Deputy Commissioner

piece in *The New York Times*, a piece which I think was brilliant. He said, "U.S. citizens are entitled to privacy. They are not entitled to anonymity." It is very, very important to note that the government has a right to know who you are. We should not know what you read. We should not know what you do in the privacy of your own home. We should not care very much about your political beliefs, but we should certainly have the right to know that Howard Safir is Howard Safir and that when he represents himself at both public and corporate events, he is, in fact, who he says he is.

Had we had similar kinds of requirements in place prior to September 11, I am not sure we could have stopped it, but I think there would certainly have been a much better chance of us finding out that these 19 individuals were connected, and were involved in something that did not appear to be legitimate.

On the more macro level, are we vulnerable? I will tell you in this city our ports are open. On our airports, although we have done incredibly well in airport screening, we have done very little relative to the back end of airports. I could penetrate just about any airport in this country right now very simply on the back end. Cargo is unrestrained. Millions and millions of containers come into this country each year. Less than three percent are screened. Our immigration service in the past has been a joke. We have been unable to track visitors to this country.

A National Identity Card

One of the things that I think we really need to focus on in the future is the use of biometrics in both visas—and again another thing that Alan Dershowitz and I agree on—in a biometric national identity card which will basically enable you to prove that you are who you say you are to the exclusion of all others. The existence of this card will prevent people from being harassed, investigated and bothered, because law enforcement will instantly know that you are, in fact, who you represent yourself to be.

The bottom line is that we have a very long way to go. The Department of Homeland Security, which is an amalgamation of 22 agencies and 170,000 employees, is going to take a very long time to get up and running in an effective manner, because they are not starting with well-functioning agencies to begin with.

The real issue is that people who have been doing things for a very long time in bureaucracies tend not to want to do new things. I call

RECOMMENDATION FROM "THE 9/11 COMMISSION REPORT"

Homeland security assistance should be based strictly on an assessment of risk and vulnerabilities. Now, in 2004, Washington, D.C. and New York City are certainly at the top of any such list....[F]ederal homeland security assistance should not remain a program for general revenue sharing.

this "malicious obedience." I found this out when I began running the U.S. Marshal Service and came in, having been in another agency. People do exactly what you tell them to do, no matter how stupid it is. I see a lot of malicious obedience going on in Washington right now, which needs to be fixed.

R. P. EDDY

New York City as a Model

Dr. Greenberg started us off by saying police are not what they used to be, and I would agree and add that in New York, the police have taken their own bold initiatives to fight terrorism. Still, especially outside of New York, police are not what they need to be. To some degree this is because the federal system is still not properly conceiving of the capabilities or the roles of local police.

Federal vs. Local Police

I would like to describe briefly why local policing is increasingly important and why some cities may want to follow the model that New York City is beginning to follow to augment their counterterrorism capabilities. Many

experts agree that the terrorist threat is quickly gaining a dangerous local dimension and therefore is less susceptible to traditional federal level prevention efforts. Many agree that this evolution from global to local terrorism reveals that our local police, like some of our federal forces, are actually beginning to become the first line of counterterrorist defense.

Local police are actually well-suited to this role, if they are enabled. *The New York City Police Department is actually revolutionizing the way cities can address counterterrorism and potentially offers a model for other cities in North America.*

When I worked on counterterrorism at the federal level in the mid-90s, we generally conceived of the Islamist terrorist as an outsider, someone who was recruited extensively, socialized, trained for terrorist operations, and then put in place or sent to a target. All the way along the line we hoped that this terrorist would be triggering intelligence trip wires.

Homegrown Jihad

That definition is not obsolete, but it is incomplete. No longer do we have to deal



simply with international terrorists who would trigger these trip wires, but in fact, there are probably two other trends we should consider about locally bred terrorism. The first is homegrown jihad. By this, I mean terrorist acts planned by groups that have a domestic U.S. base. They may work with a foreign organization, but they do not submit direct reports to that organization, as the 9/11 hijackers did.

A good example is the six Yemenis, most of them just out of high school, who were arrested in Lackawanna, New York. Some of these gentlemen trained at the Alpha Boot Camp in Afghanistan, some actually in Osama bin Laden's presence. It is not clear if they met with him, or if they just heard him speak.

Another example would be some of the 1993 World Trade Center conspirators who were living in the U.S. before they were recruited and organized by Ramzi Yousef.

Lone Jihad

The second trend is lone jihad. These are one man acts of terror. The lone wolves can also be homegrown jihadists, but they need not be. There are a couple of relevant examples of this.

[Hesham Mohamed] Hadayet, on the Fourth of July 2002, shot up the El Al terminal at LAX. There appears to be no connection between this guy and any known terrorist organizations, yet he committed an act of terror.

Also, Jose Padilla is an ex-member of Hispanic gangs. He spent time in a federal penitentiary, but he consorted with al Qaeda. He was radicalized by different influences, particularly in the prison system, and was alleged to have built a bomb to disperse radioactive dust in Washington D.C.

Sergeant Akhbar, the Islamic soldier who threw a hand grenade into his commander's

tent in Iraq, is another example. As is Charles Bishop, the Florida high school freshman, who crashed his airplane into a Tampa building after he buzzed the MacDill Air Force Base, the control tower, by only a few feet and a series of KC-135 Strato tankers which were loaded with fuel.

The Spread of Jihad

The reason we are seeing these loners and these homegrown actors is complicated. We have to acknowledge that ideas and emotions matter and that the radicalizing influences on potential jihadists have spread. Some channels are the continued and sophisticated propaganda efforts of al Qaeda, the emergence of other radicalizing Islamic theologies and the widespread effort by Islamists to use prison ministries to convert people, as they did with Jose Padilla.

Another reality is that opportunities matter. As al Qaeda's ability to train and infiltrate is degraded by our international counteractions, homegrown and lone jihad provides a dangerous outlet for this intractable rage. It is a much easier way for them, and perhaps to some extent, the only way for this theology to manifest itself into violence. What is most actionable and important about both of these trends, lone jihad and homegrown jihad, is that neither of them fit the 9/11 model or our general model about how al Qaeda and other relevant groups commit terrorist attacks against the United States. It is those models upon which we are now building our national capabilities.

The operational profile of these domestic based terrorists is more akin to that of an ordinary criminal. They may hold regular jobs; therefore, they may not need money laundering. They may not have to use the informal Hawala system for transferring funds. They

may not have to use money transfers. It is not necessary for them to cross borders, so they are less likely to have fake I.D.'s. In other words, these jihadists will not necessarily snag the federal trip wires upon which we rely. So the more we do rely upon these trip wires, the less likely it is that we will be able to intercept or prevent these acts of terror.

The obvious conclusion to this is that, as the threat becomes more localized, our counter-measures must also become more localized. The good news is that in a number of real ways local police are actually well-suited by their very nature to take on this role, if they are so enabled. And right now, they are not.

The first obvious example is the raw numbers. There are over a half million state and local police officers compared to just a few thousand federal counterterrorism officials who actually are investigators. Police have superior local knowledge. They have knowledge of communities. They have developed close relationships to the people within those communities, and they generally have greater insight into these communities than their federal counterparts. Our moderator, Professor [Daniel] Richman notes this in a recent paper of his (Daniel Richman, "Law Enforcement Federalism After September 11," *Boston Review*, Volume 31, Number 6). One sort of extraordinary example is that leaders of the Ann Arbor Arab American community asked a local police officer to be present during post-9/11 interviews by the FBI of Arab Americans.

Another ray of hope in countering this emerging trend of increasingly localized and domestic terrorism is that, contrary to the general stereotype, it is the local police who actually have the superior skills and experience at some of the core competencies necessary to prevent terrorism, particularly investigation and interrogation.

A veteran New York Police Department detective will have in order of magnitude more experience interrogating and investigating crimes than his federal counterparts. As these guys say, "They've been lied to by everybody."

So, if the emerging threats mean local police must do more, and the realities mean that they can do more, how exactly should they configure themselves and what should they do? The NYPD has been grappling with this, of course, since September 11, and in the process, has undergone a huge transformation.



“COUNTERTERRORISM BEGINS AT THE STATE AND LOCAL LEVEL. NATIONALLY, THERE ARE MORE THAN 685,000 POLICE AND SHERIFFS. IN OUR STATE ALONE, THERE ARE 75,000 SWORN POLICE OFFICERS AND SHERIFFS.”

—MARK COHEN



Model Police Department?

There are three highlights in the transformation of the NYPD in response to September 11, highlights that could potentially be models for other North American cities. The first is that there has been a radical increase in counterterrorist capabilities. The NYPD is devoting 20 times more man-hours to counterterrorism.

The NYPD intelligence division now allocates 35 to 40 percent of its resources to counterterrorism as compared to just about two percent before 9/11. First, look at who Police Commissioner Kelly is hiring (see Profiles, page 11). David Cohen (see Profiles, page 11) is now the Deputy Police Commissioner for Intelligence; he was recently the Deputy Director of the CIA for Operations as well as the Deputy Director of CIA for Intelligence.

The new Deputy Police Commissioner for Counterterrorism is Mike Sheehan (see Profiles, page 11), who was a Special Forces colonel, a Director of Counterterrorism at the National Security Council, U.S. Ambassador at Large for Counterterrorism. Cohen and Sheehan are world-class officials, world-class federal leaders in the war against terrorism.

Secondly, the NYPD—and this is probably most controversial and maybe most interesting—the NYPD has entered the territory traditionally reserved for the Feds. For instance, the NYPD is posting officers abroad. They are creating and consuming much more of their own intelligence, and ironically in the post-9/11 world, the NYPD is less reliant on the CIA and the FBI for intelligence and provision of intelligence. The NYPD is increasingly turning to their own capabilities. This is not to say that they are not still huge consumers when they can be of national level intelligence, but they are really trying to build their own capabilities in intelligence collection as well as analysis. The NYPD is creating their own core, their own cadre of international

THE CHURCH REPORT, 1976

The Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, also known as the “Church Committee,” was named after the former Democratic Senator from Idaho, Frank Church. As its chairman, Church conducted a wide-ranging investigation of the intelligence agencies in the post-Watergate period. The results of that investigation (including the discovery that the CIA had withheld information in the investigation of President John F. Kennedy’s death, and that both the FBI and CIA had targeted Martin Luther King and endeavored to destroy his image) led to the imposition of FBI and CIA guidelines that severely restricted their surveillance and investigatory authority.

The Church Committee Report is available at:

www.thirdworldtraveler.com/FBI/Church_Committee_Report.html and
www.aarclibrary.org/publib/church/reports/contents.htm

counterterrorism experts to provide advice to them and to address some of their most difficult questions, to help shine and share insights from the way other nations have defeated terrorism and bring that knowledge to bear in New York City.

Finally, the NYPD is probing proactively, with the concept of prevention and not investigation. NYPD detectives have visited over 1000 businesses around the city. They are visiting heliports, chemical and explosives stores, scuba diving stores, etc. They are building a front line defense. They are trying to prevent things. They are also running a new kind of quasi-special operations, such as heavily armored Hercules teams (see Programs of Note, page 12) which roam New York to act on warnings and to disrupt terrorist plans aimed at high risk targets. It is worth noting the necessity of a robust outreach with the private sector, with real estate companies, with private security firms, and with others to create a force-multiplier effect to prevent terrorism.

So the conclusions should be fairly obvious. *Successful Homeland Security strategy cannot solely rely on, nor solely provide resources to the federal agencies to prevent terrorism. There has to be an increased investment in state and local agencies in recognition of their potential role in preventing terrorism. A prescient strategy will ensure that the unique capacities of state and local law enforcement are integrated into a national counterterrorism prevention program.*

In New York State

MARK COHEN

Homeland Security and New York State

New York State’s Office of Public Security, created in the aftermath of the 9/11 tragedy, was one of the very first state Homeland Security offices. Nationally, there are now 55 state Homeland Security and territorial Homeland Security offices.

Homeland Security is best understood as four concentric circles. 1) The international circle, 2) the Department of Defense, 3) the Department of State and the CIA, and 4) the state and local efforts. In New York State, we have three joint terrorism taskforces. Those taskforces have approximately 350 police on them. That is local police and state police, both working with FBI officials.

Counterterrorism begins at the state and local level. Nationally, there are more than 685,000 police and sheriffs. In our state alone, there are 75,000 sworn police officers and sheriffs, 38,000 of them are of course in New York City. The remainder are in other areas of the state. We happen to have in our state 543 police departments and sheriff’s offices. It is a huge amalgamation, from departments as large as that of New York City, to the vast majority of departments, which are those with less than 20, even less than 10 police officers.



“PEOPLE WANT TO BE SAFE. THEY WANT TO BE HAPPY. THEY WANT TO LIVE A NORMAL LIFE. BUT ARE WE SAFER SINCE 9/11? THE ANSWER IS UNEQUIVOCALLY, “NO, WE ARE NOT SAFER.” ”

—PETER LEITNER

Our state has done some rather extraordinary things. First, we have divided the state into sixteen counterterrorism zones. The zones range from Zone I, Long Island, through Zone II which is all of New York City, up to Zone 16 which is Rochester. Each zone has counterterrorism units. Information sharing is enabled within the zones and through the zones through what is the first, in terms of quality, in the nation's counterterrorism network. It is a stand alone, secure system. Information is shared with law enforcement and with sheriffs and with related sectors, such as aviation, marine, health and the like. There are now within our state 337 counterterrorism network units installed throughout the state.

We have to be able to do what has literally been unthinkable in the past, and that is to be able to link up law enforcement on the local level with the federal intelligence community. We were visited by the Central Intelligence Agency in the past year, a rare

and radical occurrence. They said, “Hi, we're from the federal government. We're here to help you, but we don't know quite how, because we have never dealt with state and local law enforcement in the past.” Since then, they have provided the beginnings of a system which will enable the appropriate dissemination of relevant counterterrorism information. This will, in turn, enable police agencies, law enforcement agencies and, as appropriate, other related agencies like health, marine, aviation, education, transportation, financial, and telecommunications to respond to and take appropriate measures when a particular threat is received.

Actually, we began by building on an agency we already had in place, the so-called HIDA Center, High Intensity Drug Area, over on

Chelsea Piers, which serves eight counties. The state opened the Upstate New York Regional Intelligence Center just outside of Albany, hooking up the remainder of the counties.

But terrorism does not recognize boundaries. It does not recognize the zones that I talked about. Certainly it does not recognize counties or even state boundaries. Accordingly, we in New York State have joined together with nine other states in a consortium, The Northeast Homeland Security Agreement. It ranges from Delaware to Maine, along the Atlantic seaboard. We have said jointly through our governors and through our Homeland Security Directors that we want to be able to develop a system which will allow for the real-time sharing of information between local law enforcement and the federal intelligence community. Also, we have made application to IAIP [DHS Information Analysis and Infrastructure Protection] to enable the police and sheriffs of the ten states from Delaware to Maine to get information to and from them on a real time basis.

When it comes to counterterrorism and local law enforcement, we have seen a radical change. Is there much to be done? Yes, a huge effort still has to be undertaken.

PETER LEITNER

Police Training and Counterterrorism

People want to be safe. They want to be happy. They want to live a normal life. But are we safer since 9/11? The answer is unequivocally, “No, we are not safer.” If anything, the world has become more dangerous. The attacks have become more serious, more insidious. The attacks that have been launched overseas are more multi-disciplinary, they utilize new tools, select new targets, and expose new vulnerabilities.



We delude ourselves constantly into thinking we are safer. We make excuses for countries who are really state financiers or sponsors of terrorism, like Saudi Arabia. We make excuses for them all the time. We talk about the bombings in Riyadh as being an example that, look, the Saudis are now under attack. But it is not the Saudis under attack. It is western interests in Saudi Arabia that are under attack.

Police Training

In the last couple of years, The Higgins Center for Counterterrorism has trained over 2800 police officers in various states, as well as five cities in Canada. *One of the universal constants that we keep coming up with is the incredible willingness and desire of police and first responders and municipal and county officials, provincial officials to actually take part on this war on terrorism. But there are numerous problems. Authorities are not being given information. They are not being given skills. They are not being given techniques. And they are simply not being empowered.*

As a partial measure in strengthening law enforcement, we instruct police in something called cross-enforcement. In addition to the 600,000 sworn officers in the United States, we also have several million building inspectors, health inspectors, child welfare inspection people and others who deal in social services and who have something called warrantless entry into various premises at any time of the day or night. We have found these cross-enforcement techniques to be extraordinarily effective in places like Washington D.C., where one of the officers there who is affiliated with us has done it with 6000 of these cross inspections in the last five years.

Security Clearance for Police

One serious issue is the issue of security clearances for police. It is only by granting security clearances to local law enforcement officials that they can have access to enough information where they can then take that federal information and distill it down to the local level and put it within their own local context. The Feds cannot do this. They cannot do anything in the local context, because they do not know the local communities. They have no resources to know the local communities, but the police do.

Profiles: NYPD Commissioners and Counterterrorism

David Cohen is Deputy Commissioner of the NYPD Intelligence Division, an appointment he has held since January 24, 2002. Prior to working with the NYPD, Cohen spent two years at American International Group, a global financial services firm. Before working at American International, he worked for the Central Intelligence Agency for 35 years. During his time at the CIA, Cohen spent two years directing the CIA's Directorate of Operations, overseeing the agency's worldwide operations and maintaining agency relationships with foreign intelligence and security services. For four years he was deputy director of the CIA's Directorate of Intelligence, which reviewed every political, economic, and military assessment prepared by the CIA for the President and his senior national security advisors. Cohen's aggressive stance on pursuing terrorists, including his belief that it is necessary to lessen the Handschu (suspicion of criminal activity) requirements in order to properly investigate terrorism, has created some controversy regarding NYPD intelligence gathering methods.



Raymond Kelly was appointed Police Commissioner of the City of New York by Mayor Michael Bloomberg in 2002. Kelly is the first person to hold the office of New York Police Commissioner twice, having served as Commissioner from 1992-94 during the Guiliani Administration.

Kelly has dedicated much of his life to making New York City a safer place. Before becoming Commissioner in 1992, Kelly spent 29 years in the NYPD, serving in 25 different commands.

After leaving the NYPD in 1994, Kelly served as Director of the International Police Monitors in Haiti. In 1996, he was elected Vice President for the Americas of Interpol, a post which he held until 2000. From 1996-98, Kelly served as Under Secretary for Enforcement at the U.S. Treasury Department. From 1998-2001, he served as Commissioner of the U.S. Customs Service. After leaving the

Customs Service, he became Senior Managing Director of Global Security at Bear, Stearns & Co., Inc.

Before joining the ranks of the NYPD, Kelly served in the Marine Corps Reserves for 30 years. His education includes a B.A. from Manhattan College, a J.D. from St. John's University School of Law, an LL.M. from New York University School of Law and an M.P.A. from the Kennedy School of Government at Harvard.



Michael Sheehan was appointed Deputy Commissioner, Counterterrorism for the NYPD in June, 2003. Sheehan worked in the Army from 1977 through 1997, performing numerous

overseas assignments including counterterrorism, counter narcotics and peacekeeping assignments. Attaining the rank of Lieutenant Colonel, he was appointed Deputy Assistant Secretary of State in the Bureau of International Organizations in 1997. In 1998, after the attacks against the American embassies in East Africa, he was appointed Department of State Ambassador at Large for Counterterrorism. In this capacity, he also served as Coordinator for Counterterrorism at the State Department, starting in 1998. As Coordinator for Counterterrorism, he chaired the Inter-agency Working Group for Counterterrorism and the State Department's task force that responds to international terrorist incidents, and had primary responsibility for developing, coordinating and implementing U.S. counter-terrorism policy. In 2001, Sheehan was appointed Assistant Secretary General in the Department of Peacekeeping Operations by U.N. Secretary General Kofi Annan. In his current capacity as Deputy Commissioner, Sheehan is responsible for terrorism investigations working in partnership with the FBI Joint Terrorist Task Force. He is also responsible for training NYPD personnel and for risk assessment and critical infrastructure protection of New York City targets.

PROGRAMS OF NOTE

Operation Atlas: the NYPD's Response to Terrorism

Operation Atlas is the name of the New York City Police Department's ongoing response to the threat of terrorist attack. The NYPD describes Atlas as consisting of four core aspects: increased personnel deployment, transit system security, increased coverage, and intelligence.

INCREASED PERSONNEL DEPLOYMENT

Along with assigning bomb sniffing dogs to the Staten Island Ferry, the NYPD has increased Harbor, Aviation, and Emergency Service Units

deployment. COBRA units are prepared to deal with chemical, biological or radiological hazards. Emergency services personnel, bomb experts, and investigators make up ARCHANGEL teams, which are strategically placed throughout the city. HAMMER teams are ready for deployment, in which hazardous materials experts from the fire and police departments are deployed together. Highly trained and heavily armed officers make up HERCULES teams,

which are randomly deployed throughout the city, and unmarked, armored CAT CARS carrying heavily armed counter assault teams are deployed as well. Mobilization drills are coordinated by Counterterrorism Inspectors.

TRANSIT SYSTEM SECURITY

The Transportation Bureau, the Metropolitan Transit Authority (MTA), the Port Authority, and the National Guard are working in close cooperation to patrol the subways. The number of plainclothes and undercover officers on subways and trains has been increased, especially in certain "high density" stations. The NYPD is conducting "Surge Responses," in which large numbers of officers saturate a station. Officers regularly conduct station sweeps, in which low level subway offenders, like turnstile jumpers, are arrested, on the theory that sweeps might discourage or intercept a terrorist attack. Radiation detection is also being used in subway stations.

PATROL OPERATIONS INCREASED COVERAGE

The Counterterrorism Bureau has begun working with the Area Police Private Security Liaison Program (APPL), by which police and private security officers share information. By supplying terrorist related updates to the association of New York City Corporate and Institutional Security Directors, the Counter Terrorism Bureau adds countless eyes and ears to its patrol. Critical response vans are deployed to events, hotels, and tourist attractions, and 4,000 school safety officers are ready to evacuate children and adults from the schools, transport police resources, and staff emergency shelters. Patrol Borough Commanders are prepared to act autonomously in the event that police headquarters command and control are disabled.

INTELLIGENCE

Fuel depots are under surveillance and garage owners and attendants in Manhattan parking lots are briefed about suspect vehicles. Daily assessments are made as to which houses of worship, landmarks and foreign dignitaries may need extra security. New Jersey authorities are helping to inspect sites in New Jersey where radioactive material might be stored.

facts of note

NYPD SECURITY: NEW YEAR'S EVE, 2003

On New Year's Eve, 2003, the NYPD secured Times Square by providing an NYPD HERCULES Team, 25 additional FBI agents, a bomb squad, an aviation team, elite counterterrorism teams with equipment to detect chemical, biological or radiological contamination, the National Guard standing ready in case of a biological or chemical attack, and thousands of uniformed and undercover police officers. The U.S. Immigration and Customs Enforcement's Office of Air and Marine Operations provided 7-8 armed and unarmed Blackhawk helicopters to patrol the sky. Radar-equipped Citation Jets patrolled the sky as well, and the Coast Guard patrolled the waterways.

Most major cities across the country increased security on New Year's Eve, 2003, but the only other city to approach New York's added security was Las Vegas, where more than 100 FBI agents combed the strip for terrorist suspects and Blackhawk helicopters patrolled the skies.





The USA PATRIOT Act:

Where are we?

Where do we go from here?

OVERVIEW

Since it passed Congress on October 25, 2001 (by a vote of 98-1 in the Senate and 356-66 in the House), the USA PATRIOT Act has been controversial on several grounds. Generally, critics maintain as Stephen Schulhofer does below, that existing laws are sufficient in the fight against domestic terrorism and that it is more a matter of bureaucratic mismanagement and incompetence than a lack of laws that enabled September 11 to happen. Others defend the Act on similar grounds—that personal liberties are threatened only slightly more, if at all, than prior to the passage of the Patriot Act. Still others, like Larry Thompson and Alice Fisher, assert that it has helped stem the tide of terror in the United States. The abuses against civil liberties are perhaps most striking in regard to immigration cases as Sheridan England points out in his discussion of the *U.S. v. Benatta*. The future of the Patriot Act remains in question, as activity supporting the passage of Patriot

Act II has died under early protest. Still, whether or not the sunset clauses of the Act will actually take effect in December of 2005 remains in question, as George Bush asked in his 2004 State of the Union Address for the extension of the Act beyond that date.

At the same time, there is legislation before Congress that would limit the Patriot Act. Currently there are 12 such bills in Congress. Their purposes include: restoring due process protections to immigration and deportation trials; limiting the ability of government intelligence agencies to search library and internet records; limiting the use of data mining processes, sneak and peek searches, and roving wire taps; increasing congressional, judicial or public oversight for such searches; and adding sunset provisions to the Patriot Act. Most of these bills are bipartisan efforts. Attorney General John Ashcroft has stated that President Bush will veto at least one such bipartisan bill, the Security and Freedom Ensured Act, should it pass the House and the Senate.

VIEWPOINTS

Fisher/Schulhofer debate— “The USA PATRIOT ACT: Where Do We Go from Here?”

On February 26, CLS hosted an Open Forum on “The USA PATRIOT Act: Where Do We Go from Here?” The participants were:

- **Moderator Tom Gerety**, Director of the Brennan Center for Justice and Brennan Center for Justice Professor at NYU School of Law, a constitutional law specialist.
- **Stephen Schulhofer**, Robert B. McKay Professor of Law at NYU School of Law. Schulhofer teaches criminal law and criminal procedure at NYU. Since September 11, his research has focused on the infringement of our civil liberties in the age of terror. He is the author of *The Enemy Within: Intelligence Gathering, Law Enforcement, and Civil Liberties in the Wake of September 11*.
- **Alice Fisher**, Partner in the Litigation Department, Latham & Watkins LLP, Former Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice from July 2001-2003. At DOJ, Fisher was responsible for national coordination in

matters of terrorism, including all matters relating to September 11 investigations and prosecutions, investigation and prosecution of international and domestic terrorist groups and terrorist acts, terrorist financing investigations, USA PATRIOT Act implementation and all other terrorism policy issues.

Tom Gerety: Rhetoric Versus Action

It is a moment in American history when, as you all know from the President's State of The Union address, the renewal of the Patriot Act after its Sunset Provisions is in question before the whole country and will be for some number of months ahead of us. One of the vices of Patriot Act argument, I think it's fair to say, has been on both sides an excess of rhetoric and passion. This discussion will focus on three excerpts from the Patriot Act: sections 213, 215 and 218 (see *The Law*, pages 22, 23).



Alice Fisher, Tom Gerety and Stephen Schulhofer discuss the Patriot Act.

ALICE FISHER

In Defense of the Patriot Act

I want to talk about why the Patriot Act is so important to our homeland security. I was there on 9/11 with the Justice Department and was whisked over to the FBI, where I spent the next six months straight, 18 hours a day, dealing with threats that were coming into our country on a daily basis. For the two years that I was there we used the Patriot Act every day, and I found it a critical tool for protecting our homeland. If you saw the news just this weekend (February 21, 2004), and this is almost 2 years past 9/11, they showed a tape that bin Laden's second in command, Ayman al-Zawahiri, released. And what he said in the

“EVEN CATASTROPHIC ATTACKS ON THE SCALE OF 9/11 REMAIN WITHIN AL QAEDA’S REACH. MAKE NO MISTAKE. THESE PLOTS ARE HATCHED ABROAD BUT THEY TARGET U.S. SOIL AND THAT OF OUR ALLIES.”

—GEORGE TENET, TESTIMONY BEFORE CONGRESS,
FEBRUARY 24, 2004

tape was, “Bush, strengthen your defenses and your security measures. The Muslim Nation which sent you the legion of New York and Washington has determined to send you legion after legion seeking death and paradise.”

We also saw CIA director [George] Tenet, FBI Director [Robert] Mueller and the National Security Administrator [Condoleezza Rice] testify in front of Congress and tell Congress that the al Qaeda threat and the threat of terrorism in general is real. It is current. They still want to kill us. In fact CIA director Tenet said on February 24 [2004], “We have time and time again uncovered plots that are chilling. Our aircraft alone have uncovered new plans to recruit pilots and to evade our security measures.” He went on to say, “Even catastrophic attacks on the scale of 9/11 remain within al Qaeda’s reach. Make no mistake. These plots are hatched abroad but they target U.S. soil and that of our allies.” So it is important that we remember today that protecting our country is just as important today as it was on 9/11 and in the days after 9/11.

While I was at the Justice Department, I woke up every morning to go and brief the Attorney General and the Director of the FBI at 7:00 a.m. before they went to brief the President. And I can tell you that there was not one day that I was there at that briefing that we did not learn about threats against our country here and threats against Americans abroad. So it is very real and it is very current.

Why do I tell you this? Because I think it is a good backdrop for understanding my reasons for thinking that we need all the tools that we have to fight the terrorists and to stop them from taking away our freedom and taking away our liberty. *It is not the government that wants to take away your liberty. It is these terrorists, and our liberty is what our soldiers are abroad fighting to protect. There have been lots of*

characterizations about the Patriot Act. In some respects, for some individuals, it has become the bogey-man of everything done after 9/11.

But it is important to get to the facts about the Patriot Act, so let me give you some background on exactly what it is. It is a piece of legislation that was passed by Congress. It was passed 98 to 1 in the Senate and 357 to 66 in the House of Representatives. It has ten titles, 153 sections. It deals with law enforcement tools to combat terrorism. It deals with tools to combat money laundering and terrorist financing. It deals with border security and it deals with other technology law enforcement mechanisms.

Protections in the Patriot Act

Most of the debate centers around five to ten provisions of the Patriot Act and on which clauses will sunset in December of 2005 (see The Law, page 26). Most of the provisions involve law enforcement measures and have judicial oversight. This means that before law

enforcement can use these tools, they have to seek an order from a federal court to get the appropriate type of warrant. Only then are they able to seek the business records or the wire taps needed. When people say that the executive branch can just go willy-nilly and decide what they are going to surveil here in this country, it is simply not true. They have to go to an independent, federal judge to get the authority to use many of these tools.

There is also congressional oversight built in. Congress holds hearings. There are reports that have to be given from the Department of Justice and the FBI to Congress about the use of the Patriot Act. So there are checks and balances in each of the branches of our government on the Patriot Act and on the tools that we are using in the war on terrorism.

The Patriot Act provides three main things.

1) It provides new methods of information sharing that were not in place prior to 9/11. You hear a lot of criticism to the effect that the government was not able to connect the dots or identify terrorist hijackers before 9/11. What the Patriot Act does is to allow the sharing of information with government intelligence officials and with government law enforcement officials in ways that were not in place before.

Let me give you one example of how that was used. There was a group of individuals out in Portland, Oregon. After 9/11 they got

the law

DOMESTIC TERRORISM

Under 18 U.S.C. 2331 (as amended by USA PATRIOT Act §802) the term “domestic terrorism” is defined as activities that

(A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; and

(B) appear to be intended –

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and

(C) occur primarily within the territorial jurisdiction of the United States

it in their head that they wanted to go and fight against our soldiers in Afghanistan. So they left America. They went over and tried to get into Afghanistan through China. They could not get in. So they came back to the U.S., and they were living among us. Because of the Patriot Act and the new forms of information sharing, we were allowed to detect these individuals, to disrupt their activities, charge them with crimes and get them off the street. Any plot that they had in mind to commit here in the United States was disrupted because they have now pled guilty to terrorism charges and are behind bars. That is a direct result, I believe, of the provisions of the Patriot Act.

2) A second result of the Patriot Act is that it allows our law enforcement tools to be brought up to date. There were many tools of technology—roving cell phones and wire taps for example—that we knew the terrorists would use. They would use one cell phone, throw it in the trash can, cross state lines, pick up another cell phone, throw that in the trash can and so on. The Patriot Act allows us now to follow the terrorist instead of following the cell phone that is now in the bottom of the trash and would obviously do us no good.

3) It also expands some of the laws that were already in place to combat drug crimes and organized crime; we use these expanded laws now to combat terrorism. Before the Patriot Act, and this surprises a lot of people, you could get a wire tap on Tony Soprano for his organized crime, but you could not get a wire tap on a suspected terrorist. In the wire tap statute, it now lists terrorism as a predicate offense for its provisions.

Let's look at a hypothetical. Let's take a man by the name Khalid Sheik Mohammed. Al Qaeda calls him "The Brain." Let's say he was over in Afghanistan in the terrorist training camp meeting with bin Laden. And let's say we knew that he was there and that he then came back to America. And let's say we had an informant tell us that "The Brain" was planning to attack a city in the U.S. on March 15. Let's say he comes into the U.S. on March 1.

Should we be able to get a wire tap on him, now that we have the intelligence that says he is planning an attack here in the U.S.? Of course we should.



“GENERALLY SPEAKING, THE GOVERNMENT NOW HAS SUFFICIENT LEGAL POWERS. WHAT IT STILL DOES NOT HAVE IS THE NON-LEGAL POWERS THAT IT NEEDS TO DEPLOY ITS TOOLS EFFECTIVELY.”

—STEPHEN SCHULHOFER

Let's say, furthering the hypothetical, that we get the wire tap and he is now talking to a colleague and he says to the colleague, "I'm going to go down to that place to get that thing because we need that plan for March 15."

Should we be able to follow him to that place, and if it is a library where he goes in to check out a city map for a particular U.S. city, should we be able to get the records to know which map he is looking at?

Should we be able to go to court to get that map? Of course we should. We need to protect ourselves.

Now let's say he goes back to his apartment and he sends out a package to another colleague and it says in code on the back "March 15." We know from the wire tap that in that package is a list of individuals that the colleague is supposed to contact to carry out the plot. Should we be

able to go to a court and ask for a search warrant to look into that package to find out who is on that list? Of course we should. Let me repeat, of course we should.

These are the kind of tools that the Patriot Act gives us to protect against terrorism. We need them. We have to have them. We have to have them in this day and age because the threat is real and it exists.

STEPHEN SCHULHOFER Concerns Over the USA Patriot Act

I was not in Washington on September 11. I was right here, downtown, in New York City. And those of us who were here have no doubts about how serious that day was. We have no doubts, not only about that day, but about the many days and the many weeks that followed, which were harrowing for everybody who lives in New York City. Those of us who remember that certainly never want to live through weeks or months of that sort again. So I think, and I think I speak for everyone who was here and everybody who has paid any attention to September 11, that stopping terrorism is a very, very high priority and a serious problem.

I do not know of anybody who was surprised by George Tenet's February 24, 2004 testimony, unless it was perhaps President Bush, who said in his State of the Union message on January 28, 2003, that we were a lot safer than we were a year ago. But I think most people who followed this appreciate that we are very, very much at risk and that we need to do everything we possibly can to be safe. Part of that process is doing the very best we possibly can to collect intelligence, to be aware of what is happening and to prosecute people when we have the incriminating evidence against them.

Problems of Management and Capacity

The first thing I want to mention is that the legal issues concerning the scope of the Patriot Act are much less important than lawyers and the general public think. And that includes whether they are people on the Left who are criticizing it or people on the Right who are defending it. To have an effective intelligence process, and that is something I think all of us should be committed to, requires that information be gathered, translated, pooled by the relevant agencies, analyzed and then delivered to

people who can investigate further or take quick preventive action. Legal powers are largely irrelevant at the stages where our past problems have been greatest and largely irrelevant at the stages where they still are greatest, which are translation, analysis and delivery. Now, law has posed significant obstacles to the sharing of intelligence, which is a point that I think Alice Fisher very properly raised. But the obstacles to sharing have primarily been agency culture, resources and lines of communication. Those are the things that have mattered and still matter much more than the legal rules that relate to sharing. Finally, even at the stage of gathering domestic intelligence, the truth is that the law of the Fourth Amendment (see *The Law*, page 38) is much less important to the gathering of domestic intelligence than the various non-legal constraints.

The technical and budgetary constraints, the human resources, the training of our officers, the priorities that we assign to our officers, the organization of the agencies, the culture of the agencies, these are all the areas where our deficits have been enormous and where they continue to be enormous. These are the factors that really determine our ability to succeed, even at the very first intake stage in gathering domestic intelligence.

In reaction to September 11, legal experts, along with I think most members of the general public, concluded very quickly that we needed to take immediate steps to strengthen the government's intelligence gathering authority. The conventional cliché that you have probably heard 1,000 times is that we need to shift the balance between liberty and security.

But when the intelligence process suffers from major deficits, as it does in resources personnel, organizational strength, translation capabilities, analytic capabilities, and delivery capabilities, our task is to understand that the weaknesses of our intelligence process, and there are many of them, cannot be solved by

DOCUMENTS OF NOTE

USA Patriot Act

<http://news.findlaw.com/cnn/docs/terrorism/patriotact.pdf>

The 9/11 Commission Report

<http://www.9-11commission.gov/report/index.htm>

passing more laws. And when legal issues consume as much public attention as they have, when they become a major topic of the State of the Union message, they inevitably drive out of the conversation problems that are much, much more important. That has happened over and over again since September 11, and it continues to happen.

Pre-9/11 Laws vs. The USA Patriot Act

It is instructive to look at the legal issues and at the legal authority that the U.S. Government had before September 11, before the Patriot Act, because the government was not lacking the power to get a search warrant. It was not lacking many things before September 11. There were imperfections, to be sure, and the imperfections should be corrected. One question we might ask is what link, if any, is there between those imperfections and what happened on September 11? To what extent were they to blame for our failure to prevent the attack on the World Trade Center?

The record on that is absolutely clear. Prior to September 11 we had very severe human deficits. We had severe budgetary and organizational deficits, and those are the deficits that prevented our law enforcement agencies and our intelligence agencies from using effectively the legal powers that they had which were very strong, not perfect, but very strong legal powers.

One example of that was the fiasco with Zacharias Moussaoui in August of 2001. He was arrested. He was in custody. The FBI requested permission to do a search on his computer and to do a search of his personal effects. If they had done that, they would have found in his address book the names and contact information for two people who wound up on two different planes on September 11. And why did that happen? It happened not because there was not the legal authority to do it, but because of disorganization within the FBI and because of misunderstanding about the nature of the authority that the FBI had. They, the FBI, simply dropped the ball. There was unanimity in that there was nothing in the law that would have prevented them from doing the right thing.

At the same time, if there had been additional legal authority, would it have made a difference? Again I think the record is clear that it would not have made a difference because already the FBI was not using effectively the powers that it had. *Well before September 11, the Justice Department itself was aware that the FBI had committed a pattern of mistakes, particularly in using its authority under the Foreign Intelligence Surveillance Act (FISA) (see The Law, page 18). The most chilling detail is that the Osama bin Laden unit within the FBI had committed a pattern of mistakes in mismanaging its FISA warrants. This had been a subject of intense discussion within the Justice Department well before September 11, not because of any failure in the law but because of a failure of training and resources.*

So by the summer of 2001, we had many bright red warning lights that were flashing and it was not that they could not go to court and that a judge would have said, "You cannot get a warrant." The problem was that the deficiencies in organization, resources and priority cost us the chances that we had to abort the plot.

9/11 report

RECOMMENDATION FROM "THE 9/11 COMMISSION REPORT"

As the President determines the guidelines for information sharing among government agencies and by those agencies with the private sector, he should safeguard the privacy of individuals about whom information is shared.

Assessing the USA Patriot Act

There are five points that I want to try to mention briefly. 1) First of all, generally speaking, the government now has sufficient legal powers. What it still does not have is the non-legal powers that it needs to deploy its tools effectively. That is still lacking. And the conversations about the Patriot Act, including the one that we are having tonight, are part of the reason why people are not focusing on these other issues.

2) Secondly, there are more than a dozen initiatives since September 11 that are demonstrably not justified as a response to the terrorist threat, and that impair privacy and freedom and that are completely irrelevant to fighting terrorism because they can be used in routine investigations not related to terrorism.

3) Third, many of the measures that are relevant to fighting terrorism are so overbroad that they actually undermine our security. Steps have been taken, for example, to restrict public information, to restrict access to courts, to restrict the ability of Congress to perform the oversight function that in fact it is supposed to be performing and so on. So what we are seeing is the erosion and, in many cases, the complete obliteration of checks and balances, reducing accountability to the courts, to the public, to the press and even reducing accountability to Congress. And these developments are facts that the Justice Department acknowledges.

The Justice Department has defended as appropriate and necessary its refusal to share information and its refusal to submit to the accountability of other branches. There is not disagreement about whether it is happening. But in my view, the absence of effective systems of accountability is a recipe for wasted effort and misdirected resources and bad mistakes.

4) My fourth point is that, over the long run, our security depends on building confidence and upon ensuring that the United States exercises its power with restraint and with respect for the rule of law. Our present policies—particularly the secrecy, the reduction of checks on law enforcement power, the use of the enemy combatant power, a com-

plete absence of accountability—fuel alienation and mistrust among immigrants here and among Muslims around the world.

Therefore, what we are purchasing are short term gains, which are often slender at best, and we are purchasing them at the price of fostering lasting animosity among the people here and abroad whose help we need if we want to break the cycle of terrorist violence. Why is it that, in spite of our success in Afghanistan and in spite of our having toppled the statue of Saddam Hussein in Baghdad, why is it that the former Director of Central Intelligence, George Tenet, has said that terrorist organizations around the world are

stronger and more motivated now than they were a year ago? That is a complicated question that does not have a single answer. But I think that what I've just mentioned is a part of the answer.

5) My final point is this. There is still a lot that we need to do to maximize our security. I think that this should be absolutely the first priority for every one of us. But it does not mean that we need more surveillance laws. What I would emphasize are two steps. First, we need to restore effective checks and balances, and second we have to make the commitment to provide

the law

FISA AND THE USA PATRIOT ACT

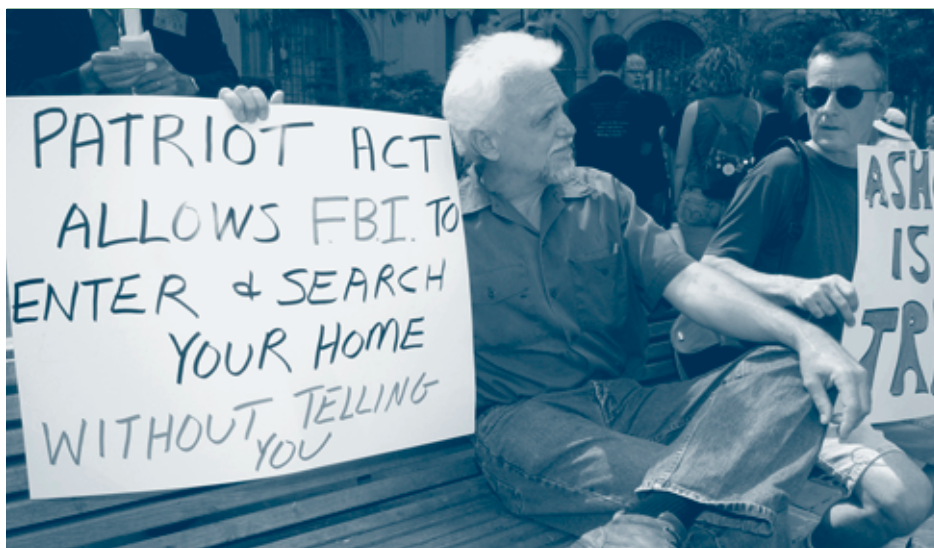
The USA PATRIOT Act expanded a little-publicized court established by the Foreign Intelligence Surveillance Act (FISA) of 1978. The Foreign Intelligence Surveillance Court (FISC or FISA court) authorizes court orders for foreign intelligence surveillance within the United States pursuant to 50 U.S.C. §1803. While the attorney general may authorize surveillance without a court order (a decision immediately reviewable by the FISC), generally an investigating agency will obtain a court order for the surveillance from the FISC.

- The Patriot Act expanded the number of judges on the FISC from seven to eleven. The Chief Justice of the United States appoints judges from at least seven different circuits of the Federal court system, and they serve seven year terms.
- The Patriot Act also established a requirement that at least three of the judges reside within 20 miles of the District of Columbia.
- The FISA also established a court to review the decisions of the FISC.

The Federal Intelligence Surveillance Court of Review is made up of three different judges from three courts, either district courts or courts of appeal.

PATRIOT ACT CASES HEARD BY THE FISA COURT

The Foreign Intelligence Surveillance Court and Court of review have heard many arguments challenging the constitutionality of the Patriot Act and the terrorist surveillance that it authorized. The constitutionality of the court itself has been challenged and passed constitutional muster numerous times, in cases such as *United States v. Cavanagh*, 807 F.2d 787 (9th Cir. 1987), *United States v. Pelton*, 835 F.2d 1067, 1075 (4th Cir. 1987), cert. denied, 486 U.S. 1010 (1988), and *United States v. Megahey* 553 F Supp 1180, (1982, ED NY) affd without op 729 F2d 1444 (1983, CA2 NY) and affd 743 F2d 59 (1984, CA2 NY).



There is much controversy over the USA PATRIOT Act.

a substantial infusion of additional resources.

We need resources to support the intelligence process, we need resources to facilitate accountability and we need resources to protect soft targets on the ground. This last probably most of all. Because without protective measures, our targets are going to be vulnerable no matter how good our intelligence is.

THE DEBATE

On FISA, Section 218

Fisher: What Section 218 did was to amend the FISA statute. The FISA statute is the Foreign Intelligence Surveillance Act statute. It has been around for many, many years. Under the FISA Act, the FBI can go to a classified court and get the authority to conduct an intelligence investigation when it relates to international terrorism or when it relates to espionage. Section 218 amended that statute to allow FISA warrants to be granted where there was a significant purpose following an international terrorism investigation or an espionage investigation whereas, before the Patriot Act, it needed to be the primary purpose.

What did that do? What did that mean? It meant that people at the FBI who were conducting the intelligence investigations and who got the warrants from the FISA court could receive information from their intelligence investigations. But they could not share it with the law enforcement FBI wing that was doing the criminal investigations. So you could have people upstairs, investigating for intelligence purposes, terrorists who were targeting the World Trade Center in 1993. But you had a

criminal investigation going on two floors down, looking at the same people, conducting grand jury proceedings, getting information, but who did not know the information, the criminal information. The significant part of 218 is that now everyone can share information.

I cannot tell you how many times we used it. We used it every day. We shared grand jury information with intelligence information in terrorism cases. Let me give you a concrete example of how it was used. There was a man who was a truck driver out in Ohio, a man by the name of Iyman Faris. He left. He went over to Pakistan. He met with some high level al Qaeda operatives. He went to a training camp. He listened to their plans. He came back to the U.S. He lived among us. On behalf of al Qaeda, he was surveilling targets here in the U.S. and sending messages back to them. Because of our information sharing provisions we were allowed

to pull all the resources together to detect him, detect what he was doing and disrupt him. So he could no longer surveil our targets here and send messages back. And he pleaded guilty. He is now doing a 20-year sentence in a court in Alexandria, Virginia for supporting terrorism.

Another example is the case of a man down in Florida who for many, many years was watched by intelligence. His name was Dr. Sami Amin Al-Arian. They were investigating him for supporting terrorism abroad, a group by the name of Palestinian Islamic Jihad, a group that has conducted hundreds of murders and suicide bombings, including the killing of Americans.

The intelligence authorities were gathering information on him but they could not share that information with the criminal side of the house, so there were no charges that could be brought to get him off the streets. After the Patriot Act and after this provision Section 218, they were allowed to share that information. They could then bring criminal charges against him, and now he has indeed been charged. So I think it is pretty non-controversial. At least in all the debates that I have been in, people are for information sharing.

Schulhofer: One thing I would say generally about all of these provisions, where I would start from, is trying to think about how to assess them. First of all, do they preserve the maximum feasible degree of accountability? Or do they preserve accountability where we can preserve it? Secondly, are they appropriate measures for fighting terrorism? And thirdly, are they narrowly tailored so that we are not sacrificing liberty unnecessarily? And I think, or I would hope, that we have broad agreement about those ideas.

“SECTION 218 AMENDED THAT STATUTE TO ALLOW FISA WARRANTS TO BE GRANTED WHERE THERE WAS A SIGNIFICANT PURPOSE FOLLOWING AN INTERNATIONAL TERRORISM INVESTIGATION OR AN ESPIONAGE INVESTIGATION WHEREAS, BEFORE THE PATRIOT ACT, IT NEEDED TO BE THE PRIMARY PURPOSE.”

—ALICE FISHER

As far as FISA is concerned, it does require an application to a court. It does require the court to issue a warrant. It does require the court to find a certain type of probable cause. In those respects I think there is a considerable degree of accountability, and that is good. Any fourth amendment surveillance requires a process much like that. So, in some ways, we might think that FISA is just routine Fourth Amendment stuff and there is nothing unusual about it at all. Let me underline differences.

On FISA vs. Fourth Amendment Requirements

Schulhofer: FISA has several respects in which safeguards are considerably less significant and less effective than ordinary Fourth Amendment requirements. *The first* is that you do not need to have the traditional kind of probable cause to believe anyone is committing a crime. All you need to have is probable cause to believe that they are an agent of a foreign organization that might be al Qaeda, but it could be the British Labor Party. It could be the German Greenpeace environmental group, for example. If there is probable cause to believe that the person is associated with a group like that, a U.S. citizen or otherwise, that would make them a foreign agent for purposes of FISA. So that is a different kind of probable cause.

“YOU DO NOT NEED TO HAVE THE TRADITIONAL KIND OF PROBABLE CAUSE TO BELIEVE ANYONE IS COMMITTING A CRIME. ALL YOU NEED TO HAVE IS PROBABLE CAUSE TO BELIEVE THAT THEY ARE AN AGENT OF A FOREIGN ORGANIZATION THAT MIGHT BE AL QAEDA, BUT IT COULD BE THE BRITISH LABOR PARTY. IT COULD BE THE GERMAN GREENPEACE ENVIRONMENTAL GROUP.”

—STEPHEN SCHULHOFER

Secondly, it authorizes some kinds of very intrusive types of searches that we do not ordinarily allow in the Fourth Amendment. *Third*, it allows the surveillance, particularly electronic surveillance, to continue over much longer periods of time with much less supervision. The person targeted is not notified that he was the target of surveillance. And if the person is prosecuted, his attorneys normally cannot review the surveillance documents as they could if it were an ordinary Fourth Amendment surveillance.

So those are significant differences. They are not the end of the world, but they are sig-

nificant differences to Fourth Amendment requirements (see *The Law*, page 18). And if you conducted a FISA-type surveillance with that low degree of judicial supervision on the basis of having probable cause to believe that someone was a serial killer, it would be unconstitutional. It would be too lax to satisfy Fourth Amendment requirements just because, on the mere basis of probable cause, you believe the person is a serial killer. We would not tolerate that. So what we do tolerate is a lower standard. The reason we allow it is because its purpose is primarily preventive. It is counterintelligence, counterespionage. And prevention is what we are all interested in.

The effect of the Patriot Act is that, under prior law, a FISA surveillance was only permissible if prevention and counterintelligence were the primary purposes. Now, a language change (section 218) means that you can use these significantly reduced safeguards and significantly more expansive types of surveillance if a significant purpose is intelligence gathering. Flipping that around, it means that you can use this when the primary purpose is criminal law enforcement. That would not have been permissible before.

Prosecutors who could not use this much more flexible, much less supervised type of surveillance to go after a serial killer or a rapist can now use this much less supervised type of surveillance even when their primary purpose is criminal law enforcement, securities fraud, tax evasion, whatever it might be, as long as a significant purpose is for intelligence gathering.

Now that is just stating the problem. And I think, to me, that does not mean that it is bad. As I assess it, I think that the barriers to

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INTERNATIONAL TERRORISM

FISA definition of International Terrorism in Section 1801(c): “International terrorism” is defined as activities that

- (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; and
- (2) appear to be intended:
 - (A) to intimidate or coerce a civilian population;
 - (B) to influence the policy of a government by intimidation or coercion; or
 - (C) to affect the conduct of a government by assassination or kidnapping; and
- (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

sharing information are a genuine problem. If you read the history of the intelligence report of the Joint Congressional Inquiry on how these agencies operated before September 11, you can see that these barriers were gumming up the machinery. So I think there is a substantial need to share as well as a substantial need for more flexibility.

On the Remedies

Schulhofer: There are two problems, however. One is that, when intelligence people have information, they should be able to pass it to the law enforcement people. It is not so clear that the law enforcement people, the people who are running a criminal prosecution, should be able to share with the intelligence gatherers. When they get grand jury information, they should be able to pass it. What the Attorney General did after the Patriot Act was to issue regulations that said, "Henceforth criminal prosecutors can initiate a FISA investigation and they can control the scope of the FISA investigation."

This is a fine point but it is very important. In my judgment, no one should object to the kind of sharing that Alice was describing in the cases of Faris and Al-Arian. Nobody should object to the flow of information back and forth. The problem occurs when a prosecutor who is running a criminal investigation and needs evidence, or needs to conduct surveillance uses FISA oriented information, rather than goes to an ordinary Article Three Court for an ordinary Fourth Amendment warrant that is subject to the tight safeguards we traditionally have.

Courts have always allowed FISA-obtained information to be used in criminal trials, but there was a requirement that certain procedures would be used to minimize the collection and dissemination of the information in order to ensure that the broad federal powers of intelligence gathering would not be used for routine criminal investigations. One such procedure was an "information screening wall," in which an official who is uninvolved with the

THE OTTER AMENDMENT

The Otter Amendment was introduced by Republican Congressman C.L. "Butch" Otter of Idaho. The amendment provided that none of the funds in a Commerce, State, and Justice Department appropriations bill could be used to execute "sneak and peek" warrants authorized by the USA PATRIOT Act. The Otter Amendment found massive bipartisan support in the House of Representatives in July 2003, when it passed in a vote of 309-118. However, it was not placed in the year-end omnibus spending bill, and so was dropped for the year. One possible explanation for the bill being dropped may have been a memo, supposedly circulated by the Executive Office for United States Attorneys to all federal prosecutors, urging them to "call personally or meet with ... Congressional representatives" to discuss the "potentially deleterious effects" of the Otter Amendment.

investigation would review the information and decide independently what material was relevant to the criminal investigation. Only that material would be passed on.

In March of 2002, the attorney requested approval of new minimization procedures which significantly diminished the presence of information screening walls. If it had passed, that would mean that the prosecutor can say, "Hey I'll go to the FISA people and have them do a FISA surveillance with greatly lowered degrees of supervision and greatly lowered degrees of accountability." And he can do that when his primary goal is criminal law enforcement. He can initiate and control the scope of the FISA investigation. That is the problematic part of this.

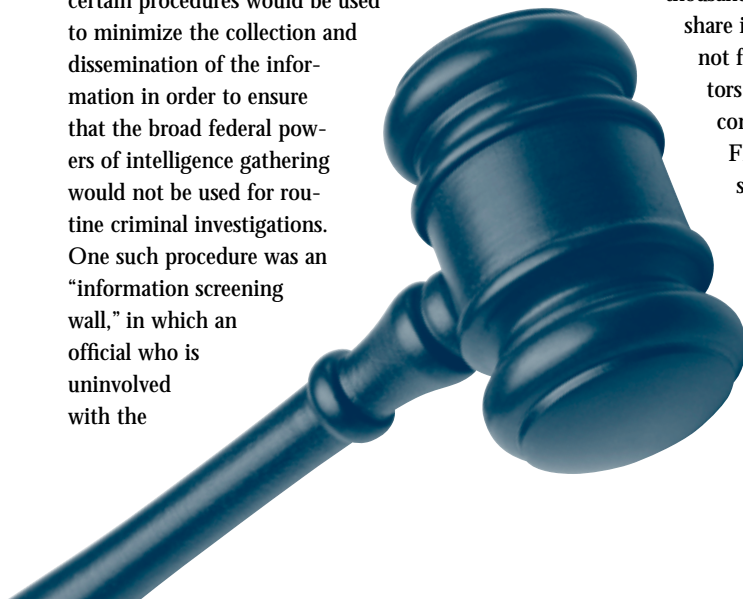
That is the part that the Foreign Intelligence Surveillance Court held to be overbroad. At the time there were seven judges (there are now eleven), who had reviewed tens of thousands of these applications to share information, and they did not feel that criminal prosecutors should be initiating and controlling the scope of a FISA investigation. So they struck down that part of the Attorney General's guidelines. On review, the FISA Court of Appeals, which had never met before, disagreed and reversed it. So we are

talking, maybe, about a fine point here. In my view, the judges on the lower court had far more experience. They were picked, by the way, by Chief Justice Rehnquist.

These were not board members of the ACLU who came to this conclusion. But these are the judges who had experience over many years and had the concern that, in spite of the need for these adjustments, we should not have prosecutors initiating surveillance of this type without meeting normal Fourth Amendment requirements. So that would be my first criticism.

The second problem, I think, is easier to understand, and that is that these new powers are not limited to terrorism investigations. These new powers can be used in any situation, situations that have no link to 9/11, no link to international terrorism of any sort, and that to me is indefensible. If the lax standards that we have under FISA are a problem, and we have always thought that they were a problem, there is no excuse for having that relaxed regime applicable when you are investigating a U.S. citizen for tax evasion.

Fisher: The FISA court is only going to grant a FISA if it is an international terrorism or espionage investigation where it is an agent of a foreign power. The thought that you could go to this independent panel of FISA judges with a tax investigation is way beyond me. An FBI agent swears under oath that, a very big affidavit, that says, "We have an international terrorism investigation. We believe that the target is an agent of a foreign power. We have



the following facts to show why we should get this wire tap or this warrant.” And then the judge looks at it and there is a discussion back and forth, and then the judge either grants the warrant or does not grant a warrant.

These are not things that just go willy-nilly and you can get it whenever you want. So I absolutely disagree that that is the standard and that you can use these classified warrants for investigation of other crimes. I would agree completely that they are used prior to a crime and they are used for prevention and for intelligence gathering. We are not going to wait for the crime to happen. We are not going to wait for the murder or the serial rapist crime in a terrorism case. We cannot wait. We cannot survive to wait.

So that is what these warrants are to do. They are to gather intelligence. We are not going wait for a crime, and therefore the standards should not be the same. I would also just say it has been awhile since I have been in law

school, but the court of appeals, I think, is the last word on this. And so I do think that we were very pleased in the Department of Justice that the FISA Court of Appeals did in fact say that the change in Section 218 was constitutional and reasonable and is, I think, a very lengthy, very articulate opinion.

On Sections 213 and 215

Fisher: Section 213 of the Patriot Act is what is known as a Delayed Notice Search Warrant, otherwise called a Sneak and Peek warrant by some. The Patriot Act codified this to allow law enforcement to be able to use these tools in terrorism and other crimes. Now these types of warrants had been issued by courts for some period of time.

In fact, I think someone told me the other night that in the very first season of the Soprano's, to use that again, that the court issued a Sneak and Peek warrant on Tony

Soprano. What is it? It means that you can go to a court and you can say, “I need to go search the premises or the property of an individual target of investigation. But I cannot tell him that I am doing the search now, because if I tell him that I am doing the search now, it is likely to cause risk of harm or flight or obstruction of justice. So I am asking you, the court, to let me delay that notice until after the premises have been searched.” Now, again, this reasoning was used in drug cases and organized crime cases before it had been upheld here by the Second Circuit. It had been upheld by the Second Circuit. It had been upheld by the Ninth Circuit. The Supreme Court had also said that the Fourth Amendment does not require immediate notice of the search.

If you had to go and tell “The Brain” that you were searching that package right there, well you are tipping him off. Then he knows exactly that you are onto him. But if you can go and search the package first, you will get the list and you will be able to find out who else is involved in the plot. And you will be able to complete your investigation and then you can tell them later that you did the search. Again, an independent federal court has to give you sign-off before you can do it. It is a tool that is critical.

Schulhofer: How does the Patriot Act differ from prior law?

Fisher: It just codified it.

Schulhofer: If there was a provision in prior law for exactly this type of search, perhaps it may be that we do not need 213. If all it does is re-state what the case law had already provided, then 213 is not really necessary. Overall, the very idea of Sneak and Peek and Black Bag Job sounds sinister, even fascist in its implications. The alarm about this has been blown way out of proportion. On 213, there is not a lot of justified criticism.

Fisher: I'll take that concession.

Schulhofer: There is before Congress something called the Otter Amendment (see The Law, page 21). It is sponsored by Representative [C.L. “Butch”] Otter from Idaho, an extremely conservative Republican congressman who proposed repeal of 213 and prohibiting Sneak and

the law

§ 213. AUTHORITY FOR DELAYING NOTICE OF THE EXECUTION OF A WARRANT

§3103a of title 18, United States Code, is amended—

(1) by inserting “(a) IN GENERAL— ‘ before ‘In addition’; and

(2) by adding at the end the following:

(b) DELAY— With respect to the issuance of any warrant or court order under this section, or any other rule of law, to search for and seize any property or material that constitutes evidence of a criminal offense in violation of the laws of the United States, any notice required, or that may be required, to be given may be delayed if—

(1) the court finds reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse result (as defined in section 2705);

(2) the warrant prohibits the seizure of any tangible property, any wire or electronic communication (as defined in section 2510), or, except as expressly provided in chapter 121, any stored wire or electronic information, except where the court finds reasonable necessity for the seizure; and

(3) the warrant provides for the giving of such notice within a reasonable period of its execution, which period may thereafter be extended by the court for good cause shown.’

§ 215. ACCESS TO RECORDS TO AND OTHER ITEMS UNDER THE FOREIGN INTELLIGENCE SURVEILLANCE ACT

Title V of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1861 et seq.) is amended by striking §501 through 503 and inserting the following:

§501. Access to certain business records for foreign intelligence and international terrorism investigations

(a)(1) The Director of the Federal Bureau of Investigation or a designee of the Director...may make an application for an order requiring the production of any tangible things...for an investigation to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution.

(2) An investigation conducted under this section shall—

(A) be conducted under guidelines approved by the Attorney General under Executive Order 12333...

(B) not be conducted of a United States person solely upon the basis of activities protected by the first amendment to the Constitution of the United States.

[section (b) (1)omitted]

(c)(1)...the judge shall enter an ex parte order as requested,...[if the application meets the above requirements]

(2) An order under this subsection shall not disclose that it is issued for purposes of an investigation described in subsection (a).

(d) No person shall disclose to any other person...that the Federal Bureau of Investigation has sought or obtained tangible things under this section.

(e) A person who, in good faith, produces tangible things under an order pursuant to this section shall not be liable to any other person for such production. Such production shall not be deemed to constitute a waiver of any privilege in any other proceeding or context.

§502. Congressional oversight

(a) On a semiannual basis, the Attorney General shall fully inform the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate concerning all requests for the production of tangible things under section 402.

(b) On a semiannual basis, the Attorney General shall provide to the Committees on the Judiciary of the House of Representatives and the Senate a report setting forth with respect to the preceding 6-month period—

(1) the total number of applications made for orders approving requests for the production of tangible things under section 402; and

(2) the total number of such orders either granted, modified, or denied.’.

For full text see <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:h.r.03162>:

Peak searches. He is worried about this kind of storm-trooper government power.

As I said, this type of reaction is way out of proportion. Having said that, let me try to underline why I think the Justice Department wants this provision and why it does more than simply codify prior law. Prior law allowed Sneak and Peak searches if it was necessary. And it allowed delayed notice for a reasonable period of time.

And 213 does something very similar. Think about electronic surveillance, where the government plants a bug. That has to be Sneak and Peek. You cannot knock on the door and say, “We want to come in and install a bug in your house.” Something like the Sneak and Peak power is inevitable if you are going to have surveillance at all.

Alice said quite correctly that the courts have allowed it in the past. So what are the

changes here? They are not dramatic. But I think they are significant. First of all the notion of what is necessary. The language of the provision relies upon the court finding reasonable cause to believe that notification may have an adverse result (see *The Law*, page 22).

You have to have the entire U.S. Code on your bookshelf to understand anything. There is a lot of this in the Patriot Act by the way. When you turn to 2705, it lists what consti-

“THERE HAVE BEEN PLENTY OF PLOTS THAT HAVE BEEN DISRUPTED, AND I DO THINK THAT, BECAUSE OF THE TOOLS THAT WE HAVE AND BECAUSE OF OUR WAKE-UP CALL, WE ARE SAFER.”

—ALICE FISHER



tutes an adverse result, mostly from prior case law endangering the life of someone, preventing the destruction of evidence, intimidating a witness. These are uncontroversial.

But the Patriot Act, clause 213, adds one to 2705 that has never appeared in prior law. That is seriously jeopardizing investigation. In other words, you can do it surreptitiously if it would jeopardize the success of the search. *This one, based on jeopardizing an investigation or unduly delaying a trial is, in my judgment, significantly broader. We do not know exactly what it means.*

Also, on delayed notice, the case law has been very specific. It is basically seven days as the maximum allowed delay unless there is an extraordinary showing. However, the new language of 213 makes it much more open-ended as to what would be a reasonable time.

The third one is that, prior to the Patriot Act, no court has ever permitted a Sneak and Peek search to seize physical evidence from the location where the search occurred. That has never been allowed in previous case law, and the new language of 213 would allow that under some circumstances.

So that is another change. Is it the end of the world? No. But these are significant differences. How do I assess them? Number one, I said accountability was a key criterion. And this is good on accountability, even if it is broader than we might like. An Article Three judge has to sign off on the probable cause for it. That meets anything we could fairly expect in terms of accountability.

Is it needed for terrorism cases, and is it narrowly tailored? The first thing that is interesting about this is that FISA has a Sneak and Peak authority for international terrorism cases. That is much broader than 213. Section 213 is almost by definition a non-terrorism power, because the government already had power to do more than this in international terrorism cases without 213. So what 213 adds to the arsenal is the power to conduct these types of broader searches in non-terrorism cases.

Schulhofer: A reporter for a newspaper can just decide to go try to dig up information on John Edwards, for example. And he can spend the next six months of his life, if his employer allows him to do it, snooping around trying to dig up everything he possibly can about John Edwards and about thousands of other people. And the government, the FBI guidelines, would not permit that.

I think it is perfectly appropriate for there to be limitations on the government that do

not apply. The private sector has other limitations, which result from the nature of the resources that are available to them. The government has a greater potentiality for the use and misuse of information.

This limitation grew out of a 20-year record that the Church committee documented where, by 1976, the FBI had over one half million domestic intelligence files on one half million American citizens in Washington alone, not counting the files that were in the field offices.

On Feeling Safer

Fisher: Do I think that we are safer now than we were in 9/11? You bet, because we have used the tools that we had. We have received new tools from Congress to protect our homeland. People, the public, are more aware now than ever. We saw that with the shoe bomber and the individuals on the plane that took him down rather than having him take the plane down. So people are more aware.

So I do think that, even though we might not hear every day of the threats and the attack plots that are detected and disruptive and prevented, it does not mean that they do not exist. There have been plenty of plots that have been disrupted, and I do think that, because of the tools that we have and because of our wake-up call, we are safer.

Schulhofer: The fact is that we are not doing nearly enough to protect targets, key targets like ports, chemical plants, weapons facilities and so on. So it is true, I think, that doing what is needed in those areas will cost a lot of money. But the point is to be safe, and if we are not willing to pay that price, we cannot be safe no matter how much of our liberty we surrender.

the law

CAN THE GOVERNMENT READ YOUR MAIL WITHOUT TELLING YOU? YES, IF...

...your mail shows “an adverse result.” Under 18 USC S. 2705, an adverse result is (A) endangering the life or physical safety of an individual; (B) flight from prosecution; (C) destruction of or tampering with evidence; (D) intimidation of potential witnesses; or (E) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

A Former Justice Department Lawyer Remarks on the USA PATRIOT Act



Frank Cilluffo, Larry Thompson, Lee Wolosky, Mary McCarthy and Stephen Schulhofer discuss the domestic reforms aimed at fighting terrorism

LARRY THOMPSON

The USA PATRIOT Act: An Assessment
Remarks delivered at the "Are We Safer?" conference, sponsored by The Center on Law and Security, NYU School of Law, November 18, 2003.

I do not know if we are safer today than we were on September 10. But I know that we are doing everything we possibly can to protect the American people from future terrorist attacks, and our task is daunting.

I sort of view the task of those in government in terms of protecting the country and the homeland against terrorist attacks like a baseball season, not just a game. In order to be successful, we are going to have to pitch a no hit game for each game, 162 games in the season. For the bad guy to be successful, all he has to have is a bloop single that finds its way between the second baseman and the short-stop and just barely gets through the infield. That is a daunting task. It is almost a task of perfection. And we are going to have to do everything we possibly can to make certain that the American people and the homeland are protected.

I am just going to briefly review and survey for you what the Department of Justice's role has been in our counterterrorism, anti-terrorism effort. I think the important thing to understand

with respect to the role of the Department of Justice is that what the department has done involves, basically, two major points.

The first point is that we, as leaders in the department after 9/11, had to emphasize to our prosecutors and investigators that there was a new paradigm with respect to what the Department of Justice was going to do in anti-terrorism. In other words, we were going to move from a culture of investigation and prosecution after the fact or event, to one of

prevention and disruption. And let me tell you, that sounds very simple. It sounds very logical. But it was difficult to do, and it has been an on-going difficult objective. We have a new paradigm as it relates to anti-terrorism; from investigation and prosecution, we have moved to one of prevention and disruption.

Number two, I had the occasion to meet and discuss anti-terrorism efforts with a number of officials from Western European countries and some Asian countries. I was struck by what each of those law enforcement and intelligence officials told me with respect to their observations. And these are countries that had more experience in dealing with anti-terrorism than we have had in the United States.

I remember meeting, for example, with Eliza Manningham Butler, Chief of Britain's MI5 in this regard. What they said was that the single most important thing that they did in their countries that they thought was effective from an anti-terrorism standpoint was what I would term good old-fashioned sustained police work. So that is one of the things that we undertook at the Department of Justice, to unleash, if you will, a regime of initiatives that put a lot of noise in the system. That stirred the pot as it related to those who might be engaged in terrorist activities. Sort of like a cop on the beat. And to let the bad guys know that we were around.

So, let me just talk to you a little bit about what the DOJ has done to try to explain briefly why some of these initiatives were undertaken. First of all, I would like to just point out one

facts of note

THE BIRTH OF THE USA PATRIOT ACT

The Formal title of the USA PATRIOT Act is an acronym, standing for the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act. The PATRIOT Act was introduced to the House on Oct. 2, 2001 as H.R. 2975 (the Provide Appropriate Tools Required to Intercept and Obstruct Terrorism Act); it was introduced to the Senate on October 4, 2001 as S. 1510 (the Uniting and Strengthening America Act). The Senate version included money laundering provisions, while the House bill did not. The two bills were synchronized and renamed as H.R. 3162, the USA PATRIOT Act, and the unified bill was passed on October 25, 2001. President George W. Bush signed the Act into law the next day.

“UNDER SECTION 218, THE FEDERAL GOVERNMENT, PRIMARILY THE FBI, HAS AN INCREASED ABILITY TO CONDUCT SEARCHES AND SURVEILLANCE OF SUSPECTED TERRORIST ACTIVITY. IT ALLOWS FOR INCREASED COLLABORATION BETWEEN LAW AND THE INTELLIGENCE OFFICIALS. IT BASICALLY ALLOWS THE FBI AND INTELLIGENCE OFFICIALS TO CONNECT THE DOTS BETTER.”

—LARRY THOMPSON

fact: the department has begun, since 9/11, to identify and track hundreds of suspected terrorists in this country. The human resources of intelligence that FBI agents and others have has increased dramatically. One of the ways and reasons that this has been accomplished is that we have had new legal authority to identify and track more terrorists.

The primary legal authority is the very controversial Patriot Act. The Patriot Act has three key elements. One is information sharing. The second deals with provisions that simply allow law enforcement to track terrorist communications more adapted to the way people communicate today through the internet, as opposed to with rotary telephones. The third component of the Patriot Act is simply increased punishment for terrorist activities. Information sharing is key.

Federal law enforcement officials now have an increased ability to share grand jury information and wire tap information with other federal officials and with state and local officials. That is very important. Under section 218, the federal government, primarily the FBI, has an increased ability to conduct searches and surveillance of suspected terrorist activity. It allows for increased collaboration between law and the intelligence officials. It basically allows the FBI and intelligence officials to connect the dots better.

Prior to section 218, FBI agents and prosecutors had to evaluate continually the case to make certain that the surveillance and search techniques being utilized constituted a primary purpose of intelligence versus criminal activity. Now the standard has changed, allowing much greater collaboration. And it allows the Department of Justice, through the FBI and

the prosecutors, to better identify and track suspected terrorists.

I mentioned that the Patriot Act expanded punishment with respect to some terrorist activities. Interestingly enough and shockingly, before 9/11, the punishment meted out for certain terrorist activity was lower than that prescribed in the law and, in the federal criminal code for drug activity and racketeering. And the Patriot Act simply elevated to an essentially equal level the punishment for certain terrorist activities.

We modified the FBI investigation guidelines. They are called the Attorney General Investigation Guidelines. These guidelines now allow the FBI to have more flexibility in terms of investigating future terrorist activity. It allows the FBI more flexibility in terms of developing human sources of intelligence.

We changed the rules with respect to what

we call in the law enforcement community “C.I.’s”, confidential informants. And we eased up on the red tape that FBI agents had to go through before he or she could bring someone into the fold as a confidential informant. I think those have been very helpful.

We have allowed the FBI something I think is common sense. But some people have had some objections to it, that is, we have allowed the FBI agents simply to go into public places that everyone in this room can go into. Prior to modifying the guidelines, FBI agents were restricted as to some of the public places they could go to either on the internet or just physical locations.

The department [DOJ] has undertaken to do more in terms of attacking the terrorists’ financial networks. A number of terrorist organizations had been designated. Millions of dollars in support of terrorist activities have been frozen. And hundreds and hundreds of accounts around the world have been frozen, and I think that is very important.

Of course, the department has arrested and detained a number of people engaged in potential terrorist activity. There was the highly publicized disruption of some terrorist activity in four key American cities—Buffalo, Seattle, Portland and Detroit. At the time I left, there were over 250 criminal charges brought against individuals for suspected terrorist activity. I think it is important that over 500 people have been deported from the country whose activity was linked to the

the law

SUNSET CLAUSES

Certain sections of the Patriot Act have a sunset clause and will expire in December 2005. Those that do not expire include §203(a), (c) (authority to share criminal investigation information), 210 and 211 (scope of subpoenas for records of electronic communication), 213 (delayed notice of execution of a warrant), 216 (modification of pen register and “trap and trace” devices), and 219 (single jurisdiction search warrant authority). President Bush has lobbied to renew the Act. This would maintain some of the most controversial sections, including §214 (pen register and “trap and trace” FISA authority) and 220 (nationwide service of search warrants for electronic evidence). Whether the Act will be renewed in 2005 remains unclear.

“THE DEPARTMENT [DOJ] HAS UNDERTAKEN TO DO MORE IN TERMS OF ATTACKING THE TERRORISTS’ FINANCIAL NETWORKS. A NUMBER OF TERRORIST ORGANIZATIONS HAD BEEN DESIGNATED. MILLIONS OF DOLLARS IN SUPPORT OF TERRORIST ACTIVITIES HAVE BEEN FROZEN. AND HUNDREDS AND HUNDREDS OF ACCOUNTS AROUND THE WORLD HAVE BEEN FROZEN, AND I THINK THAT IS VERY IMPORTANT.”

—LARRY THOMPSON

9/11 investigation by the FBI. The department has attempted to build the country’s long-term anti-terrorism capacity, and I think from a long-term standpoint, that is very important.

There has been a nearly threefold increase in the anti-terrorism budget. We have added over one thousand new FBI agents to our anti-terrorism efforts. We have added over 250 assistant United States attorneys. And I would be remiss if I did not mention one other factor as it relates to what the Department of Justice is doing in anti-terrorism efforts because I think it is important. All of this has been done

by the Department of Justice, while reaching out to our Arab and Muslim population throughout the country and cracking down on backlash crimes.

We have had a significant increase in backlash crimes. And they were not just against Arabs and Muslims, but against people who look like Arabs and Muslims, for example, Sikhs. A number of Sikhs were attacked as a result of what we would call hate crimes. So, we have also intensified our hate crime unit. We have a component within the Department of Justice called the Community Relations Service. That outfit has worked very hard to

develop best practices for state and local law enforcement as it relates to how to identify and how to investigate hate crimes.

We had over one hundred criminal prosecutions that the department participated in, either alone, on the federal level, or assisting with state and local prosecutors in some of those. And a lot of this is put into the context of our having concerns, legitimate concerns, for civil liberties.

I would like to point out, though, that while we need never to do anything that is outside our constitutional and legal framework, and we need to never do anything that will impact the essential character of this nation, *I would like to think that the most important liberty that we have is the right to be free from violence, the right to be free from terrorist attacks and the right to be safe and secure in our homes and on our streets and in our jobs.*

Are these things working? Recently released in a court hearing is a transcript of a recording from an alleged terrorist suspect, Jeffrey Battle. He was involved in the Portland terrorist activity. And, if you will, permit me to just read to you an excerpt of what Mr. Battle said regarding some of the government’s anti-terrorism efforts. This is what he said:

The terrorists are aware of what is going on. We need to put the pressure on them, keep the pressure on them and do everything that we can to prevent and deter their activity.

Profiles of Note

Larry Thompson was formerly the U.S. Deputy Attorney General at the U.S. Department of Justice (DOJ). He is currently a Senior Fellow in Economic Studies and Governance Studies at the Brookings Institution. Attorney General Ashcroft named Thompson in March 2002, to lead the National



Security Coordination Council, coordinating all functions of the Department relating to national security, particularly its efforts to combat terrorism.

Previously, Thompson was a partner in the law firm of King & Spalding in Atlanta, Georgia. From 1982-1986, he served as the United States Attorney for the Northern District of Georgia. In July 1995 he was appointed Independent Counsel for the Department of Housing and Urban Development Investigation by the Special Panel of U.S. Circuit Court Judges appointed by the U.S. Supreme Court. In April 2000, he was selected to chair the Judicial Review Commission on Foreign Asset Control.

Thompson received a B.A. in sociology from Culver-Stockton College, an M.A. in

sociology from Michigan State University and a J.D. from the University of Michigan.



Viet D. Dinh is credited with co-authoring the USA PATRIOT Act. He was the Assistant Attorney General for the Office of Legal Policy at the U.S. Department of Justice (DOJ) from May, 2001

until June, 2003. Currently, he is on the faculty of the Georgetown University Law Center where he is a Professor of Law and

Director of Asian Law and Policy Studies a position he held since before joining the DOJ. His areas of specialization include constitutional law, corporate law, and the law of academic development.

Prior to his Professorship, he served as a law clerk to Judge Laurence H. Silberman of the U.S. Court of Appeals for the District of Columbia Circuit and to U.S. Supreme Court Justice Sandra Day O'Connor. He was Associate Special Counsel to the U.S. Senate Whitewater Committee, as well as Special Counsel to Senator Pete V. Domenici for the impeachment trial of President Clinton, and counsel to the Special Master in *In Re: Austrian and German Bank Holocaust Litigation*.

Dinh was born in Saigon, Vietnam. He immigrated to Portland, Oregon at the age of ten and his family then settled in Fullerton, California. He graduated *cum laude* from both Harvard College and Harvard Law School.



John Yoo has also been given credit for being a major contributor to the USA PATRIOT Act. Yoo has been a Professor of Law at the University of California at Berkeley School of Law (Boalt Hall) since 1993. During

this time, he also served as Deputy Assistant Attorney General in the Office of Legal Counsel of the U.S. Department of Justice (2001-03), and General Counsel of the U.S. Senate Judiciary Committee (1995-96).

Yoo clerked for Judge Laurence H. Silberman of the U.S. Court of Appeals of the District of Columbia Circuit, as well as for Supreme Court Justice Clarence Thomas. His areas of expertise include foreign affairs, national security, and constitutional law. His book *War, Peace, and the Constitution* is scheduled to be published by the University of Chicago Press this year.

Yoo was born in Korea and immigrated to the United States at the age of three months. He graduated *summa cum laude* from Harvard College and received his J.D. from Yale Law School, where he was editor of the *Yale Law Journal*.

Terrorist Trial Updates*

February 5, 2004:

Abdelghani Mzoudi

Acquitted on the grounds of insufficient proof in a German court for aiding and abetting the 9/11 attack on the World Trade Center and for belonging to a terrorist group. The U.S. refused the Hamburg court access to alleged 9/11 strategist Ramzi Binalshibh or his interrogation transcripts. Mzoudi's acquittal is currently under appeal. Defense Attorney: Guel Pinar. Prosecutor: Walter Hemberger. Judge: Klaus Ruehle.

April 19, 2004: Abu Hamza al-Masri

Indicted by the U.S. and arrested in London on charges of trying to establish a terrorist training camp in Oregon, providing material support to al Qaeda and the Taliban in 1999 and 2000, and of plotting with an Islamic group that kidnapped a group of tourists in Yemen in December 1998. The radical Muslim cleric has been linked to Zacarias Moussaoui and Richard



Reid. Extraditing al-Masri from Britain could take months, as Britain does not extradite citizens to countries that execute prisoners. Rearrested on August 26, on suspicion of terrorism relating to acts in the U.K. Defense attorney: Muddassar Arani. Magistrate: Timothy Workman.

June 3, 2004: Nabil al-Marabh

Deported but no charges are being pursued against him, surprising some. Al-Marabh had been the number 27 man on the FBI's list of must capture suspects, an FBI informant claimed al-Marabh was planning to blow up a NYC tunnel, and al-Marabh had told the FBI that he had trained at militant camps in Afghanistan and sent money to a former roommate who has been convicted of trying to blow up a hotel in Jordan. The Justice Department decided not to indict al-Marabh, in order to protect intelligence.

trial update

ZACARIAS MOUSSAOUI TRIAL UPDATE

On October 2, 2003, U.S. District Judge Leonie Brinkema said prosecutors could not seek the death penalty for Moussaoui and could not even allege that he had a link to the 9/11 conspiracy. She put those shackles on the government's case because it had denied the defendant, on national security grounds, access to witnesses who were in a position to say whether he was part of the 9/11 gang—Ramzi Binalshibh, Khalid Sheikh Mohammed and other key al Qaeda figures the U.S. has captured. On June 2, on appeal, the 4th circuit stated that Moussaoui can be prosecuted in a civilian courtroom, the Justice Department can seek the death penalty, and that Moussaoui must be allowed access to the three al Qaeda prisoners who may be able to exonerate him. However, Moussaoui can only receive written statements from those prisoners in a form to be decided by the trial judge.

June 15, 2004: Virginia Jihad. Masoud Khan, Seifullah Chapman, and Hammad Abdur-Raheem

Found guilty of supporting terrorism and providing material support to Lashkar-e-Taiba, a group fighting against India for the independence of Kashmir. It was alleged that eleven men, the three included, were using paintball to train in military techniques. Six of the eleven pleaded guilty, charges against a seventh, Caliph Basha Ibn Abdur-Raheem were thrown out on February 20, and the final defendant, Sabri Benkahla is scheduled to go on trial. Khan also was charged with conspiracy to provide support to al Qaeda, and was acquitted. Khan was sentenced to life in jail, Chapman was sentenced to 85 years, and Abdur-Raheem was given eight years. Defense Attorneys: John Zwerling, John Nassikas III, Prosecutor: Gordon Kromberg. Judge: Leonie Brinkema.

June 16, 2004: Nuradin Abdi

Indicted on June 10, 2004, on charges of fraud and misuse of documents (for claiming he had been granted valid asylum status), conspiracy to provide material support to a designated foreign terrorist organization (al Qaeda), conspiracy to provide material support to terrorists, and conspiring with admitted al Qaeda member Iyman Faris and others to detonate a bomb at a Columbus Ohio shopping mall, after obtaining training in Ethiopia. Abdi has been in custody since November on immigration-related violations. After his appearance in court on the June 16, the presiding magistrate ordered a psychiatric evaluation in order to determine



Ghassan Elashi, former chairman of the Holy Land Foundation in Richardson, Texas.



Attorney Frank Dunham, representing Yaser Esam Hamdi, a U.S. citizen, who has been detained as an enemy combatant without trial. (AP Photo/Evan Vucci)

if he is competent to stand trial. Defense attorney: Mahir Sherif. Prosecutor: Bill Hunt. Magistrate: Mark Abel.

June 17, 2004: Imam Fawaz Damra

Convicted of concealing ties to terrorist groups on his immigration application. He may be sentenced to up to five years in jail, and deported. Defense Attorney: John Cline. Prosecutor: Cherie Krigsman. Judge: James Gwin.

July 8, 2004: Elashi Brothers

Ghassan, Bayan, Basman, Hazim and Ihsan Elashi and their computer company, InfoCom. Convicted in Dallas for illegally exporting computer equipment to Libya and Syria. The defense had claimed the brothers were misled by businessman Yousef Elami. They are also facing trial later this year for allegedly funneling money to a high ranking Hamas official who is a relative. Defense Attorneys: Ruchard Anderson, Marlo Cadeddu, Michael Gibson, Jeff Kearney, Tim Evans. Prosecutor: Barry Jonas. Judge: Sam Lindsay.

July 27, 2004: The Holy Land Foundation

Ghassan Elashi, Shukri Abu-Baker, Haitham Maghawri, Mohammad El-Mazain, Akram Mishal, Mufid Abdulqader, Abdulrahem Odeh, and the Holy Land Foundation. Charged with conspiracy, providing financial and material support to a terrorist organization, money laundering, and tax evasion. The indictment alleges that the Holy Land Foundation was funneling money to Hamas. The Foundation claims to be America's largest Muslim charity. Defense Attorneys: John Boyd, Tim Evans, Alex Landon, Randall Hamud. Prosecutor: James Jacks. Judge: Gladys Kessler

August 5, 2004: Mohammed M. Hossain and Yassin M. Aref

Arrested for conspiring with a man claiming to have ties to Islamic terrorists. The two allegedly conspired to launder \$50,000 in payment for importing a Chinese shoulder-fired missile, in order to assassinate a Pakistani diplomat in New York City. The man claiming terrorist ties was in fact an undercover federal agent.

August 11, 2004: Mounir el Motassadeq

On trial (retrial) for allegedly giving logistical support to the Hamburg al Qaeda cell that included 9/11 hijackers Mohammed Atta, Marwan al-Shehhi and Ziad Jarrah. Previously convicted, that conviction was overturned by an appeals court on the basis that el Motassadeq was denied testimony from suspects held by the U.S. For the new trial, the U.S. has promised to provide transcripts of interrogations of those suspects, but not the suspects themselves.

August 13, 2004: Yaser Esam Hamdi

Government discloses that it is in negotiations to release Yaser Esam Hamdi, an American national captured in Afghanistan and held in Guantánamo Bay as an enemy combatant. Hamdi was a defendant in Hamdi v. Rumsfeld, where the Supreme Court held that the indefinite detention of "enemy combatants" without the right to challenge that detention in U.S. courts was unconstitutional.

August 17, 2004. Rusman "Gun Gun" Gunawan

Indonesia postpones trial of Rusman "Gun Gun" Gunawan, brother of Hambali, as an accessory to the August 2003 bombing of the JW Marriot Hotel in Jakarta.

August 18, 2004. Eight Men Charged

Britain arrests 8 men under its 2001 Anti-terrorism, Crime, and Security Act.

- Dhiren Barot, 32, from Willesden, London
- Mohammed Naveed Bhatti, 24, from Harrow, Middlesex
- Abdul Aziz Jalil, 31, from Luton, Omar
- Abdul Rehman, 20, from Bushey, Hertfordshire
- Junade Feroze, 28, from Blackburn
- Zia Ul Haq, 25, from Paddington, London
- Qaisar Shaffi, 25, from Willesden
- Nadeem Tarmohammed, 26, also from Willesden

** as of August, 26, 2004*

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George P. Varghese, "A Sense of Purpose: The Role of Law Enforcement in Foreign Intelligence Surveillance," 152 *Penn. L. Rev.* 385 (November 2003).

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9/11 report

FROM "THE 9/11 COMMISSION REPORT"

"...[T]he successful use of the legal system to address the first World Trade Center bombing had the side effect of obscuring the need to examine the character and extent of the new threat facing the United States. The trails did not bring the Bin Laden network to the attention of the public and policymakers."



Securing the Homeland

OVERVIEW

Like the Patriot Act, much of the Homeland Security Act was envisioned even before 9/11, and catapulted into form in the immediate aftermath of 9/11. In January of 2001, a task force co-chaired by Senators Gary Hart and Warren Rudman published a report for the United States Commission on National Security/21st Century called "Road Map for National Security: Imperative for Change." In the report, the Task Force warned of the possibly catastrophic results of gaps in information sharing amongst government information agencies, and suggested that a single government agency be created to integrate and coordinate homeland security information. On October 11, 2001 (one month after the September 11 attacks and nine months before the President's homeland security legislation was introduced in the form of H.R. 5005) Senator Joseph Lieberman, a democrat from Connecticut, and Senator Arlen Specter, a republican from Pennsylvania, introduced the Department of National Homeland Security Act of 2001 (S.1534). The Act attempted to unify the multitude of federal information agencies under a single department, as had been suggested by the Hart-Rudman report.

Bush was resistant at first to the creation of a new department. Richard Clarke (who was National Coordinator for Security, Infrastructure Protection, and Counterterrorism on the National Security Council in September of 2001) has written that this resistance was both because the new department would be unmanageable, and because he was uncomfortable with the idea that such an important piece of legislation should come from the man who had been the democratic nominee for Vice President in the 2000 campaign. Ridge was reportedly also opposed to changing his original appointment as the head of the Office of Homeland Security within the White House, a position conceived of as a parallel to the National Security Advisor and which he assumed on October 8, 2001. Ridge's White House staff consisted of about fifty people. Despite the proclivities of Bush and Ridge, counterterrorist experts, military strategists and security specialists had seen the need for intensified attention to national security. Partly, as a result of the anthrax attacks in early September and mid October of 2001, the House and the Senate ratified the Homeland Security Act with telling speed. Essentially, the Act constituted a massive reorganization of the



federal agencies devoted to intelligence, border security, transportation security, immigration services, science and technology and the secret service. The initial budget was \$31.2 billion dollars and the new department included 160,000 employees. All told, twenty-two agencies were combined into the new agency. For 2004, the Department of Homeland Security received \$36.5 billion. The

President has requested 40.2 billion for 2005. There are three main parts to the budget: State Grant Allocation, Law Enforcement Terrorism Training Program, Citizen Corps.

From the start, the Department of Homeland Security has been beset by confusion and disappointment. Its mission, the scope of its authority, its accountability, its judgment, its managerial capacity and its fiscal efficiency have been far from clear to the general public, to the Congress and to many of the grant recipients. The reasons for this are many. GAO Reports, reports from the U.S. Conference of Mayors Homeland Security Monitoring Center, and a new Hart-Rudman report give some indication of the problem.

To begin, it is important to note that the creation of a new department is an overwhelming task even in times of peace. The last such department was the Department of Veterans Affairs, created in 1989; however, that department had already existed in the form of the Veterans Administration, and the creation of the Department of Veterans Affairs merely elevated the Veterans Administration to a cabinet level department. In contrast, the creation of the Department of Homeland Security has been heralded by some as the largest reorganization of government since World War II. Second, the goals of the nation as a whole have been conflicting, hindering Homeland Security in its attempts to project a clear public image. While Bush urged people to get on with their lives, Homeland Security kept Americans in an increased state of "Terror Alert," urging citizens, for example, to buy duct tape to protect against radioactivity. Third, the confusion of cultures was immense. As Donald Kettl has described it, "Meshing organizations with very different cultures can pose vast challenges. It is one thing to try to integrate border security. It is quite another to link Coast Guard members, who are part of a uniformed military service, with immigration control officials, who work at desks and in airport terminals." Fourth, there has been the problem of assessment, which

is difficult, if not impossible. The May 2004 GAO Report on First Responders in the National Capital Region, reports, “The lack of standards and consistently available data” as well as the lack of a “baseline” from which to judge expenditures and program quality has made assessment “difficult.” Fifth, there is no reliable means to date of determining what threat level exists to the nation’s security either from within or from external forces.

Finally, there has been general frustration on the part of homeland security grantees at the state and local law enforcement agencies over the receipt of funding. While much funding has been allocated, little has reached its targeted recipient. The reasons, again, are many. The first is that local municipalities find it difficult to deal with the reimbursement policy of the DHS grants. As they do not have the cash available to expend funds up front, they do without. In addition, as the Mayor’s report of 2003 concludes, much of the funding seems to be held up at the state level, without an adequate mechanism for releasing it to the localities and principalities. The January 2004 Mayor’s Report concludes in a survey of 215 cities representing every state and Puerto Rico, that the majority of funds had not reached the cities.

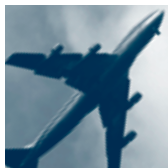
Moreover, while the overall DHS funding is increasing, the amount available for certain programs and states is decreasing. For example funding is up approximately 66% in the Office of Domestic Preparedness, yet a February 2004 Report from the International Association of the Chiefs of Police reports that overall funding is down 16% while DOJ funding for primary law enforcement assistance programs (terrorist related) is down 66%. While this looks from an overall perspective like a blow to counterterrorism, it may indeed reflect a more streamlined and experienced view of counterterrorism; for example, the upswing in the UISA funding reflects the new focus on funding urban centers, as opposed to the previous funding which provided funds more indiscriminately than in previous years.

Given the vast challenge of bureaucratic reorganization that has faced the DHS, it is not surprising that it has been slow to make a noticeable impact on state and local activities. At the federal level as well, the Department is accused of having mistaken priorities, financial confusion and turf battles over information gathering. Still, it remains at present the nation’s first defense against terror involving interstate threats, from electric grids to border security.

PROGRAMS OF NOTE

Programs at the Department of Homeland Security (DHS)

Transportation and Security Administration (TSA)



With a budget of \$5.3 billion, the TSA is receiving the most attention from the proposed budget for the DHS. Yet, critics still say that the agency is

stretched too thin, and that there is a lack of focus on rail security (especially in light of the March 11 Madrid bombing). The budget for the TSA focuses almost exclusively on aviation needs, granting only \$147 million to non-aviation concerns. Out of the \$5.3 billion, \$4.8 billion is earmarked for airport screening operations (up from \$3.9 billion in 2004), and additional funds are provided for such things as reconfiguring airport baggage areas in order to install explosive detection systems.

Immigration and Customs Enforcement (ICE)



ICE is receiving \$4 billion in federal homeland security funds. This department’s operations include removing criminal aliens, sponsoring Federal Air

Marshals on commercial flights, and protecting federal government facilities. Yet the department was approved in Congress as an intelligence integrating department, a role which critics assert is not being fulfilled but rather is being trumped by the FBI and the CIA. The creation of the Terrorist Threat Integration Center and the Terrorist Screening Center has also raised questions for ICE. While ICE provides intelligence analysts to both centers, some (including the Inspector

General of DHS) warn that the ability of ICE to fulfill its role as intelligence integrator is undermined by the two newer centers.

First Responder Preparedness Grants



The next largest financial allocation is to the Office of Domestic Preparedness, which will distribute grants totaling \$3.6 billion to states, territories, and local

governments for planning, equipment, training and drills of local first responders. Here, critics complain that the money is delivered too slowly and to the wrong places. Christopher Cox (R-California), chair of the House Select Committee on Homeland Security has reported that less than 20% of the anti-terrorism grants to states and localities had been spent as of April. For this, Cox blames red tape and slow planning at the state and local levels. There is also disagreement as to where and how local funding should be allocated. For instance, the Bush Administration proposes reorganizing the funds in order to increase funding to high-threat cities, whereas Cox would prefer that the money

were sent out purely on evaluations of threat level with no other considerations. President Bush also suggested halving the largest homeland grant program to states and localities. The Senate has rejected that plan, restoring the \$1 billion that had been cut, but is considering milder reforms, such as those suggested above.

Project Bioshield



Project Bioshield is the largest anti-bioterror initiative, with a \$2.5 billion advance appropriation. This project would make funding available to purchase new drugs and vaccines against biological and chemical weapons. While the allocation would not necessarily all be spent in 2005, it would all be available immediately. However, there is talk that some senators would prefer more control over how the money is spent, and drug companies are frustrated by the amount of time the Senate is taking to approve the program's authorizing legislation.

Coast Guard Port, Waterway and Coastal Security



The Coast Guard has been granted \$2.1 billion to improve waterway and coastal security. Yet, the Coast Guard maintains that \$7.2 billion is needed for security over 10 years, and critics complain that only \$46 million is being requested by

the White House for direct grants to ports instead of to the Coast Guard, for items like security cameras and fences. Senator Ernest F. Hollings (D-South Carolina) has complained that "The President and this Congress have not taken this issue seriously."

Information Analysis and Infrastructure Protection Directorate



Finally, the budget for this intelligence integration directorate is \$865 million. Critics complain that in fact, the Department of Homeland Security is acting only as a support system for the FBI and the CIA, with the two more established agencies playing the leading role in intelligence integration. Cox has said he would like the directorate to develop a matrix of terrorist intents, motives, and capabilities mapped against the nation's vulnerabilities and critical infrastructure, to be used to direct homeland security strategies and resources. Department officials also promise a growing role for this unit to analyze threats and vulnerabilities.

RECOMMENDATION FROM "THE 9/11 COMMISSION REPORT"

"We recommend the establishment of a National Counterterrorism Center (NCTC), built on the foundation of the existing Terrorist Threat Integration Center (TTIC)." (See below)

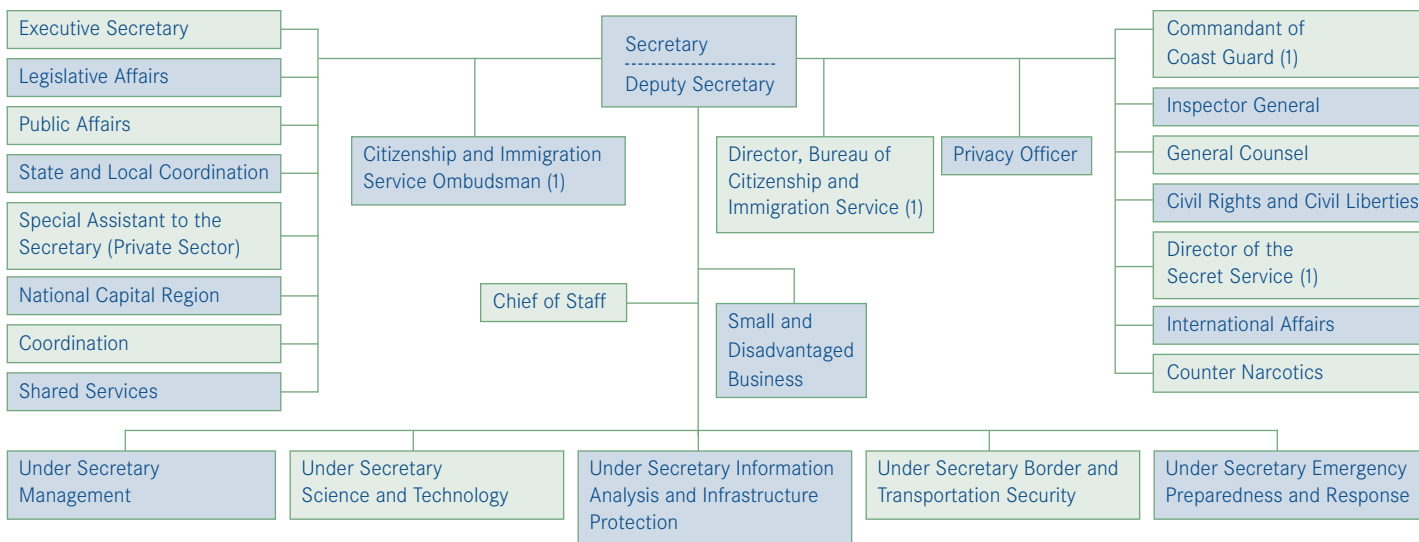
Terrorist Threat Integration Center (TTIC)



Plans for the Terrorist Threat Integration Center (TTIC) were first announced in President George W. Bush's 2003 State of the Union Address, and it began operations on May 1 of that year. Created in order to integrate information from the various government information agencies, TTIC has the primary responsibility for terrorism analysis in the federal government, except regarding purely domestic terrorism, which remains the domain of the FBI.

TTIC's role is purely analytical; it has no operational authority. Reports are sent daily from TTIC to the President, senior policy-makers, and those agencies responsible for the protection of the country. It has access to 14 separate U.S. Government information networks, as of April, 2004; connectivity to another 10 networks is planned. TTIC's information comes from the FBI, the CIA, the Departments of State, Defense, and Homeland Security, the

Department of Homeland Security



Capitol Police, the Department of Energy, and the Nuclear Regulatory Commission.

TTIC also sponsors a website, TTIC Online, which collects terrorism-related documents at various levels of classification and makes that information available to every major federal department and agency involved in counterterrorism activities. Currently this includes 2600 users. Throughout the past year, TTIC has issued various advisories, warnings and alerts about threats of terrorism at home and abroad, and is credited with informing the national threat condition level.

(TTIC was blamed for the 2003 "Patterns of Global Terrorism Report" which was found to be incomplete and incorrect.)

North American Aerospace Defense Command (NORAD)

Famous during the Cold War for vigilantly standing guard against nuclear attack, the North American Aerospace Defense Command (NORAD) has returned to the public eye. It is NORAD's responsibility to defend United States air space from attack by both foreign and domestic enemies.



In pursuing its motto of "Deter, Detect, Defend," NORAD conducted exercises simulating the September 11 scenario in the two years leading up to

the attacks, exercises where mock hijacked airlines were used as weapons to crash into targets. However, until the September 11 attacks of 2001, NORAD was responsible only for responding to threats from abroad; i.e. planes originating from outside of the United States. NORAD was not looking for such threats originating within U.S. borders and was not responsible to respond to them. Since the attacks, NORAD F-15 and F-16 fighters have patrolled U.S. cities and NORAD's Commander in Chief, General Ralph Eberhart, is directing the actions of all fighter aircraft performing Combat Air Patrols.

President Bush has stated that the September 11 attacks were unimaginable and unforeseeable. However, news reports state that an email from a former NORAD official, dated before the September 11 attacks, discusses a simulated hijacking exercise, where a plane would be used as a weapon to crash into the Pentagon. According to the email, the exercise was not performed because the Pentagon felt it was too unrealistic.

U.S. Northern Command (NORTHCOM)



The U.S. Northern Command (NORTHCOM) was established on April 17, 2002. On October 1, 2002, it began operations at Peterson Air

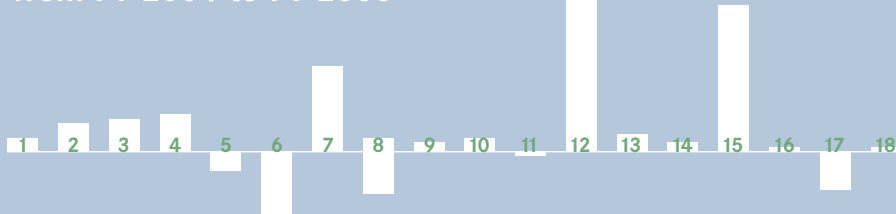
Force Base in Colorado. The NORTHCOM Commander, General Ralph Eberhart, is responsible both for homeland defense and for NORAD. He is responsible for land, aerospace and sea defense of the United States, and his area of operations includes all of North America as well as parts of the Caribbean and the contiguous waters in the Atlantic and Pacific Oceans. The commander of NORTHCOM would also command any U.S. forces operating in support of civil authorities in the United States, in the event that such forces are needed.

NORTHCOM's mission is the preparation for, prevention of, deterrence of, preemption of, defense against, and response to

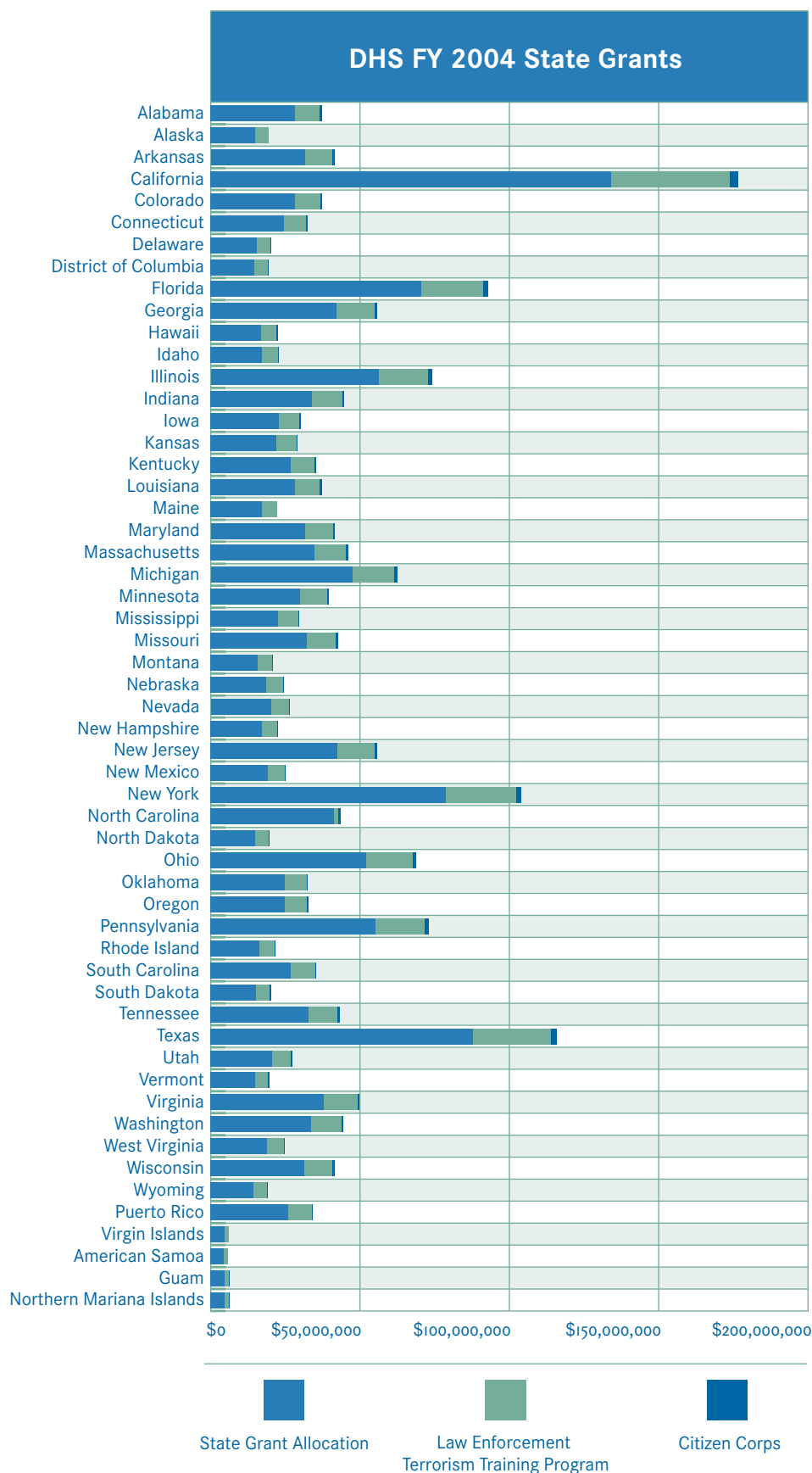
Fiscal 2005 Bush Administration Budget Request For Key Programs of the Department of Homeland Security and Changes from Fiscal 2004

	Total 2004	Total 2005	% Change
1 Total Budget Authority \$	36.5 billion	40.2 billion	10%
2 Transportation Security Administration	4.4 billion	5.3 billion	21%
3 Aviation Screening	3.9 billion	4.8 billion	23%
4 Non-Aviation Screening	113 billion	147 billion	30%
5 Office of Domestic Preparedness	4.4 billion	3.6 billion	-18%
6 State Homeland Security Grants	1.7 billion	750 billion	-56%
7 Urban Area Security Grants	894 billion	1.5 billion	68%
8 FIRE Act Grants	750 billion	500 billion	-38%
9 Immigration & Customs Enforcement	3.7 billion	4.0 billion	8%
10 Salaries and Expenses	2.1 billion	2.4 billion	14%
11 Federal Air Marshals	623 billion	613 billion	-2%
12 Project Bio-Shield	885 million	2.5 billion*	180%
13 Coast Guard Port/Coastal Security	1.8 billion	2.1 billion	17%
14 Science and Technology Directorate	913 billion	1 billion	10%
15 Bio-Surveillance Initiative	53 billion	118 billion	122%
16 Information Analysis & Infrastructure Protection	834 million	864 million	4%
17 FEMA Preparedness & Response	664 million	444 million	-33%
18 U.S.-VISIT	328 million	340 million	4%

Percent Change Per Program from FY 2004 to FY 2005



*Advance appropriation that may be spent over several years, beginning FY 2005



threats and aggression directed towards U.S. territory sovereignty, domestic population and infrastructure, as well as crisis management, consequence management, and other domestic civil support. In sum, NORTHCOM is responsible for U.S. homeland defense.

Domestic military support by NORTHCOM may be required in the event of fires, hurricanes, floods and earthquakes, in which case disaster relief operations may require military force. Also, in the event of a terrorist attack employing a weapon of mass destruction, the military may be called on to give consequence management assistance.

Multistate Anti-Terrorism Exchange (MATRIX)



The Multistate Anti-Terrorism Exchange (MATRIX) is considered to be a "state to state information sharing project." It consists of a vast database

containing public, commercial, and state information (such as criminal history, drivers' licenses, vehicle registration information, property ownership, etc.). State information is collected from the various states as a requirement for their entry into the program. Currently five states—Connecticut, Florida, Michigan, Ohio, and Pennsylvania—are participating in the program. Originally, 13 states agreed to participate, but many states have dropped out of the program for reasons ranging from fears of abuse of the program to a belief that not enough states were participating in the program to make it worthwhile.

The database allows law enforcement to search for matches with only partial information—for instance, a partial license plate number—as well as allowing law enforcement to search the information contained on the database at an incredible speed. Supporters of the program maintain that no privacy concerns are raised by this ability, because all of the information contained on the database was already legally available to law enforcement, and that the database simply allows for a more efficient search of that information.

However, critics claim that the program involves data mining, wherein everyone's records (as opposed to those of specific suspects) are searched, and "reasonable suspicion" is determined by computer analysis rather

than by human examination. In further concerns about privacy, critics oppose the use of a scoring system, referred to as the “terrorism factor” or the “terrorism quotient.” The system scans for “anomalies” in behavior and compiles lists of potential terrorism based on these anomalies. MATRIX creators insist that this capability, while originally included in the program, has been removed.

Critics of the program also complain that a full list of information sources has not been made available by the program, despite multiple requests. There is some concern that bank account numbers and credit card information, as well as purchase history and travel history, might be contained on this database. MATRIX also maintains that this is not the case. Finally, critics complain that there are not sufficient safeguards against abuse contained in the program. While law enforcement must go through a background check and get authorization to use the system, and the program’s creators, Seisint, Inc., require that there be a report of a crime or suspicious activity before the system is used, the program itself does not have safeguards in place to make sure these procedures are followed.

9/11 report

RECOMMENDATION FROM “THE 9/11 COMMISSION REPORT”

“The current position of Director of Central Intelligence should be replaced by a National Intelligence Director with two main areas of responsibility: 1) to oversee national intelligence centers on specific subjects of interest across the U.S. government and 2) to manage the national intelligence program and oversee the agencies that contribute to it.”

VIEWPOINTS

The Mission of Homeland Security



The Director of Homeland Security, Tom Ridge

FRANK CILLUFFO

The Mission of Homeland Security

Frank Cilluffo is Associate Vice President for Homeland Security at The George Washington University. Prior to this post, he worked in the White House as Special Assistant to the President for Homeland Security. After September 11, he was a principal advisor to Governor Tom Ridge and directed the President’s Homeland Security Advisory Council.

Mr. Cilluffo delivered the following remarks at the “Are We Safer?” conference, sponsored by The Center on Law and Security, NYU School of Law, on November 18, 2003.

When the [Bush] administration came in after 9/11, trying to get our arms around homeland security was quite a challenge. You cannot separate homeland security policy from foreign policy, from economic policy, from military policy, from diplomacy, from health policy, from technology policy, from science policy and so forth. One of the main issues in creating the Department of Homeland Security was how do you marshal and mobilize what our nation has? I am a big believer in the Vanevar-Bush model. As President Roosevelt’s science advisor after World War II, he plugged in forming disparate communities, namely the science communities, the private sector and the government, ultimately leading to what is now the military industrial complex.

Obviously, we do not need bricks and mortar for dealing with Homeland Security, but we need to bring those same pieces together in a flexible and rapid fashion. And that is part of what we were trying to do. There are questions we should not treat lightly, questions such as

freedom or security? Civil liberties or security? Commerce or security? These are not either/or propositions. Yet, we can and must have both. You have got to be able to recalibrate to meet a certain threat. And sometimes, you need to. You cannot prosecute a 21st century war with 19th century laws. But at the same time, you obviously need to factor in the issues that make us great.

Cultural Challenges

If there were one single word that had to capture what we were going through, I think that word would be to “connect.” We were the first to connect the many federal departments and agencies that had a homeland security related mission. We faced some very big cultural challenges. The first day I went into the office to sit down with then Governor Ridge, the President must have walked in six times because it was the day the anthrax crimes hit Congress. Immediately, we knew that these were not the usual suspects of FBI, CIA, Department of Defense. We needed to plug in new players and give them a front seat at the national security planning table. We brought together [epidemiologists], primary care physicians, agricultural services inspectors, people who obviously were never part of the national security planning table before. Why? To give one example, the word surveillance means something very different to an epidemiologist than it does to a law enforcement official [or] a military officer. We wanted to confront some of the cultural issues.

Part of the challenge is this: the national security community we came into was a product

of the Cold War to some extent. Culturally, the FBI wants to string the criminal up. The CIA wants to string him along. And then you bring in the health community, and they want to deal with the strung out. These are very different views in terms of end states, in terms of where they are going. The challenge is, how do you bring these pieces together?

The federal challenge was easy. Ultimately, we needed to connect with our federal, state and local partners. And here again, there are some \$64,000 questions that the founders of our republic had in mind in terms of federalism. What is the role of federal government? What is the role of state government? What is the role of local government? From the President's perspective, it was to empower those in the front lines, those who are ultimately going to turn victims into patients, those who are ultimately going to save lives. And those are ultimately the same people who can determine whether or not the war can be won or lost. The idea was to be able to push capacity and capability. The Department of Homeland Security is not a business-as-usual kind of department. It is not like the Department of Defense. Actually a relatively flat organization; its goal is to empower those at the state and local level.

The Private Sector and Security

We also came to the immediate conclusion that we need to connect with the private sector. The private sector owns and operates a majority of the infrastructure that underpin our country. Ninety percent. Whether it is electronic power, telecommunications, finance and banking, transportation, 911 emergency. This cannot be a "Thou shalt" from Washington. This cannot be something dictated from the beltway. It cannot be mandates. Just like our state and local partners, we need to identify what the right partnership is.

One of the big policy issues that needs to be addressed today is the matter of building the

“ONE OF THE BIG POLICY ISSUES THAT NEEDS TO BE ADDRESSED TODAY IS THE MATTER OF BUILDING THE BUSINESS CASE FOR HOMELAND SECURITY...FROM THERE, YOU HAVE TO IDENTIFY HOW FAR WE NEED TO GO, AND THAT IS SOMETHING THAT ONLY CAN BE DONE COLLECTIVELY BY THE PUBLIC AND THE PRIVATE SECTOR ON A SECTOR BY SECTOR BASIS.”

—FRANK CILLUFFO

business case for homeland security. How far can the private sector take security? From there, you have to identify how far we need to go, and that is something that only can be done collectively by the public and the private sector on a sector by sector basis. We need to be able to spur that investment by providing incentives. Right now, the incentives are disincentives.

There is some discussion right now in SEC reporting requirements for what companies are doing for security, somewhat akin to the Y2K legislation. But the big enabler has been on the liability side in some recent discussions such as whether or not people should be indemnified from punitive damage if they meet a certain set of standards. I think that the private sector would actually like those guidelines. If they know how much it will cost, they will meet that cost. If the cost goes above and beyond that though, they should be indemnified from further liability and exposure. Uncle Sam needs to become the insurer of last resort at the state and local level.

Private Citizens and Security

We are also connecting with the American people, and that is the thinking behind the

USA Freedom Corps, the SERT [Special Emergency Response Team] teams. Ultimately, we must try to empower those inside our communities and to play a role in securing the homeland. One thing that most people do not realize is that in most terrorist incidents, as in most natural disasters, the first responder is actually an ordinary citizen. You want to make sure that they have the tools to better help themselves.

Obviously, we want to make sure that the professionals have the tools and the capacities and the capabilities to get things done. But normally it is ordinary citizens as in Oklahoma City.

The last thing we can afford to do is swap business cards on game day. We need to get people together before the bomb goes off. And that is a huge challenge. So we came to the conclusion that we needed to create a department. Now, I think expectations are exceedingly high. I think it is going to take time for the department to gel.

What we did was build on the strengths of the existing organizations. We heard a lot of the weaknesses. We came to the conclusion that merging twenty-two entities is actually easier than two or three. Because there are no winners and there are no losers. In a merger and acquisition, there is no such thing as an equal merger. When you have twenty-two, you can actually build on the strengths of the existing entities. But I also think that if you were to actually look at are we more secure today than before 9/11, the unequivocal answer would be yes.

But the adversary is also playing in this game. They base their actions on our actions. It has been a long cat and mouse game. The challenge is how to stay ahead of the curve.

the law

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. – The Fourth Amendment to the U.S. Constitution

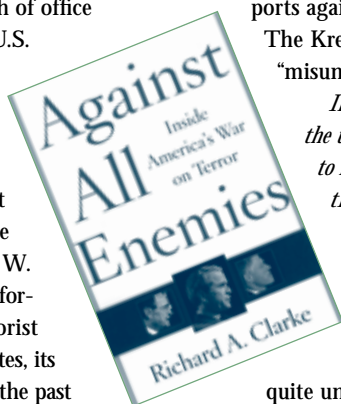
BOOK REVIEW

J'accuse for the Bush Administration

A Review of Richard A. Clarke's *Against All Enemies: Inside America's War on Terror* (2004)

Taking Richard Clarke literally, President George Bush is an enemy of the United States. The title and the preface of his best-selling account of America's struggle with terrorism refer to the oath of office sworn by officers of the U.S. government to "support and defend the constitution against all enemies foreign and domestic." The enemies at issue are al Qaeda and the administration of George W. Bush. Clarke charges the former with numerous terrorist attacks on the United States, its friends and interests over the past decade. He charges the latter with failing to protect the nation against al Qaeda attacks, instead undertaking unnecessary war "to test personal theories or expiate personal guilt or revenge." He further accuses the administration of conspiring to use future terrorist attacks as a pretext for "further assaults on our rights and civil liberties." *Much like Emile Zola's "J'accuse" letter, what follows is a detailed affidavit in support of a complaint alleging high crimes and misdemeanors.*

Notwithstanding the drama of these allegations, the most exciting section of the book is a first-hand account of Richard Clarke's September 11, 2001. As Chair of the White House's Counterterrorism Support Group, Clarke led the crisis response on that awful morning. With Vice President Dick Cheney relaying the orders, Clarke had the Executive Mansion evacuated and the president removed to a secure location. Some 4,400 civil aircraft were grounded, and NORAD (see Programs of Note, page 35) was ordered to shoot down those planes that failed to comply. Even before the first tower collapsed, the government obtained evidence that the hijackers were members of al Qaeda. Fearing a wider attack, Mayor Rudy Giuliani ordered the evacuation of Manhattan south of Canal



Street, and Clarke ordered the evacuation of landmarks and federal buildings across the country. The Coast Guard and then the Navy moved ships to defend the nation's major ports against the use of tankers as weapons.

The Kremlin was also notified to forestall "misunderstanding and miscalculation."

In the face of mass murder, chaos, and the unknown, some special people manage to maintain their poise and work effectively. Clarke is one of those rare individuals. That is not to say everything remained cool, calm or collected in the White House throughout that terrible day. Clarke referred to the Vice President with a term

quite unsuitable for a dignified law review to republish except in articles analyzing freedom of expression. Clarke's language when inquiring how known al Qaeda operands were permitted to board the planes is similarly unprintable. Clarke's salty prose gives his narrative an additional veneer of verisimilitude. This is important because the book's content is not otherwise all that news. Virtually all the important information had already been made public prior to its publication. The notability of *Against All Enemies* stems not for the information it contains but for the credibility of its author – the person uniquely qualified to present the "real story" of America's war on terrorism.

While unique, Richard Clarke represents a type. He has dedicated his career to the technical work required for protecting his country. Over the course of three decades, he rose steadily but unremarkably through the ranks, owing to his zealous dedication to the mechanics of national security. Along the way, he managed portfolios ranging from nuclear weapons to intelligence, rising to the rank of assistant secretary of state for political-military affairs under President G.H.W. Bush. Having served two Republican presidents with distinction, he was appointed the first National Coordinator for Security,

ORGANIZATIONS RESEARCHING TERRORISM AND HOMELAND SECURITY

The Brookings Institution
www.brookings.edu

The CATO Institute
www.cato.org

The Center for
American Progress
www.centerforamerican-progress.org

Center for Strategic and
International Studies
www.csis.org

Federation of American
Scientists
www.fas.org

The Heritage Foundation
www.heritage.org

The Homeland Security
Institute
www.homelandsecurity.org

National Memorial Institute
for the Prevention of Terrorism
www.mipt.org

The RAND Corporation
www.rand.org

Infrastructure Protection and Counterterrorism by Bill Clinton. While G.W. Bush continued Clarke in that key position, he downgraded it to the sub-cabinet level Deputies Committee – a portentous signal about the importance the new president attached to terrorism prior to September 11, 2001. For half a year, Clarke worked to convene a Cabinet level meeting to address the

al Qaeda threat, a meeting that finally took place on September 4. Clarke implies that the Administration's relative neglect of the al Qaeda threat prior to 9/11 determined in great part what followed in Iraq and on the home front.

Clarke's most sensational claim is that the President immediately sought to link the attacks of September 11 to Saddam Hussein. Even before the dust had settled, President Bush grabbed Clarke to order him to "go back over everything, everything. See if Saddam did this. See if he's linked in any way." Defense secretary Donald Rumsfeld and his deputy Paul Wolfowitz voiced similar sentiments in the effort to build a case for invading Iraq – an item at or near the top of their agenda long before September 11. Working with the Secretary of State and his Deputy to nip this misguided plan in the bud, Clarke vented "Having been attacked by al Qaeda, for us now to go bombing Iraq in response would be like invading Mexico after the Japanese attacked us at Pearl Harbor." Indeed. Following the release of this book and Clarke's televised testimony before the 9/11 Commission, the Administration attempted to refute his claims. With apparent confirmation from such insider sources as those reflected in Bob Woodward's *Plan of Attack*, however, these efforts have waned.

Clarke clearly laments the fact that the President chose to attack Iraq rather than pursuing al Qaeda with single-minded determination. Clarke declaims also the President's stingy approach to homeland security, a concept he accepted only when forced upon him. In light of the failure to find WMD, the on-going turmoil in Iraq and the increased incidence of terrorist attacks around the world, his complaint continues to gain cogency.

Surprisingly, Clarke believes that "any leader whom one can imagine as President on September 11 would have declared a 'war on terrorism.'" To the contrary, even President Reagan's Navy Secretary John Lehman, a member of the 9/11 Commission, has recently observed, "Our enemy is not terrorism. Our enemy is violent, Islamic fundamentalism." As with the military campaign to depose the Ba'athist regime, many responsible analysts believe the "war on terrorism" is a tragic detour from the path to defeating al Qaeda and its allies. Members of a non-state network planned

and launched the attacks committing grave crimes against individuals, the United States and against humanity. In response, the President declared war against terrorism not on the network responsible for the attacks. Imagine that Winston Churchill had stood before Parliament in the dark days of 1940 and declared "War on Blitzkrieg." At a time when the nation faces truly significant threats, why invite a piling on by declaring war on every group that could possibly be said to employ terrorist tactics? This includes scores of groups and thousands of individuals who had not previously borne a grudge against the United States.

Instead of war in Iraq, Clarke's sweeping concluding chapter advocates expending national treasure on the fight to eliminate al Qaeda and its allies, stabilizing Afghanistan against a resurgence of the Taliban, and increasing America's own resilience to future attacks. At the same time, he expands on his concerns that John Ashcroft's mismanagement of civil liberties issues has undercut the willingness of "Americans to trust their government." In a widely overlooked passage, Clarke intriguingly concludes, "Thus, those of us who most cherish America's civil liberties should be in the forefront of advocacy for effective, appropriate security measures with meaningful oversight and review mechanisms, such as a Civil Liberties and Security Board."

Against all Enemies will likely serve as an important source for historians. The first hand accounts of the battles – bureaucratic and otherwise – waged against al Qaeda are supplemented by work by journalists (most notably Woodward), the 9/11 Commission, and eventually by additional memoirs. That said, I suspect that the debates of future historians have already been framed. "Either you're with us or you're against us." Publication of Clarke's book along with his highly public testimony before the 9/11 Commission launched the broader public debate. Several months later, with the widespread release of Michael Moore's *Fahrenheit 9/11*, the tide appears to be turning: polls indicate that for the first time a majority of the country believe that the conquest of Iraq was a mistake. This debate will continue long after the war has ended.

REVIEWED BY
MARK R. SHULMAN

Profiles of Note



J. Cofer Black has served as the State Department Coordinator for Counterterrorism since December, 2002. Ambassador Black also represents the Department of State on the Counterterrorism Security

Group. Having been described as both a "terrorist hunter" and a "super-spy," Ambassador Black attained his current role following a 28 year career at the CIA, including serving as the Director of the CIA Counterterrorist Center, as well as the CIA Director's Special Assistant for Counterterrorism and National Intelligence Officer for Counterterrorism. In his various capacities he has received the Distinguished Intelligence Medal, the George H. Bush Medal for Excellence, and the Exceptional Collector Award for 1994.

Ambassador Black's current office is responsible for developing, coordinating, and implementing U.S. counterterrorism policy.

Tom Ridge was sworn in as the first Director of the Office of Homeland Security (OHS) in October 2001. The OHS was created in response to the events of September 11, and as its Director, Ridge was charged with developing and coordinating a comprehensive national strategy to defend the United States against terrorism. The Homeland Security Act of 2002 elevated the OHS to a cabinet level department. On January 24, 2003, Ridge became the first Secretary of the Department of Homeland Security (DHS). As the Secretary of DHS, Ridge could become eighth in the line of presidential succession, pending legislation in the U.S. Senate.

Prior to his service at the DHS, Ridge served as Governor of Pennsylvania for two terms, from 1995 to 2001. He began his public service career in 1982, when he was elected to Congress as a Representative from Pennsylvania, an office to which he was overwhelmingly re-elected six times.

Ridge received his B.A. degree from Harvard University. He earned his law degree at The Dickinson School of Law and was in private practice before becoming assistant district attorney in Erie County, a position he held until 1982, when he was elected to Congress.

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Quarterly Features

CLS in the News

As part of its ongoing commitment to public education, The Center for Law and Security invites journalists to attend its events. Below is a sample of reporting from some of The Center's recent programs.



FROM THE FINANCIAL TIMES

Reporting from the CLS

conference "Prosecuting Terrorism: The Global Challenge," June 3-5, 2004

"Strict limitations on intelligence sharing are hindering efforts by law enforcement agencies to understand how the global terrorist threat is changing, senior police and legal officials have been told. Countries routinely share information on terrorism, but this is done between the states on a bilateral basis. This system means intelligence agencies choose who to share information with. It also means they can control the flow of information and protect their sources, because it is shared on the understanding that it will not be passed on to third countries without the originating agency's permission. However, pressure for information to be pooled—so that all countries facing a terrorist threat can have access to it—has increased since the Madrid bombings in March.

'Bilateral relations are what people believe will work, and distrust is what occurs most frequently,' Ronald Noble, Secretary General of Interpol, the international police organization, said at the weekend. 'Unless we can change that set of ideas we are not going to make progress. We haven't tried enough at being open on sharing information. We have done too much to conceal it,' he told "a meeting of legal and security experts in Florence, organized by New York University Center on Law and Security."

- MARK HUBAND, "INTERPOL URGES MORE SHARING OF TERROR INTELLIGENCE," *THE FINANCIAL TIMES*, JUNE 8, 2004.

New York Law Journal

FROM THE NEW YORK LAW JOURNAL

Reporting on Legal Education and the Center on Law and Security

"With the creation last year of the Center on Law and Security, a fledgling research and policy program on the legal dimensions of counterterrorism at New York University School of Law, Andrew S. Peterson found the answers to a professional calling. 'If you want to become a terrorism expert, how do you meet people?' asked Mr. Peterson, a second year law student at NYU. 'Who do you talk to? Where do you get a start at making a career?'

As an incoming student last fall, Mr. Peterson worked as a research aide at the center's busy headquarters off Washington Square, helping to organize conferences, publications, and spirited colloquia—notably, a panel deliberation last month of the topic of the pan-Arab TV news service Al-Jazeera, with input from correspondent Abderrahim Foukara.

This week, Mr. Peterson settled into an apartment in Washington, D.C., in preparation for a summer internship with the Domestic Security Section of the U.S. Department of Justice.

He and four other NYU Law students likewise placed by the Center—two more at the Justice Department; one in Lyon, France, at Interpol, the agency providing mutual

assistance among police authorities of 178 member nations; and one at the Organization for the Prohibition of Chemical Weapons, a United Nations agency in The Hague—are destined to become 'national resources,' said Karen J. Greenberg, the Center's executive director."

-TOM ADCOCK, "NATIONAL SECURITY AS A LAW SPECIALTY," *NEW YORK LAW JOURNAL*, MAY 21, 2004

CONGRESSIONAL BRIEFING ON GUANTÁNAMO BAY

CLS Goes to Washington

Two months before the Supreme Court handed down its decisions against the detentions at Guantánamo Bay, CLS organized a Congressional Briefing on "The Supreme Court and Guantánamo Bay." The event, held on April 29, 2004, was offered to elected members and their staffs as an opportunity to participate in a detailed discussion on the controversial issues involved. The briefing which featured NYU School of Law Professors David M. Golove and Barry Friedman. It was attended by 70 people, including members of Congress and key personal and Committee staffers. Karen Greenberg, Executive Director of CLS, moderated the event.

For additional articles on the Center and its activities, see:

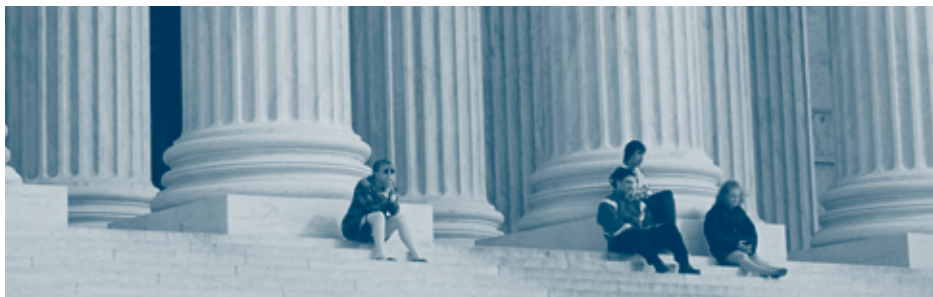
Brendan Bernhard, "Meeting Al-Jazeera," *The LA Weekly*, June 4-10, 2004

Vivienne Walt, "Police See More European Citizens Involved in Terror Activities," *The Boston Globe*, June 13, 2004

Leo Sisti, "Cosi Combatto Al Al Qaeda," *L'Espresso*, June 17, 2004

Marco Bastiani, "Noble (Interpol): 'L'Italia esempio contro il terrorismo'" *Il Giornale della Toscana*, June 5, 2004.

Franca Selvatici, "Contro il terrore un'alleanza tra i Paesi minacciati," *La Repubblica Firenze*, June 6 2004



FILM REVIEW

Lost (and Misguided) Among the Ruins Control Room • Fahrenheit 9/11 • Outfoxed

These days, it seems you can't go anywhere without confronting the debate over the war on terror and the current behavior of the United States at home and in Iraq. Recently, three documentaries have grabbed audience attention with the aim to provoke. They are Jehane Noujaim's *Control Room*, Michael Moore's *Fahrenheit 9/11*, and Robert Greenwald's *Outfoxed: Rupert Murdoch's War on Journalism*. The first one, directed by an Egyptian American woman focuses on the war abroad, the other two, primarily on the war at home.

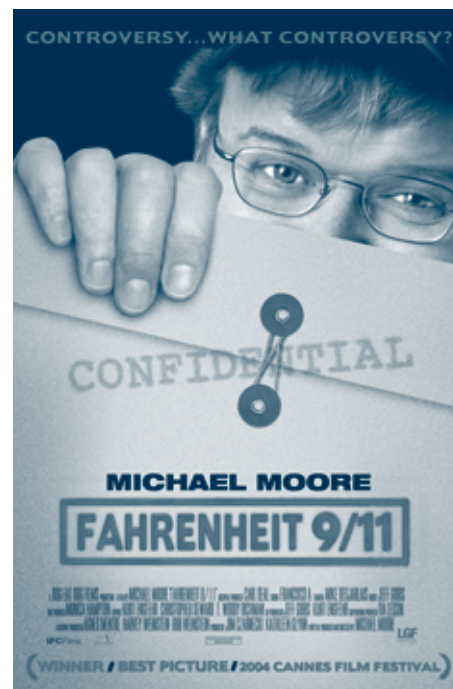
Control Room, a look at the work of Al Jazeera reporters covering the Iraq war, is for the American public a sorely needed antidote to the whitewashed view of the war in Iraq that has come via the television news into American living rooms. The murders of civilians, the grief of Iraqi mothers, the confusion of well-intentioned American soldiers, the dead and maimed bodies of American soldiers—all these are graphically presented in *Control Room*. For Americans—seeing what Europeans and others around the world have been seeing since the outbreak of war in March of 2003—this film is a rare chance to understand one of the reasons anti-Americanism has been increasing the world over and how the goodwill that grew out of the tragedy of September 11 has been so rapidly squandered. And despite its clear critique of American behavior in Iraq, most notably the hypocritical bombing of civilians in the name of democracy, it also sheds a sympathetic light on some of the participants. For example, the United States army liaison to the press, Josh Rushing, who at the start of the documentary is unquestioning of America's motives and its anti-Arab attitudes, is by the end of the footage, much more introspective concerning his role as a soldier in Iraq on a mission of dubious intent. He is unable to resist a developing interest in the complexities of the relationship between Americans and Arabs and he even becomes interested in learning Arabic.

As one of the heroes of the film, his personal growth and his openness to questions of intent and effect, stand in direct contrast to the attitudes of the embedded reporters who remain as much in the dark about American motives and behavior as the Al Jazeera reporters do. The most telling example of this occurs at one of the daily briefings. The briefing officer, General Vincent Brooks, refers for the first time to the deck of 55 cards of wanted Iraqis. In response, an Al Jazeera reporter asks for a copy of the deck. The answer he and all the other reporters receive is that there are none available and no, you can't look at ours. This blatant sense of controlling information and the spin of the war is one of the telling features of the film. So, too, is the focus on two Al Jazeera personalities: Samir Khadir, a Senior Producer of the Qatar based network, and Hassan Ibrahim who, like many of the Al Jazeera reporters these days, is a former BBC journalist. Both display a modicum of respect for the United States, until, that is, their fellow Al Jazeera reporter, Tariq Ayyoub, whom the audience has gotten to know over the course of the film, is killed by U.S. tank fire in Baghdad. The sense of loss and insult is devastating to both the producer and the reporter. The destructive affect upon the attitudes of both men is apparent as well in the radicalized behavior of the entire Al Jazeera newsroom.

The film's weakness lies in its refusal to cast the same critical look at Al Jazeera that



Al Jazeera anchorwoman courtesy Al Jazeera satellite network.



it casts on the Americans. What about the usage of Al Jazeera as the spokesman for Al Qaeda? What about Al Jazeera's involvement as a media facilitator in threats about hostage taking and beheadings?

Yet, despite its anger at the Americans, the film holds out some hope for a more humane and attentive future. The wry irony of Hassan Ibrahim who, witnessing yet another civilian and seemingly unprovoked American bombing in Baghdad, says, when asked by a frustrated colleague, "Who will stop the U.S.?" answers, "Americans will stop the U.S."

In Michael Moore's *Fahrenheit 9/11*, this statement becomes a question. Will Americans who see the story the way he does be motivated to take action against Bush and the Bush Administration? Will Americans be able to stop this? By this, he means the following: the use of lies to take the country to war, the uncomfortable connections between the Bush family and the Saudi royal family, the close connection between the military, Halliburton and the White House, and the intellectual and managerial deficiencies of George W. Bush, to name a few. The movie covers a vast amount of territory, beginning with Bush's appointment to office at the hands of the Supreme Court, his early vacation-prone days in office, and the terrible events of September

11. The movie focuses on Bush's decision to go to war against Iraq, as well as the current confusion of soldiers and citizens over the aims of such a decision. The film belongs to the genre of outrage, disbelief, and documentation that has characterized books such as Al Franken's, *Lies and Lying Liars Who Tell Them: A Fair and Balanced Look at the Right* and the recent tell-alls by Richard Clarke, Joseph Wilson and others.

There are some remarkably telling and unforgettable moments in this film, among them: the marine recruiters who go to a mall in Moore's hometown of Flint, Michigan and hang around the parking lot, dismissing "gangsters" but using hip language and facts, like the fact that the rapper Shaggy had served in the Marines, to attract recruits. Or Moore's portrayal of the military as a place for the unemployed, a fact that has been overlooked by other reporters and commentators. Most poignant is the story of Lila Lipscomb, a Michigan mother who raises the flag outside of her house every day, and who comes from and has brought up a family with a history of joining the military. She is a woman who considers herself an unparalleled patriot, and when her son dies, she is destroyed by the knowledge that he died for nothing, as he writes her in his last letter home. She takes an unforgettable and heart-breaking walk towards the White House filled with anger, rage and a sense of betrayal by her country.



Also heart-breaking is the imagery of September 11. Moore never shows the buildings or the collapse or the bodies. He merely shows New Yorkers watching, looking up at the clear blue sky and reacting in horror, as the rain of debris descends upon them. Like *Control Room*, *Fahrenheit 9/11* shows the Iraq war in much of its gory detail: injured children, screaming wives, amputated limbs, crippled, maimed and dead Americans. And throughout, no one fighting seems to know just why they are there.

At the heart of both these films lies the contention that the media has complicated its role and has kept the fact of America's myopia and errors out of the public eye. Robert Greenwald's *Outfoxed: Rupert Murdoch's War on Journalism* depicts the worst case scenario. Focusing on Fox News, the film portrays corporate control that dictates much of the "journalism" created by the network's reporters and producers for political purposes, specifically those of the Bush Administration. Greenwald, interviewing numerous former Foxnews employees, demonstrates convincingly that the network is anything but "fair and balanced," as its tagline declares. Slight references to other news stations suggest that they too may be edging towards the polemical as opposed to the dispassionate, in part, we assume, for the competitive edge of market share. Media-wide there is a failure to ask and answer pertinent questions. *Outfoxed* suffers from not following in more detail the prevalence of biased behavior at the other networks. Still, like *Fahrenheit 9/11* and *Control Room*, *Outfoxed* reinforces the fact that the news has lost its sense of itself as serving the public as opposed to serving corporate owners or one of the political parties. Reporters, wherever they are posted, have become virtual "embeds," dependent upon their protectors/captors for their information, as well as for their sustenance, physical and otherwise.

Years hence, these documentary films, fraught with more questions than answers, more open-mouthed in wonder than content in conclusions, will likely be seen as evidence of the confusion and sadness that has characterized artists as well as policy makers in the post-September 11 era.

REVIEWED BY
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Faculty Publications

NOAH FELDMAN

What We Owe Iraq: War and the Ethics of Nation Building, Princeton University Press (2004).

"The Theorists' Constitution—and Ours," 117 *Harvard Law Review* 1163 (2004).

"The Voidness of Repugnant Statutes: Another Look at the Meaning of *Marbury*," 148 *Proceedings of the American Philosophical Society* No. 1, p. 27 (March 2004).

"A Third Way for Iraq," *New York Times*, February 20, 2004.

"Accretionary Law and Aristotelian Equity in Maimonides," in Hanina Ben-Menahem, ed. *Equity and Jewish Law* (2004).

DAVID GOLOVE AND STEPHEN HOLMES

"Terrorism and Accountability: Why Checks and Balances Apply Even in 'The War on Terror,'" 2 *The NYU Review of Law and Security* 2 (2004).

STEPHEN HOLMES

"The National Insecurity State," *The Nation*, May 10, 2003.

"No Grand Strategy and No Ultimate Aim," *The London Review of Books*, May 6, 2004.

RICHARD H. PILDES

"Emergency Contexts Without Emergency Powers," 2 *International Journal of Constitutional Law* 296 (2004).

"Between Unilateralism and the Rule of Law: An Institutional Process Approach to Rights During Wartime," 2 *International Journal of Constitutional Law* 296 (2004).

Student/Alumni Corner

ON THE DETENTION OF PERSONS OF "SPECIAL INTEREST"

BY SHERIDAN ENGLAND, NYU SCHOOL OF LAW, J.D. 2004.

One of the most troubling applications of Patriot Act enforcement has been the detention of persons classified by the government as being of "special interest" to law enforcement. In September 2001, Chief Immigration Judge Michael J. Creppy barred the press from attending immigration hearings of people detained by the INS where the detainees were classified as being of special interest. This, in effect, prevented the public from understanding how law enforcement was classifying people as "of interest." The secrecy surrounding what appeared to be regular INS deportation hearings generated intense litigation from media groups. Circuit courts split over whether the directive violated the First Amendment; the U.S. Supreme Court declined to settle the issue.

The recently decided case *United States v. Benatta* (2003 U.S. Dist. LEXIS 16514) confirms the typed of abuse activists predicted would occur under the "of special interest" standard. Defendant Benamar Benatta was a non-immigrant B-1 visitor from Algeria who overstayed his U.S. stay. Benatta was a member of the Algerian Air Force, who came to the U.S. to receive aviation training from Northrup/Grumman. Benatta remained in the United States seeking political asylum and employment. Unsuccessful in finding employment, Benatta flew to Canada to seek asylum. Canadian authorities detained him upon arrival on September 5, 2001, and transported Benatta to U.S. INS officials on September 12, 2001. Benatta was interrogated by FBI personnel, and deportation proceedings were commenced against him on September 13, 2001. Without access to counsel, Benatta was relocated from INS facilities to the Metropolitan Detention Center (MDC) by U.S. Marshals, where he was further interrogated by FBI Terrorist Task Force agents. Despite being cleared of terrorist suspicion in November 2001, the defendant was kept at the MDC in high security confinement until April 30, 2002.

The Benatta court described the government's justification in the handling of Benatta as "incompet[ent] and neglig[ent]," and that

he "undeniably was deprived of his liberty held in harsh conditions which can said to be oppressive". The court also saw through the government's attempt to deflect attention away from its efforts to hold Benatta under The Patriot Act without access to counsel. Judge H. Kenneth Schroeder remarked:

"What I do find the most troubling...is the prosecution's attempt to put a spin on what was done in this case by asserting that at all times the defendant was in the legal custody of the INS and was being held for the purpose of enforcing the immigration laws of the United States. The facts of this case belie that assertion."

Clearly, Benatta left the U. S. with the intent of residing in Canada. As Benatta was forcibly returned to the U. S. by Canadian authorities, he cannot be said to have immigrated back to the U. S. in violation of immigration laws. As such, INS deportation hearings may not have been the appropriate mechanism to remove Benatta from the U.S. Regardless, his transfer from INS facilities to FBI prison proves that law enforcement held him as a Patriot suspect "of interest." Judge Schroeder noted that,



while in custody at MDC, Benatta was identified by a USMS number, which would indicate that law enforcement was holding him as a criminal suspect rather than an INS detainee, and that the INS does not classify its detainees as "high security" as Benatta was, despite the FBI formally clearing him of terrorist suspicion.

While the Benatta court reasoned that the INS and FBI colluded to keep Benatta without leaving a paper trail and that their insistence that he was being held for removal proceedings was "subterfuge," the court failed to address whether their actions constituted "improper purpose." By refusing to reach that question, Benatta's Fifth Amendment Claim was gutted. The court held that delaying the immigration indictment of the defendant because of his Patriot Act detention did not deprive the defendant the right to a fair trial because it could not be shown how the government gained a "tactical advantage" or that evidence and witnesses had been lost because of the delay.

The effect of this holding is that immigrant detainees under the Patriot Act have no remedy for collusive government behavior other than a dismissal of their deportation hearing. This is of little consolation to immigrants, as the government can simply renew immigration proceedings at a later date. Because, under Benatta, detainees will receive no compensation for their "oppressive" incarceration, the government has the green light to incarcerate and interrogate immigrants without counsel. Absent some form of punitive punishment, there is no internal or external checks and balance system in place to curb government abuse of immigrants.

Benatta is not an anomaly. Many immigrants are mistreated as a result of their "of special interest" distinction in Patriot Act justified detention. The Report to Congress on the Implementation of §1001 of the USA PATRIOT Act (January 27, 2004) and "Analysis of the Second Response by the Department of Justice (DOJ)" (January 2004) from the Office of the Inspector General (OIG) document Benatta-type abuses and other infringements on civil rights.

OIG found DOJ abuses rampant with Patriot Act detainees. OIG concluded that the DOJ held 762 Patriot Act detainees under terrorist suspicion in conditions that were "excessively restrictive and unduly harsh." Specifically, videotapes showed "compliant detainees being slammed or rammed against the wall, pressed by their heads...and having

upcoming events

their fingers or hands twisted, despite officer's denials that this ever occurred." OIG concluded that inmates were abused physically and verbally, that law enforcement audio taped detainees' meetings with their attorneys, and that federal prosecutors declined to prosecute law enforcement offenders. Because immigrant victims cannot collect damages under a 5th Amendment claim and federal prosecutors refuse to impose criminal sanctions, law enforcement to date has had total immunity to infringe on civil liberties of its Patriot Act suspects.

Sheridan England is currently the CLS-Sponsored Post-Doctoral Fellow in Global Counterterrorism at Interpol.

Our Dedicated Staff



Francesca Laguardia is in her third year of a J.D./Ph.D. program in Law and Society at NYU and is a Research Assistant at the Center on Law and Security. Much of her

research is contained in this review. Her other research has focused on the Jose Padilla case, U.S. counterterrorism, and the application of classic thinkers to today's political situation.



The Center on Law and Security has two Program Administrators. They are **Elizabeth (Liz) Oliner** and **Kristin Henderson**. Liz graduated from

Yale in 2000 and then worked as a research and production intern at CBS from 2000 to 2003. She has written for the AP and covered the 2000 election for MTV on-line. Kristin received her B.A. from Boston University in 1998 and pursued graduate work in non-proliferation studies and international policy at the Monterey Institute. Prior to working at the Center she worked at Columbia University and the New School University. Together Kristin and Liz are the backbone of the Center as they are responsible for administering the many programs and events of the Center.

UPCOMING EVENTS FROM THE CENTER ON LAW AND SECURITY

OPEN FORUMS

Thursday, September 23, 6:00-8:00 p.m.

Torture: The Road to Abu Ghraib and Beyond

Featuring: Joshua Dratel, Stephen Gillers, Anthony Lewis, Dan Mori, Burt Neuborne, Dana Priest, Samuel Rascoff
Lipton Hall, 110 West 3rd Street

Monday, November 8, 7:00-9:00 p.m.

The Trial of Saddam Hussein: Legal vs. Political Visions

Featuring: Noah Feldman, Gary Bass, Tom Parker
Vanderbilt Hall, Room 204, 40 Washington Square South

ROUNDTABLES

Thursday, November 18, 6:00-9:00 p.m.

Nonproliferation: The Legal Dimension

Greenberg Lounge, Vanderbilt Hall, 40 Washington Square South

LECTURES

October 26, 6:30-8:30 p.m.

Noah Feldman, "Iraq: The U.S. chooses a Path"

Greenberg Lounge, Vanderbilt Hall, 40 Washington Square South

BRIEFINGS

Business & legal community briefings are provided as a public service. Congressional briefings are provided to members of Congress and take place in Washington D.C.

Thursday, September 30

Business/Legal Briefing, Iraq: Where Do We Go from Here?

Thursday, October 7

Congressional Briefing, Torture

FILM SERIES

(Film screenings are free and open to the public.)

Monday, August 30, 6:00-8:00 p.m.

Outfoxed: Rupert Murdoch's War on Journalism

Followed by a Q and A session with Director Robert Greenwald
Lipton Hall, 110 West 3rd Street

Monday, October 6, 6:00-8:00 p.m.

Arna's Children

Followed by a Q and A session.
Lipton Hall, 110 West 3rd Street

COMING UP IN ISSUE #4:

European Counterterrorism: Prosecutors, Terrorists and the Law

DID YOU KNOW THAT:

The NYPD...

- Stations its own people in Israel, London, Canada, France, and Singapore, in order to obtain information?
- Consists of **37,000** officers, including **45** Arabic speakers. In comparison, the Los Angeles Police Department has **9,600** officers, and **17** Arabic speakers. The U.S. Foreign Service has **54** fluent Arabic speakers.

For updates on terrorist trials, current reading lists, upcoming conferences, and open forum proceedings, please visit our website at www.law.nyu.edu/centers/lawsecurity/

Thank You

Thanks go to our indefatigable and astute staff.

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